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Court Review

Volume 55, Issue 2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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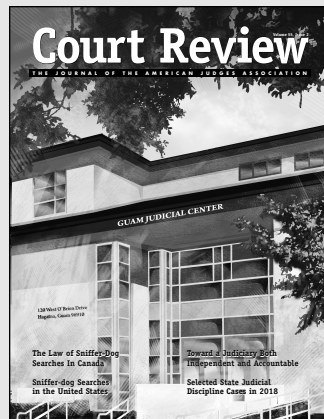
2019

EDITOR'S NOTE

In addition to our recurring columns, this issue focuses on odors and ethics. We start with AJA president Robert Torres, Jr.'s final column as president providing an informative overview of recent AJA accomplishments. Thank you, Judge Torres, for your past and future leadership and service to AJA. Next we hear from our regular Canadian columnist, Judge Wayne Gorman. An interesting irony occurred in planning this issue. When we heard from Judge Gorman that his column would address Canadian developments regarding searches using sniffer dogs, we learned that one of our editors, Prof. Eve Brank, was working on an article addressing developments in the United States regarding sniffer dogs. Prof. Brank kindly accelerated her article so that we could present them as complementary pieces in this issue. Regardless of your legal system, you will find a review of the similarities and differences in the approaches to these points of analysis presented by these two articles.

Next, we hear from Robert Tembeckjian, the administrator and counsel of the New York State Commission on Judicial Conduct. Mr. Tembeckjian has decades of experience in judicial ethics and judicial disciplinary commissions. He is one of the leading speakers on issues of judicial ethics. We asked Mr. Tembeckjian to share with you his observations and insights drawn from his decades of work with our peer judges and guarding the integrity of the judiciary. We think you will find the results fascinating.

Speaking of judicial ethics, we asked our regular ethics columnist, Cynthia Gray, director of the Center for Judicial Ethics, to do something a little different for this issue. Many of our readers may not know that Ms. Gray provides a regular service by reporting on judicial ethics decisions across the United States. We and many judges have found a regular review of her reports invaluable components of our learning how to be a judge and how to navigate the critical ethical restrictions that preserve the credibility and integrity of the judiciary. We asked Ms. Gray to depart from her usual topical column to give you a taste of this valuable resource she regularly provides outside the pages of *Court Review*. Ms. Gray's closing line says it beautifully, "Reading about others' missteps may help judges navigate ethically when almost everything they do has the potential for a cringe-worthy headline." Readers dedicated to quality professional judging will want to incorporate a review of these reports as part of their routine.—David Prince



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 61 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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The cover piece was created by Frank Perez, a local Guam artist, and features the Guam Judicial Center. The Judiciary is comprised of both the Superior Court of Guam and the Supreme Court of Guam. The Guam Judicial Center was constructed in 1991 to accommodate the expansion of court operations, and the establishment of specialty courts, as well as to meet the needs of Guam's growing population.

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President's Column

Robert J. Torres, Jr.

Dear colleagues and *Court Review* readers!

This is the last column I will write as your president, and it has been an honor and a privilege to serve. Besides planning our well-renowned educational programs, over the past year, we focused on strengthening our committees by keeping them active and meeting regularly—whether in person at our conferences or through the numerous phone calls that spanned nine time zones and the International Date Line. We have been committed to bolstering membership while collaborating and partnering with other organizations to provide excellent educational opportunities. We continue to encourage diversity throughout our organization, and offer wellness and judicial family support to our members.

In April, we wrapped up our midyear meeting in Savannah, Georgia, where we partnered with the National Association of Drug Court Professionals (NADCP) to provide education sessions on Effective Judicial Practices and Court Interventions for Defendants with Substance Use Disorders and Therapeutic Jurisprudence Initiatives. The NADCP's Chief Executive Officer Carson Fox, Chief Operating Officer Terrence Walton, and Board of Directors Chair Michael Barrasse were panelists for the sessions, along with California Judge Richard Vlavianos. The National Judicial College also aligned with our efforts by providing a pre-conference course on Advanced Bench Skills: Procedural Fairness. It was a successful midyear meeting, and the efforts of Mary Celeste in getting the commitment from NADCP and NJC cannot be overlooked.

We are excited about our 59th Annual American Judges Association's Educational Conference in September, which will be a joint conference with the Supreme Court of Illinois Judicial College. The venue for the 2019 annual conference is the historic Drake Hotel in downtown Chicago, and we will be joined by 100 judges from the home state. The educational programs will examine issues that impact the administration of justice, judicial decision making, and emerging legal topics. On the list of social activities is a Chicago Cubs baseball game and the 5-star guided architecture cruise of the historic Chicago River. The 2019 Joint Conference Workgroup composed of AJA and Illinois members spent considerable time over the last year planning the education and social activities for what promises to be another successful program. I want to thank all Workgroup members for their contributions and specially recognize the efforts of Illinois Judge Neil Cohen and Anita C. Shore, J.D., of the Illinois Judicial Education Division.

Our education and conference committees have traditionally been the most active committees but because of the dynamic chairs and co-chairs, other standing committees are being more involved through frequent teleconference meetings and routine collaboration. The Judicial Wellness Committee chaired by Joseph Rossi helped develop content for a presentation on wellness and mindfulness by the former Director of the Federal Judicial Center, Judge Jeremy Fogel, and Judge Gerald Lebovits. The

Court Security committee, co-chaired by Eugene Lucci and Natalie Tyrell, are developing educational programs on personal judicial security and sovereign citizens issues for the 2020 Philadelphia conference. Jerrauld Jones, Tracy Brandeis-Roman, and Mangesh Duggal of the Criminal and Juvenile Justice committee are also working on topics for future conferences. The Diversity Committee, chaired by Yvette Alexander and Roxanne Song Ong, organized a presentation on Deliberative Decision Making that will be presented at the National Bar Association Judicial Council meeting in July and at the AJA Annual Conference in September.

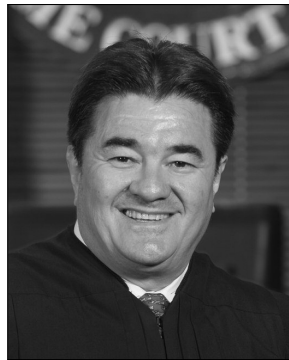
Another committee that has been active is our Membership Committee co-chaired by Judge Elliott Zide. The committee has launched a new membership development campaign with strategies for attracting new members, restoring dropped members, and reducing attrition of members.

We have much to look forward to with our cross-cultural educational exchange to Cuba in February 2020, the AJA 2020 midyear meeting in Napa, the 2020 annual meeting in Philadelphia, the 2021 midyear meeting in San Antonio, Texas and the 2021 annual meeting in New Orleans jointly with the Louisiana Judicial College. Your participation in these conferences enhances AJA's diverse membership, which is the strength of our organization. Our efforts to promote and improve the effective administration of justice will only get easier as our committees strengthen and grow.

Our future president will have an amazing year—just as I did—because of the support, camaraderie, and capable group of judges within our organization. AJA strives to find exciting and adventurous ways to bring its members together for educational advancement, networking, and peer mentoring to “Make Better Judges.”

By the time this column is published, the Supreme Court will have completed its first term with the current group of justices. Some of these cases involve fundamental questions of citizenship and political participation. This includes *Lamone v. Benisek*, where the Court will review lower-court orders that Maryland must redraw its congressional district maps due to partisan gerrymandering, and *Department of Commerce v. New York*, which considers whether the 2020 census can include questions about citizenship that opponents allege will undermine Latino participation. The Court will also consider more technical questions, such as whether courts should defer to an agency's reasonable interpretation of its own ambiguous regulation (*Auer* deference), at issue in *Kisor v. Wilke*. The decisions in these cases and others will shape our nation and our courts for years to come.

Finally, to memorialize my last President's Column I requested the cover of *Court Review* be a painting of the Guam Judicial Center done by a retiring court employee and local artist Frank Perez. I hope you enjoy it, and I thank you all for allowing me to serve. I have become a better justice and court leader because of you.



The Law of Sniffer-Dog Searches in Canada

Wayne K. Gorman

In *Who's a Good Boy? U.S. Supreme Court Considers Again Whether Dog Sniffs Are Searches* (Justic, January 16, 2019), Professor Sherry F. Colb notes that the United States Supreme Court “is currently considering whether to grant review in *Edstrom v. Minnesota*.” She indicates that this “presents the issue whether police must obtain a search warrant before bringing a trained narcotics dog to sniff at a person’s door for illicit drugs.” Professor Colb’s article goes on to consider prior occasions in which the Supreme Court of the United States has considered the constitutionality of searches though dog sniffing.¹

Ultimately, the United States Supreme Court denied the application for *certiorari* in *Edstrom v. Minnesota* (2019 WL 888181). As a result, it will not be considering the dog-sniff issue raised in that case.

Professor Colb’s article made me think about the law of dog-sniffing-related searches in my country. As a result, in this column, I intend to look at how the use of sniffer-dogs searches has been addressed by the Supreme Court of Canada.

INTRODUCTION

The Supreme Court of Canada’s initial consideration of this issue came in the companion cases of *R. v. Kang-Brown*, 2008 SCC 18, and *R. v. A.M.*, 2008 SCC 19. The issue was framed in the context of whether the use of the sniffer dogs in these cases constituted a search and if so, whether the search was reasonable in the context of section 8 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982. That section of the Charter states:

Everyone has the right to be secure against unreasonable search or seizure.

SECTION 8 OF THE CHARTER

In Canada, section 8 of the Charter has been interpreted such that “the ‘search or seizure’ question reduces to whether the act intruded on the claimant’s ‘reasonable expectation of privacy’.” If not, there was no ‘search or seizure’ and no violation of section 8” (see Steven Penney, *The Digitization of Section 8 of the Charter: Reform or Revolution?* (2014), 67 S.C.L.R. (2d) 505, at paragraphs 6 to 8). In *R. v. Spencer*, 2 S.C.R. 212, the Supreme Court of Canada held that a “sniffer dog provides information about the contents of the bag and therefore engages the privacy interests relating to its contents” (at paragraph 47).

In the Canadian context, a violation of section 8 of the

Charter can lead to exclusion of evidence pursuant to section 24(2) of the Charter, which states:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

R. V. KANG-BROWN

In *Kang-Brown*, a police officer involved in an operation designed to detect drug couriers at bus stations approached the accused, identified himself, and asked the accused if he was carrying narcotics. The accused said no. The officer then asked to look in the accused’s bag. Another officer with a sniffer dog approached. The dog sat down, indicating the presence of drugs in the bag. The accused was searched and drugs were found on his person and in his bag.

The trial judge found that the accused was neither arbitrarily detained nor unlawfully searched and entered a conviction. The Alberta Court of Appeal upheld the conviction. An appeal was taken to the Supreme Court of Canada.

R. V. A.M.

In *A.M.*, the police used a sniffer dog to search a school for the presence of drugs. In a gymnasium, the sniffer dog reacted to an unattended backpack. The police, without obtaining a search warrant, opened the backpack and found illicit drugs. The trial judge excluded the evidence and acquitted the accused. The Ontario Court of Appeal upheld the acquittal. An appeal was taken to the Supreme Court of Canada.

WHAT APPROACH DID THE SUPREME COURT OF CANADA TAKE?

In each of these decisions, the Supreme Court of Canada was divided and three judgments were filed in each instance. As a result, determining the *ratio discendi* can be difficult. Interestingly, many years later, the Supreme Court suggested in *Spencer* that while it was “divided on other points, it was unanimous in holding that the dog sniff of Mr. Kang-Brown’s bag constituted a search” (at paragraph 29). In *R. v. Aucoin*, 3 S.C.R. 408 (2012), the Supreme Court indicated that in *Kang-Brown* it “recognized a common law power to conduct sniffer

Footnotes

1. I became aware of this article because of it being posted by Judge Kevin Burke in his blog (see blog.amjudges.org/).

dog searches” (at paragraph 76). Finally, in *R. v. MacDonald*, 1 S.C.R. 37 (2014), the Court indicated that in *Kang-Brown* “a majority of the Court recognized a common law power to conduct sniffer-dog searches” (at paragraph 32).

It appears that a majority of the Court in *A.M.* and *Kang-Brown* concluded as follows:

1. A dog’s sniffing constitutes a search for the purposes of section 8 of the Charter; and
2. The use of sniffer dogs is lawful based upon the common-law powers of the police to investigate crime.

Five years after these two decisions were rendered, the Supreme Court of Canada returned to the issue of the use of sniffer dogs. Once again, it rendered two judgments (*R. v. Chehil*, 2013 SCC 49, and *R. v. MacKenzie*, 2013 SCC 50). However, this time the majority decisions are readily ascertainable.

R. V. CHEHIL

In *Chehil*, the police checked the accused’s airplane luggage by utilizing a drug detection dog. The dog gave a positive indication for the scent of drugs. The accused was arrested and his luggage was searched. Three kilograms of cocaine was found.

At the commencement of her decision in *Chehil*, Justice Karakatsanis, writing for the entire Court, succinctly explained what it had decided in *A.M.* and *Chang-Brown* (at paragraph 1):

The Court concluded that the use of a properly deployed drug detection dog was a search that was authorized by law and reasonable on a lower threshold of “reasonable suspicion”. Because they are minimally intrusive, narrowly targeted, and can be highly accurate, sniff searches may be conducted without prior judicial authorization.

The Supreme Court also indicated that the appeal required it “to elaborate on the principles underlying the reasonable suspicion standard and its application.” This elaboration resulted in the Supreme Court holding that the police can use a drug detection dog without obtaining prior judicial authorization if they have a “reasonable suspicion” based on objective, ascertainable facts, that evidence of an offence will be discovered through the utilization of the dog. The Court indicated that the “reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are objective ascertainable grounds to suspect that an individual is involved in criminal behaviour” (at paragraph 6).

The Supreme Court also indicated in *Chehil* that reasonable suspicion “derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny. While reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime.... As a result, when applying the reasonable suspicion

standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard” (at paragraphs 26 and 27).

However, the Court also indicated that a constellation of factors “will not be sufficient to ground reasonable suspicion where it amounts merely to a ‘generalized’ suspicion because it ‘would include such a number of presumably innocent persons as to approach a subjectively administered, random basis’ for a search’... Indeed, the reasonable suspicion standard is designed to avoid indiscriminate and discriminatory searches” (at paragraph 30). The Court also held that a “nexus must exist between the criminal conduct that is suspected and the investigative technique employed. . . . In the context of drug detection dogs, this nexus arises by way of a constellation of facts that reasonably supports the suspicion of drug-related activity that the dog deployed is trained to detect” (at paragraph 36).

Finally, the Court held in *Chehil* that the onus is on the Crown “to show that the objective facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity.” The Court pointed out that “the reliability of a particular dog is also relevant to determining whether a particular sniff search was conducted reasonably in the circumstances” (at paragraph 45).

THE CONCLUSION IN CHEHIL

The Supreme Court indicated that when a sniffer dog delivers a positive indication, the police may arrest the suspect if they have reasonable and probable grounds to do so. If the arrest is valid, the police may conduct a search to secure evidence without prior judicial approval. The Court stated that this “is what occurred in this case” (at paragraph 55).

The Court concluded in *Chehil* that “considering the strength of the constellation of factors that led to the decision to deploy the dog, the reliability of the dog, and the absence of exculpatory explanations, the positive indication raised the reasonable suspicion generated by the constellation to the level of reasonable and probable grounds to arrest the accused” (at paragraph 76).

R. V. MACKENZIE

In *MacKenzie*, the accused was charged with possession of a controlled substance for the purpose of trafficking. The police had stopped the accused’s vehicle for speeding. After the vehicle was stopped, the investigating officer suspected that the accused was involved in illegal drug activity. He detained the accused and then utilized a drug detection dog to conduct a perimeter search of the vehicle, resulting in a “positive” reaction by the dog. The police arrested the accused and searched his vehicle incident to the arrest. Thirty-one pounds of marijuana was found.

At the commencement of his reasons in *MacKenzie*, Justice Moldaver, writing for the majority of the Court, referred to Justice Karakatsanis’s reasons in *Chehil*, and indicated that her

**[S]niff searches
may be
conducted
without prior
judicial
authorization.**

[T]he use of a sniffer dog constitutes a search that is protected by section 8 of the Charter.

“efforts have spared me the heavy lifting in this case, as the broader questions that I have just mentioned are fully canvassed in her reasons.” He then indicated: “I therefore concentrate here on the application of the reasonable suspicion standard to the facts of this case. I also address certain additional issues that arise in the context of a sniffer-dog search that

occurs subsequent to a roadside stop, as occurred here. The Court did not address those issues in *Kang-Brown* and *A.M.* and the facts of this case present an occasion for clarification of the applicable principles” (at paragraph 3).

SNIFFER DOGS AND MOTOR VEHICLES

Justice Moldaver noted in *McKenzie* that the Court “has held that motor vehicles, though emphatically not Charter-free zones, are places in which individuals have a reasonable but ‘reduced’ expectation of privacy. . . . The privacy context here is thus analogous to the bus terminal in *Kang-Brown* and the school in *A.M.*, where the use of police sniffer dogs on the basis of reasonable suspicion was found to pass *Charter* muster. As a result, I am satisfied that the police here were entitled to enlist the aid of a sniffer dog for crime prevention on the same basis” (at paragraph 31).

WHAT IS REASONABLE SUSPICION?

The Court pointed out in *McKenzie* that reasonable suspicion “must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and ‘no-win’ behaviour—he looked at me, he did not look at me—cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors” (at paragraph 71). However, the Court also pointed out that “while it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron microscope” (at paragraph 65).

Justice Moldaver explained the concept of “reasonable suspicion” in the following manner (at paragraphs 73 and 74):

Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not—indeed must not—devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.

Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means “reasonable grounds to suspect” as distinguished from “reasonable grounds to believe” (*Kang-Brown*, at paras. 21 and 25, per Binnie J., and at para.

164, per Deschamps J.). To the extent one speaks of a “reasonable belief” in the context of reasonable suspicion, it is a reasonable belief that an individual might be connected to a particular offence, as opposed to a reasonable belief that an individual is connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, “reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime” (para. 27).

THE CONCLUSION IN MCKENZIE

The Supreme Court concluded in *McKenzie* that “the police had reasonable suspicion that the appellant was involved in a drug-related offence such that they could enlist Levi to perform a sniff search of the appellant’s vehicle. The appellant’s s. 8 privacy rights were not breached and the marihuana seized from the rear hatch of his car was thus admissible at trial” (at paragraph 91).

A SUMMARY OF THE SUPREME COURT OF CANADA’S DECISIONS

As we have seen, it is well settled in Canada that the use of a sniffer dog constitutes a search that is protected by section 8 of the Charter. However, it is also well settled that Canadian police can use sniffer dogs to search without prior judicial authorization if they have the requisite reasonable suspicion. In addition, if a Canadian police officer has reasonable and probable grounds to arrest as a result of the use of a sniffer dog, that officer can conduct a search incidental to the arrest. This search does not require prior judicial authorization and extends beyond a search of the person arrested (see *R. v. Saeed*, 1 S.C.R. 518). However, none of the cases decided by the Supreme Court of Canada involved residences.

The Supreme Court has clearly indicated that the constitutionality of sniffer-dog searches are based on two primary factors: (1) the reliability of such searches and (2) their non-invasive nature. In addition, the Court’s granting of constitutional validity to such searches was based upon the police having reasonable suspicion. In *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 3 S.C.R. (2015) 250, the Court noted that “a high degree of accuracy has been crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion” (at paragraph 67).

It has been suggested by one author that the Supreme Court has set the “standard for a sniff search in these kinds of locations” as a “possibility—not probability.” A standard “justified by the minimally intrusive nature of sniff searches” (see Sonia Lawrence, 2013: *Constitutional Cases in Review* (2014), 67 S.C.L.R. (2d) 3, at paragraph 51).

In *R. v. Zolmer*, 2019 ABCA 93, the Alberta Court of Appeal described these types of searches as examples of “air searches,” which are not considered to be “intrusive” (at paragraph 32). In *R. v. Jackman*, 2016 ONCA 121, it was noted that a “dog sniff is minimally invasive on an individual’s privacy interests” (at paragraph 26). In addition, the Supreme Court of Canada has not limited dog-sniffer searches to border searches. The power is broad enough to search at schools and in motor vehicles.

Where else it will be expanded to, if anywhere, waits to be seen.

Despite their non-intrusive nature, the use of sniffer dogs must comply with section 8 of the Charter. Thus, for a search based upon the use of a sniffer dog to be reasonable, the police must have reasonable grounds to suspect that a search will reveal evidence of a criminal offence. This will depend, in part, on the reliability of the dog utilized. In *Goodwin*, the Supreme Court stated that the “reliability of a search or seizure mechanism is directly relevant to the reasonableness of the search or seizure itself.” The Court also indicated that the “high degree of accuracy” involved in sniffer-dog searches was “crucial to endorsing sniffer-dog searches on a lower standard of reasonable suspicion” (at paragraph 67). Thus, the dog effectively becomes the Crown’s most important witness. The dog’s “qualifications” are an important element.

CONCLUSION

Though the Supreme Court of Canada’s rulings in the dog-sniff cases has provided Canadian police with a broad constitutional search power, it is not an unlimited one. Consider *R. v. Molnar*, 2018 MBCA 61, and *R. v. Urban*, 2017 ABCA 436. These decisions illustrate that though reasonable suspicion is a low standard, it must be objectively established and that it only applies to the dog sniff, not any subsequent searches.

In *Molnar*, the accused was charged with the offence of possession of marijuana for the purpose of trafficking. The police had utilized a sniffer dog to test a suitcase in the baggage car of a train. A positive reaction was obtained. The suitcase had no identification. The accused was arrested, and the suitcase was searched. Drugs were found and connected to her. The trial judge ruled that the police had reasonable grounds to arrest the accused and that the searches were incidental to her arrest. The accused was convicted.

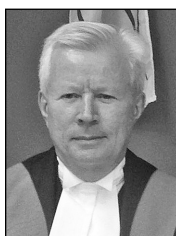
On appeal, the Manitoba Court of Appeal overturned the conviction. The Court of Appeal noted that the “hit on the grey suitcase by Bernie was compelling information that elevated Constable Kristalovich’s reasonable suspicion that the grey suitcase contained marijuana to reasonable grounds to believe (subjectively and objectively) that it did.” However, the police did not connect the bag to the accused before arresting her. This led the Court of Appeal to hold that there “was no evidence that the grey suitcase in question was the only grey suitcase in the baggage car bound for Washago. While the evidence was strong to establish a reasonable suspicion, particularly after Bernie’s positive hit on the grey suitcase, in contrast to the cases cited above, the required strong connection between the grey suitcase and the accused for the RCMP to have objective reasonable grounds to arrest her did not exist” (at paragraph 35).

In *Urban*, the accused was convicted of the offence of pos-

sessing marijuana for the purpose of trafficking. The conviction was based upon evidence found by the police after deploying a sniffer dog to search the exterior of his vehicle.

In setting aside the conviction, the Alberta Court of Appeal indicated that though the “reasonable suspicion standard has become a low bar particularly since *Chehil* and *MacKenzie*,” the totality of the evidence did not support the officer’s “subjective belief that Mr. Urban might be involved in a drug-related offence. . . . Consequently, he lacked authority at common law to detain Mr. Urban for the purpose of a controlled substance investigation and to conduct a sniffer dog search of the exterior of Mr. Urban’s vehicle, thereby breaching Mr. Urban’s rights under s 9 (arbitrary detention) and s 8 (unreasonable search and seizure) of the *Charter*” (at paragraph 44).

In conclusion, the Supreme Court of Canada has considered sniffer-dog searches and given them their constitutional blessing, but only at the initial investigative stage. Their use to search residences has not been considered. As the Supreme Court noted in *MacKenzie*, relying in part on a decision of the Supreme Court of the United States, this case does not “involve the use of sniffer dogs in contexts such as the home, where courts have long recognized a heightened privacy interest (see, e.g., *R. v. Evans*, 1 S.C.R. 8; *Florida v. Jardines*, 133 S. Ct. 1409 (2013)).”²



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial

Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

2. In *R. v. Leipert* (1997) 1 S.C.R. 281, the Court dealt with an appeal in which, after receiving a tip from a Crime Stoppers program, a police officer went to the accused’s residence with a sniffer dog and on “four different occasions the policeman and Bruno walked the street in front of Leipert’s residence. Each time Bruno indicated the presence of drugs in Leipert’s house.” The police then obtained a search warrant. The “main allegations raised in

support of the warrant were the observations of the police officer at the site.” When the search warrant was executed, evidence was seized and the appellant was charged with cultivation of marijuana and possession of marijuana for the purpose of trafficking. In the Supreme Court of Canada, the appeal concerned disclosure of the Crime Stoppers tip rather than the use of the dog’s reaction to obtain a search warrant.

Sniffer-dog Searches in the United States

Eve M. Brank, Jennifer L. Groscup, Emma Marshall, & Lori Hoetger

We present here a complement to Judge Wayne Gorman's article on the law of sniffer-dog searches in Canada found on page 52. Similar to Judge Gorman's article, we examine U.S. Supreme Court cases about the use of police dogs in searches.

The U.S. Supreme Court first addressed the issue of dog sniffs in *U.S. v. Place*¹ pursuant to the Fourth Amendment protection from unreasonable government searches and seizures and requirements for obtaining a search warrant.² We start with a brief historical³ reminder of Fourth Amendment case law to provide context for current sniffer-dog questions. Next, we provide an overview of U.S. Supreme Court cases that have addressed what role sniffer dogs should have in Fourth Amendment jurisprudence.

A BRIEF FOURTH AMENDMENT HISTORY

The Fourth Amendment was born out of the American Revolution with historians pointing to the colonists' protests against English writs of assistance as the spark that fired the revolution.⁴ The writs of assistance allowed no specific suspicion or pointed location for a search. Rather, the British officials could search businesses and homes with very little delay.⁵ Desiring not to return to life like they experienced under British rule, the framers of the Bill of Rights included the Fourth Amendment's protection against unreasonable searches and seizures. For more than a century, no caselaw directly focused on the Fourth Amendment.⁶ Near the turn of the twentieth century, the Supreme Court in *Weeks v. United States*⁷ excluded evidence obtained by law enforcement who did not have a warrant but still went into a home and seized papers that implicated the defendant in a federal crime. In a unanimous decision, the Court developed what is known as the Exclusionary Rule and excluded the evidence because the

papers were illegally obtained. In *Silverthorne Lumber Co. v. United States*⁸ the Exclusionary Rule was extended to evidence that was obtained because of illegally acquired information.⁹ The primary goal of the Exclusionary Rule is to disincentivize government officials from ignoring the law to search and seize evidence that they could not lawfully obtain. In other words, the rule is meant to "prevent, not to repair."¹⁰

How are law enforcement agents to behave so they do not have their evidence excluded? For almost 200 years, defining a search or seizure rested on the common understanding of physical intrusions.¹¹ But, in 1967, the Court rejected the physical trespass requirement detailed in earlier cases and instead focused on a new understanding of Fourth Amendment rights in *Katz v. United States*.¹² Justice Harlan's widely relied upon concurring opinion outlined a two-prong test for determining when the Fourth Amendment protections are triggered. In the first prong, the question is whether the individual claiming an expectation of privacy had an actual, subjective expectation that the searched area or item was private. In the second prong, the question is whether that subjective expectation is one that society is willing to recognize as reasonable. The Supreme Court has applied the *Katz* logic in a variety of places finding that the Fourth Amendment does not apply to searches involving the police digging through garbage at the curb,¹³ wired police informants,¹⁴ bank-maintained account records,¹⁵ a pen register on a telephone that records the phone numbers called,¹⁶ or the area beyond the curtilage of a home.¹⁷

In addition to the reasonableness clause, the Fourth Amendment also includes the Warrant Clause. The plain language of the Warrant Clause provides that a search should not occur without a warrant. Nonetheless, the Court in *United States v. Rabinowitz*¹⁸ held that warrants are unnecessary if a

Footnotes

1. 462 U.S. 696, 707 (1983).
2. U.S. CONST. amend. IV
3. See generally Eve M. Brank & Jennifer L. Groscup, *Psychology and the Fourth Amendment*, in 3 ADVANCES IN PSYCHOLOGY AND LAW 119 (Monica M. Miller & Brian Bornstein eds., 2018).
4. David A. Sklansky, 100 COLUM. L. REV. 1739 (2000).
5. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).
6. Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46 (1960).
7. 232 U.S. 383 (1914).
8. 251 U.S. 385 (1920).
9. The Supreme Court later referred to this category of excludable evidence as "fruit of the poisonous tree" in *Nardone v. United States*, 308 U.S. 338, 341 (1939). The application of the exclusionary rule was further extended in *Mapp v. Ohio*, 367 U.S. 643 (1961) to apply in cases where violations were committed by

state officials and to preclude illegally obtained evidence from being admitted in state court proceedings.

10. *Elkins v. United States*, 364 U.S. 206, 217 (1960).
11. See e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (where defendant argued unsuccessfully that a wiretap constituted a search and seizure under the Fourth Amendment). In holding that the intrusion was insufficient to trigger the protection of the Fourth Amendment the Court focused on the lack of a physical trespass.
12. *Katz v. United States*, 389 U.S. 347, 361 (1967).
13. *California v. Greenwood*, 486 U.S. 35 (1988).
14. *U.S. v. White*, 91 S.Ct. 1122 (1971).
15. *U.S. v. Miller*, 96 S.Ct. 1619 (1976).
16. *Smith v. Maryland*, 442 U.S. 735 (1979).
17. *Oliver v. U.S.*, 466 U.S. 170 (1984).
18. 339 U.S. 56 (1950).

search is reasonable and conducted during a lawful arrest. Importantly, the Court in *Rabinowitz* said there was no “fixed formula”¹⁹ for determining reasonableness and defaulting to always requiring a warrant is not appropriate. Instead, the Court held that reasonableness would be determined in light of the case facts and circumstances. Accordingly, the Court later found that a search incident to an arrest is reasonable within the “grabbable area.”²⁰ More importantly, *Terry v. Ohio*²¹ held that a police officer could stop and frisk a suspect looking for weapons when the officer had a “reasonable suspicion” that the person is engaged in criminal activity. The police do not need a warrant and they do not need to have probable cause to arrest the suspect, but their intrusions on individuals should still be limited.

When police engage in technology-aided investigations it provides the Court with new case facts and circumstances to consider. For example, in 2001, the Court in *Kyllo v. United States*²² held that obtaining illegal drug-growing data from thermal imaging was a Fourth Amendment search and the officers should have had a search warrant. The Court in *Kyllo* seemed concerned with the efficiency of data collection from the thermal imaging device and the fact that such a device would not be commonly available to those not in law enforcement. In a similar vein, law enforcement sniffer dogs are a special type of searching technology. A frequently used means of obtaining probable cause to search is a “sniff” for the presence of illegal items such as explosives, cadavers, and drugs.²³ In these instances, the trained dog’s “alert” to the presence of drugs frequently becomes the “probable cause” that serves as the justification to conduct a warrantless search lawfully.²⁴ In fact, this practice is so widespread and common in American policing that officers have been known to refer to dog-sniff tests as “walking probable cause” or “probable cause on a leash.”²⁵ The following sections will detail the U.S. Supreme Court caselaw in chronological order that has addressed such sniffer dogs.

THE FOURTH AMENDMENT AND SNIFFER DOGS

U.S. V. PLACE²⁶

Dog Sniff of Luggage Is Not a “Search”

When preparing to board his plane in Miami for New York City, Raymond Place’s behavior attracted the attention of law enforcement agents. Because he was preparing to board his flight, the Miami agents alerted drug enforcement agents in New York where Place was detained upon arrival. After Place did not consent to a search of his luggage, the agents told him they were going to take the luggage to a federal judge to obtain a search warrant. The officers then took the luggage to a different New York airport where they subjected the luggage to a sniff

test by a trained narcotics detection dog. The dog positively alerted to the presence of narcotics in one of the bags. Approximately 90 minutes had elapsed from taking the bags from Place to the dog at the other airport. Because it was late on a Friday afternoon, the officers kept the luggage and secured a search warrant on Monday morning at which point they found cocaine in one of the bags. Place argued that the warrantless seizure of his bag was in violation of the Fourth Amendment. At issue was whether based on reasonable suspicion law enforcement could temporarily detain Place’s luggage and subject it to a trained narcotics detection dog.

The Supreme Court held that the officers’ lengthy seizure and detention of the luggage exceeded the permissible bounds set forth in *Terry*.²⁷ In dicta, the Court noted that the dog’s sniff did not constitute a search within the meaning of the Fourth Amendment. The Court stated that there must always be a balance between “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests.”²⁸ Despite the substantial government interest in detecting narcotics, the Court held that the police violated Place’s Fourth Amendment rights when they seized his luggage for 90 minutes and because of such a lengthy seizure, the evidence obtained from the subsequent search was inadmissible. Although arguably not a question before them,²⁹ the Court noted that the dog sniff was not a search. They described the dog sniff of that luggage as unique given that the dog was only trained to detect narcotics and was able to sniff the bag while it was closed and all its contents could remain private. The Court heralded the dog-sniff procedure as limited in both manner and the information obtained and not a search for the purposes of the Fourth Amendment.

A frequently used means of obtaining probable cause to search is a “sniff” . . .

CITY OF INDIANAPOLIS V. EDMOND³⁰

Dog Sniff Is Less Intrusive Than a Search

Almost two decades after *Place*, the Supreme Court again had a case before them that involved narcotic-sniffing canines when a city’s roadblock checkpoints were in question. The city of Indianapolis was operating vehicle checkpoints to find illegal drugs in passing cars. Cars were stopped without any reasonable suspicion or probable cause, but simply because they were at the checkpoint. Once a car was stopped, one officer would walk a narcotics-sniffing dog around the car to determine if the dog would alert to the scent of drugs. Two stopped motorists brought a lawsuit on behalf of the class of stopped motorists because they felt their Fourth Amendment Rights

19. *Id.* at 63.

20. *Chimel v. California*, 395 U.S. 752 (1969).

21. 392 U.S. 1 (1968).

22. 533 U.S. 27 (2001).

23. John J. Ensminger & L. Papet, *Walking Search Warrants: Canine Forensics and Police Culture after Florida v. Harris*, 10 J. ANIMAL & NAT. RESOURCE L. 1 (2014).

24. Jane Y. Bambauer, *How the War on Drugs Distorts Privacy Law*, 64

STAN. L. REV. 131 (2012).

25. Ensminger & Papet, *supra* note 23.

26. 462 U.S. 696 (1983).

27. *Terry*, *supra* note 21.

28. *Id.* at 703.

29. *See id.* at 710 (Brennan J., concurring); *see also id.* at 720 (Blackmun, J., concurring).

30. 531 U.S. 32 (2000).

[T]he Court did not believe the dog sniff changed the lawful character of a traffic stop.

were violated. Although the Supreme Court noted that similar checkpoints are permissible when they are set up to increase highway safety (e.g., verifying drivers' licenses, drunk driving tests) or are related to specific border security issues, the Supreme Court held in *Edmond* that checkpoints to simply detect general illegal activity are not. However, the Court again endorsed the dicta in *Place* that a canine sniff was not a Fourth Amendment search saying, "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is much less intrusive than a typical search."³¹ However, the question remained: "What privacy interests are implicated by a drug-sniffing dog?"

ILLINOIS V. CABALLES³²

Random Dog Sniffing OK for Traffic Stop Citation

Roy Caballes was speeding down an Illinois interstate when a state trooper pulled him over. A second trooper who was part of the Police Drug Interdiction Team overheard the stop information on the police dispatch and immediately proceeded to the stop location with his narcotics-sniffing dog. While the first trooper was in his squad car to finish issuing a warning ticket for Caballes, the second trooper walked the dog around the exterior of Caballes' car. The dog alerted to the trunk of the car, which led to a search of the trunk where the officers found marijuana that led to a narcotics conviction for Caballes.

Caballes argued the drug evidence should be excluded because even though the whole incident only took 10 minutes, the officers did not have specific and articulable facts related to drugs that would have justified a drug-sniffing dog. Relying on the uniqueness of dog sniffs as detailed by *Place*, the Supreme Court held that the dog sniff in this instance did not violate Caballes' Fourth Amendment rights. They noted that using a well-trained narcotics-detection dog does not infringe upon legitimate privacy rights because the Court did not believe the dog sniff changed the lawful character of a traffic stop.

Both Justices Souter and Ginsberg wrote separate dissenting opinions. Justice Souter's dissent rested on the idea that because research had demonstrated that even well-trained narcotics-sniffing dogs have between a 12.5% to 60% false positive rate, they are clearly not infallible. If the dogs are not infallible, then Justice Souter reasoned, the sniff cannot be used without probable cause since the officers did not have reasonable suspicion to conduct the additional search in the first place. Justice Ginsberg's dissent focused on the need for reasonable suspicion to conduct this secondary search. She was less concerned with the length of the search rather the lack of reasonable suspicion before bringing in the drug-sniffing dog.

FLORIDA V. HARRIS³³

A Certified Dog Is Reliable Enough

Florida police officer William Wheatley was on a routine patrol with his narcotics-sniffing dog, Aldo, when he pulled over Clayton Harris for an expired license plate. Harris appeared nervous to Officer Wheatley and had an open beer can inside his truck. Officer Wheatley asked if he could search Harris's truck, but Harris refused. At this point, Officer Wheatley brought Aldo out of the patrol car and walked him around Harris's truck. Aldo alerted to Harris's driver's-side door handle. Using the alert as probable cause, Officer Wheatley searched Harris's truck, and although he did not find any narcotics (i.e., drugs that Aldo was trained to detect), he did find a variety of items that were indicative of manufacturing methamphetamine (i.e., meth). Officer Wheatley arrested him and Harris confessed to making and using meth. Out on bail from this first offense, Harris was again pulled over by the same Officer Wheatley and Aldo—this time for a broken brake light. Aldo again alerted to the same door handle, but this time Officer Wheatley did not find anything during his search of Harris's truck.

The Supreme Court in reviewing the *Harris* case examined the question of what factors should be considered in determining a narcotics-sniffing dog's reliability. The Court noted that the reliability of the dog can be demonstrated by factors such as the training and certification the dog has received while minimizing the importance of field performance in reliability analysis. Justice Kagan delivering the unanimous decision stated that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs."³⁴ The Court did note that even if a dog was generally reliable, there could be surrounding circumstances that could undermine probable cause from a particular alert. Some examples the Court provided were the officer cuing the dog (consciously or unconsciously) or if the dog was working in unfamiliar conditions. The Court reasoned that none of those exceptions applied for Aldo and there was no reason to believe that Aldo was not reliable. As the court stated, Aldo's "sniff is up to snuff."³⁵

FLORIDA V. JARDINES³⁶

The Court Shortens the Leash at Homes

The Supreme Court heard *Florida v. Jardines* with the *Harris* case on October 31, 2012. The decisions for both cases came down about five weeks apart in February and March of 2013. Where *Harris* is about a dog sniffing a vehicle, *Jardines* is about a dog sniffing the porch of a home. Based on a tip that mari-

31. *Id.* at 42.

32. 543 U.S. 405 (2005).

33. 568 U.S. 237 (2013).

34. *Id.* at 247.

35. *Id.* at 248.

36. 569 U.S. 1 (2013).

juana was being grown in the home of Joelis Jardines, two detectives and a trained narcotic-sniffing dog approached Jardines's home. The dog alerted at the base of the front door, which prompted the detective to obtain a search warrant. The ensuing search of Jardines's home revealed marijuana plants. At issue for the Supreme Court was whether the dog sniffing the front porch was a search under the Fourth Amendment. Although the previous outlined cases seem to suggest that the Supreme Court is giving a long leash to narcotic-sniffing dogs, the Court in *Jardines* shortens the leash. That line is the private home. In their holding that the dog sniff on Jardine's front porch was an unlawful warrantless search, the majority rely on the fact that the officers were within the curtilage of the home and the property rights inherent in one's home. Justice Kagan in her concurring opinion went a step further and analogized the police dog to high-powered binoculars being used to look inside a home through its windows. She concluded such would not only be a trespass on a person's property, but also an invasion of person's privacy. With this, Justice Kagan reinforced the idea that trained sniffer dogs are powerful instruments not available for general public use.³⁷

RODRIGUEZ V. U.S.³⁸

Dogs Can't Sniff on Routine Traffic Safety Stops

Switching back to dogs sniffing cars, Justice Ginsburg delivered the majority opinion for *Rodriguez*. A Nebraska police officer, Morgan Struble, pulled Dennys Rodriguez over after witnessing Rodriguez swerve onto the shoulder of the highway. Struble is a K-9 officer and had his narcotics-sniffing dog with him in his car. Rodriguez explained that he swerved to miss a pothole. After issuing a formal warning to Rodriguez, Officer Struble then asked if he could walk his dog around the vehicle. Rodriguez refused consent, so Officer Struble instructed Rodriguez to get out of his vehicle while they waited for a second officer. After the second officer arrived, Officer Struble took the dog around Rodriguez's vehicle twice with the dog alerting halfway through the second trip. Approximately eight minutes had passed since the issuing of the warning and the dog alerting. The majority focused on the fact that the extension of the traffic stop for the dog sniff occurred after the conclusion of the traffic stop, or in other words after the warning was issued, rather than the length of the extension. In relaying the majority opinion, Justice Ginsburg noted that the police are not permitted to extend the duration of a traffic stop without reasonable suspicion, even if it is only a minimum amount of time. The use of a drug-sniffing dog, the Court reasoned, is for detecting criminal activity and is not part of a routine traffic stop meant to ensure vehicle safety on the roads.

SUBSEQUENT LOWER-COURT DECISIONS

In the years since *Jardines* and *Rodriguez*, lower courts have

been confronted with a crop of new issues in analyzing sniffer-dog searches. The Minnesota Supreme Court recently determined that, unlike a sniff of a home's front porch in *Jardines*, use of a drug-sniffing dog in a hallway immediately adjacent to an apartment was not an unconstitutional search.³⁹ The Minnesota Supreme Court distinguished the apartment complex from the situation in *Jardines*, clarifying that, "The area immediately adjacent to [the defendant's] apartment door is not analogous to the front porch in *Jardines* because it is located in an internal, common hallway that other tenants and the police jointly use and access."⁴⁰

The Colorado Supreme Court also departed from U.S. Supreme Court reasoning when evaluating a drug-sniffing dog search of a vehicle in *People v. McKnight*.⁴¹ Previous drug-sniffing-dog-search opinions had relied on the reasoning in *Place* that the use of a drug-sniffing dog does not implicate a reasonable expectation of privacy because these dogs only sniff out illegal activity, but Colorado legalized marijuana under their state constitution in January 2014. The Colorado Supreme Court had previously held a positive alert of a drug-sniffing dog could be used to support a finding of probable cause to search a vehicle.⁴² But, according to the Colorado Supreme Court most recently, because individuals can lawfully possess marijuana in the state of Colorado, drug-sniffing dogs are similar technology to the use of a thermal-imaging device the U.S. Supreme Court analyzed in *Kyllo*.⁴³ The Colorado Supreme Court went on to hold that, because a sniff from a dog trained to detect marijuana can reveal lawful activity, that sniff is a search under the state constitution and must be justified by probable cause.⁴⁴

Sniffer dogs can detect contraband other than drugs, and an appellate court in Massachusetts was confronted with one such type of search in *Commonwealth of Massachusetts v. Devoe*.⁴⁵ In that case, police officers were investigating a report of a female suspect with a firearm at a local park. The officers responded with their sniffer dog who had been trained to detect firearms. The dog positively alerted to the presence of a firearm in a bag and the defendant was charged with unlawful possession of a firearm for not having a permit. The defendant argued the dog sniff of her bag was unconstitutional. Similar to the Colorado Supreme Court's reasoning in *McKnight*, the Massachusetts appellate court distinguished the firearm sniff because such a sniff reveals potentially noncriminal activity (e.g., carrying a concealed weapon with a valid permit). But the appellate court did not reach the question of whether the sniff was an unreasonable search under the Fourth Amendment and instead deemed the search unconstitutional on other grounds.

[T]he Court in *Jardines* shortens the leash. That line is the private home.

37. See case cited *supra* note 22 and accompanying text.

38. 135 S. Ct. 1609 (2015).

39. *Minnesota v. Edstrom*, 916 N.W.2d 512 (Minn 2018), *cert. denied*, 139 S.Ct. 1262 (2019).

40. *Id.* at 520.

41. 2019 WL 2167746 (May 20, 2019).

42. *People v. Zuniga*, 372 P.3d 1052 (2016); *People v. Cox*, 401 P.3d 509 (2017).

43. See case cited *supra* note 40 and accompanying text.

44. See case cited *supra* note 40, 42 at 55.

45. 95 Mass.App.Ct. 1107 (April 12, 2019) (slip op., unpublished disposition).

QUICK LIST OF 10 IMPORTANT 4TH AMENDMENT CASES

Weeks v. United States, 232 U.S. 383 (1914) – created exclusionary rule in federal cases

Mapp v. Ohio, U.S. 643, (1961) – created exclusionary rule in state cases

Katz v United States, (1967) – 4th Amendment applies whenever and wherever there is a reasonable expectation of privacy

Terry v. Ohio, 392 U.S. 1 (1968) – created “stop and frisk” for reasonable suspicion

Chimel v. California, 395 U.S. 752 (1969) – allows searches incident to an arrest

Pennsylvania v. Mimms, 434 U.S. 106 (1977) – 4th Amendment allows person be ordered out of car

New Jersey v. T.L.O., 469 U.S. 325 (1985) – allows student searches in public schools

Illinois v. Wardlow, 528 U.S. 119 (2000) – running from police provides basis for stop

Kyllo v. United States, 533 U.S. 27 (2001) – thermal imaging evidence not sufficient for probable cause warrant

Arizona v. Gant, 556 U.S. 332 (2009) – police can search vehicle after arrest only if have reasonable belief to find evidence or other probable cause

RESEARCH CONTINUES

Although the Court has held that dog sniffs are not searches requiring probable cause, empirical research on the issue has found that participants rated the intrusiveness of a dog sniff similarly to a frisk, which the Court has held to be a search.⁴⁶ Additionally, *Chicago Tribune* reporters Dan Hinkel and Joe Mahr found that law enforcement dogs across a three-year period were less than 50% accurate in accurately detecting drugs or drug paraphernalia.⁴⁷ The accuracy of the dog sniff seems to impact how invasive their sniff is perceived. In two separate studies, Professor Jane Bambauer told law students or lay people the accuracy of the dog was either 100%, 99%, or 90%.⁴⁸ The participants’ perception of the dog’s invasiveness

increased as the accuracy decreased. In other words, the less accurate the dog was, the more invasive the sniff was perceived to be. Professor Bambauer also found that participants were more likely to think a dog sniff was a search when the sniff target was a house compared to a car.⁴⁹

Despite these findings, empirical questions remain about public perceptions of police dogs and their sniffs. For example, based on the Supreme Court attention to the issue, we have examined a variety of locations beyond the simple car versus home comparison. Our research indicates that more privacy is expected for a home than for other types of living situations, such as an apartment or hotel room, and that, contrary to Bambauer’s findings and court assumptions, people might expect an equivalent, high amount of privacy in their cars and their homes.⁵⁰ Similar to Bambauer, we found that a dog’s accuracy can affect perceptions of the dog’s reliability.⁵¹ We also investigated how quality of training and certification can impact perceptions of the dog’s reliability (two of the issues raised in *Harris*). We found that reliability perceptions were not influenced by the quality of ongoing training the dog receives, despite the fact that training was emphasized by the Court and that higher-quality, continued training might actually improve a dog’s reliability. However, current certification did increase perceptions of the dog’s reliability.

Additionally, we investigated the issues raised in *Rodriguez* by varying whether a traffic stop was extended to conduct a dog sniff or question the driver about drugs, whether the extension to the traffic stop occurred before or after the ticket was issued, and the length of time the traffic stop was extended (2, 7, or 17 minutes). Consistent with the Court’s reasoning that a dog sniff exceeds the ordinary type of investigation necessary for a traffic stop, participants perceived dog sniffs as more invasive than asking drug-related questions. Also consistent with the Court’s reasoning that the timing of the extended investigation relative to issuing a ticket is the most important factor, participants perceived the extension of the stop as more problematic when it was conducted after the ticket was issued as opposed to before. Contrary to the Court’s argument that the length of the extension of the stop is not important, participants thought that the stop was more problematic when the delay was long (17 minutes) or moderate (7 minutes) rather than minimal (2 minutes).

CONCLUSION

Generally, law-enforcement-trained-dog sniffs are not searches requiring probable cause to conduct, unless conducted within the curtilage of a home or someplace where the dog and its handler are not entitled to be. As such, the police

46. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727 (1993).

47. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

48. Bambauer, *supra* note 24 (law students); Jane Y. Bambauer,

Defending the Dog, 91 OR. L. R. 1203 (2013) (laypeople).

49. Bambauer, *supra* note 24, at 47.

50. Jennifer Groscup, Eve Brank, Emma Marshall & Lori Hoetger, *Give Me a Home Where the Drug Sniffing Dog Doesn’t Roam: Privacy Expectations for Canine Searches* (manuscript in progress).

51. Emma Marshall, Jennifer Groscup, Alex Rivera & Eve Brank, *Good Dog! How the Background of Law Enforcement Dogs Affects Perceptions of Canine Searches* (manuscript in progress).

are usually not required to obtain a warrant or establish probable cause before the dog sniff. But as the legal landscape evolves, and new technology and privacy implications arise, courts will continue to face novel fact patterns regarding dog sniffs. Courts will have to address the issue of at what point a sniffer dog crosses the line to an invasive technology similar to the device used in *Kyllo*. The training and reliability of the dogs, the ability to detect potentially lawful items, and the privacy of the area sniffed, are all concerns courts must consider when evaluating these searches.



Eve M. Brank, J.D., Ph.D., is currently the Director of the Center on Children, Families, and the Law, Professor of Psychology, and Courtesy Professor of Law at the University of Nebraska-Lincoln. Her research primarily focuses on the way the law intervenes (and sometimes interferes) in family and personal decision making. Related to the current article,

the authors have recently completed a series of studies funded by the National Science Foundation examining people's willingness to consent to police searches.



Jennifer Groscup, J.D., Ph.D., is an Associate Professor in the Psychology and Legal Studies departments at Scripps College. Her research interests have included legal decision making, particularly in judges' and jurors' perceptions of expert evidence. Her current research investigates issues related to the Fourth Amendment including consent searches, privacy expecta-

tions, and the use of law enforcement dogs. She is the President-Elect of the American Psychology-Law Society, Division 41 of the American Psychological Association.



Emma Marshall is a third-year graduate student in the dual J.D./Ph.D. Law-Psychology and Social-Cognitive Program at the University of Nebraska-Lincoln. She received her B.A. in Psychology from Pomona College in 2014. Her primary research interests are in the intersection of the Fourth Amendment, privacy, and consent to search decision making. She is especially interested in judicial reasoning and perceptions of police searches in situations involving K-9 officers and drug-sniffing dogs.



Lori Hoetger is an Assistant Public Defender in Douglas County, Nebraska. She graduated from the University of Nebraska Law-Psychology program, completing her J.D. in 2014 with highest distinction and Ph.D. in Psychology in 2018. Before her current position, she served as a judicial law clerk on the United States Court of Appeals for the Eighth Circuit.

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Toward a Judiciary Both Independent and Accountable

Robert H. Tembeckjian

There may be no state interest more compelling than the independence, impartiality, and integrity of the judiciary.¹ There may also be no public office for which individual accountability is so critical, not only because judges often have the last word in our society's disputes, but because public confidence in the courts is fundamental to the rule of law around which our society is organized. Trust in the administration of justice depends not only on the merits of the verdicts rendered in the courtroom but on the probity and the appearance of probity among those who decree them. A litigant may not feel happy about losing a case, but no one should walk out of a proceeding reasonably believing that the process was tainted by an arbiter who was biased, improperly influenced, or otherwise unfair.

By the early twentieth century, some states had individually attempted to address the delicate balance between judicial independence and accountability, typically by drafting rudimentary standards of ethical conduct to which judges could aspire.² The American Bar Association then took up the issue and in 1924 issued Canons of Judicial Ethics, which attempted to harmonize the judicial responsibility to decide cases free from outside influence with the judge's obligation to behave on and off the bench in a manner that enhances respect for the independence, integrity, and impartiality of the judiciary.³

Throughout the United States, while the 1924 ABA code offered commendable aspirational guidance to the bench, enforcement was either entirely lacking or left to the courts themselves. Not surprisingly, judges were not especially energetic about enforcing rules of conduct on one another.⁴ Nor was the alternative remedy of impeachment apt to be initiated by a legislature.⁵

It was not until 1960 that a state adopted a method of judicial ethics enforcement that was not controlled by the judiciary itself.⁶ The California Commission on Judicial Performance was created to investigate and, where appropriate, impose public discipline on judges who were found to have violated promulgated rules of judicial ethics.⁷ As other states followed suit and there was talk of implementing ethics oversight in the federal courts, associations representing judges and some newspapers expressed concerns that judicial con-

duct commissions would chill judicial independence.⁸ Far less frequently appreciated was the degree to which a judicial conduct commission could protect and promote the independence of the judiciary. Now, nearly 60 years after the advent of the first one, independent ethics entities have not only become part of the judicial landscape in the states, they have indeed safeguarded judicial independence as surely as they have redressed judicial misconduct.

JUDICIAL INDEPENDENCE

Although the judiciary article of the United States Constitution⁹ is far shorter than the legislative and executive articles that together established our tripartite system of government, its role and impact are outsized. From the founding of the American republic, an independent and impartial judiciary has not only been the indispensable anchor of our tripartite system of government, it has been an immeasurable protector of our most basic rights and liberties, such as ensuring the right to counsel, the right against self-incrimination, the right to a fair trial, the right to free expression, and the right to worship. This may subject judges to unfair and certainly unwanted criticism. A prosecutor may denounce the release of a defendant on recognizance. A public defender may decry the imposition of the maximum sentence against a convicted felon. An editorial may take issue with an appellate court's legal reasoning. A public official may claim bias because of a judge's political pedigree or ethnic ancestry.

Whatever pressure or public clamor may be brought to bear, the judge's job is to act at all times, on and off the bench, in a manner that upholds and promotes public confidence in the independence, integrity, and impartiality of the judiciary.

Why are judicial probity and fairness so significant? Because public confidence in the administration of justice is what keeps people coming back to the courts and what empowers the writ of our law. The judicial branch may be the most subtle and least understood of the three, but its independence, integrity, and impartiality are at the heart of what George Washington identified as the "due administration of justice" that is the "firmest pillar of good government."¹⁰ And as Alexander Hamilton explicated in *The Federalist* in 1787-

Footnotes

1. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 739 (2014); *Raab v. Commission on Judicial Conduct*, 100 N.Y.2d 305 (2003); *Watson v. Commission on Judicial Conduct*, 100 N.Y.2d 290 (2003); see also, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
2. In 1909, for example, the New York State Bar Association adopted Canons of Judicial Ethics.
3. ABA, *Canons of Judicial Ethics*, available at <https://bit.ly/2YRHb4S>.
4. G. Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 292-94 (1987).

5. *Id.* at 296.

6. Calif. Const., art. VI, §18, available at <https://cjp.ca.gov/>

7. *Id.*

8. *A Threat to Judicial Independence*, N.Y. TIMES, July 28, 1978, at 22, col. 1; *System Relieving Judges of Duties May Not by Legal, Justice Says*, N.Y. TIMES, Nov. 17, 1977, at 34, col. 3.

9. U.S. Const., art. III.

10. George Washington, Letter of Attorney General Edmund Randolph, Sept. 28, 1789, available at <https://founders.archives.gov/documents/Washington/05-04-02-0073>.

88,¹¹ and history has repeatedly underscored, the judiciary owes its power not to an army to enforce its will, nor to the public purse to fund its mandates, but to the integrity of its judgments. It is confidence in that integrity, and in the principle that the litigant will get a fair shake from an impartial magistrate, a fair-minded jury, and an unbiased appellate reviewer, that keeps citizens coming to the courts rather than turning to the streets to resolve disputes.

Time and again, from the earliest days of our civil society to the present, the courts have stood up to the potential tyranny of the mob and government. Not always, of course. Judges and juries are fallible human beings. Try as they might to get it right, sometimes they get it wrong. As every trial judge knows and occasionally jokes, that is why we have appellate courts.

But at critical junctures in our history, ordinary citizens, protected by evenhanded judges, have made extraordinary decisions that shaped what we became as a society of laws. In New York in 1734, when a Grand Jury refused to indict John Peter Zenger for libel but the Attorney General charged him anyway, a petit jury acquitted him, and two classic American principles were enshrined before we even had a national constitution: freedom of the press and truth as a defense. Nearly three centuries later in California in November 2017, when a jury found Jose Ines Garcia Zarate guilty of felonious possession of a firearm but not guilty of the heartbreaking murder of Kate Steinle, another anonymous group of average citizens demonstrated what the rule of law looks like. Despite the massive attention drawn to the case because the defendant was a repeat illegal entrant into the United States, a jury of average citizens upheld the proposition that a defendant may only be convicted if the proof is properly presented and beyond a reasonable doubt, and that even the xenophobic public pronouncements of politicians must not lead jurors to where the evidence does not go.¹²

JUDICIAL ACCOUNTABILITY

Before there was a code of judicial conduct, it was not necessarily uncommon for judges to engage in activities that compromised or appeared to compromise their judicial independence. Indeed, the 1924 ABA Canons of Judicial Ethics was adopted in significant measure because Kennesaw Mountain Landis, the first commissioner of major league baseball who was also a federal judge, refused to quit the bench and insisted on performing both jobs contemporaneously.¹³ Although Landis eventually relinquished his judgeship, without meaningful enforcement mechanisms in either the federal or state court systems, the 1924 Canons were largely hortatory, and compliance was voluntary.

Beginning with California in 1960, all 50 states moved to

fill the vacuum between judicial independence and accountability with judicial ethics enforcement commissions.¹⁴ Moreover, every state has adapted the ABA Model Code, most recently revised in 2007, whose preamble describes it as “rules of reason” intended as both a guide to ethical behavior and a basis for imposing sanctions.¹⁵ At the federal level, and even in states that have adopted codes and means of enforcement for executive and legislative branch officials, judges are bound to a more stringent set of promulgated standards of conduct than any other public officers. And few are as energetically enforced. In 2018, for example, 136 judges were publicly disciplined in 34 states, including 29 in Texas, 19 in New York and eight each in California and Washington.¹⁶

While the concept of an independent judiciary came well before public insistence on an accountable one, it would be wrong to conclude that the latter is a brake on the former. Contrary to what may be a common complaint among judges, judicial conduct commissions, far from inhibiting judicial independence, actually and critically protect it. Recognizing that judicial commissions are here to stay, in 1994 the ABA also adopted Model Rules of Judicial Disciplinary Enforcement, *inter alia* to help ethics professionals avoid crossing the line between independence and accountability.¹⁷

A judicial conduct commission is not an appellate court. It can neither remand nor remit a case, nor overrule a court-adjudicated finding of fact or conclusion of law. Nor in most states does the commission have administrative authority over the courts, so it cannot transfer cases from one judge to another, nor reassign a judge to a different term of court or part of the state. Typically, it can only investigate and, where appropriate, discipline a judge for violating the Code. Even where the commission determines that a judge was unethically motivated to decide a case a certain way and should be removed from office—say, a close relative of the judge was a party or lawyer in the matter, or the judge had a substantial undisclosed interest that was affected by the outcome—the determination may only discipline the judge; it has no effect on the court case itself. An aggrieved party would have to seek redress through the courts themselves to mitigate or undo the disciplined judge’s mal-motivated decision.

Whether by confidential caution, public reprimand or removal from office, the commission holds the judiciary to account for ethical transgressions and plays an important role

**Time and again
... the courts
have stood up to
the potential
tyranny of the
mob and
government.**

11. The Federalist, numbers 78 through 83.

12. *The Kathryn Steinle Murder Trial: Why the Jury and Trump Saw Two Different Cases*, L. A. TIMES, Dec. 2, 2017, [available at https://www.latimes.com/local/lanow/la-me-kate-steinle-analysis-20171202-story.html](https://www.latimes.com/local/lanow/la-me-kate-steinle-analysis-20171202-story.html).

13. John Roberts, 2011 Year-End Report on the Federal Judiciary, at 1-2, [available at https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf](https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf).

14. Judicial ethics enforcement entities are variously called commissions, boards, offices, etc. For purposes of this article, they are generically referred to as “commissions.”

15. ABA Model Code of Judicial Conduct, Feb. 2007, [available at https://bit.ly/2HLvNlf](https://bit.ly/2HLvNlf).

16. National Center for State Courts, Center for Judicial Ethics.

17. ABA, Model Rules for Judicial Disciplinary Enforcement, [available at https://bit.ly/2EHLxr9](https://bit.ly/2EHLxr9).

The vast majority of complaints are dismissed as without merit.

in protecting the public from unfit incumbents.¹⁸ Many also have authority to retire a judge for physical or mental disability.¹⁹

Of course, however justified, even the mildest discipline will sting the affected judge. It may, therefore, be natural for judges to

view judicial commissions with suspicion, as a scold or even as an inhibitor rather than protector of judicial independence. But they would be wrong.

Examining the record of the New York State Commission on Judicial Conduct, statistically the most active in the country since its creation in 1978, makes the point.

There are over 1,400 courts throughout New York, and approximately 3,300 judges. Since 1978, the commission has issued over 850 public disciplinary decisions including 172 removals from office.²⁰ But these startling numbers do not tell the entire story. For in addition to the disciplines it imposes, the commission absorbs a great deal of public and personalized criticism that would ordinarily be directed to the judiciary. Those 850 disciplines comprise a mere 1.5% of the more than 58,000 complaints received, processed, analyzed, and mostly rejected over that same time frame. In other words, 98.5% of the time, the commission tells a complainant that there was no ethical wrongdoing, and it explains why.²¹ Nearly half of those complaints were limited to expressions of dissatisfaction with the court's decision, and not one of those was investigated.²²

In receiving, considering, dismissing, and explaining its reasons for declining to investigate such complaints, the commission deflects and takes upon itself the anger of litigants that would otherwise be aimed at the courts. Moreover, in a public annual report, it not only elucidates the behavior that *did* result in discipline but also demonstrates with statistical evidence that it shields judges from unfair attack.²³ As such, the commission helps to protect the judge's freedom and responsibility to rule on the merits.

The New York experience is representative. In virtually all jurisdictions, the statistical record is the same. The vast majority of complaints are dismissed as without merit.²⁴

The recent firestorm of controversy in California regarding the so-called "Stanford rape case" is a prime example of how a disciplinary commission may actually protect the independence of the judiciary. It is also a lesson in the perils of allowing a superseding process to negate that protection.

Whatever one's view of the merits of Judge Aaron Persky's sentencing of former Stanford University swimmer Brock Turner for the sexual assault of an unconscious "Emily Doe"—three months in jail, plus three years' probation and registration as a sex offender—it was the California Commission on Judicial Performance that initially answered the public outcry from those who considered the sentence lenient. The California commission examined and found that the sentence was lawful and within the judge's discretion, that he had not been motivated by such misconduct as bias based on gender, race, or socioeconomic status, and that he was not insensitive to the seriousness of sexual assault.²⁵ That should have been the last word, but it was not. The California commission was subjected to fierce political criticism for exonerating Judge Persky of misconduct,²⁶ and the state auditor initiated an investigation of the commission itself.²⁷

As for Judge Persky, being cleared of misconduct by the commission did not save him from California's recall provision, through which he was ousted from office by majority vote.²⁸ In a spectacular irony, a judge who was ethically bound "not [to] be swayed by public clamor or fear of criticism"²⁹ was removed from the bench as a result of both. Mindful of the warnings over 225 years ago, not only by Alexander Hamilton about tampering with judicial independence but also by James Madison about the "impulse of passion" that may perniciously factionalize the body politic,³⁰ one might ask: What is more likely to chill the independent rendering of judicial decisions: the removal of a judge for ethical misconduct by a disciplinary commission after a due-process proceeding, or the recall of a judge by an electorate unhappy with a single decision?

The California commission's experience in *Persky* is not singular.

In 1997, in *Matter of Duckman*, a case that generated worldwide attention, the New York commission threaded the needle between acts of misconduct and judicial discretion.³¹ Duck-

18. In many states, judicial disciplinary commissions also have the power to suspend a judge. New York's commission does not have such authority. Source: National Center for State Courts.

19. See, for example, N.Y. Const., art. VI §22; Calif. Const., art. VI §18; N.M. Const., art. VI §32; Ariz. Const., art. 6.1.

20. State of New York Commission on Judicial Conduct, Commission Decisions, available at <https://on.ny.gov/2Wv2Q5z>.

21. N.Y. Jud L §44(11).

22. 2019 Annual Report, N.Y. State Commission on Judicial Conduct, at 258, available at <http://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

23. 2019 Annual Report, N.Y. State Commission on Judicial Conduct, at 1-18, available at <http://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

24. Calif., <https://bit.ly/2HLxFKN>; Ariz., <https://bit.ly/2EL1qcK>; N.M., <https://bit.ly/2HQSbQZ>; Wash., <https://bit.ly/2JPeuSI>.

25. Press Release, California Commission on Judicial Performance, Commission on Judicial Performance Closes Investigation of

Judge Aaron Persky, available at <https://bit.ly/2XiAR5Y>.

26. *Recall Judge Persky Leader Takes Issue with Judicial Commission Finding*, MERCURY NEWS, Jan. 6, 2017, available at <https://www.mercurynews.com/2017/01/06/recall-judge-persky-leader-takes-issue-with-judicial-commission-finding/>.

27. *California's Judicial Disciplinary Agency to be Audited After Complaints*, S. F. CHRON., Sept. 20, 2018, available at <https://www.sfchronicle.com/news/article/California-s-judicial-disciplinary-agency-to-be-13245619.php>.

28. *Santa Clara County Voters Recall Judge Aaron Persky*, STAN. DAILY, June 6, 2018, available at <https://www.stanforddaily.com/2018/06/06/voters-recall-judge-aaron-persky/>.

29. ABA Model Code of Judicial Conduct, Rule 2.4(A).

30. The Federalist, number 10.

31. *Duckman v. Commission on Judicial Conduct*, 92 NY2d 141 (1998), available at <http://cjc.ny.gov/Determinations/D/duckman.htm>.

man, a New York City Criminal Court Judge, had reduced the bail on a defendant from \$5,000 (which he couldn't make) to \$2,000 (which he could). The defendant promptly went out and killed both his girlfriend and himself. The political and tabloid outcry against Judge Duckman was unprecedented. The then-governor, mayor and state Senate majority leader, among many others, called for his removal.³² The tabloid focus on Duckman brought to light numerous other problematic acts in his judicial record, and the commission determined to remove him from office for *inter alia* repeatedly making statements that were gender and race insensitive, and for deliberately dismissing accusatory instruments as facially insufficient when he knew they were not, because he did not believe the lower-level crimes at issue should be prosecuted. But as to the matter for which the governor and others wanted him removed—the bail reduction that led to murder—the commission dismissed the charge, having determined that it was a lawful ruling within the judge's discretion, and that it had not been tainted by prejudice or other misconduct. Promptly thereafter, the evidently displeased governor recommended a cut in the commission's budget, which was later restored by the legislature.

JUDICIAL DISCIPLINARY ENFORCEMENT IN THE FEDERAL COURTS

As effective as the states have been in enforcing judicial ethics, the federal judiciary has lagged far behind. To be sure, there is a Code of Conduct for United States Judges, based on the same ABA Model Code the states have all adapted and adopted.³³ But there is no office or dedicated professional staff to enforce it. The federal judiciary has retained the exclusive authority to police itself—the failure of which in the states led to the evolution of independent ethics-enforcing commissions.

It is exceedingly rare for a federal judge to be disciplined. In 2016, for example, 1,303 complaints were filed with the federal circuits, but only four were investigated.³⁴ In the past decade fewer than one federal judge per year has been disciplined.³⁵ In the history of the United States, only 15 federal judges have been impeached; eight were convicted, three resigned, four were acquitted. Two who had been convicted of crimes—Harry Claiborne of Nevada and Walter Nixon of Mississippi—refused to quit, went to jail and drew their judicial

salaries until Congress impeached and removed them from office.³⁶

These shortcomings were most recently illustrated by the failure of the federal judicial disciplinary “system” to complete ethics inquiries into important complaints because the judges at issue suddenly resigned—e.g., former Ninth Circuit Chief Judge Alex Kozinski, who was accused of sexual harassment,³⁷ or Third Circuit Associate Judge Maryanne Trump Barry, who was accused of financial fraud³⁸—or failed even to undertake an investigation because the judge, Brett Kavanaugh, was elevated to the Supreme Court, which does not apply the Code of Judicial Conduct to itself.³⁹

Such high-profile failures and generally low investigative numbers inevitably suggest that the federal bench, which is probably no more or less ethically challenged than the typical state bench, is self-protective. Indeed, a committee chaired by Supreme Court Justice Stephen Breyer commented in a 2006 report that a system in which judges judge one another is at risk of undue favoritism.⁴⁰

Public confidence in the federal courts could be improved by the creation of an independent judicial monitor to collect complaints, investigate those with merit, and initiate proceedings before a disciplinary panel of judges designated by the chief justice for lesser, *i.e.* non-removable offenses. In egregious cases, the independent monitor could recommend proceedings to the House of Representatives, since the only means by which a federal judge may be removed is impeachment by the House and conviction by the Senate.⁴¹

The languid federal ethics enforcement record has been addressed more than once by the Supreme Court, the United States Judicial Conference, and the United States Senate, but meaningful, comprehensive reform has remained elusive. The Breyer committee in 2006 recommended a uniform procedure throughout all the federal circuits for dealing with complaints against judges, but it did not recommend a centralized staff or process. There is no staff specifically trained and dedicated to adjudicating let alone rooting out misconduct among judges systemwide. There is no equivalent to the ABA Model Rules of Judicial Disciplinary Enforcement.

The federal judiciary has retained the exclusive authority to police itself. . . .

32. *Pataki Calls for Judicial Panel to Remove a Brooklyn Judge*, N. Y. TIMES, Feb. 29, 1996, at B1, col. 2, available at <https://www.nytimes.com/1996/02/29/nyregion/pataki-calls-for-judicial-panel-to-remove-a-brooklyn-judge.html>.

33. U.S. Courts, Code of Conduct for United States Judges, available at <https://bit.ly/2VVup3F>.

34. *Sexual Misconduct by Judges Kept Under Wraps*, CNN, Jan. 26, 2018, available at <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html>.

35. *Id.*

36. U.S. Senate, The Impeachment Trial of Harry E. Claiborne (1986), U.S. District Judge, Nevada, available at <https://bit.ly/2JM68vj>; U.S. Senate, Senate Impeachment Trial Powers Upheld, January 13, 1993, available at <https://bit.ly/2KdF0EC>.

37. *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harass-*

ment Allegations, N. Y. TIMES, Dec. 18, 2017, available at <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

38. *Retiring as a Judge, Trump's Sister Ends Court Inquiry into Her Role in Tax Dodges*, N. Y. TIMES, Apr. 10, 2019, at A23, available at <https://www.nytimes.com/2019/04/10/us/maryanne-trump-barry-misconduct-inquiry.html>.

39. *In re Complaints Under the Judicial Conduct and Disability Act* (Judicial Council Tenth Cir., Dec. 18, 2018), available at <https://bit.ly/2JNi7bP>.

40. Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act: A Report to the Chief Justice (Sept. 2006), available at <https://bit.ly/30XlouE>.

41. United States Const., art. I, sec. 2; art. II, sec. 5; art. III, sec. 4.

[T]he judiciary must not become just another casualty of partisan politics or culture wars.

The Executive Committee of the United States Judicial Conference, chaired by Judge Merrick Garland of the D.C. Circuit Court of Appeals, recently reexamined the federal court ethics enforcement system, but in its March 2019 report it, too, chose to keep judges firmly in charge of their own discipline.⁴² This will not likely inspire public confidence

or result in more sanctions than what has become the minimal norm. While the federal courts did take a step forward by creating a Judicial Integrity Office in December 2018 that became operative in April 2019, its mandate is limited to “workplace conduct matters” for court employees.⁴³ The broad range of ethical matters addressed in the judicial code of conduct, applicable to judges, are apparently not within the purview of the new judicial integrity officer.⁴⁴

More than once since 2006, Congress has entertained proposals to strengthen the system by creating an “Inspector General for the Judicial Branch,” to be appointed by the chief justice on consultation with congressional leaders.⁴⁵ Among other things, the inspector general would investigate possible misconduct by judges, as well as conduct audits and pursue inquiries as to non-judicial employees to prevent and detect waste, fraud, and abuse. It would report to the Chief Justice and to the Congress on matters that may require action by either, which could result in the reprimand of a judge by the courts or the impeachment and removal of a judge by the House and Senate.⁴⁶ While such legislation has never advanced beyond committee, the less effectually the courts appear to deal with the next string of notorious Kozinski-Kavanaugh-Barry type issues, the more likely Congress will be to act, for better or worse. Having a system legislatively imposed on the courts could be avoided by crafting a meaningful one on their own.

Would it be too much to expect, in a cynical and dizzying political era, for our federal judiciary to demonstrate how to accept responsibility and promote accountability in contrast to political actors that often try to avoid both? Might an invigorated national system of judicial ethics enforcement show, as state government entities have long demonstrated, that officers of at least one branch of government are held to the highest standards of conduct, with measurable and measured consequences when, on occasion, they fail to meet those standards?

Doing so would considerably enhance public confidence in what always must remain the “firmest pillar” of our constitutional republic.

BUILDING AND MAINTAINING PUBLIC CONFIDENCE IN THE COURTS

Judges and ethics enforcers have important roles to play in protecting the independence of the courts and the public’s confidence in it. At times that may mean acting contrary to popular opinion. It may mean restraint when action would be so much easier and more politically expedient. It may require engaging in some public education, as the California commission did in the *Persky* matter, and the New York commission did in *Duckman*. Yet the greatest risk to judicial independence is one that a judicial ethics enforcement entity has no power to combat.

In an age when normative public standards and constitutional institutions routinely come under attack, in some instances by the very people who are sworn to preserve, protect and defend them, the judiciary must not become just another casualty of partisan politics or culture wars. Yet a judicial ethics commission has no authority over a president who seems blithely to criticize judicial decisions as “a disgrace” simply because he disagrees with them,⁴⁷ nor over a Congress that seems to spiral ever downward toward an acrimonious partisan abyss.

Perhaps nowhere is the threat to an independent judiciary more evident than the rancorous manner in which we elect or appoint judicial officers. As the US Supreme Court case of *Caperton v. Massey Coal* and the blood sport of federal judicial nominations all too vividly reveal, special interest groups now commit unseemly amounts of money to affect judicial elections and nominations. In *Caperton*, millions of coal industry dollars were spent to elect a West Virginia Supreme Court Justice who then cast the tie-breaking vote in a case favoring the coal industry. The US Supreme Court found the compromise to independence and impartiality so great as to invalidate the decision.⁴⁸

Yet seven years before *Caperton*, in *Republican Party of Minnesota v. White*, the Supreme Court had released judicial candidates from rules that prohibited unfettered comment on political issues in the course of their campaigns.⁴⁹ Short of making a pledge, promise, or commitment with respect to cases, controversies, or issues likely to come before the court, judicial candidates were freed to say just about anything that circumpect judges had previously avoided.

42. U.S. Courts, Judicial Conference Approves Package of Workplace Conduct Reforms (Mar. 12, 2019), available at <https://bit.ly/2HpZlWZ>; Guide to Judiciary Policy, available at <https://bit.ly/2wrUYDc>; Ann E. Marimow, *Federal Judiciary Leaders Approve New Rules to Protect Court Employees from Workplace Harassment*, WASH. POST, Mar. 12, 2019, available at <https://wapo.st/2MnJYBw>.

43. U.S. Courts, Judicial Integrity Officer Named for Federal Judiciary (Dec. 3, 2018), available at <https://bit.ly/2W6xygW>.

44. Id.

45. News Release, Sen. Chuck Grassley, Grassley Bill Would Improve Oversight of the Federal Judiciary (Mar. 22, 2015), available at

<https://bit.ly/2HPjjJH>; Judicial Transparency and Ethics Enhancement Act of 2015, S. 1418, 114th Cong., available at <https://bit.ly/2wtirnr>.

46. Id.

47. *Trump Takes Aim at Appeals Court, Calling It a “Disgrace,”* N. Y. TIMES, Nov. 20, 2018, at A11; available at <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html>; see also, <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

48. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 US 868 (2009).

49. 536 US 765 (2002).

Other campaign statements may not violate the rules so clearly. If a candidate were to say, “I have long been pro-choice [or right-to-life], and on the bench, I will always try to do the right thing,” a disciplinary enforcer would have to weigh whether this was a disguised and prohibited issue-related “pledge” or “promise,” and whether imposing discipline for it

The increasingly divisive, special-interest, and politically driven view of the judiciary cannot be what we want for our system of justice. But, like the electoral recall of Judge Persky in California, it poses a far greater threat to judicial independence and the rule of law than any judicial disciplinary commission ever did. This trend toward factionalizing the judiciary, which brings with it the potential to eviscerate the most distinguishing, liberty-saving feature of our constitutional governance, must be resisted. It cannot be said forcefully enough that there is a compelling, even overriding state interest in the independence, impartiality, and integrity of the judiciary. We play with it, and fail to protect it, at our great national peril.

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Responsibility, Respect, Temperance, and Honesty:

Selected State Judicial Discipline Cases in 2018

Cynthia Gray

In 2018, as a result of state disciplinary proceedings, seven judges were removed from office, 25 judges resigned or retired in lieu of discipline and publicly agreed to never serve again, one judge agreed to resign and was publicly admonished, 11 judges were suspended without pay, three judges received cease-and-desist orders, and 84 judges received public censures, reprimands, admonishments, or warnings.¹ Reflecting that the code of judicial conduct requires a judge “to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,”² the conduct underlying those sanctions related both to performing judicial duties, such as abuse of authority and lack of diligence, and to off-bench activities, such as driving while intoxicated and inappropriate political activity.²

SOCIAL MEDIA

The trend of judges getting into trouble on Facebook that began in 2009 continued through 2018, with several discipline cases illustrating the perils of participating on social-media platforms that judicial ethics advisory committees have warned judges about.

For example, the Arizona Commission on Judicial Conduct publicly reprimanded a judge for mocking a litigant in a Facebook post that purported to be a verbatim account of an eviction proceeding over which the judge had presided and began: “In the category of, You can’t make this stuff up!”³ The post described a maintenance man’s testimony about finding heroin under the bathroom rug in the tenant’s apartment. The tenant testified that the heroin was not his, explaining that cocaine was his drug of choice and he keeps his drugs in a safe. When asked how the heroin got into his apartment, the tenant replied: “I don’t know. Maybe one of the hookers I had in my apartment left it.” The judge’s post ended: “Needless to say, the Court ruled in favor of the landlord.”

When one of his Facebook friends asked if this was a true story, the judge posted: “Yes. It goes without saying but the tenant wasn’t the brightest bulb in the chandelier.”

Based on an agreement, the Kentucky Judicial Conduct

Commission publicly reprimanded a judge for sharing a news story on her Facebook account with the comment: “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.”⁴ The judge’s Facebook account included her title and name.

Even if a post does not use the judge’s title, it may constitute judicial misconduct. The New York State Commission on Judicial Conduct noted that although a judge’s disparaging posts about a private-property dispute did not refer to the judge’s judicial position or mention the litigant by name, “many in his small community would likely know that he is a judge and would recognize the property and individuals involved.”⁵ The litigant, S., had bought property from the estate of the stepfather of the judge’s wife. S. was also the complaining witness in several cases against her domestic partner before the judge and his co-judge.

After someone filed a complaint about the judges’ handling of the cases, the judge posted photographs on his Facebook account, six showing the property before its sale to S. and four showing disarray when S. was in default on the purchase contract. The judge commented: “good [sic] thing mommy and daddy come [sic] through. (if selling do a back ground [sic] check.)” The judge intended the post to be publicly viewable because he was “upset” at S. for repeatedly and publicly accusing him and his co-judge of misconduct and encouraging others to file complaints with the Commission.

The Commission found that the photos and derogatory comments constituted misconduct.

Even if he was provoked by what he perceived as S.’s improper behavior, it was respondent’s obligation as a judge to observe high standards of conduct and to act with restraint and dignity instead of escalating the unseemly public accusations and debate over a private matter that played out on Facebook. Every judge must understand that a judge’s right to speak publicly is limited because of the important responsibilities a judge has in dispensing justice, maintaining impartiality and

Cynthia Gray is director of the Center for Judicial Ethics of the National Center for State Courts. Parts of this article were previously published in the winter 2019 issue of the Judicial Conduct Reporter or as posts on the Center’s blog. For information and to sign up, visit www.ncsc.org/cje.

Footnotes

1. See “State Judicial Discipline in 2018,” 40 JUDICIAL CONDUCT REPORTER 4 (NCSC 2019), available at <https://tinyurl.com/y4kf53oq>.
2. Model Code of Judicial Conduct (ABA 2007), Rule 1.2, available at <https://tinyurl.com/y4juj9z6>.

3. Urie, Order (Arizona Commission on Judicial Conduct, June 12, 2018), available at <https://tinyurl.com/y9d9surv>. The judge referred to the individuals by their role in the case, not by their names.
4. In re the Matter of McLaughlin, Agreed order of public reprimand (Kentucky Judicial Conduct Commission, June 12, 2018), available at <https://tinyurl.com/y9jrdlga>.
5. In the Matter of Fisher, Determination (New York State Commission on Judicial Conduct, June 26, 2018), available at <https://tinyurl.com/y94vg3rp>.

acting at all times in a manner that promotes public confidence in the judge's integrity.

RESPONSIBILITY

Several judges were held responsible in 2018 for content posted by others to whom they had delegated the responsibility of maintaining their Facebook pages. For example, the Texas State Commission on Judicial Conduct publicly reprimanded a judge for, in addition to other misconduct, campaign advertisements for other candidates posted on his Facebook page even though he had not authorized the posts and did not know about them until he received the Commission's inquiry.⁶ Similarly, the Texas Commission publicly admonished a judge for Facebook posts advertising a school-supply drive, soliciting donations for an individual, and advertising his donation of a rifle to a charitable raffle. Even though a member of his judicial staff handled his Facebook page, many posts were made without his prior authorization, and he was often unaware of what appeared on his page.⁷

That responsibility extends to judicial candidates and their campaign Facebook pages. For example, the Florida Supreme Court removed a judge from office for criticism of her campaign opponent for representing criminal defendants on a Facebook page that was created by an electioneering-communications organization formed by her campaign consultant.⁸ The Court held that the judge's actions, "individually and through her campaign, for which she was ultimately responsible[,] unquestionably eroded public confidence in the judiciary." The Court emphasized that nothing in the code of judicial conduct permitted a judicial candidate to delegate to a "campaign manager the responsibility for written materials created or distributed by the campaign."

The Nevada Commission on Judicial Discipline publicly reprimanded a former judge for a photoshopped picture of herself and an actor that her campaign manager had posted on her campaign Facebook page, which misled the public that the Rock had endorsed her campaign, and for her subsequent comment on the post: "I'm 'almost' taller than him. Almost."⁹ The Commission found that the judge had failed to take reasonable measures to ensure that her campaign representatives complied with the code of judicial conduct, noting that her contract with her campaign manager did not contain any restrictions on the posting of social-media materials, such as obtaining prior approval from the judge, that the judge did not discuss with campaign representatives the prohibitions in the code, and that the judge failed to supervise her campaign representatives. The Commission reminded judicial candidates that "campaign-related social media platforms, such as Facebook, maintained by a campaign committee or others, do not insulate them from the strictures of the Code."

RE-POSTING

The importance of judges' understanding the technical aspects of the social media they use was highlighted by a case in which a court commissioner told his presiding judge and the California Commission on Judicial Performance that he had taken posts down when that was not true, although the gravamen of the misconduct was the "egregious" posts and re-posts on his Facebook page.¹⁰ In May of 2017, the presiding judge wrote the commissioner that there was a "significant concern" about the "content" of a number of his posts and the "impression" a member of the public might have on viewing them. In a written response, the commissioner stated that he had deleted the posts, had refrained from sharing similar posts, and had "designated my Facebook account as 'private' which means only my friends can view any future posts." In his self-report to the Commission, the commissioner repeated those representations.

However, for at least four months longer, the commissioner's Facebook page remained public, and several of the posts were still on the page. Although the commissioner had tried to change the page to private, his "unfamiliarity with the technology resulted in the changes not taking effect as intended." When he was told that the posts were still public, "the commissioner immediately sought further assistance, deleted the offending posts, and increased the privacy settings on his Facebook profile."

Reproducing screenshots of many of the posts, the Commission decision described at least 45 posts or re-posts that "inherently" undermined public confidence in the judiciary and brought the judicial office into disrepute. The commissioner's page reflected, among other things, anti-immigration sentiment, anti-Muslim sentiment, anti-Native American sentiment, anti-gay-marriage and anti-transgender sentiment, anti-liberal and anti-Democrat sentiment, anti-California sentiment, opposition to then-presidential candidate Hillary Clinton, accusations against President Barack Obama, a lack of respect for the federal justice system, and contempt for the poor. Based on a stipulation, the Commission publicly censured the now-former commissioner and barred him from receiving an appointment of work from any California state court, noting that, because the commissioner had retired, that was the strongest discipline it could impose.

As that case illustrates, judges may be liable not only for their original content on Facebook but also for material they re-post. Similarly, the Texas Commission publicly reprimanded a judge for sharing a "meme" on his Facebook page that featured a pic-

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[social media]
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. . . "inherently"
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in the
judiciary. . .**

6. Public Reprimand of Lopez (Texas State Commission on Judicial Conduct, June 6, 2018), *available at* <https://tinyurl.com/ybmfteyn>.

7. Public Admonition of Metts (Texas State Commission on Judicial Conduct, October 3, 2018), *available at* <https://tinyurl.com/ycm2gp77>.

8. Inquiry Concerning Santino, 257 So.3d 25 (Florida 2018).

9. In the Matter of Almase, Findings of fact, conclusions of law, and

imposition of discipline (Nevada Commission on Judicial Discipline, October 22, 2018), *available at* <https://tinyurl.com/y865qdxv>.

10. In the Matter Concerning Gianquinto, Decision and order (California Commission on Judicial Performance, August 22, 2018), *available at* <https://tinyurl.com/ydguvlza>.

[T]here is no “meaningful or workable distinction between in-person and written or electronic solicitations.”

ture of retired Marine Corps General James Mattis with the text, “Fired by Obama to please the Muslims, hired by Trump to exterminate them.”¹¹ The judge told the Commission that he thought the meme “showed an interesting contrast” between the two presidents’ attitudes toward General Mattis but that he later realized that he “should not have posted it, because it’s not just about how [he] interpreted it, but how others might.” The reprimand was also for his own posts “railing or

venting” about the intolerance of liberals.

MORE GUIDANCE

Illustrating the need for further guidance on charitable activities and social media, the Washington State Commission on Judicial Conduct admonished two judicial officers for Facebook posts soliciting contributions to nonprofit organizations.¹² In both decisions, the Commission noted that “social media is a relatively new form of communication,” and “the law tends to lag behind technology.” Stating that most judges “are quite conscious that they may not solicit funds for themselves or others in face-to-face encounters,” the Commission concluded that there is no “meaningful or workable distinction between in-person and written or electronic solicitations.” The Commission emphasized that the “prohibition against judicial solicitation of money does not reflect on the worthiness or virtue of the charity or cause” but that “a near blanket prohibition . . . is necessary as it would be impossible to exercise principled distinctions based on the nature of the charity involved, and it would be improper to have a government agency such as a conduct commission make such value choices.”

Thus, the Commission publicly admonished a supreme court justice for two posts soliciting support for nonprofit organizations. The justice’s Facebook page identifies her as a member of the judiciary and, “[i]n Facebook parlance,” is a “government official” page that anyone can access and that no one can “friend.” The justice is actively engaged in the community and uses the page to educate viewers about matters related to the judicial branch; her posts are intended to make the court and judicial officers more accessible and transparent to the public.

On April 22, 2018, the justice posted on her Facebook page:

Join Lifelong for Dining Out For Life on April 26!

On Thursday, April 26, raise your fork for Dining Out For Life! Join Lifelong at one of 90 restaurants in the Greater Seattle Area who are set to donate 30-50% of their proceeds to vital programs that support people facing serious illness and poverty in our community.

(Lifelong is a nonprofit organization that provides recovery assistance for persons suffering from drug abuse and addiction.) Similarly, the justice posted on her Facebook page about a weekly newspaper that employs homeless people and previously homeless people as vendors.

The Commission explained:

While these Facebook posts present no articulable element of coercion, the Commission finds that it is still an abuse of the prestige of judicial office. The prestige is appropriately reserved for the service of the office itself, and not to be used for the individual benefit of the judge or others, regardless how generally good the cause may be.

The justice did not believe her posts rose to the level of a solicitation, but she acknowledged that the Commission is the body charged with enforcing the code and deferred to its determination that the posts were a violation. Recognizing that greater guidance is needed on the increasingly prevalent use of social media, the justice believed the stipulation would provide such guidance and raise awareness of the risks of sharing information on social media that could be construed as solicitations or endorsements.

DISQUALIFICATION

Outside the context of a judicial discipline case, in an interlocutory appeal from the denial of a motion to disqualify in a civil case, the Florida Supreme Court held that, standing alone, a judge’s Facebook “friendship” with an attorney appearing in a case did not disqualify the judge from presiding over a case involving the attorney, the first decision on the issue by any state supreme court.¹³ The Court did not discuss whether a judge should disclose a Facebook friendship with an attorney.

The Court began with the “general principal” that a traditional friendship between a judge and an attorney, standing alone, did not require disqualification, noting that traditional friendship “varies in degree from greatest intimacy to casual acquaintance.” Facebook friendship, the Court found, “exists on an even broader spectrum,” varying “in degree from greatest intimacy to ‘virtual stranger’ or ‘complete stranger.’”

Therefore, the Court held, disqualification was not required: no reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on a judge’s Facebook friendship with an attorney that “in and of itself” provided “no significant information about the nature” of their relationship, indicated only “a relationship of an indeterminate nature” without revealing “the degree or intensity of the relationship,” and did not “signal the existence of a traditional ‘friendship’” much less “a close or intimate relationship.”

The Court disagreed with the reasoning of *Florida Advisory*

11. Public Reprimand of Burkeen (Texas State Commission on Judicial Conduct, February 21, 2018), *available at* <https://tinyurl.com/y9nnywla>.

12. In re Yu, Stipulation, Agreement, and order (Washington State Commission on Judicial Conduct, December 7, 2018), *available at* <https://tinyurl.com/yava9qfm>; In re Svaren, stipulation, agreement,

and order (Washington State Commission on Judicial Conduct, December 7, 2018), *available at* <https://tinyurl.com/yd8drd98>.

13. Law Offices of Herssein and Herssein v. United Services Automobile Association (Florida Supreme Court, November 15, 2018), *available at* <https://tinyurl.com/ybmvpec8>.

Opinion 2009-20,¹⁴ which stated that a judge may not be friends on Facebook with lawyers who may appear before the judge. The advisory opinion itself does not mention disqualification or the appearance of partiality. That advisory opinion had reasoned that, because a judge's Facebook friends may see who the judge's other Facebook friends are, the judge's selection of some attorneys as friends on Facebook and rejection of others and communication of those choices conveys, or permits others to convey, the impression that they are in a special position to influence the judge. Citing advisory opinions from other states and noting that the Florida committee's advice was the minority position, the Court explained that even "traditional 'friendship' involves a 'selection and communication process,' albeit one less formalized than the Facebook process," as people "traditionally 'select' their friends by choosing to associate with them to the exclusion of others" and "traditionally 'communicate' the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension."

In a dissent, one justice argued that, contrary to the premise of the majority, "equating friendships in the real world with friendships in cyberspace is a false equivalency." The dissent explained that a Facebook "friendship" "may reveal far more information regarding the intimacy and the closeness of the relationship," noting that a Facebook friend "gains access to all of the personal information on the user's profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public" Further, the dissent argued, the majority's standard would force a litigant to engage in "impractical and potentially invasive" discovery to determine if there was something more than a mere Facebook "friendship" that could justify filing a motion for recusal. The dissent urged the Court to "at least adopt parameters for judges to follow when engaging with social media" and in determining whether to friend an attorney or disqualify from a case.

One justice filed a concurring opinion to "strongly urge judges not to participate in Facebook." The concurring justice agreed that "'friendship' on Facebook, without more, does not create a legally sufficient basis for disqualification" but argued that "judges must avoid situations that could suggest or imply that a ruling is based upon anything else." Recognizing that Facebook may be the primary means some judges "stay in touch with family members, actual friends, or people with whom they have reconnected after many years," the concurring justice sug-

gested "at the very least," judges should carefully "limit their 'friendships' to cover only such individuals."

SEXUAL MISCONDUCT

It was too early to tell in 2018 whether the #MeToo movement, which began in late 2017, would result in more judges being sanctioned for sexual harassment or similar improprieties. Even if there has been a recent increase in complaints about such conduct to judicial discipline commissions, those matters might still be in the confidential investigation phase, particularly if the allegations are extensive and disputed.

As in every year, in 2018, there were several judges who were publicly sanctioned for sexual misconduct or who resigned while under investigation for such conduct. For example, a former Kansas judge was ordered to cease and desist from offensive and demeaning verbal and/or physical conduct toward female court reporters and other judges and to continue his retirement;¹⁵ a Texas justice of the peace was publicly reprimanded for hiring a woman with whom he had an intimate relationship and making inappropriate comments to her during office hours, in addition to other misconduct;¹⁶ and another Texas justice of the peace was publicly reprimanded for engaging in an intimate relationship with the city's prosecutor.¹⁷ The judges' resignations and agreements not to serve in judicial office again ended investigations of an Indiana magistrate's inappropriate relationships with court employees and attorneys during court hours and on court property¹⁸ and a Texas probate judge's alleged affair with an attorney representing a party in a high-value probate matter before the judge, as described in a magazine article titled "Ardor in the Court."¹⁹

Accepting the parties' stipulation of facts, the Massachusetts Supreme Judicial Court indefinitely suspended a judge without pay and publicly censured him for his sexual relationship with a member of the drug court team.²⁰ The Court noted that there had been no finding, determination, or stipulation about whether there was sexual harassment or discrimination and that it was not addressing that issue. The Court, which does not have the authority to remove judges, provided that its order be delivered to the governor and the legislature. The judge resigned.

For approximately five months, while Tammy Cagle was an active member of the team in the drug court over which the judge presided, the judge and Cagle had sexual encounters in Cagle's home and in the judge's office. The judge used his offi-

"[E]quating friendships in the real world with friendships in cyberspace is a false equivalency."

14. Available at <https://tinyurl.com/y1rw9zm>.

15. Inquiry Concerning Yeoman, Order (Kansas Commission on Judicial Qualifications, February 7, 2018), available at <https://tinyurl.com/y5w253m4>.

16. Public Reprimand of Jasso and Order of Additional Education (Texas State Commission on Judicial Conduct, April 18, 2018), available at <https://tinyurl.com/y8cb39m2>.

17. Public Reprimand of Berry and Order of Additional Education (Texas State Commission on Judicial Conduct, February 21,

2018), available at <https://tinyurl.com/y8xabvtu>.

18. In the Matter of Shoulders, Stipulation and agreement (Indiana Commission on Judicial Qualifications, May 2, 2018), available at <https://tinyurl.com/y8lh7pu7>.

19. Peyton, Voluntary agreement to resign from judicial office in lieu of disciplinary action (Texas State Commission on Judicial Conduct, January 26, 2018), available at <https://tinyurl.com/yd7nlxf8>.

20. In re Estes, Order (Massachusetts Supreme Judicial Court, May 24, 2018), available at <https://tinyurl.com/ybtgguwt>.

"Comments of a sexual nature . . . are inappropriate in any professional setting. . . ."

cial e-mail account to communicate with Cagle to facilitate one of the encounters and to devise a strategy to prevent his family from seeing their text messages. Before or after some of their encounters, they discussed the operation of the drug court generally and one defendant in particular. During their affair, the

judge attempted to mediate problems between Cagle and other members of the drug court team.

Emphasizing that a judge is the leader of the drug court team, the Court stated that it had "no doubt that the Judge's undisclosed sexual relationship with a member of his team raises, at the least, the appearance of inappropriate influence and partiality in his decisions regarding drug court participants and thus puts the integrity of the drug court during his leadership into question." It explained:

Further damaging respect for his office, the Judge used his [chambers] in the court house for at least several of their sexual encounters, reflecting complete disrespect for the dignity and decorum of the court. . . . It is beyond dispute that these egregious, deliberate, and repeated acts of misconduct severely diminished respect in the eyes of the public not only for this judge but also for the judiciary.

Although it noted that the judge's "performance evaluations suggest that he has been a conscientious judge who consistently received very positive ratings from attorneys, court employees, and jurors," the Court concluded: "The Judge's misconduct . . . is serious, and his prior positive evaluations cannot repair the damage to the judicial system caused by his grave, willful, and repeated wrongdoing."

INAPPROPRIATE "JOKE"

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly admonished a judge for responding "nine inches" after a female court clerk stated to him, "I have a question for you" after a court session.²¹ When the clerk expressed shock, the judge acknowledged that his comment was inappropriate.

Shortly thereafter, the clerk disclosed the incident to co-workers. The following week, after being contacted by court administration, the clerk reported the matter to the county human resources department. The human resources manager met with the judge, and the judge acknowledged the impropriety of his comment again, offered to formally apologize to

the clerk, and voluntarily agreed to view an online training course on sexual harassment and discrimination.

In his answer to the Commission's statement of allegations, the judge acknowledged that he made the comment and that it was inappropriate. He explained that he had intended to make a joke to a person he had known for several years and whom he considered a friend but that he realized the comment was in bad taste and "should not have been made regardless of [the clerk's] subjective opinion of its offensiveness."

The Commission stated:

Comments of a sexual nature, such as the comment at issue here, are inappropriate in any professional setting, and particularly so when the speaker holds such a disproportionately high position of power over the person subjected to the comments. Because of that power disparity, subordinate employees can feel inhibited from reporting such conduct and endure a workplace unsure of when they might again be subjected to it. Respondent's comment detracted from the dignity of Respondent's judicial office.

The Commission noted that the judge's "inappropriate comment appears to have resulted from Respondent being overly casual around court staff and not showing due regard to his role as a judge."

DEMEANOR

As every year, many sanctions in 2018 were for violations of the code requirement that a judge "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity."²² For example, the Texas State Commission on Judicial Conduct publicly admonished a judge for (1) referring to a man who was the subject of a guardianship proceedings as "Mr. Maggot" or "Maggot Man" or words to that effect; (2) comparing the IQ of a woman who was the subject of a guardianship proceeding to the IQ of a pen; and (3) interacting with litigants in three guardianship cases in a manner that reasonably led them to feel disrespected, demeaned, and frustrated.²³

Injudicious demeanor was one of the grounds for which the New York Court of Appeals removed two judges.

The Court removed one judge for (1) striking witness testimony and dismissing petitions in two cases because counsel reflexively kept saying "okay"; (2) on numerous occasions, acting impatiently, raising his voice, and making demeaning and insulting remarks to attorneys, often in open court; (3) awarding counsel fees without providing an opportunity to be heard, contrary to applicable rules; and (4) failing to cooperate with the Commission.²⁴

21. In re Kathren, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct, December 7, 2018), available at <https://tinyurl.com/y7xhvk5>.

22. Model Code of Judicial Conduct (ABA 2007), Rule 2.8(B), available at <https://tinyurl.com/y4juj9z6>.

23. Public Admonition of Cross and Order of Additional Education (Texas State Commission on Judicial Conduct, April 18, 2018),

available at <https://tinyurl.com/y823b7kg>.

24. In the Matter of O'Connor, 112 N.E.3d 317 (New York 2018). The Court's decision was based on the determination of the State Commission on Judicial Conduct. In the Matter of the O'Connor, Determination (New York State Commission on Judicial Conduct, March 30, 2018), available at <https://tinyurl.com/y9e73pfq>.

For example, during direct examination in a non-jury trial, when Pamela Smith, who represented the landlord/petitioner, said “okay” after her witness’s answers, the judge told her to “stop telling [the witness] his answers are okay”; Smith apologized. Shortly thereafter, Smith again said “okay” after some of her witness’s answers, and the judge again told her to stop, and Smith again apologized.

The next time Smith said “okay” after her witness’s answers, the judge interrupted her for a third time and told her to “[s]top telling [the witness] his answers are okay.” Smith apologized again and explained that it was a “reflex.” The judge said it was not a reflex because she did not do it all the time, warned that he would strike the testimony and dismiss the case the next time she did it, and asked, “Do we understand each other?”

When Smith said “okay” after the very next answer, she caught herself and immediately apologized. Nevertheless, the judge *sua sponte* excused the witness, telling Smith, “the testimony is stricken because you clearly were leading him by telling him periodically that his answers were okay. And that’s totally unacceptable.”

Smith called another witness and said “okay” after the witness’s response to her first question. The judge told her, “That’s once. Next time —.” When Smith said “okay” a short time later, the judge struck the testimony of her second witness. After Smith said she had no other witnesses, the judge granted opposing counsel’s motion to dismiss for lack of evidence. The dismissal meant Smith’s client had to restart the case, and he lost approximately \$90,000 as a result.

In several other non-jury trials, the judge made comments to attorneys such as:

- “[You and I] have probably a different idea of how a professional conducts themselves.”
- “[You have] no idea what you’re doing,” and “Apparently, there’s a lot you don’t understand.”
- “You don’t have to sarcastically say thank you every time I make a ruling, okay counsel? . . . I don’t see any other way to take it, counsel . . . It’s obviously clear.”
- “Maybe you should do something right for a change instead of just apologizing all the time okay, counsel?”
- “Is there some course in law school now, how to be discourteous and how to be rude? Because if there is, you must have gotten an A in it.”
- “I’m glad you think it’s funny . . . No wonder people think lawyers are a disgrace. It’s people like you who give them that impression.”

The judge argued that his courtroom demeanor “was justified by the circumstances, including the ‘rough and tumble’ nature of landlord-tenant litigation.” Disagreeing, the Court explained:

[T]he need to maintain order must be counterbalanced against a judge’s obligations to remain patient and to treat

those appearing before the court with dignity and courtesy As we have explained, “respect for the judiciary is better fostered by temperate conduct, not hot-headed reactions”

LACK OF RESPECT

The New York Court of Appeals removed a second judge for (1) making discourteous, insensitive, and undignified comments before counsel and litigants in court; (2) driving while intoxicated, being discourteous to and seeking preferred treatment from the arresting officers, violating the terms of her conditional discharge, and going to Thailand without notice to the court, resulting in the revocation of her conditional discharge; and (3) failing to disqualify herself from the arraignment of a former client and attempting to have his case transferred in a manner that she thought might benefit him.²⁵

For example, the judge learned one day from her clerk that an in-custody defendant the judge was scheduled to arraign was biting, spitting, cursing, kicking, and punching sheriff’s deputies, and using racial slurs while being transported to the court. While awaiting the case, the judge said from the bench to a sheriff’s deputy, “I heard she’s going crazy,” and “Well, tase her”; “Shoot her?”; “What do you do, billy-club people?”; “Well, punch her in the face and bring her out here. You can’t take a 16-year-old?”; “What do you want me to do, leave her? I don’t like her attitude”; “She needs a whoopin’”; and “Is she crazy or is she bad?”

Another day, the judge arraigned a defendant charged with disorderly conduct for intentionally blocking traffic by walking in the middle of the road. Before accepting his plea, the judge told the defendant to “stay out of the street. It’s super annoying. I hate when people walk in front of my car. If there was [sic] no rules, I would totally run them over because it’s disrespectful.”

Another time, the attorney for a man charged with misdemeanor sexual misconduct objected to an order of protection in favor of the alleged victim, referred to the alleged victim’s three-week delay in signing a statement against D.W., and stated, “It appears to me to be a case of buyer’s remorse.” The judge laughed and told the assistant district attorney, “That was funny. You didn’t think that was funny.” A minute or two later, following D.W.’s arraignment, the judge stated: “Oh, man. I don’t mean to be so inappropriate. I thought that was freakin’ hilarious. . . . She [referring to the prosecutor] didn’t think it was funny. . . . She was offended. I thought it was hilarious.”

The Court held that the judge’s repeated failure to speak in a dignified manner with defendants, sheriff’s deputies, and attorneys demonstrated a lack of “respect toward everyone who appears in a court.”

“[R]espect for the judiciary is better fostered by temperate conduct, not hot-headed reactions”

25. In the Matter of Astacio, 112 N.E.3d 851 (New York 2018). The Court’s decision was based on the determination of the State Commission on Judicial Conduct. In the Matter of Astacio, Determination

(New York State Commission on Judicial Conduct, April 23, 2018), available at <https://tinyurl.com/ycw2ngqk>.

The judge's conduct was "sufficiently disruptive and disconcerting"

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ATTEMPTS TO INFLUENCE

In 2018 the New Jersey Supreme Court had three cases involving judges who had improperly used the prestige of their office to try to influence official action in their favor or in favor of a friend.

- In *In the Matter of Wright*, the Court publicly reprimanded a judge who had involved herself in the scheduling and processing of a friend's custody case.²⁶
- In *In the Matter of Palmer*, the Court publicly censured a judge (a harsher sanction than reprimand) for identifying himself as a judge to court personnel when discussing his own family law case.²⁷
- In *In the Matter of DeAvila-Silebi*, the Court removed a judge who had involved herself in a former intern's custody dispute.²⁸

(The Court's orders do not describe the judges' misconduct; this discussion is based on findings by the Advisory Committee on Judicial Conduct or a three-judge panel.)

The imposition of three different sanctions in cases involving violations of the same rules is attributable in part to differences in the nature and extent of the misconduct.

Judge Wright had escorted a friend seeking temporary custody of his grandson to the court's intake office, talked to court personnel to ensure her friend had the right forms, asked the judge on emergent duty about the schedule, and then told a staff member that her friend could return on Monday.

Judge Palmer had appeared at the Somerset County Courthouse, identified himself several times as a judge from Ocean County, and asked about how to emancipate his child and how to lower his child support payments. He spoke in succession to a clerk, a caseworker, a senior probation officer (after the caseworker asked for assistance), and the senior probation officer's supervisor (after the senior probation officer asked for assistance). When talking to the caseworker's supervisor, for example, the judge referred to his lack of a pay raise, remarking "you the tax payers decided that a long time ago." The judge's conduct was "sufficiently disruptive and disconcerting" that a supervisor told the Somerset County assignment judge, who reported the incident to the Ocean County assignment judge.

Judge DeAvila-Silebi called the police the day before Mother's Day, identified herself as the emergent duty judge, and told a sergeant she wanted an officer to accompany a mother to retrieve her child. The police department dispatched an officer with the mother to the home of the child's paternal grandmother; the officer took the five-year-old boy from his

grandmother and returned to police headquarters with the child and the mother, after which the mother left with the child. Judge DeAvila-Silebi also "demonstrated dishonesty, perversion of her judicial authority and betrayal of the public trust" by making numerous misrepresentations to the police department. For example, contrary to what she told the police sergeant, she had not received a phone call from an attorney, no emergent application had been filed, and she had not seen the court order regarding parenting time.

Probably the biggest contrasts between the three cases that justified escalating sanctions from reprimand to censure to removal were the aggravating and mitigating factors.

In *Wright*, there were no aggravating factors justifying more than a reprimand, and the mitigating factors included the judge's sincere remorse and contrition, which had demonstrated to the Committee that the likelihood of her repeating the misconduct was "nearly nonexistent."

In *Palmer*, the Committee concluded that "enhanced discipline" was justified because this was the third time in three years that the judge had been the subject of discipline. In mitigation, the Committee noted that that the judge had not intended to influence the court staff he spoke to and "there was no indication that they were actually influenced."

In contrast, in *DeAvila-Silebi*, during the disciplinary proceedings, the judge "not only failed to acknowledge her wrongdoing or express remorse or contrition" but "displayed additional dishonesty and transcended her right to present a defense." The panel emphasized that the judge's "'disturbing' decision to perpetuate a defense without any 'compunction about being less than credible' as the investigation of her conduct continued, 'evidence[s] that [she] lacks the honor and integrity demanded of a judge.'"

PRESTIGIOUS PROMOTIONS

There are numerous judicial ethics advisory opinions on whether and to what extent judges may use their judicial titles to promote permitted extra-judicial activities such as writing books.²⁹ If they had sought an opinion or at least reviewed existing advice, two judges may have avoided sanctions for misuse of their positions in 2018.

The Illinois Courts Commission publicly reprimanded an appellate judge for soliciting paid speaking engagements using his judicial position, finding he not only lent the prestige of office to advance his private interests, but exploited his judicial office in financial and business dealings, engaged in financial and business dealings with persons likely to come before his court, and played an active role in managing a business.³⁰ The Commission stated that it was not finding that the judge's misconduct was willful but noted it was "frankly puzzled" that he had never sought guidance from available

26. In the Matter of Wright, 194 A.3d 495 (New Jersey 2018), adopting the presentment of the Advisory Committee on Judicial Conduct, available at <https://tinyurl.com/y7xgg3zf>.

27. In the Matter of Palmer, 196 A.3d 579 (New Jersey 2018), adopting the presentment of the Advisory Committee on Judicial Conduct, available at <https://tinyurl.com/y7gcb8qb>.

28. In the Matter of DeAvila-Silebi, 194 A.3d 497 (New Jersey 2018),

based on the report of a three-judge panel, available at <https://tinyurl.com/ybmbp3fal>.

29. See, e.g., U.S. Advisory Opinion 114 (2014), available at <https://tinyurl.com/y3t8jhgl>. See also Gray, "The Judge as Author," 35 JUDICIAL CONDUCT REPORTER 1 (spring 2013).

30. In re Steigman (Illinois Courts Commission, August 13, 2018), available at <https://tinyurl.com/y9u3gkxt>.

sources such as “prior decisions of this Commission (some of which relate to the conduct of business by judges) and the excellent advisory opinions produced by the Illinois Judges Association’s committee on judicial ethics,” several of which were on relevant topics.

The judge testified that he had been writing and speaking on legal topics for decades to share his love of the law and to educate the public. He began soliciting paid speaking opportunities after an organizer of continuing legal education seminars for prosecutors offered to pay him \$1,250 for a two-day presentation. The judge’s income was \$32,000 to \$34,000 for over 24 presentations over two years.

The judge made over 120 solicitations. The judge used judicial letterhead for most of his solicitations to law enforcement groups. The judge initially sent solicitations to medical societies and hospitals by his work e-mail but switched to judicial letterhead after the response to the e-mail solicitation had been “tepid.” If he did not receive a response, he sometimes followed up by telephone. He had his secretary assist him with the letters and e-mail solicitations by dictating them for her to transcribe as he would any other correspondence. He paid all the postage for the letters himself.

Noting that the code prohibits judges from soliciting donations for charitable organizations, the Commission stated that, “[t]he same principles apply with even greater force when the ‘cause’ for which the judge is soliciting is a business or commercial activity that serves the judge’s own financial benefit.” The Commission found that the judge’s use of stationery and other judicial resources to advance his “burgeoning speaking business was an exploitation of his judicial office” It explained:

Respondent pursued the opportunity to give paid presentations on the law with energy, using judicial letterhead stationery to increase the likelihood of a positive response to his solicitations and making follow-up calls to recipients who had not responded. Respondent’s zeal in this pursuit arose primarily from his genuine belief that he was providing a public benefit by explaining legal concepts to non-lawyers. Nevertheless, while his motives may have been pure, the fact that the “public service” he was providing also enriched him financially created the danger that recipients of his solicitation might feel coerced to hire him, or might think that hiring him to give a presentation would cause him to favor their interests in cases that came before him.

The Commission agreed that merely being paid to speak or teach may not constitute actively managing a business and emphasized that it was not criticizing or trying to inhibit the practice of judges educating the public regarding the law. However, it concluded that, by directly soliciting paid speaking engagements and following up to urge reluctant recipients to hire him, the judge “went beyond simply earning a fee for per-

mitted activity, and instead actively sought to increase his extrajudicial sources of revenues.”

PROJECT PROMOTION

A Special Court of Review appointed by the Texas Supreme Court publicly admonished a judge for referring to his judicial title and position to promote a project that included a book, website, and an online referral service.³¹ The judge and his wife, an attorney who conducts mediations in family law cases, co-authored the book *Divorce in Peace: Alternatives to War from a Judge and Lawyer*. The book’s front cover lists “John and Laura Roach” as authors. The back cover has a photo of the authors together, next to the statement: “John and Laura have spent their careers, as lawyers and a judge, trying to help couples avoid the pitfalls of high conflict divorces.” An “About the Authors” section describes John Roach as “a Texas district court judge with a true passion for the law” and states that, “[a]s a judge, he has had a front row seat to over 10,000 family law cases.” The book’s text does not refer to “Judge John Roach” or “Judge Roach,” but the book has sections titled “Judge’s Perspective” and “Mediator’s Perspective” that offer additional comment on particular topics.

The book’s introduction refers to the “attorneys, financial planners, mental health professionals and others who are committed to the same principles of peaceful resolution” and “are listed at our website, www.divorceinpeace.com.” Professionals could be listed on the website without charge with a photo, resumé, practice-area description, and e-mail address. Professionals who chose a subscription option, which ranged from \$59.99 a month to \$199 a month, could post additional information such as client reviews, blog posts, articles, and videos.

When the book was published, a brochure was mailed to approximately 18,000 recipients, including about 12,000 Texas attorneys listed with the State Bar as family law practitioners. The brochure repeated the website address several times and described the benefits for attorneys who paid fees to subscribe to the network.

A series of promotional videos were made for the project. For example, in one video, titled “About Us,” the judge and his wife were featured with a picture of a gavel; the judge discussed his expertise as an elected state district court judge who has presided over 10,000 family law cases. The judge decided not to use the videos after viewing them because he was concerned that portions may violate the canons. However, the videos were available on the website for approximately 30 days and were still accessible on YouTube as of May 2018. According to the judge, he had been unsuccessful in his repeated efforts to remove the videos from YouTube because he did not have the necessary user name and password and could not

The judge initially sent solicitations to medical societies and hospitals by his work e-mail . . .

31. In re Roach, Judgment and public admonition (Texas Special Court of Review, July 24, 2018), *available at* <https://tinyurl.com/y4j7gpo>.

obtain the information from the production company in India that had helped to create the videos.

Describing a spectrum, the court explained that, at one end, “are plainly impermissible situations involving a judge who directly uses his or her authority over litigants to coerce actions that will benefit the judge financially.” At the other end of the spectrum, the court stated, “judges are permitted to write and publish books on legal and non-legal topics; identify themselves as judges in biographical descriptions; and sell books they have written so long as they do not exploit the judicial title in doing so.”

The court concluded that “[t]his case falls in the middle of the spectrum” because the judge did not direct “coercive conduct towards litigants or attorneys appearing in his court to compel actions from which he stood to benefit financially” but the “circumstances involve more than individual sales of a law-related book written by a judge.” The court acknowledged that there was no reference to the judge as “Judge John Roach” or “Judge Roach” in the book or in the referral service brochure and no evidence the judge was photographed in his robe in connection with the book and website. However, it stated that his “judicial role is readily apparent based on the first eight words of the book’s ‘About the Authors’ section” and “[l]ittle effort is required for readers to discern that the ‘Judge’ referenced on the front and back covers is John Roach, and that the ‘Judge’s Perspective’ highlighted throughout the book comes from him.” The court described the project as “structured to create a financial gain arising from attorneys who paid for subscriptions in hopes of being hired by readers who acted on the book’s multiple invitations to visit the website and find Divorce in Peace-affiliated attorneys.” The court concluded that the judge’s “participation in aspects of this interconnected project” improperly exploited his judicial position in business activities.

CONCLUSION

Many judicial discipline cases each year involve a pattern of egregious behavior aggravated by lack of remorse that most judges have trouble imagining. Other cases, however, start with a small slip or blind spot that judges may find uncomfortably

more relatable. To ensure their ethics radars are sufficiently sensitive, judges should re-read the code of judicial conduct at least annually, take advantage of the resources of their state judicial ethics advisory committees, and review information from other states as ethical standards are the same in significant respects across the country. For example, every quarter, the Center for Judicial Ethics of the National Center for State Courts publishes the online *Judicial Conduct Reporter*, with articles on recent cases and advisory opinions and analysis of issues such as “Judicial ethics and jurors” and “A judge’s discretion to report criminal conduct” (both in the spring 2019 issue);³² “Consensual sexual relationships between judges and court staff”; “Pornography at the courthouse”; and “Vouching for pardon, parole, or clemency” (from the fall 2018 issue).³³ The Center also has a blog with posts every Tuesday on new cases, advisory opinions, or other developments, and Throwback Thursdays, with summaries of discipline cases from 25, 20, 10, and 5 years ago.³⁴ Reading about others’ missteps may help judges navigate ethically when almost everything they do has the potential for a cringe-worthy headline.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization’s October 2014 dissolution.)

She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the *Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

32. 41 JUDICIAL CONDUCT REPORTER 1 (spring 2019), available at https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Spring_2019.ashx. The *Judicial Conduct Reporter* is published every quarter electronically, and current and past issues of the *Reporter* are available online as a free download at <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx>.

You can sign up to receive notice when a new issue is available at <http://www.ncsc.org/newsletters>.

33. 40 JUDICIAL CONDUCT REPORTER 3 (fall 2018), available at https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Fall_2018.ashx.

34. See <https://ncscjudicialethicsblog.org/>.

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BAR CALLS by Judge Victor Fleming

Across

- 1 Set forth
6 First-aid kit roll
10 Shade close to cyan
14 Little Pigs number
15 Reuner, for short
16 Rhode Island's motto
17 Duffer's dream
18 One of Columbus's fleet
19 Pay to play
20 Becoming enraptured
22 Garfield or Felix
24 2017 John Grisham novel
29 Region of Spain
31 Food court hanger-outer
32 Place for un chapeau
33 Center of a peach
34 Debits' opp.
35 2017 John Grisham novel
40 ___ Tai (rum cocktail)
41 Use a pan
42 Money in Marseilles
43 Napes
46 Here ___
48 2018 John Grisham novel
50 Noisy commotion
51 Pointy-nosed animal
55 Popular houseplant
58 Sister of Maggie and Bart
60 ___ hitch (kind of knot)
61 He sold his birthright to Jacob
62 European car make

- 63 Asian nation

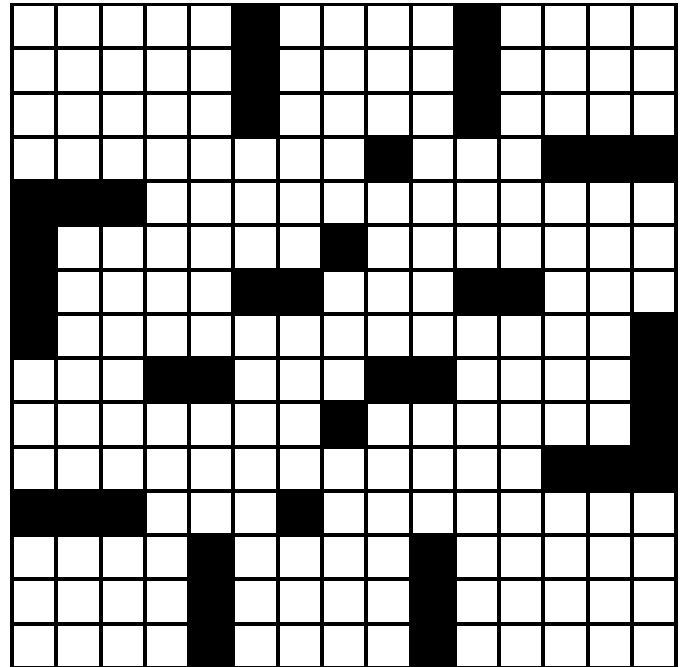
- 64 Hits with a laser beam

- 65 Historical seamstress

- 66 "Terrific!"

Down

- 1 Fr. religious figures
2 Begin to melt
3 Jason's boat
4 Move to a new home
5 High schooler
6 Astringent used in dyeing
7 Straighten out
8 Word play unit
9 Waste away
10 "___ Be the Day"
11 Long period of time
12 Well-chosen, as a phrase
13 Jamie ___ Curtis of cinema
21 Cyber "seems to me"
23 Syst. of unspoken words
25 Neglect to include
26 Triple Crown jockey Eddie
27 Like a one-lane bridge
28 Drying-out woe, for short
29 Append
30 Put on the payroll again
33 K-pop superstar
36 In bad taste
37 Ural River city
38 Jeff Foxworthy subjects
39 One-story cottage



- 40 Dec. hrs. in Denver
44 Neighbor of Saturn
45 Provided meals to
46 Chronological records
47 Coll. cagers' contest
49 Caravan stopovers
52 Came apart
53 Knievel of stunts
54 ___ estate

- 55 Turk topper
56 That Cuban?
57 Cardi B's music
59 Wall St. event

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 67.

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The Resource Page



FEATURED BOOKS ABOUT FOURTH AMENDMENT

The Fourth Amendment Handbook, 3rd Ed. by William W. Greenhalg (American Bar Association 2010)

First written by a renowned Georgetown Law Center professor, this volume can be a handy reference and instruction booklet for all Fourth Amendment issues and cases. It contains summaries of all Supreme Court Fourth Amendment decisions through 2009. The book also features an alphabetized table of cases, a chronological table of cases by case name and other identifying information, a conceptual index of various doctrines, a Supreme Court roster from 1914 through 2009, and an indication of cases that have been overruled.

Making Sense of Search and Seizure Law by Phillip A. Hubbart (Carolina Academic Press 2005)

If you find the need to understand more about the history, background, and precedent of the Fourth Amendment, then this 2005 book will be helpful and concise. The stated reason for the study is to make sense of the Fourth Amendment, that is, to render it understandable and coherent in a single volume. In addition, the book contains helpful summaries of judicial interpretation and construction that can enhance a judge's reading of Fourth Amendment cases, and facilitate a better understanding.



HELPFUL FOURTH AMENDMENT LINKS

National Constitution Center – Fourth Amendment

<https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv>

This Philadelphia educational nonprofit provides multiple platforms and resources to support civil and legal education about the Constitution and all its

Amendments. Its Trustees include Justice Neil Gorsuch, former Sen. Joe Biden, former Gov. Jeb Bush, former President Bill Clinton, and retired Justice Sandra Day O'Connor. This link leads to two essays from eminent law professors about the Fourth Amendment.

American Bar Association–Telephone Technology

https://www.americanbar.org/groups/judicial/publications/judges_journal/2016/spring/telephone_technology_versus_the_fourth_amendment/

A former Chair of the ABA's National Conference of State Trial Judges, Judge Herbert B. Dixon, Jr., wrote this excellent review of telephone technology and Fourth Amendment issues. The history is traced and the explanations are clear. The important cases are listed and explained. This serves as a very helpful resource for judges.

Hiding In Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance In Public—law review article

http://law.emory.edu/elj/_documents/volumes/66/3/levinson-waldman.pdf

Delving deeper into “digital age public surveillance technologies,” this 2017 law review article comes from an established author from the Brennan Center at NYU to try to answer the question, “How is the judiciary to adapt traditional Fourth Amendment concepts to the Government's modern, more sophisticated investigative tools?”

2018 Fourth Amendment Cases

<https://www.policeone.com/2018-review/articles/482335006-SCOTUS-year-in-review-A-quartet-of-Fourth-Amendment-cases/>

Police.One is an online law and information resource for law enforcement officers. This 2018 article was written by a lawyer and former police officer to list notable search and seizure cases from that year. It includes four cases that we may not have otherwise heard about, and is a concise explanation of legal issues.

Fourth Amendment Cases and Citations
<http://www.fourthamendment.com/ccl.php>

Fourthamendment.com is an author's “online supplement” to a Lexis book published about the Fourth Amendment. This link purports to list all Fourth Amendment cases alphabetically, but the site in general is a plethora of info, quotes, resources, links and lists regarding all things Fourth Amendment.

WANT TO READ MORE ABOUT DOG-SNIFF SEARCHES, OR JUST DOGS?

Who's a Good Boy? U.S. Supreme Court Again Considers Whether Dog Sniffs Are Searches (Justia.com)

<https://verdict.justia.com/2019/01/16/whos-a-good-boy-us-supreme-court-considers-again-whether-dog-sniffs-are-searches>

This is a good parallel piece to our feature article this issue about dog-sniff searches. The author is a law professor that writes clearly and concisely for *Verdict*, a commentary feature of Justia.com., a large legal information clearinghouse. The article frames the arguments well regarding dog-sniff cases in the U.S. Supreme Court now and yet to come.

The Dog Days Are Over: Terry Stops, Traffic Stops, and Dog Sniffs After *Rodriguez* (*The Federal Lawyer*, Oct/Nov 2015)

http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2015/October/Features/The-Dog-Days-Are-Over-emTerryem-Stops-Traffic-Stops-and-Dog-Sniffs-After-emRodriguezem.aspx?FT=.pdf

From *The Federal Lawyer*, the periodical of the Federal Bar Association, this succinct 2015 article discusses the ramifications of the then-recent *Rodriguez v. U.S.* case in which the U.S. Supreme Court held police may not prolong traffic stops to wait for a dog sniff absent other probable cause (also highlighted in our feature article this issue on dog-sniff searches).