



Ave Maria School of Law  
Moot Court Board Journal

# THE GAVEL

Spring 2017  
Volume 8,  
Issue 2



**FEATURING:**  
Clifford Taylor,  
*Retired Michigan  
Supreme Court Chief Justice,  
Visiting Professor of Law,  
and Justice in Residence*



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## *Volunteer Opportunity to Serve as Judge*

for the  
Ave Maria School of Law  
Moot Court Board  
The Saint Thomas More Trial Competition  
in  
March 2017

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# MOOT COURT BOARD PRESIDENT'S MESSAGE

This year the Moot Court Board experienced great success in its competitions! In the fall, the Board sent a team to the First Annual Notre Dame National Appellate Advocacy Tournament for Religious Freedom. The team, consisting of Victor Bermudez and Stephanie Williams, made it to the semi-final round where they placed 4th overall in the competition! We also had a strong showing in Atlanta, GA, where our team competed in the New York City Bar National Appellate Competition.

In October, our Vice President for Internal Competitions, Aimee Schneckner, managed the 4th Annual Robert H. Bork Moot Court Competition. This year's problem dealt with two Fourth Amendment issues, and the championship round was judged by our own President and Dean, Kevin Cieply, The Honorable John E. Steele with the United States District Court for the Middle District of Florida, and The Honorable Darryl C. Casanueva with Florida's Second District Court of Appeal. The four finalists were Nicole Staller, Megan Strayhorn, Brandy Shafer, and myself. Ms. Staller and Ms. Strayhorn were crowned the Champions of the round, and Kelsey Blikstad and Brett Gold were awarded Best Brief.

Our Spring Semester has been just as successful and exciting! The Board sent two teams to the Annual Chester Bedell Memorial Mock Trial Competition in Jacksonville, FL, and another team to the Tulane Baseball Arbitration Competition in New Orleans, LA. Additionally, in February, the Board sent a team to Chicago, IL, to compete in the National Cultural Heritage Moot Court Competition against 27 other teams. The team, consisting of Antonette Hornsby and Daniel Whitehead, advanced past 20 teams and placed in the top 8 of the quarterfinals! Finally, this March, the Board sent a team to Boston, MA, to compete in a regional round for the ABA National Appellate Advocacy Competition where the team outscored Boston University in the first round of oral arguments!

As we finish up this competition season, the Board will send another team to New York City to compete in the Wagner Labor Law Competition. Lastly, the Board looks forward to hosting its Annual St. Thomas More Trial Competition this month in which there will surely be an abundance of talent.

This year has been a great success, but it wouldn't have been possible without the support of our Faculty Advisor, Professor Mark Bonner, and our Executive Board: Aimee Schneckner, Vice President of Internal Competitions, Nicole Staller, Vice President of External Competitions, Antonette Hornsby, Vice President of Publications, Megan Strayhorn, Vice President of Operations, and our newest Executive Member, Hersh "Tripp" Spangler, Vice President of Events - thank you all from the bottom of my heart! Our Moot Court Board would not have been the success that it was without you! I will forever cherish the memories and the friendships that I have gained over the course of the year. Soon I will pass the title to the next President, and I know that he or she will continue to strive for success. I am truly grateful to have worked with each and every one of our Moot Court Board Members. I know that they will all continue to have success in their futures and will go on to become shining examples in our profession.

The Moot Court Board Members have been hard at work preparing their articles for this semester, and we hope that you enjoy the newest volume of The Gavel.

Thank you for all of your support this past year.

Sincerely,

Brittney Davis  
President, Moot Court Board, Ave Maria School of Law  
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# A NOTE FROM THE EDITOR IN CHIEF

*Dear Reader:*

This semester's Gavel packs with it a variety of topics that you are sure to find both enlightening and entertaining!

To start, this semester's Gavel features one of Ave Maria's most distinguished faculty members: Justice Clifford Taylor. Justice Taylor's article, *Justice Antonin Scalia's Legacy: Remarks by Clifford W. Taylor, Former Chief Justice of the Michigan Supreme Court*, embarks on the history of originalism in understanding its role and impact on the judiciary branch today. He goes on to distinguish the originalist, or rather the "the textualist," from purposivists, and it's with this understanding in mind that Justice Taylor discusses Justice Scalia's legacy and his role in defending originalism. In short, Justice Taylor's article provides a "play by play" look at the key players and judges who have defended the rule of law. This article is sure to give you a greater appreciation for the history of our Constitution or, at the very least, will have you running out to get a copy of Justice Scalia and Bryan Garner's praiseworthy book: *Reading Law*.

As a little bit of background, Justice Taylor received his undergraduate degree from the University of Michigan and his law degree from George Washington University. Afterwards, Justice Taylor began his legal career as an officer in the U.S. Navy and went on to become an Assistant Prosecutor in Michigan before later taking a position in a private firm where he now serves as a partner. Justice Taylor also served on the Michigan Court of Appeals from 1992 to 1997 before serving on the Michigan Supreme Court from 1997 to 2008. While on the Michigan Supreme Court, Justice Taylor served twice as the Court's Chief Justice. Finally, Justice Taylor, as Justice in Residence and Visiting Professor of Law at Ave Maria School of Law, teaches a few lucky law students the ins and outs of constitutional and statutory interpretation and the canons of interpretation in his noteworthy course: Tenets of Constitutional and Statutory Interpretation.

Still, as much as I'm sure that you will enjoy Justice Taylor's article, take the time to read through the rest of the articles. This semester's topics include stories about a celebrity couple's embryos, public defenders in immigration court, and some reflections on *Roe v. Wade*. Meanwhile, you'll also learn a little about the Bald and Golden Eagle Protection Act and its susceptibility to Establishment Clause challenges. Finally, this semester's Gavel features a personal favorite topic of discussion: The Americans with Disabilities Act and the role that "testers" play under this Act.

I'm certain that you will enjoy reading the articles found in this edition of the Gavel!

Sincerely,

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# ACCORDING PERSONHOOD STATUS TO EMBRYOS IN THE CONTEXT OF ARTIFICIAL REPRODUCTIVE TECHNOLOGIES

By Aimee Schneckler



Actress Sofia Vergara and ex-fiancé, Nick Loeb, created and cryopreserved two female pre-embryos with the intention of using them to start a family together in the near future. Those plans, however, were never realized as the couple split up in 2014. Following the break-up there has been much dispute over the fate of the cryopreserved pre-embryos. The couple had entered into a fertility contract in California, however the

contract did not include a provision concerning the fate of the embryos should the couple break up. This situation is not unique as *in vitro* fertilization is becoming a popular method for building a family—but the Vergara-Loeb story took an unconventional twist as voiding the California fertility contract would have added consequences.

On December 7, 2016, a right to life suit was brought in Louisiana, naming the two frozen female embryos – Emma and Isabella – as the plaintiffs.<sup>1</sup> Loeb conspicuously asserted the embryos' rights in Louisiana state court, even though the embryos are cryopreserved in Beverly Hills, California, because Louisiana is the only state in the country that accords personhood status to an embryo, thus giving embryos the legal capacity to sue and be sued in a court of law. According to the Louisiana statute, “[a]n *in vitro* human exists as a juridical person until such time as the *in vitro* fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.”<sup>2</sup> Thus, even prior to implantation and fertilization, an embryo (in this case a pre-embryo) is accorded personhood.

Loeb is intent on bringing his biological daughters into the world, and he is highly encouraged by Louisiana's law which accords personhood status to embryos. In an op-ed for the *New York Times* Loeb stated:

When we create embryos for the purpose of life, should we not define them as life, rather than as property? Does one person's desire to avoid biological parenthood (free of any legal obligations) outweigh another's religious beliefs in the sanctity of life and desire to be a parent? A woman is entitled to bring a pregnancy to term even if the man objects. Shouldn't a man who is willing to take on all parental responsibilities be similarly entitled to bring his embryos to term even if the woman objects? These are issues that, unlike abortion, have nothing to do with the rights over one's own body, and everything to do with a parent's right to protect the life of his or her unborn child.<sup>3</sup>

Nick Loeb's regard for his potential children begs the question of what legal status frozen embryos should be accorded in terms of *in vitro* fertilization so that the sanctity of life

is fully recognized and preserved. Should the pre-embryos be considered persons, property, or something else? Each state has come up with a different answer to this question, and a review of case law reveals equally scattered results. Cases have attempted to legally define embryos as persons, property, or human tissue deserving “special respect.”<sup>4</sup> It is important to settle on the legal status of embryos and perhaps go so far as to make that status uniform across the states. The legal status determines the decision-making authority of the parties, IVF providers, and courts over the pre-embryos, as well as the options for dispute resolution.”<sup>5</sup>

How the law treats a frozen embryo is of vital importance as artificial reproductive technologies become increasingly advanced. The law must keep up with the developing technology and the most natural way to begin would be to evaluate the legal status accorded to pre-embryos. Our laws must keep up with this quick development because disputes like Vergara's are not uncommon. Since IVF is becoming a more common means of reproduction, and since the process typically requires couples to create many more embryos than they intend to use, the laws of our country must identify a uniform way of referring to pre-embryos, lest these embryos remain cryopreserved in limbo, with uncertain legal rights. Affording “personhood” status to these pre-embryos as Louisiana does could be the answer to the various fertilization disputes we are seeing and would save countless potential lives in the process. It is interesting that pro-life advocates have not utilized this statute in litigation before, and with regard to the Vergara-Loeb litigation, New Orleans family law attorney Elizabeth Meneray says it is “odd is that [the] law is from the '80s and you would think that someone would have tried this by now.”<sup>6</sup> Perhaps going forward we can learn the true consequences of Louisiana's treatment of embryos as persons under the law, more specifically what impact the court's recognition of an embryo as the legal equivalent of a born child will have on legal thinking about the status of embryos, but also on abortion rights, autonomy rights, and procreation rights going forward. ○

## References:

- <sup>1</sup> Human Embryo No. 4 HB-A et al. v. Vergara, No. 767-189, petition filed (La. Dist. Ct., 24th Jud. Dist., Jefferson Parish Dec. 7, 2016).
- <sup>2</sup> La. Stat. Ann. § 9:123 (2016).
- <sup>3</sup> Nick Loeb, Op-Ed, Frozen Embryos Have a Right to Live, N.Y. TIMES, April 30, 2015, at A31.
- <sup>4</sup> Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
- <sup>5</sup> Erica Steinmiller-Perdomo, Is Personhood the Answer to Resolve Frozen Pre-Embryo Disputes?, 43 FLA. ST. U. L. REV. 315, 317 (2015).
- <sup>6</sup> Wilborn P. Nobles III, Sofia Vergara Embryo Case Could Have Broader Impacts On Reproductive Law, The Times Picayune, (Jan. 5, 2017), [http://www.nola.com/crime/index.ssf/2017/01/sofia\\_vergara\\_lawsuit\\_gretna\\_1.html](http://www.nola.com/crime/index.ssf/2017/01/sofia_vergara_lawsuit_gretna_1.html)

# JURY SECRECY MUST GIVE WAY IN CASES OF RACIAL BIAS

## THE SUPREME COURT OF THE UNITED STATES RECENTLY HELD THAT THE SIXTH AMENDMENT PERMITS A TRIAL COURT TO HEAR JUROR TESTIMONY REGARDING ANOTHER JUROR'S RACIST REMARKS DURING DELIBERATIONS.

By Victor Bermudez



For over two-hundred years, courts have vigorously guarded secrecy in jury deliberations. In 1785, Lord Mansfield held inadmissible an affidavit from two jurors claiming that, in their deliberations, the jury had decided the case through a game of chance.<sup>1</sup> The United States Supreme Court followed England's example in 1915 requiring secrecy in fear that jurors would face harassment by the losing party in an attempt to collect information to overturn the verdict.<sup>2</sup> This rule was eventually

adopted into the Federal Rules of Evidence as Rule 606(b).<sup>3</sup> The rule prohibits a court from receiving a juror's affidavit claiming misconduct during deliberations while deciding on the validity of a verdict or indictment.<sup>4</sup> The rule carves out three specific exceptions. These exceptions allow the court to receive testimony "about whether (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."<sup>5</sup> The rule became known as the "No Impeachment Rule."

The Supreme Court has historically protected the contents of jury deliberations. Memorably, in *Tanner v. United States*, the Court refused to receive juror testimony that several jurors had consumed alcohol, marijuana, and cocaine during breaks, and had slept through portions of the trial.<sup>6</sup> Most recently, the Supreme Court unanimously defended the importance of jury secrecy in *Warger v. Shauers* where it held that testimony about a juror's statement made during deliberations is not admissible to show that the juror lied during voir dire.<sup>7</sup>

The federal rule, however, was not followed as strictly in every jurisdiction. In fact, nineteen jurisdictions, including Florida, recognized an exception that is not explicitly recognized in Federal Rule 606(b).<sup>8</sup> Particularly, these jurisdictions provided courts with the ability to hear juror testimony during inquiries into racial bias in jury deliberations. However, Congress made an intentional decision to reject such a broader version of Rule 606(b).<sup>9</sup> Furthermore, the majority of jurisdictions did not recognize this exception.<sup>10</sup> This included

the state of Colorado, where the Colorado Supreme Court, in *Pena-Rodriguez v. People*, affirmed a trial court's finding that a juror's expression of racial bias during deliberation could not form the basis of a new trial.<sup>11</sup> The court reasoned that Colorado's "no impeachment rule" prohibits inquiry into what happens in the jury room.<sup>12</sup>

In *Pena-Rodriguez*, Miguel Angel Pena-Rodriguez was accused of making sexual advances toward two teenagers.<sup>13</sup> After the trial, the jury returned guilty verdicts on three misdemeanor charges.<sup>14</sup> After the jury was excused, Mr. Pena-Rodriguez discussed the case with several jurors who informed him that a particular juror had expressed bias toward Mr. Pena-Rodriguez and his key witness because they were Hispanic.<sup>15</sup> The jurors signed affidavits revealing racially biased statements made by the juror in question.<sup>16</sup> The trial court refused to grant Mr. Pena-Rodriguez a new trial in accordance with the Rule 606(b).<sup>17</sup> The Colorado Supreme Court affirmed the decision, acknowledging the tension between "two fundamental tenets of the justice system: protecting the secrecy of jury deliberations and ensuring a defendant's constitutional right to an impartial jury."<sup>18</sup>

On September 26, 2016, the Supreme Court of the United States agreed to hear Mr. Pena-Rodriguez's appeal in which he argued that Rule 606(b) seriously infringed on his constitutional right to an impartial jury.<sup>19</sup> The Court heard oral arguments on October 11, 2016, in which the justices expressed concerns about the potentially vast scope a ruling in this case may require.<sup>20</sup> Specifically, the Court inquired as to other possible juror biases such as religion or sexual orientation.<sup>21</sup>

In a 5-3 decision, the Supreme Court overturned the Colorado Supreme Court's decision.<sup>22</sup> In the majority opinion, Justice Kennedy stated that "the duty to confront racial animus in the justice system is not the legislature's alone."<sup>23</sup> Time and again, the United States Supreme Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system.<sup>24</sup> Justice Kennedy distinguished *Pena-Rodriguez* from both *Tanner and Warger* pointing to a "sound basis to treat racial bias with added precaution."<sup>25</sup> He wrote that added protections are necessary to "prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."<sup>26</sup> Thus, the Court declared,

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.<sup>27</sup>

Justice Alito wrote a dissenting opinion and was joined by Chief Justice Roberts and Justice Thomas. Justice Thomas also wrote a separate dissenting opinion in which he declared that the majority ruling was inconsistent with the original understanding of the Sixth or Fourteenth Amendments. He remarked that the majority, "in its attempt to stimulate a

'thoughtful, rational dialogue' on race relations, . . . ends the political process and imposes a uniform, national rule."<sup>28</sup>

Justice Alito, in his dissent, first acknowledged the potential harm in disallowing evidence of a racially bias jury. He then pointed out that "avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence and the effect on our justice system that this loss entails."<sup>29</sup> He offered the following example:

Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail.<sup>30</sup>

Justice Alito also asserted that the ruling did not provide a ground for limiting the holding to only cases involving racial bias.<sup>31</sup> He opined that the ruling leaves reason to find that cases involving bias based on national origin, religion, sex, and any other classification would merit equal treatment.<sup>32</sup>

Justice Alito's concerns seem warranted regarding the Supreme Court's justification in carving out an exception in juror secrecy laws for racial bias but not for religious, gender, or sexual orientation biases. By limiting the holding to racial bias, will the Court later decide that, under our Constitution, a Hispanic man has greater protections from biased jurors than does a Muslim woman? ○

**References:**

- <sup>1</sup> Vaise v. Delaval, 99 Eng. Rep. 944 (K. B. 1785).
- <sup>2</sup> McDonald v. Pless, 238 U.S. 264, 267 (1915).
- <sup>3</sup> Fed. R. Evid. 606(b)(1).
- <sup>4</sup> Id.
- <sup>5</sup> Fed. R. Evid. 606(b)(2).
- <sup>6</sup> Tanner v. United States, 483 U.S. 107, 126 (1987).
- <sup>7</sup> Warger v. Shauers, 135 S. Ct. 521, 527 (2014).
- <sup>8</sup> See Amicus Curiae Brief of Center on the Administration of Criminal Law in Support of Petitioner at 22, Pena-Rodriguez v. Colorado, 15-606 (U.S. 2016).
- <sup>9</sup> Warger v. Shauers, 135 S. Ct. at 527.
- <sup>10</sup> Id. at 525.
- <sup>11</sup> Pena-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 1995).
- <sup>12</sup> Id.
- <sup>13</sup> Id.
- <sup>14</sup> Id.
- <sup>15</sup> Id. at 289.
- <sup>16</sup> Id.
- <sup>17</sup> Id.
- <sup>18</sup> Id. at 288.
- <sup>19</sup> Pena-Rodriguez v. Colorado, 137 S. Ct. 29 (2016).
- <sup>20</sup> Pena-Rodriguez v. Colorado, Oyez, <https://www.oyez.org/cases/2016/15-606> (last visited Feb 26, 2017).
- <sup>21</sup> Id.

<sup>22</sup> Pena-Rodriguez v. Colorado, No. 15-606, 2017 U.S. LEXIS 1574, at \*37 (Mar. 6, 2017)

<sup>23</sup> Id. at \*26.

<sup>24</sup> Id.

<sup>25</sup> Id. at \*30.

<sup>26</sup> Id.

<sup>27</sup> Id. at \*30-31.]

<sup>28</sup> Id. at \*38.

<sup>29</sup> Id. at \*44.

<sup>30</sup> Id. at \*46-47.

<sup>31</sup> Id. at \*64-65.

<sup>32</sup> Id.

## FROM HEARSE TO HURST: THE RESHAPING OF THE FLORIDA DEATH PENALTY SCHEME

By Brandy Shafer



The death penalty scheme has changed drastically over recent years in Florida. One case, *Hurst v. Florida*, has deemed the Florida death penalty scheme unconstitutional because it gave too much power to judges, rather than to the juries to make the ultimate decision on guilt.<sup>1</sup> *Hurst*, essentially froze this

punishment in Florida leading to a nationwide plunge in executions. The Sixth Amendment to the United States Constitution requires a jury, not a judge, to find each fact necessary to impose a sentence of death.<sup>2</sup> A jury's mere recommendation is not enough.<sup>3</sup> Furthermore, the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) held that "any fact that 'exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury."<sup>4</sup>

Prior to *Hurst* and for nearly four decades, Florida's capital punishment scheme required only a simple majority of jurors to recommend a death penalty sentence. This scheme made Florida one of only three states in which a unanimous vote was not needed.<sup>5</sup> Now, a pro-death penalty legislature must adjust the law after the Florida Supreme Court struck down as unconstitutional a provision that does not require all twelve jurors to agree on a death sentence when they recommend punishment to a judge.<sup>6</sup> The law also requires juries to weigh whether sufficient mitigating factors exist to outweigh the aggravating circumstances, but the law is

silent about whether those decisions must be unanimous.<sup>7</sup> Florida's old sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

*Hurst* gave rise to a new wave of public policy concerns about the role of judges. Specifically, juries are now able to weigh factors for and against a death penalty sentence, but the presiding judge can then weigh other factors that were never considered by the jury. This broad judicial discretion coupled with Florida's less than unanimous voting scheme has the potential to call into question all death penalty statutes and may even lead some to believe that these statutes violate the Eighth Amendment's prohibition against "cruel and unusual" punishment.

Stephen Harper, a law professor who runs the Death Penalty Clinic at Florida International University, asserts "it's unlikely the Supreme Court ruling will open the door for most Florida death-row inmates to new sentencing hearings."<sup>8</sup> However, Florida inmates whose initial appeals have not been exhausted may be able to argue that the latest decision applies to them. Further, any capital cases that are awaiting trial would likely be delayed while state legislators and the Florida Supreme Court sort out the next steps.<sup>9</sup> Unfortunately, that will not happen until spring when the legislature reconvenes.

This isn't the first time Florida has come under fire for its death penalty scheme. In 2014, Florida's death penalty statutes came under fire from the United States Supreme Court for its unwavering and rigid I.Q. standard imposed in death sentences.<sup>10</sup> The Supreme Court previously ruled that states could not execute individuals deemed to have an intellectual disability; nevertheless, Florida used an I.Q. score of 70 as its determining factor. In a 5-4 decision, the Court found that the standard was too rigid and violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>11</sup> Since the Supreme Court ruled on barring execution of the intellectually disabled, every state legislature that has considered this issue has acted in a way contrary to Florida.<sup>12</sup> A number of states are now in direct opposition to Florida, which indicates that there is an evolving standard in relation to the public outcry.

With the reshaping of Florida's death penalty structure, one question remains: is meaning fixed at enactment or does it evolve? The immediate answer could be that statutory interpretations change over time. Judges are faced with the question of whether to employ an interpretative methodology that embraces evolving meaning or base their judgment on a strict interpretation. As a result of the changing structure, the goal of Attorney General Pamela Bondi has not changed. She will continue seeking to carry out as many death sentences as possible arguing that the sentencing errors were legally harmless.<sup>13</sup>

As the post *Hurst* appeals fill the courts, this still leaves hundreds of families dealing with the agonizing review of these cases.<sup>14</sup> The unwavering indecisive state that Florida is in will unfortunately not be resolved any time soon. ○

## References:

- <sup>1</sup> *Hurst v. Florida*, 136 S. Ct. 616 (2016).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> Since *Apprendi*, this rule has applied to plea bargains (*Blakely v. Washington*, 542 U.S. 296 (2004)); sentencing guidelines (*United States v. Booker*, 543 U.S. 220 (2005)); criminal fines (*S. Union Co. v. United States*, 567 U.S. \_\_ (2012)); mandatory minimums (*Alleyne v. United States*, 570 U.S. \_\_ (2013)); and capital punishment (*Ring v. Arizona*, 536 U.S. 584 (2002)).
- <sup>5</sup> Anna M. Phillips, U.S. Supreme Court rules Florida's death penalty system is unconstitutional, TAMPA BAY TIMES, <http://www.tampabay.com/news/courts/criminal/florida-death-penalty-system-is-ruled-unconstitutional-by-supreme-court/2260930>.
- <sup>6</sup> Steve Bousquet, Florida's death penalty system will face renewed stress in 2017, TAMPA BAY TIMES, <http://www.tampabay.com/news/politics/legislature/floridas-death-penalty-system-will-face-renewed-stress-in-2017/2307829>.
- <sup>7</sup> Sam Hananel, Florida death penalty system is unconstitutional, Supreme Court rules, PBS NEWSHOUR, <http://www.pbs.org/newshour/rundown/florida-death-penalty-system-is-unconstitutional-supreme-court-rules/>.
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.*
- <sup>10</sup> See generally Fla. Stat. 921.137 (2016).
- <sup>11</sup> Supreme Court overturns Florida's rigid IQ cutoff for death penalty eligibility, PBS NEWSHOUR, <http://www.pbs.org/newshour/bb/supreme-court-overturns-floridas-rigid-iq-cutoff-death-penalty-eligibility/>.
- <sup>12</sup> *Hall v. Florida*, 134 S. Ct. 1986 (2014). *Supra* at note 26.
- <sup>13</sup> Steve Bousquet, Florida's death penalty system will face renewed stress in 2017, TAMPA BAY TIMES, <http://www.tampabay.com/news/politics/legislature/floridas-death-penalty-system-will-face-renewed-stress-in-2017/2307829>.
- <sup>14</sup> *Id.*

# FEDERALIST CONFLICTS OF ROE V. WADE.

By Brett Gold



Despite the recent changes to the political majority and their filling of the Supreme Court's vacancy, hurdles still exist to overcome *Roe v. Wade*'s still controversial holding. Some state legislatures have taken it upon themselves to propose or enact constitutional provisions challenging a major tenet of the *Roe* opinion: the lack of "personhood" of the unborn child.<sup>1</sup> However, the extent of control these provisions have to bind a court are unknown since they are susceptible to being struck down as unconstitutional. As a result, these legislative actions are likely to be an insufficient catalyst for *Roe*'s reversal. Most of these types of provisions seek to alter the state's recognition of the unborn as deserving of the protections afforded by the state constitution's



equal protection and due process clauses.<sup>2</sup> However, both the scope of these provisions, if enacted, and the very real potential of their being stricken down by the federal courts render their potentiality as real challenges to *Roe* dubious.

The main premise of any challenge to the *Roe* holding would likely be based on the majority opinion's own words: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>3</sup> Justice Blackmun is speaking of the tenuously understood conception of when life began, at the time of writing the *Roe* opinion. However potentially unsophisticated the understanding of beginning of life issues was at that time, the proposed state amendments would likely not change the Court's opinion, as similar arguments have been made by parties and amici in both *Roe* and subsequent cases, with no change to the fundamental right to abortion holding of *Roe*.<sup>4</sup> Absent a particularly cogent argument, scientific or otherwise, that the unborn at all stages are deserving of constitutional protections, it is unlikely that state level constitutional amendments will persuade the federal courts to rethink *Roe*. This is without considering that the state constitutional amendments can be easily found facially unconstitutional in relation to the federal interpretation of *Roe*.

Even if the provisions were to stand up to Supreme Court scrutiny and become effective, there would remain issues of whether they would actually have any practical impact at all. The due process argument would protect only against state action, not against those of private parties. The legislature of that state would have to enact laws criminalizing the private action, and this would be notwithstanding the life of the mother exceptions and undue burden standards which would be viewed in deciphering whether these state provisions pass constitutional muster.

Given the hurdles present in attempting to enact protections to the unborn through the state constitutions, it is likely that these methods will prove ineffective at implementing any substantial change in the jurisprudential reading of abortion in that state, let alone somehow persuade the Supreme Court to ignore *stare decisis* and revisit its holding in *Roe*. While it may be unsuccessful in implementing immediate change to abortion jurisprudence, it may bring support to a cause and concept which should be an issue for the states to decide. ○

#### References:

<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> Colo. Const. art. V, § 50; R.I. Const. art. I, § 2; Fla. Const. art. X, § 22.

<sup>3</sup> *Roe*, 410 U.S. at 156-57.

<sup>4</sup> Motion and Brief for Certain Physicians, Professors and Fellows of the Am. College of Obstetrics and Gynecology as Amici Curiae Supporting Appellees, *Roe v. Wade*, 410 U.S. 113 (1973).

# PROBATION IN FLORIDA

By Daniel Del Vecchio



Last year, probation in Florida was significantly impacted in a major way. The Supreme Court of Florida, by denying review of *Mobley v. State*<sup>1</sup>, has provided clarification on two important issues: (1) when the probation period is not tolled and (2) what exactly is required to toll the probation period. It also clarified what new crime

violations are for the purpose of a warrant under section 901.02.<sup>2</sup> This decision preserves the purpose of probation and the probationer's rights while on probation.

In *Mobley*, the appellant entered a plea of no contest to various charges and was placed on probation for approximately eighteen months, extending from March 7, 2011 to September 7, 2012.<sup>3</sup> A month before the appellant's probation was set to expire, the appellant failed to make restitution payments and to pay fees for drug testing.<sup>4</sup> As a result, the probation officer filed affidavits stating that the appellant violated his probation, the trial court issued warrants for the appellant's arrest, and his probation was extended by two years for non-law violations.<sup>5</sup> This occurred on September 27, 2012, exactly twenty days after the probation period was set to end.<sup>6</sup> Unfortunately for the appellant, he led the police on a motorcycle chase after his probation period was extended and was sentenced to 332.95 months in prison for his original offenses that occurred a year ago because he violated his probation.<sup>7</sup> The appellant argued on appeal that his probation expired when it was originally supposed to on September 7, 2012, while he was in jail and was not tolled by his arrest, making the extension of his probation improper.<sup>8</sup>

The State argued that the probation period for the appellant was tolled due to his arrest for his probation violations by failing to pay for his fines and other fees. The State claimed there was an applicable exception that allowed the period to be tolled, thereby making the extension of the appellant's probation proper. In support, the State cited section 948.06(1)(f) of the Florida Statutes, which details the tolling provision in probation cases and asserted that the provision was satisfied.<sup>9</sup> The State argued that the warrant was appropriate under the statute because the appellant was not arrested for his failure to pay the fees. Rather, the appellant was arrested for the crimes that he committed over a year and a half prior to the second incident which were also the exact crimes from which his initial probation stemmed.<sup>10</sup>

The court in *Mobley* correctly determined that the warrant that had been issued was not the type required under Fla. Stat. § 901.02. The court determined that violations of probation are not new crimes for the purposes of a warrant

under section 901.02.<sup>11</sup> Section 948.06(1)(f) requires a warrant under 901.02 to toll the probationary period, and Section 901.02 requires that the warrant be issued for a crime.<sup>12</sup> The court held that missed payments constituting a violation of probation were not crimes for a warrant under section 901.02. Thus, probation was not tolled while the defendant was in jail. Therefore, the court held that the appellant's probation ended on September 7, 2012 and it could not have been revoked or extended.<sup>13</sup>

The Florida Supreme Court issued its ruling on June 6, 2016, denying the Petition to Review.<sup>14</sup> The State wanted the Supreme Court to determine that a violation of probation was a crime for the purposes of Section 901.02 which is a dangerous precedent to set. It would be especially unfair and egregious in the cases where probationers cannot afford to pay their fines, fees, and tests as they would be going to jail for being poor.

With the *Mobley* ruling, the State and county probation departments in Florida are going to face some issues tolling the probation period. It is going to require them be more reactive to violations instead of passive. There are some ways that the probation department can avoid any problems that may arise from the *Mobley* decision. One simple way is to inquire as to the current and future status of the prospective probationer before the court orders their probation conditions. If the probationer does not have a job or steady income at the time, it might seem prudent to not have any monetary requirements at all and instead impose more service based requirements on the probationer, such as community service programs or, victim impact panels. It also might be worth looking into whether there are any non-profits that seek to help rehabilitate people with drug or alcohol addictions. These non-profits can possibly help them pay for any drug tests that are a condition of their probation. Another solution is for the probation officer to file an affidavit alleging a violation and a notice to appear to enact the tolling provisions in the statute, especially if it is near the end of the probationer's probation period.

Probation is a great tool for the State to rehabilitate its citizens and help them get their lives back on track. The *Mobley* ruling will only further this aim by protecting probationers who cannot afford to pay their fees and fines. It is unfair to punish those who are too poor to pay. ○

#### References:

- <sup>1</sup> *Mobley v. State*, 197 So. 3d 572 (Fla. Dist. Ct. App. 2016), review denied, No. SC16-936, 2016 WL 3149708 (Fla. June 6, 2016).
- <sup>2</sup> Fla. Stat. Ann. § 901.02 (West).
- <sup>3</sup> *Mobley*, 197 So. 3d 573.
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> Fla. Stat. § 948.06(1)(f) (West).
- <sup>10</sup> *Mobley*, 197 So. 3d 574.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* § 948.06(1)(f).
- <sup>13</sup> *Mobley*, 197 So. 3d 574.
- <sup>14</sup> *State v. Mobley*, No. SC16-936, 2016 WL 3149708, at \*1 (Fla. June 6, 2016).

# UPDATING THE LAW: ALTERING BGEPA'S LANGUAGE TO REFLECT ITS PURPOSE

By Daniel Whitehead



Right now, only members of federally recognized tribes are permitted to possess eagle feathers due to an exemption provided by the Bald and Golden Eagle Protection Act<sup>1</sup> ("BGEPA") and the Secretary of the Interior's interpretation of that exemption. The Courts of Appeals currently dispute how to treat BGEPA's Indian religion exemption in the face

of repeated Religious Freedom Restoration Act ("RFRA") challenges. BGEPA makes it a federal crime to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle . . . alive or dead, or any part, nest, or egg thereof."<sup>2</sup> However, an exemption to BGEPA allows the Secretary of the Interior to permit persons to possess eagles and their parts "for the religious purposes of the Indian tribes."<sup>3</sup> The Secretary issued regulations construing the term "tribes" as referring only to federally recognized tribes, as opposed to state-recognized and unrecognized tribes.

This restriction exists because of the unique relationship that exists between the tribes and the United States government. To become a federally recognized tribe, the United States government must by a formal political act acknowledge that the tribe is a self-governing political entity whose inherent sovereignty pre-dates the United States Constitution. Thus, the relationship between the United States and the federally recognized tribes is akin to a sovereign to sovereign state relationship. The United States takes care to respect the sovereignty of the tribes by permitting them to retain core aspects of inherent sovereignty.<sup>4</sup>

Restricting eagle feathers to members of federally recognized tribes has been hotly disputed, with Native Americans and non-Native Americans arguing that the regulations violate RFRA<sup>5</sup> by preventing them from applying for permits. The government, in several cases,<sup>6</sup> has argued that restricting the exemption to members of federally recognized tribes achieves the government's interest in serving the needs of the federally recognized tribes (or a similar interest) due to long wait-times to receive feathers from the National Eagle Repository. On one hand, some courts have agreed, citing the government's "trust" or "treaty" obligations to the federally recognized tribes.<sup>7</sup> Others have noted there's no reason why some Indians deserve the exemption and not others, speculating that the government's interest in protecting only federally recognized tribes is too narrow. Some courts have

asserted that a real compelling interest could be protecting Native American religions and cultures generally.<sup>8</sup> Now, the problem with allocating feathers to individuals outside of the federally recognized tribes is that it would result in increased delays for federally recognized tribe members to receive the feathers they need to conduct their religious ceremonies.

Unfortunately for the government, as it stands, the regulation's interpretation of the exemption's text does not lend credibility to the government's asserted interest in protecting the interests of the federally recognized tribes. This problem arises from the fact that the permits are issued on an individual basis to members of the federally recognized tribes who can demonstrate that they require the feathers for a *bona fide* American Indian religious practice. The way the permits are issued makes it appear that the government is merely favoring certain individuals' religious practices over others, as opposed to the government trying to preserve and protect the citizens of the federally recognized tribes owing to the tribes' status as sovereign entities.

There is a simple way to ameliorate this situation. The permits should not be issued on an individual basis. Rather, the permits should be issued on a tribal basis; in other words, tribal governments should apply for the permits. If this were the case, the government would have a simpler time making the case that it has a compelling interest in protecting the federally recognized tribes' interests because the tribal governments, instead of individual members, would be applying for the permits. BGEPA challengers would be unable to make the argument that the exemption discriminates on a religious basis (arguably violating the Establishment Clause) as opposed to a political basis—and if this were the case, the regulation would have a much easier time surviving the demanding RFRA analysis. ○

#### References:

<sup>1</sup> 16 U.S.C. 668(a) (1978).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> For instance, the tribes cannot be sued by individuals without its consent and are not subject to state constitutions, state laws, and state taxes without their consent. The tribes are also permitted to create constitutions, regulate their lands, legislate, and establish their own judicial systems.

<sup>5</sup> 42 U.S.C. § 2000bb-1 (1993).

<sup>6</sup> E.g., *Gibson v. Babbitt*, 23 F.3d 1256, 1257 (11th Cir. 2000) (per curiam); *Wilgus v. United States*, 638 F.3d 1274, 1285-86 (10th Cir. 2011).

<sup>7</sup> See *Gibson*, 23 F.3d 1256.

<sup>8</sup> E.g., *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 474 (5th Cir. 2014); *United States v. Hardman*, 297 F.3d 1116, 1133 (10th Cir. 2002).

## FIXING THE SYSTEM: PUBLIC DEFENDERS FOR IMMIGRANTS

By Hershhal "Tripp" Spangler



The right to appointment of legal representation is a legal entitlement guaranteed by the Sixth Amendment that most Americans take for granted. However, no such right exists for immigrants who have legal proceedings in immigration court. The Immigration and Nationality Act states that an "alien shall have the privilege of being represented, at no

expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."<sup>1</sup> This includes immigrants who are facing deportation hearings since these hearings are civil proceedings. Since legal counsel is a privilege and not a right in immigration court, there is no legal requirement for the appointment of counsel to immigrants.

The vast majority of immigrants, especially those who are indigent, often appear before immigration court without any legal representation. Their lack of legal representation hinders both the application of justice and the efficiency of the immigration court system. In the United States, immigration courts are facing a severe backlog and legal costs, including detention costs, are rising.<sup>2</sup> One proposal to address these problems is the adoption of a nationwide public defender system for the immigration court system.

A recent study, published in the *University of Pennsylvania Law Review* by Ingrid V. Eagly<sup>3</sup> and Steven Shafer,<sup>4</sup> conducted an evaluation of access to counsel within the immigration court system.<sup>5</sup> The study researched over 1.2 million deportation cases decided between 2007 and 2012.<sup>6</sup> The study found that only 37% of all immigrants and only 14% of detained immigrants were able to gain access to legal representation.<sup>7</sup> The study also found that "barriers to representation were particularly severe in immigration courts located in rural areas and small cities, where almost one-third of detained cases were adjudicated."<sup>8</sup> Interestingly, the study also found that only 2% of immigrants involved in these proceedings found representation through pro bono efforts.<sup>9</sup>

In 2014, NERA Economic Consulting, on behalf of the New York City Bar Association, conducted a study that considered the financial cost of a public defender system for the immigration court system.<sup>10</sup> This study showed a federally funded public defender system, while potentially expensive, would pay for itself by "saving about the same amount in reduced government expenditures to detain and remove immigrants and in other savings associated with the overburdened enforcement system."<sup>11</sup> The study found that

the total cost of a public defender system for the immigration court system would cost an estimated \$208 million annually.<sup>12</sup> This program would be “funded and overseen by the federal government” and would “provide counsel to every respondent in immigration removal proceedings under 8 U.S.C. § 1229a who qualifies as indigent.”<sup>13</sup>

The study also estimated that detention costs “borne by the federal government would decline at least \$173 to \$174 million per year.”<sup>14</sup> They could decline by more, but this is the low-end estimation. The study also looked at additional savings that would occur and estimated that costs for “other federal outlays, including payments for legal orientation programs, transportation, and foster care would decline by between \$31 and \$34 million per year.”<sup>15</sup> Therefore, combined with the detention cost savings, the study estimates a total savings of between \$204 and \$208 million per year.<sup>16</sup> Consequently, the program would essentially pay for itself when the savings that would occur are considered. The study goes on to note that when considering a high-end estimate of savings, as is possible considering the potential unknown effects, such a view would still produce estimated savings that would “exceed the estimated cost of the proposal.”<sup>17</sup>

In 2013, New York City became the first city to implement an experimental public defender system for its immigration court system. On July 19, 2013, the New York City council allotted \$500,000 to the first public defender system for immigrants facing deportation.<sup>18</sup> Not only did the implementation of this program show that it was possible to form a public defender system for immigrants, it also showcased the importance of providing legal representation to immigrants, especially indigent immigrants.<sup>19</sup> Many believe this pilot program in New York City is the first step to a nationwide program.<sup>20</sup>

Already, the program has made an impact upon the immigrants in New York City facing legal proceedings within the immigration court system. Not only has the project been successful in providing legal representation, but it has also helped “reunite more than half of the clients with their families.”<sup>21</sup> On top of this, because the program has been so successful, “the project has been expanded to two upstate New York immigration courts, and is being used as a model for similar programs” in other U.S. cities.<sup>22</sup> These other cities include Boston, Chicago, Los Angeles, and San Francisco.<sup>23</sup>

Our immigration court system in this country is facing numerous problems. From inefficiencies, to burnout on the part of immigration judges, to the lack of justice that many immigrants experience, there are many areas of reform that need to be dealt with. One area of reform that is desperately needed and would help address many of the other problem areas of our immigration courts is the lack of legal representation for most immigrants. This could be accomplished by implementing a federally funded public defender system for our immigration court system. It would provide fairness and efficiency to our immigration courts. It is way past time that we stop talking about the problems facing our immigration system and court system. It is time to act. ○

## References:

- 1 Immigration and Nationality Act § 240(b)(4)(A) (1965).
- 2 Ingrid Eagly, Public Defenders Are Needed To Ensure Justice in Our Immigration System, *BORDER CRIMINOLOGIES* (April 11, 2016), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/04/public-defenders>.
- 3 Professor of Law, UCLA School of Law.
- 4 UCLA School of Law, J.D. 2015.
- 5 Ingrid V. Wagly and Steven Shafer, A National Study of Access To Counsel In Immigration Court, *University of Pennsylvania Law Review*, 164:1, (2015).
- 6 *Id.* at 2.
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 John D. Montgomery, Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings, *NERA ECONOMIC CONSULTING*, (May 28, 2014), [http://www.nera.com/content/dam/nera/publications/archive2/NERA\\_Immigration\\_Report\\_5.28.2014.pdf](http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf).
- 11 Kirk Sample, Public Defender System for Immigrants Facing Deportation Would Pay For Itself, Study Says, *NEW YORK TIMES*, (May 29, 2014), [http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html?\\_r=0](http://www.nytimes.com/2014/05/30/nyregion/study-favors-free-counsel-to-navigate-deportation.html?_r=0).
- 12 Montgomery, *supra* note 11, at 3.
- 13 *Id.* at 2.
- 14 *Id.* at 3.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 Mark Noferi, The First Immigration Public Defender System: New York 2013, *LAW AT THE MARGINS*, (Aug. 5, 2013), <http://lawat-themargins.com/perspectives-the-first-immigration-public-defender-system-new-york-city-2013/>.
- 19 *Id.*
- 20 *Id.*
- 21 Lorelei Laird, New York Program Provides Public Defenders In Deportation Cases, *ABA JOURNAL*, (Sept. 1, 2016), [http://www.abajournal.com/magazine/article/new\\_york\\_public\\_defenders\\_deportation](http://www.abajournal.com/magazine/article/new_york_public_defenders_deportation).
- 22 *Id.*
- 23 *Id.*



# MYRIAD GENETICS: Latent Threat to Human Dignity

By Jay Hamilton



Law and culture have long protected private property. Legal protection of discoveries, or patents, are comparatively new. The modern patent originates from Britain's Statute of Monopolies which prevented the crown from claiming ordinary items as royal property and then taxing them.<sup>1</sup> While the statute banned royal monopolies, it explicitly

granted them to entrepreneurs to encourage capitalism.<sup>2</sup> While capitalism usually yields superior economic growth, it does not always yield morally superior results. The Catholic Church warns that the "universal destination of goods," is to benefit all mankind, especially the poor.<sup>3</sup> Patents can protect the poor, but in some cases, patenting a specific discovery can prevent life-saving advances in science. Biological patents can be used this way, and more importantly, can be immoral when they assert dominion over the human body.

Human byproduct patents have been recognized by the law as early as 1911,<sup>4</sup> when the court in *Parke-Davis & Co. v. H.K. Mulford Co.* ratified a patent for purified human adrenaline.<sup>5</sup> In the 1960's and 1970's, genetic engineering became possible and the Supreme Court permitted the patenting of an entire species because of its artificially altered genome in *Diamond v. Chakrabarty*.<sup>6</sup> The *Chakrabarty* decision paved the way for the 2013 case *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.* in which human gene patenting indirectly gained a foothold.<sup>7</sup>

The criteria for a patent under 35 U.S.C. § 101 is that the proposed patent candidate be a "new and useful" "machine," "process," or combination of matter.<sup>8</sup> Myriad Genetics sought to patent human genes that fostered the growth of certain cancers and to patent the cDNA copy of those genes.<sup>9</sup> The Supreme Court held that the naturally occurring genes Myriad isolated were not patentable,<sup>10</sup> but that the cDNA created from them was patentable because it does not contain the extraneous introns found in natural DNA.<sup>11</sup> The Court came to the correct legal conclusion: human genes are not "new" combinations of matter and cannot be patented while the cDNA made from it is technically a new product under the 35 U.S.C. § 101. The court's reasoning in *Myriad* was not incorrect, just incomplete. The decision considered only patent law, not the ethicality of owning human material.

As one of the amicus briefs for *Myriad* reminded the court, a microscopic amount of human material is still human in essence.<sup>12</sup> The cDNA extracted from humans is likewise still human. It should be self-evident to the Supreme Court that the benefit of gene patenting for the common good is greatly outweighed by the dangers posed by commoditizing man. The United States was once infected by slavery and it took nearly a century to end it. Having staved off that evil, the nation now

faces human trafficking and fetal tissue trading. Permitting corporations to own and trade what "grants individuality" to all people<sup>13</sup> would be another disastrous blow to human dignity.

In addition to the fact that the *Myriad* decision was based upon a technical reading of the law rather than ethics, the resulting standard is viewed by pro-patent experts as easily circumvented.<sup>14</sup> The minimal difference between *Myriad's* patentable DNA and un-patentable cDNA makes the threshold minimal: an ordinary human gene intentionally exposed to a carcinogen would probably earn a patent under *Myriad*. The feasibility of such workarounds not only threatens human dignity, but also poses a threat to the common good. Thomas Aquinas wisely stated that possessions should be shared "without hesitation" in the face of true need.<sup>15</sup> *Myriad Genetics* sought to patent the genes they discovered and would have prevented other groups from researching them for fifteen years, merely because they discovered them first.<sup>16</sup> Research needs to be profitable in order to function, but if there is any realm of science where the law should foster cooperation rather than exclusivity, it is the study of terminal illnesses.

Since *Myriad* was properly decided under the federal patent statute, Congress should create stricter laws as to the patentability of human material. Additionally, if a case with appropriate facts arises, the Supreme Court should take a harder stance on gene patents to protect human dignity. With careful advocacy and an eye on developments in science we can prevent people from being perceived as commodities. It is not just economically and socially preferable to do so, it is our duty. After all, we are made in the image of God. ○

## References:

- 1 PATENT LAW, <https://www.britannica.com/topic/patent#ref791882> (last visited February 8, 2016).
- 2 *Id.*
- 3 Catechism of the Catholic Church, the Seventh Commandment, 2403, <http://www.scborromeo.org/ccc/para/2403.htm>.
- 4 *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 F. 95, 97 (C.C.D.N.Y. 1911).
- 5 *Id.*
- 6 *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).
- 7 *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).
- 8 35 U.S.C.S. § 101 (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).
- 9 *Ass'n for Molecular Pathology*, 133 S. Ct. at 2111.
- 10 *Id.*
- 11 *Id.*, at 2119.
- 12 Brief for Amici Curiae of the Ethics and Liberty Commission of the Southern Baptist Convention and Prof. D. Brian Scarnechia in Support of Petitioners at 7, *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (No. 12-398), quoting *Am. WoodPaper Co. v. Fibre Disintegrating Co.*, 90 U.S. (23 Wall.) 566, 594 (1874).
- 13 Brief for Amici Curiae of the Ethics and Liberty Commission of the Southern Baptist Convention and Prof. D. Brian Scarnechia in Support of Petitioners at 7, *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (No. 12-398).
- 14 DISCOVERING THE UNDISCOVERABLE: PATENT ELIGIBILITY OF DNA AND THE FUTURE OF BIOTECHNICAL PATENT CLAIMS POST-MYRIAD, 10 Wash. J.L. Tech. & Arts 35, 44.
- 15 Thomas Aquinas, *Summa Theologiae* II-II 66.2 <http://dhsprpriory.org/thomas/summa/SS/SS066.html#SSQ66OUTP1> (last visited 2/8/2017).
- 16 *Ass'n for Molecular Pathology*, 133 S. Ct. at 2111.

# JUSTICE ANTONIN SCALIA'S LEGACY:

## Remarks by Clifford W. Taylor, Former Chief Justice of the Michigan Supreme Court<sup>1</sup>

By Justice Clifford Taylor



To properly appreciate the contribution of Justice Antonin Scalia to our jurisprudence, it is necessary to begin with an overview of the approaches to constitutional interpretation that have pertained since our Constitution was ratified 228 years ago and examine how Justice Scalia fits into that on-going process.

As our Constitution was the first written national constitution in the world, the initial question, as indeed it continues to be today, was: should the United States Supreme Court and the various inferior courts, including state courts, interpret it as one normally would any written instrument, or should some other approach control the giving of meaning to it? This first approach means, simply enough, that its written terms would be construed using ancient and well known interpretative rules that have always governed the construction of any document, be it a contract, a bill of lading, a traffic ordinance, a religious tract such as the Bible or any writing from long ago. The goal when doing this is to give it a fair reading so as to get an accurate understanding of what the words, phrases and terms of art used meant when the instrument was created. That is, a reading that does not twist or deconstruct the writing to get a desired result. Thus, as every sensible person understands intuitively, be they a mechanic, a lawyer, a theologian, or an English literature professor you use context, grammar, syntax, and the meaning of words understood by the drafting generation as well as terms and phrases of art as understood at the time of its creation to discern its meaning. That is it. There is no room in this approach to “grow” the Constitution by morphing it into something that later sensibilities might demand. That is the meaning of, and why you “put it in writing” of course.

To perhaps state the obvious, early judges and justices of our nation and those that toiled after them for most of our history have had no doubt that this was the proper approach.

Why they felt this way is important to consider: it was to make the Constitution permanent. James Madison, probably the most influential of the Constitutional Convention participants, said it forthrightly: “I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it

is the legitimate Constitution.....If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!”

Similarly, Alexander Hamilton said: “Whatever may have been the intention of the framers of a constitution...that intent is to be sought for in the instrument itself...” In early adjudications under the then new Constitution, Chief Justice John Marshall in *Marbury v. Madison*, echoed the same sentiments asserting that the Constitution should be interpreted according to the “plain import of the words.”

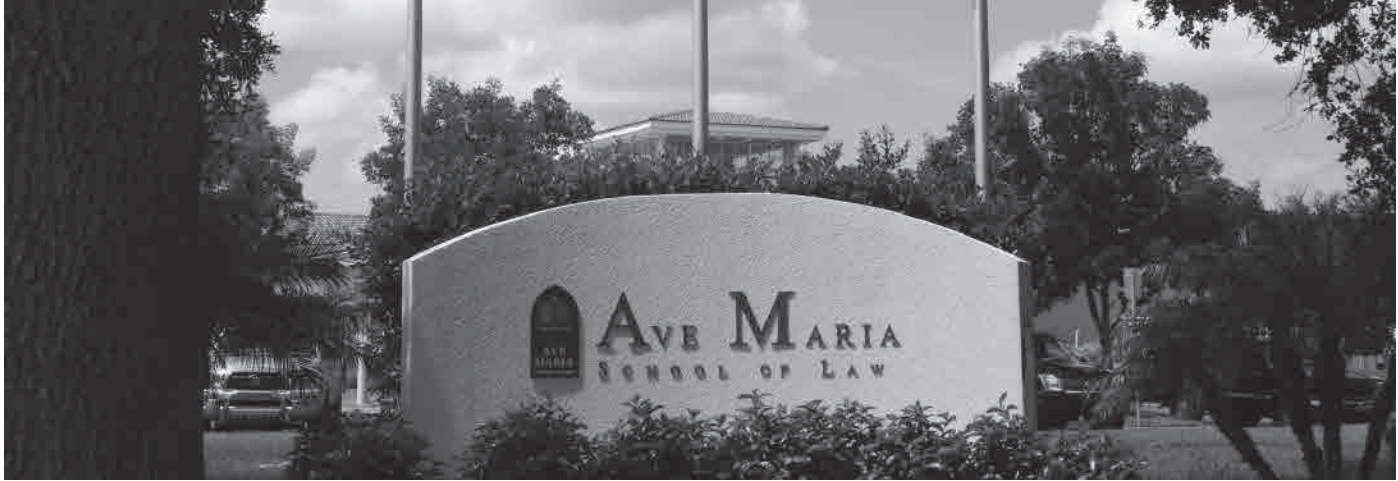
Marshall’s intellectual successor, Justice Joseph Story, held the identical views as did the preeminent constitutional scholar of the mid to late 19th century, Michigan’s Thomas M. Cooley, who said regarding the Constitution in his book, *Constitutional Limitations*, a text that dominated constitutional law teaching well into the 20th century: “We must presume that the words have been employed in their natural and ordinary meaning.”

As the 20th century dawned, Justice Oliver Wendell Holmes unsurprisingly argued for the same approach, and it isn’t a stretch to say that there was really no serious dissent from this position until the 1950s or so. In fact, so entrenched was this approach to interpretation that it didn’t even have a name with the closest descriptive phrase being “the rule of law.”

To help you appreciate this point, in the mid 1990s I was at a Federalist Society program at the Harvard Law School where Judge Laurence Silberman of the United States Court of Appeals for the District of Columbia Circuit remarked that there was no need for a rule of law group like the Federalist Society at Harvard when he was a student in the 50s because everyone was a Federalist. That was my experience at the George Washington University Law School a decade later as well.

Now, this isn’t to say that there were no judges or courts during this long time that got it wrong and didn’t follow the text’s commands. Of course they did, with the most infamous examples being the *Dred Scott* case and the cases decided in the economic substantive due process era. Yet, even in error, those justices didn’t acknowledge that they were straying and certainly didn’t give the competing technique a descriptive title. By late mid-century, however, this began to be questioned as new approaches that spurned the old rule of law approach to judging took hold.

Justices in an increasing number of cases began to look past the words, context, and grammar of not just the Constitution, but also statutes in order to get what they thought were good results. An example of what they were doing with statutes can be found in the Supreme Court’s candid articulation of their approach to statutory interpretation in 1980 in *Mohasco Corp. v. Silver*, 447 US 807 (1980): “We first review the plain meaning of the relevant statutory language; we examine the legislative history of the 1964 Act and the 1962 amendments for evidence that Congress



intended the statute to have a different meaning; and finally we consider the policy arguments in favor of a less literal reading of the Act." Being advanced then, was that enforcing the statute that Congress actually enacted was, more or less, discretionary.

It was the same for constitutional interpretation. Here the justices used creative doctrines such as substantive due process via the 14th Amendment to justify historical notions like the so-called wall between church and state as well as dictating through the incorporation theory that the Bill of Rights was applicable to the states. Thus, the Court came up with outcomes such as "one man one vote," federal preemption of pornography, vagrancy and obscenity laws plus aggressive expansions of brand new rights that were just conjured up such as the multitude of cases nesting under the extra-constitutional notion of privacy. These new approaches, even if intellectually suspect, were attractive to some of the justices because they thought that it was only through this means that these policies, invaluable as they were assumed to be, could be permanently immunized from the people and their legislatures.

All of the new standards proposed by these jurists started with abandoning lock-step fidelity to the Constitution's original meaning and replacing it with tests that would determine constitutional meaning by having judges look to such amorphous concepts as the well-being of our society or upholding values that are fundamental or reflective of deeply embedded cultural values or even attempting a fusion of constitutional law and moral theory. There were other standards advanced of course, and they collectively began to be shorthanded as "purposivism": an approach to the law where the "purpose" of a statute or constitutional provision is sought, regardless of the actual language of the instrument, leading to a conclusion where the policy preferences and substantive value judgments of the judiciary trumped those of other branches of government. Adherents of this new theory of effective judicial supremacy met the argument that this could easily devolve into rule by judges by not very convincing assurances that there was no need for concern because, somehow, justices have a peculiar competence to define constitutional provisions and would surely act prudently.

A person can buy this rationale or not, but inescapable is that under this regime the justices, not the citizens through

their representative bodies such as the legislature or city council, got to make the call on whether a given social policy was one they agreed with. So, a legislative apportionment that disproportionately recognized the importance of rural interests rather than applying a simple one man one vote metric could be held to have a purpose to treat unequally urban dwellers and accordingly be unconstitutional. Or, as it was for the late Justices Thurgood Marshall, William Brennan, or Harry Blackman and as is today for Justice Stephen Breyer, the death penalty, clearly allowed under the Constitution, had evidently a purpose that wasn't in keeping with the evolving standards of the nation's ideals and thus was unconstitutional.

This new-found judicial power was alarming to constitutional traditionalists and in the mid-80s Attorney General Edwin Meese began to speak powerfully about the profound problems such an arrogation of power by judges posed. Others such as Scalia's friend, Judge Robert Bork, brilliantly outlined the political roots of the power seizure characterizing this as a "politicalization of the law" in his powerful book, *The Tempting of America*.

Bork saw the problem this way: "Professions and academic disciplines that once possessed a life and structure of their own have steadily succumbed, in some cases almost entirely, to the belief that nothing matters beyond politically desirable results, however achieved. In this quest, politics invariably tries to dominate another discipline, to capture and use it for politics' own purposes, while the second subject-law, religion, literature, economics, science, journalism, or whatever-struggles to maintain its independence. But retaining a separate identity and integrity becomes increasingly difficult as more and more areas of our culture, including the life of the intellect, perhaps especially the life of the intellect, become politicized. It is coming to be denied that anything counts, not logic, not objectivity, not even intellectual honesty, that stands in the way of the 'correct' outcome."

Within the judiciary itself, however, it was Justice Antonin Scalia who mounted the long and continuing defense of the rule of law as he argued clearly and convincingly in his opinions, interviews, lectures and books (especially his invaluable book with Bryan Garner: *Reading Law*) for originalism or, as he preferred to describe it, textualism, on its own merits. He had no time for the purposivists tools such

as shifting burdens, multi-factor tests and varying levels of scrutiny because they were found nowhere in the written law and were by their nature, intentionally vague, pliable and difficult to understand which thereby allowed the Court to reach a desired outcome rather than a principled legal one. It was his argument that on a day-to-day basis textualism insures more perfect justice in the long run of cases than the more subjective purposivism which allows favoritism and makes the law far less predictable.

As important as that practical point was, he relied upon political theory to argue that the textualist approach gives to "we the people," not an unelected committee of nine lawyers sitting as a court, the power to decide controversial social policy and all variety of political questions constrained only by the actual limitations on democratic policy making found in the Constitution itself. University of Texas Constitutional Law Professor Lino Graglia's evaluation of purposivism and the cases it has produced I think nicely outlines the general constitutional doctrinal confusion purposivism was felt to have created, and especially the continuing intellectual dissonance of *Roe v. Wade*: "Whatever the merits of the Supreme Court's decisions over the past three decades they have as to the issues decided deprived us of the right of self government, which necessarily includes the right to make what others might consider mistakes...An opponent of judicial activism need not claim to know the answer to so difficult a question of social policy as, say, the extent, if any, to which abortion should be restricted to know that it is shameful in a supposedly democratic country that such a question should be answered for all of us by unelected and unaccountable government officials..."

Scalia pithily made the same point in his 1997 book, *A Matter of Interpretation*: "if the people come to believe that the Constitution is not a text like other texts; that it means, not what it says or what it was understood to mean, but what it should mean... well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those who they seek to interpret it....they will look for judges who agree with them as to what evolving standards have evolved to; who agree with them as to what the Constitution ought to be."

This concept of "they will look for judges who agree with them" of course means the searchers will look to the popularizers of political ideas: political parties. And as might be expected, the two great political parties have come down on roughly opposite sides of "what evolving standards have evolved to." Thus, Democrats have views on things such as race, religious liberty, voting rights, campaign finance, immigration, the left's climate agenda, gun rights and of course abortion that differ from the Republican's views for the most part. It is through that prism that the parties' positions on who should be Scalia's replacement must be seen.

Accordingly, notwithstanding protestations by the Democrats that all that is going on here is an effort to try to find a new Justice who is impartial, has good judgment and possesses lawyerly acumen or from the Republican side that a new President vetted in part by the people on this very issue in the upcoming elections should make the pick,

both parties are testing any potential justice against what they expect he/she will do on cases that concern these very contentious issues.

Accordingly, what they are thinking about are relatively recent 5-4 decisions such as *Citizens United v. Federal Elections Commission* holding that "the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections". Or *Glossip v. Gross* which held that even though assisted suicide drug cocktails could misfire they did not violate the Constitution's ban on cruel and unusual punishment. Or *Burwell v. Hobby Lobby* saying family-owned and other closely held companies can opt out of the Obama Care mandate if they have religious objections to it. Or *Town of Greece v. Galloway* where a ceremonial opening prayer was held to not be an unconstitutional establishment of religion. Or *District of Columbia v. Heller* which held that the Second Amendment protects individual gun ownership and allows the keeping of loaded guns in one's home for self-defense. Or *Shelby County v. Holder* that struck down Section 4 of the Voting Rights Act, which reduces federal control over election law. Or the anticipated cases regarding President Obama's climate agenda or the almost certain cases following up on the same sex marriage cases that will impact religious liberty.

I think Scalia would be saddened, if not surprised, that this is what judicial selection has devolved to. But, I also feel that he would argue that such was inevitable when the federal courts abandoned what he saw as the judge's traditional role and became in the words of the late Justice William Brennan "platonic guardians" of the American people because with the assumption of that role, the views of the potential judge on policy issues became how the nominee was evaluated not on judicial competence and attitude.

So, gone are the days when, as late as when Sandra Day O'Connor was before the Senate or even when Scalia himself was, that it was all about merit based qualification as a lawyer and judge. Moreover, absent a remarkable change in this country and what we see as the role of a judge, it never again will be and this should sadden more than just appreciators of Scalia. ○

#### References:

- <sup>1</sup> Retired Justice Clifford W. Taylor is a Visiting Professor and Justice in Residence here at Ave Maria School of Law. Justice Taylor received his B.A. from the University of Michigan and J.D. from George Washington University. He served as a Justice on the Michigan Supreme Court from 1997 to 2008 and twice served as Chief Justice. Before service on the Supreme Court he was a Judge on the Michigan Court of Appeals for 5 years. Prior to his judicial service, Taylor was a lawyer in Ingham County, Michigan, where he practiced for 20 years with the final 16 as a partner in the firm of Denfield, Timmer and Taylor. In his professional career, Taylor served on the Michigan Board of Law Examiners, The Michigan Commission on the Courts in the 21st Century, and the Board of Directors of the National Conference of Chief Justices. He has also served his community in many other capacities including on the executive and financial committees for the Chief Okemos Council of the Boy Scouts and on the board of directors for the Michigan Dyslexia Institute. He currently serves as the Chairman of the Board of Directors of the Michigan think tank Mackinac Center for Public Policy.



# ADA TESTERS: Why They Are “Testing” the Patience of Small Businesses and the Judicial System

By Kelsey Blikstad



Many Americans are unaware of the term “tester” in connection with the Americans with Disabilities Act of 1990 (“ADA” or “Act”). For ADA purposes, “a tester is a qualified individual with a disability who is testing an entity’s compliance with federal disability statutes.”<sup>1</sup> In layman’s terms, a tester is a disabled individual who travels

to various businesses to test their compliance with the ADA and, upon finding noncompliance, sues the business. While, in theory, testers appear honorable by advocating for the rights of the disabled, testers have a negative impact upon small businesses and the judicial system. To alleviate this negative impact and still encourage businesses to adhere to ADA regulations, lawmakers should create sanctions for vexatious litigants, establish recovery limits, and shift the responsibility of attorney’s fees.<sup>2</sup>

## BACKGROUND OF THE ADA

The ADA became law on July 26, 1990, under the Administration of George H.W. Bush.<sup>3</sup> The Act prohibits discrimination and ensures everyday rights of the disabled, including access to employment and government programs and the ability to make consumer purchases.<sup>4</sup> Specifically, “Title III of the ADA prohibits places of public accommodation from excluding disabled persons thus depriving them of the goods and services offered.”<sup>5</sup>

## EFFECT OF ADA TESTERS

Upon suit by a tester, a small business may face many hurdles. First, a small business may need to obtain legal counsel to respond to a tester’s complaint. Many times, the parties settle, which may require a business owner to pay a settlement and incur legal fees. Second, a small business will then need to comply with ADA regulations. Physical compliance includes, but is not limited to, reconstructing parking, entrances, door handles, interior layouts, shelving, and seating. These financial responsibilities may burden small business owners who are trying to keep afloat.

Although attorneys may enjoy the opportunity for employment, ADA tester suits congest the courts.<sup>6</sup> Serial ADA litigators frustrate judicial resources and have become a hot topic in Florida courts. Oftentimes, these litigators will “file boilerplate complaints with virtually identical claims, many of which do not withstand close scrutiny.”<sup>7</sup> For

example, in Florida, one attorney filed lawsuits on behalf of a minor child “alleging that she had been denied full access to . . . a pawnshop, a liquor store, and a swimming-pool supply shop[.]”<sup>8</sup> Multiple ADA tester suits that are boilerplate and meritless are burdensome and time consuming to judges and law clerks.

In Florida, lawmakers are discussing ADA reform by establishing a grace period for small businesses to become ADA compliant. Republican Florida representative, Gayle Harrell, an advocate for disabled rights, believes that ADA serial testers are taking advantage of small businesses under a federal law that was meant to aid disabled individuals.<sup>9</sup> Representative Harrell argues that the goal of the ADA is compliance, not to reward “drive-by litigators.”<sup>10</sup> As a lawmaker, she believes a 120-day grace period is a reasonable period to ensure compliance without punishing the small business owner.<sup>11</sup>

## SOLUTIONS FOR SMALL BUSINESSES AND THE JUDICIAL SYSTEM

### Vexatious Litigant Sanctions

Sanctions for ADA vexatious litigants have become common among circuits. For example, in California, courts may sanction vexatious litigants by either requiring litigants to obtain leave of the court before filing a new suit or by requiring them to pay a security bond.<sup>12</sup> To determine if a plaintiff is a vexatious litigant, the Fourth Circuit has adopted a four-factor test.<sup>13</sup> These factors include:

- (1) the party’s history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party’s filings; and (4) the adequacy of alternative sanctions.<sup>14</sup>

This approach is useful because it does not prohibit ADA lawsuits. Rather, it holds litigants accountable in their decision to sue small businesses. For instance, the requirement for litigants to post a security bond weeds out plaintiffs who are merely suing for monetary gain.

### Recovery Limitations

The ultimate purpose of the ADA is to provide accommodations to the disabled. Allowing profit-driven litigants to make a living as a tester is not a function of the Act. Recovery limits may dissuade testers from suing small businesses for profit. Additionally, this approach may encourage small businesses to allocate company resources for ADA compliance instead of financially benefiting testers.

### Shifting of Attorney’s Fees

While under the American Rule each party pays its own attorney’s fees, to thwart profit-driven litigation, testers should absorb legal fees of defense counsel.<sup>15</sup> Shifting the burden of attorney’s fees would discourage testers from suing for profit and instead focus on encouraging small businesses to become ADA compliant.

## CONCLUSION

To discourage ADA testers from being profit-driven litigants, various remedies, such as vexatious litigant sanctions, recovery limits, and shifting of attorney's fees, may provide relief to small businesses and the judicial system. Ultimately, these solutions encourage ADA compliance without hindering and frustrating small business owners and the courts. ○

### References:

- <sup>1</sup> Leslie Lee, Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation, 19 Va. J. Soc. Pol'y & L. 319 (2011).
- <sup>2</sup> Id.
- <sup>3</sup> United States Department of Justice, Civil Rights Division, Introduction to the ADA, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited on Feb. 11, 2017).
- <sup>4</sup> Id.
- <sup>5</sup> Legal Almanac: The Americans With Disabilities Act § 4:1.
- <sup>6</sup> Linda H. Wade & Timothy J. Inacio, A Man in A Wheelchair and His Lawyer Go into A Bar: Serial ADA Litigation Is No Joke, Trial Advoc. Q., Fall 2006, at 31, 33.
- <sup>7</sup> Id.
- <sup>8</sup> Id.
- <sup>9</sup> Katie Lagrone and Matthew Apthorp, Crippled Florida businesses seek help over serial Americans with Disabilities Act suers, ABC Action News – WFTS Tampa Bay (Nov. 21, 2016), <http://www.abcactionnews.com/longform/crippled-florida-businesses-seek-help-over-serial-americans-with-disabilities-act-suers>.
- <sup>10</sup> Id.
- <sup>11</sup> Id.
- <sup>12</sup> Id. at 1.
- <sup>13</sup> Id.
- <sup>14</sup> *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 818 (4th Cir. 2004).
- <sup>15</sup> United States Department of Justice, 220. Attorney's Fees, <https://www.justice.gov/usam/civil-resource-manual-220-attorneys-fees> (last visited on Feb. 11, 2017).

## IS YOUR PHONE PROTECTED?

By Mohad Abbass



As of January 2014, ninety percent of American adults owned a mobile device.<sup>1</sup> In 2013 alone, Americans used their mobile device to talk for 2.6 trillion minutes, send 1.9 trillion text messages, and view 3.2 trillion megabytes worth of data from the internet.<sup>2</sup> Today, a cell phone's capability has progressed so far that it is now a handheld

computer storing massive amounts of information.<sup>3</sup> The information Americans store in their cell phones includes not only text messages and call logs, but also emails, videos, credit card information, medical records, and much more. As increasing numbers of Americans use their smart phones to store personal data, the need for greater privacy protections

in these devices is paramount.<sup>4</sup>

Recognizing the importance of cell phones in the lives of many Americans, the U.S. Supreme Court in *Riley v. California* held that it is imperative for police to obtain a warrant before perusing the digital contents of a cell phone during a search incident to arrest.<sup>5</sup> The decision in *Riley* was initially regarded as a huge victory for the protection of individual privacy rights. Nonetheless, even though the ruling in this case thoroughly expounded on the risk associated with the warrantless search on an arrestee's cell phone, the decision did not go far enough in protecting the Fourth Amendment privacy rights of American citizens.<sup>6</sup>

After *Riley*, one might expect judges to now be careful in limiting the scope of cell phone search warrants. Similarly, one might also expect judges to now provide law enforcement officers with suitable instructions regarding the implementation of cell phone search warrants.<sup>7</sup> However, those expectations are incorrect. Even after *Riley*, a warrant based on probable cause typically does not restrict an officer from searching certain cell phone contents.<sup>8</sup>

Thus, many cell phone warrants post-*Riley* are far broader in scope than they were intended to be.<sup>9</sup> This leads the lower courts to either issue "any and all data" cell phone search warrants,<sup>10</sup> in which the entire cell phone would be searched, or issue a warrant with a more detailed list of the types of data to be searched.<sup>11</sup> However, this list would still allow for the search of areas unrelated to the crime being investigated.<sup>12</sup>

Herein lies the problem: just as a judge should not authorize the police to search a table drawer for a lawnmower, a judge should also not authorize the police to go through cell phone data that is not related to the crime being investigated. For the decision in *Riley* to be effective, the courts need to give equal importance to cell phone searches as they do for home searches. In other words, officers should only be allowed to search certain areas in a cell phone where there is probable cause to believe evidence will be found, just as if they were searching in a home. It is understood that in complex cases, where the police have to go through millions of pages of data, a judge may issue a general warrant to search the entire cell phone.<sup>13</sup> But in simpler cases, where the police know that the evidence could be found in a specific area, like in text messages, a judge should not issue a warrant to search the entire cell phone.<sup>14</sup> Therefore, the best way to ensure Fourth Amendment protection is by putting restrictions on cell phone searches that limit the search to the specific area where probable cause exists.<sup>15</sup> ○

### References:

- <sup>1</sup> William Clark, PROTECTING THE PRIVACIES OF DIGITAL LIFE: RILEY V. CALIFORNIA, THE FOURTH AMENDMENT'S PARTICULARITY REQUIREMENT, AND SEARCH PROTOCOLS FOR CELL PHONE SEARCH WARRANTS, 56 B.C. L. Rev. 1981, 1982 (2015).
- <sup>2</sup> CELLULAR TELECOMM. INDUS. ASS'N, WIRELESS INDUSTRY SUMMARY REPORT, YEAR-END 2013 RESULTS 8 (2014), [http://www.ctia.org/docs/default-source/Facts-Stats/ctia\\_survey\\_year\\_2013\\_graphics-final.pdf?sfvrsn=2](http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_year_2013_graphics-final.pdf?sfvrsn=2).
- <sup>3</sup> *Riley v. California*, 134 S. Ct. 2473, 2481 (2014).
- <sup>4</sup> Why Police May Still Have Free Reign to Search an Arrestee's

Cell Phone Despite a Warrant Requirement, 3 February, 2016.  
<http://www.jurist.org/dataline/2016/02/veroncia-reyes-search-phones.php>.

<sup>5</sup> Clark, *supra* at 1983.

<sup>6</sup> Adam M. Gershowtiz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 *Vand. L. Rev.* 585 (2016).

<sup>7</sup> Gershowtiz, *supra* at 601.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 638.

<sup>14</sup> *Id.* at 638.

<sup>15</sup> *Id.*



# THE BRADLEY ACT IS A LOSING BET

By Paul Udouj



The “Professional & Amateur Sports Protection Act of 1992,”<sup>1</sup> also known as the Bradley Act, was an attempt by Congress to preserve the integrity of professional sports and to prevent the rise of teen gambling in the United States. Senator Bill Bradley gave a moving speech on the senate floor, endorsing the Act, which swayed his

fellow senators to pass this defective regulation. Emotional speeches, however, are not the best way to run a country, and although this law initially looks like a winner, it is actually an air ball.

Bradley feared the NFL’s and NBA’s regulatory defenses would be inadequate to prevent the temptations of gambling. The result, he worried, would be an erosion of public confidence as fans watched players shave points or take dives to cash in on their game wagers.<sup>2</sup> Because sports marketing targets teenagers, with the NFL spending close to \$100 million between 1998 and 2007 on youth football alone, youth would accept players’ self-serving bad conduct as acceptable.<sup>3</sup> Gambling could create a message that sports were now really about winning money. However, the NFL wanted the focus to be on the core values that come with competitive sportsmanship and keep the spotlight on its “unique leadership role in society.”<sup>4</sup> Knute Rockne, the famous University of Notre Dame coach, once said, “One man practicing sportsmanship is far better than a hundred teaching it.”

While the Act led the fight to stop sports gambling, it had one real problem: it did not prevent *all* states from reaping the benefits of gambling. The law did not shackle Las Vegas and New Jersey, so they raked in the profits, while the mention of “purity” and “sportsmanship” disappeared from the lips of Congress. In *iMEGA v. Holder*, several unions associated with gambling attempted to overturn the Act based on it being a violation of the Commerce Clause.<sup>5</sup> In that case, the leagues failed to establish a nexus between legalized sports gambling and actual harm. The unions were not alone as the federal government’s involvement in state gambling was also starting to raise Tenth Amendment red flags.

Still, this 10th Amendment defense seems to be weakening as *NCAA v. Christie* began to climb its way towards the Supreme Court. In *Christie*, New Jersey Governor Chris Christie, two state legislators, and a horse racing industry group are asking the Court to overturn a lower court decision,<sup>6</sup> thereby striking down the Garden State’s sports wagering law.<sup>7</sup> However, the problems with the Act go beyond just the legal issues because it has “lost its relevancy in today’s age of Internet gambling.”<sup>8</sup> With the web connecting gamblers to

sporting websites across the globe, why should the United States find it necessary to put a fence around Las Vegas and New Jersey at the taxpayer's expense?

The obsolete ideas built into the Act must be sacked like a quarterback past his prime. Las Vegas has long ago lifted the ban on betting on local sports such as University of Nevada, Las Vegas ("UNLV") games. Even though these local teams are in the shadow of the Vegas gaming hub without the protection of a gambling ban, no evil corruption of local games exists. The Act was created twenty-five years ago, and since then, the internet has changed the reach and scope of gambling. Presently, it is rare to find an office that does not have a NCAA Final Four bracket. Although, not officially gambling, these unregulated brackets represent the state's lost gambling and tax profits. Professional sports must also consider local custom as they expand globally. As the NFL branches overseas, it must realize that part of European society already gambles inside the stadium. The United States sports franchises would increase profits if they followed the lead of their European counterparts. Aside from being outdated, the Act hindered interstate commerce and created a fear of corruption that in fact did not exist. It is time for this law to cash out. ○

#### References:

- <sup>1</sup> Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992).
- <sup>2</sup> Senator Bill Bradley (D-NJ), The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474, 2 Seton Hall J. Sport L. 5, 6 (1992).
- <sup>3</sup> Patrick Hruby, Vice Sports, How the NFL Brands Itself in American Classrooms, VICE SPORTS (Feb. 17, 2015) [https://sports.vice.com/en\\_us/article/how-the-nfl-brands-itself-in-american-classrooms](https://sports.vice.com/en_us/article/how-the-nfl-brands-itself-in-american-classrooms).
- <sup>4</sup> League Employment, NFL, (Last visited January 30, 2017), <http://www.nfl.com/careers/values>.
- <sup>5</sup> Nicholas Burkhart & Dylan Welsh, The Legalization of Sports Gambling: An Irreparable Harm or the Beginning of Unprecedented Growth?, 21 Sports Law. J. 145, 166 (2014).
- <sup>6</sup> Christie v. Nat'l Collegiate Athletic Ass'n, 134 S. Ct. 2866 (2014) (petition for cert. denied).
- <sup>7</sup> Supreme Court Asked to Uphold New Jersey Sports Gambling Law, 26 Westlaw Journal Entertainment Industry 1 (2014).
- <sup>8</sup> Dylan Oliver Malagrino, Off the Board: NCAA v. Christie Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act, 118 Penn St. L. Rev. 375, 377 (2013).

# ANTI-POLICE TODAY, ANTI-LAW TOMORROW?

By Stephanie Williams



You have been living under a rock for the past few years if you haven't heard of or experienced the recent surge of anti-law enforcement sentiments growing in various cities across the country. This movement of distrust poses an interesting question not only for the future respect of law enforcement, but also for the future respect of law itself.

Since the Enlightenment era there has been an ever increasing prevalence of self-definition and self-governance that has slowly ushered in a change to the moral landscapes in many western countries. Some of these changes, such as women's and civil rights, recognized the truths of human dignity and effectuated changes that reflected these truths. Subscribers to the anti-police sentiments argue that their position seeks to recognize the same inherent human dignity and that individuals should be free from racial profiling and unwarranted violence. Unfortunately, the recognition of this truth has transformed the mistakes of imperfect individuals into a condemnation of law enforcement generally.

At the heart of this movement is a distrust in those individuals charged with enforcing the law and maintaining the peace. Conversely, at the heart of many condemned actions taken by law enforcement is a distrust of citizens to remain peaceful and respectful of the officers and the law. This distrust does not stem from the concept or reality of law enforcement officers. It stems from the reality of the human condition: that man is imperfect, will make mistakes, and will act according to motives other than the good.

While the sentiments outwardly expressed target the distrust toward police, it is quite possible that these sentiments may shift their focus to a general distrust of the law in the future. Already individuals are targeting the codes and rules of law enforcement officers as the source of the officer's misconduct and, thus, the problem that needs to be fixed.<sup>1</sup> But these codes and rules, just like every other law, were written by imperfect individuals attempting to give their citizens guidance for a good, prolific, and peaceful society. If discontented portions of the population are now blaming codes and rules for effects caused by the human condition, it is an easy task to blame the law for a whole plethora of other problems.

One reaction to this reality has been to do away with law altogether and return to individuals the rights which they surrendered to government when they entered into society. However, many philosophers and social thinkers from Aquinas



to Hans Kelson to Robert George, have condemned this idea. Humans, as rational animals, are guided by the natural law toward what is good and away from what is contrary to the good.<sup>2</sup> Even so, individuals are not able to determine how they should act in all circumstances by reason alone and thus need law to inform their actions in practical matters.<sup>3</sup> If we were to abandon written law altogether, society would still operate according to laws but it would be less efficient and more dangerous.

The solution to the problems identified in anti-law enforcement sentiments should address the laws and codes that govern citizens and civil servants. This is precisely what the legislature and, by extension, voters are tasked with in our society. But the true solution to the problems causing such distrust between law enforcement and citizens begins with each individual. Laws do not exist in a vacuum; they exist for the good of the people who are subject to them. A law can be nothing more than what its authors make it. Ultimately what makes law work and succeed is each individual who decides to honor the just laws in pursuit of the good. Until each individual, law enforcement and citizens alike, chooses to pursue the good and allow others to do the same, no revision of laws or codes will fix the problems of society. ○

#### References:

- <sup>1</sup> Unlawful assembly as Social Control, 64 UCLA L. Rev. 2, 5 (2016).
- <sup>2</sup> Kelsen and Aquinas on "The Natural-Law Doctrine", 75 Notre Dame L. Rev. 1625, 1627 (2000).
- <sup>3</sup> Id.

## INVOKING THE RULE OF SEQUESTRATION: In the Courtroom? Yes. In a Deposition? Maybe.

By Ryan Murphy



In a breach of contract claim, the plaintiff's attorney decides to take a defendant's deposition regarding the formation of a contract. Upon arrival, the attorney is confronted with an adverse, non-party, material witness to the contract's creation wanting to sit in on the defendant's deposition. Under Florida law, what options

are at the attorney's disposal to ensure that the material witness's future testimony will not be colored by what is heard and seen during the defendant's deposition?

Generally, "the rule of witness sequestration is designed to help ensure a fair trial by avoiding the coloring of a witness's testimony."<sup>4</sup> A motion for sequestration is known as "invoking the rule." Logically, this concept should apply

to pre-trial proceedings. However, few sources of law exist pertaining to this general principle's practical application in depositions when a protective order is not obtained. Florida Statute § 90.616 states that "at the request of a party the court shall order . . . witnesses excluded from a proceeding so they cannot hear the testimony of other witnesses."<sup>2</sup> The statute does not define "proceeding," adding a further lack of clarity. Interestingly, "the burden is on the party seeking to avoid sequestration of a witness to demonstrate why the witness is essential"<sup>3</sup> while the burden to obtain a protective order from the court (precluding a party's presence during discovery) is on the movant.<sup>4</sup> However, invoking the rule at a deposition is peculiar since a judge is generally not available during a deposition to rule on the request, unlike the ease of obtaining a ruling in the courtroom. This leaves the attorney with decisions: reschedule the deposition pending a court order of sequestration, proceed with the deposition knowing the resulting prejudice is incapable of being remedied on appeal, or invoke the rule ad hoc and cross their fingers that opposing counsel complies. Unfortunately, this is a bleak array of options.

The few cases that have addressed this issue are inapposite. In *Dardashti*, the court ordered the sequestration of a husband and wife during their depositions on remand because the Florida Supreme Court expects exclusion upon request and this should apply to depositions. The court held:

[i]t is not enough to suppose that the average husband and wife will have long since dove-tailed their versions of the facts so that no prejudice can result. This is so because they can have little advance warning during depositions of unexpected and oblique questions requiring instantaneous response. To permit the one to sit and absorb the answers of the other . . . facilitates the very coloring of a witness's testimony frowned upon by our Supreme Court.<sup>5</sup>

Conversely, in *Smith*, the plaintiff sued a physician and a hospital for negligence.<sup>6</sup> The plaintiff's attorney began the deposition of the physician but noticed a non-party, resident physician was also present. The attorney invoked the rule and asked the resident physician to leave the room. The defendant's attorney refused to comply. Unlike *Dardashti*, the *Smith* court held that the unwritten rule that a witness must be sequestered at trial did not apply to depositions and can only be accomplished through a motion for a protective order.<sup>7</sup> These cases are difficult to reconcile and leave attorneys without guidance on a critical discovery issue.

Looking to federal jurisdictions, the law remains inconsistent. Some federal district courts apply a similar federal rule of sequestration<sup>8</sup> to depositions absent a court order.<sup>9</sup> Conversely, other federal courts hold that the federal rule "does not apply to depositions."<sup>10</sup>

Since the material consequences of a sequestration

denial are difficult to quantify and given the trial court's broad discretion,<sup>11</sup> it is not a viable appeal. As a result, it is unlikely that the Florida Supreme Court will offer an opinion. Therefore, the sure option is to prevent the possible procedural dispute by obtaining a protective order in advance of the deposition by meeting the burden imposed by Rule 1.280(c).<sup>12</sup> This, of course, requires an attorney to somehow predict when an adverse, material witness is likely to sit in on a deposition. However, if the witness's arrival is a surprise and there is an inability to seek the judge's ruling on sequestration during the deposition, the result is essentially a procedural deadlock.

For the defendant in the forgoing hypothetical, refusing the plaintiff's request to invoke the rule will give them the benefit of colored witness testimony in addition to creating an intimidating deposition environment for plaintiff's attorney. However, the defendant does so at the peril of upsetting the judge for such prejudicial tactics.

Conversely, the plaintiff may feel they cannot meet the burden of a protective order or delaying the deposition pending a court order may be costly or impossible due to discovery deadlines. Accordingly, invoking the rule and taking the chance that opposing counsel or a judge on the phone would agree would be beneficial. However, should they refuse, proceeding with the deposition puts the plaintiff's case at a strategic disadvantage against consistent witness testimony. Therefore, like most litigation decisions, invoking the rule in a deposition absent a protective order is a tactical one without a predictable outcome. ○

#### References:

- <sup>1</sup> *Booker v. State* 730 So. 2d 1079, 1094-95 (Fla. 2000).
- <sup>2</sup> Fla. Stat. Ann. § 90.616 (2016)(emphasis added).
- <sup>3</sup> *Hernandez v. State*, 4 So. 3d 642, 663 (Fla. 2009).
- <sup>4</sup> Fla. R. Civ. P. 1.280 (2016).
- <sup>5</sup> *Dardashti v. Singer*, 407 So. 2d 1098, 1100 (Fla 4th Dist. Ct. App. 1982).
- <sup>6</sup> *Smith v. S. Baptist Hosp. of Florida, Inc.* So. 2d 1115, 1116 (Fla 1st Dist. Ct. App. 1990).
- <sup>7</sup> *Id.* at 1117-18.
- <sup>8</sup> Fed. R. Evid. 615 (2016).
- <sup>9</sup> *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453 (M.D. Ga. 1987) (citing *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 567 (N.D. Ga. 1979)).
- <sup>10</sup> *Stoyanov v. Mabus*, 126 F. Supp. 3d 531, 552 (D. Md. 2015).
- <sup>11</sup> *Smith*, 564 So. 2d at 1118.
- <sup>12</sup> Fla. R. Civ. P. 1.280 (2016).

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