

Criminal Justice Section Newsletter

Volume 31, No. 3: Spring 2023

Spring Meeting Highlights

The ABA Criminal Justice Section convened its 2023 Spring Meeting on April 20-22 in Memphis, Tennessee, featuring the annual Spring Institute with CLE programs, and holding committee and council meetings.

The theme of this year's Spring Institute was "Memphis: At the Intersection of Civil Rights and Criminal Justice." Plenary sessions featured "Traction from Tragedy- Police Accountability as a Whole of Society Approach" and "Current Trends and New Developments Where Criminal Issues Intersect with Civil Issues."

Breakout sessions included:

- Voter Suppression/Voter Fraud Criminalizing the Voting Rights of People with Criminal Convictions;
- Coming to Grips with Broken Windows Theory: A Closer Look;
- Addressing the Criminalization of Gender-Affirming Care for Transgender Youth;
- Youth Justice: Ensuring Meaningful Reentry and Reintegration.



Global White Collar Crime Institute in Argentina

This year's Global White Collar Crime Institute returned to South America (after São Paulo, Brazil in 2017) and took place in Buenos Aires, Argentina, during March 30-31. The reception was held at the Bosch Palace, the residence of the United States Ambassador to Argentina.

Plenary sessions included:

- Meet the Enforcers;
- A Comparative Examination of Sentencing in White Collar Cases;
- Money Laundering, Asset Recovery and Crypto-Currencies;
- Internal Investigations: Global Cooperation and Resolution Considerations;
- Procedural and Structural Differences Between Jurisdictions;
- Global Anti-Corruption Trends.



White Collar Crime Institute in Miami

The 38th National White Collar Crime Institute was held in Miami, Florida on March 1-3 and drew a record attendance. The program included several “ethics” and “skills” sessions to satisfy the CLE requirements of all state bars. The much-acclaimed panels of U.S. District Judges, general counsel of leading corporations, and of the Directors of Enforcement of the Securities and Exchange Commission and the Commodity Futures Trading Commission, as well as senior representatives of the U.S. Department of Justice Criminal Division returned this year.

U.S. Deputy Attorney General Lisa O. Monaco gave the annual E. Lawrence Barcella Memorial Address. Women in White Collar Luncheon featured Camille Vasquez, a partner at Brown & Rudnick LLP and the counsel for Johnny Depp during the Depp v. Heard trial.



Midyear Meeting

The 2023 CJS Midyear Meeting took place on February 1-3 in New Orleans, Louisiana, featuring following CLE programs:

- Sending Children to Angola Prison Death Row: Implications for Families, Justice, & Reform;
- An Extraordinary Program on Extraordinary Writs: What Everyone Needs to Know;
- What Can the On Screen Sherlock Holmes Teach Us About Brilliant Inferences Versus Implicit and Explicit Biases?;
- Extending Justice II: Strategies to Increase Inclusion and Reduce Bias (A Focus on Gender);
- The State of Criminal Justice 2022: The Authors Speak.

CJS Award Winners

In addition to Mark E. Wojcik, Professor at the University of Illinois Chicago Law School (recipient of the 2022 **Raeder-Taslitz Award**) and Ellen C. Yaroshefsky, Professor at the Hofstra University School of Law (recipient of the 2022 **Charles English Award**), the following have been awarded the rest of the 2022 CJS awards:

- **The Frank Carrington Crime Victim Attorney Award** – Seema Gajwani, Chief, Restorative Justice Program Section, DC Attorney General’s Office;
- **The Livingston Hall Juvenile Justice Award** – Dr. Aleksandra Chauhan, Juvenile Defender Advocate, South Carolina Commission on Indigent Defense;
- **The Curtin-Maleng Minister of Justice Award** – Ereik Barron, U.S. Attorney for the District of Maryland, Circuit Court for Baltimore City, and Andrew H. Warren, State Attorney, Florida 13th Judicial Circuit, Hillsborough County.

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Legal Education Police Practices Consortium News

The ABA Legal Education Police Practices Consortium has been hard at work this spring, planting seeds for the rest of the year and beyond. The Spring Consortium Fellowship cohort had 41 students, from 28 law schools, representing 18 states and the District of Columbia. Students this semester undertook a variety of different research initiatives within their local jurisdictions including but not limited to:

- Investigating the public availability of policing data across an identified state
- Developing resources for citizens on their legal rights during police interactions and following arrest
- Examining hiring practices within local police departments to gauge diversity of new recruits and prevent recruitment of individuals with past or current association with violent extremist organizations
- Assessing police officer sentiments towards body worn camera policies
- Analysis of police department budgets and the impact on community trust and confidence
- Review of police technologies, such as Shotspotter and facial recognition technologies
- Comparative analysis and multi-state survey of police duty to intervene laws.

Fellows will conclude their semester at the end of April 2023 with Fall fellows anticipated to begin in August.

The Consortium has also been working with Lincoln Memorial University in the delivery of their Police Law, Policy, and Practices Course. This 2-credit course brings together students

with law enforcement to discuss a variety of issues related to policing and the law in an interactive manner, that emphasizes respectful dialogue and bilateral information sharing. Offered via Zoom, the virtual platform ensures officers from across the country can be involved with limited cost implication for the school or department (apart from the officer's time). It also allows the deployment of breakout rooms for students and the officers to respond to discussion prompts, ensuring more direct engagement between the two. The Consortium is currently investigating how this course might be expanded to promote the involvement of students from additional member schools.

Finally, the Consortium website (abalegaledpoliceconsortium.org) continues to grow with access to policing data and policies from across our network as well as a database of law of the police scholars. For more information about the Consortium, email to LEPPC@americanbar.org.

Upcoming Events

CJS Annual Meeting: August 3-6, Denver, CO

Southeastern Regional White Collar Crime Institute: September 6-8, Braselton, GA

London White Collar Crime Institute: October 9-10, London, UK

CJS Fall Institute: November 2-3, Washington, DC

ABA/ABA Financial Crimes Enforcement Conference: November 28-30, National Harbor, MD

For more info on CJS programs, see ambar.org/cjsevents.

CALL FOR NOMINATIONS: CJS AWARDS 2023

April 1 - July 31, 2023

Submit to CJSAwards@americanbar.org

The Charles R. English Award: For judges, prosecutors, the defense bar, academics, and other attorneys who are members of the American Bar Association Criminal Justice Section and have distinguished themselves by their work in the field of criminal justice.

The Frank Carrington Crime Victim Attorney Award: Awardees are attorneys or legal service providers (including organizations) who have either directly represented specific victims in criminal, juvenile, or appellate courts or who have worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system.

The Livingston Hall Juvenile Justice Award: For an active member of the bar who devotes a significant portion of his or her legal practice to youth and children, and is making positive contributions to the field both in and outside the courtroom.

The Curtin-Maleng Minister of Justice Award: The award is bestowed on a prosecutor who embodies the principles enunciated in the ABA Standards for Criminal Justice, Prosecution Function, particularly that "the Duty of the prosecutor is to seek justice, not merely to convict." Originally known as the Norm Maleng award, it was renamed the Curtin-Maleng Award in 2021.

The Raeder-Taslitz Award: This award is given to a law professor whose excellence in scholarship, teaching or community service has made a significant contribution to promoting public understanding of criminal justice, justice and fairness in the criminal justice system, or best practices on the part of lawyers and judges.

The Albert J. Krieger Champion of Liberty Award: This award recognizes defense attorneys who embody the principles enunciated in the ABA Standards for Criminal Justice, Defense Function.

Key Considerations for Corporate Compensation Arrangements in Light of DOJ Criminal Division Pilot Program Incentivizing Clawbacks¹

By Andrew S. Boutros, David N. Kelley,
Jay Schleppenbach and D. Brett Kohlhofer

As readers of this Newsletter are likely well aware, in March 2023 Deputy Attorney General (“DAG”) Lisa Monaco while speaking at the ABA Criminal Justice Section 38th National Institute on White Collar Crime announced a Compensation Incentives and Clawbacks Pilot Program (“Pilot Program”) at the Criminal Division (“Division”).² The following day, Assistant Attorney General (“AAG”) Kenneth A. Polite, Jr. of the Division, also delivered remarks at the Institute about the Pilot Program,³ at which point the Division published a short memorandum describing how the Program will operate.⁴ This article provides brief background on the Pilot Program before highlighting a series of important considerations for companies and those who advise them in relation to this Program.

The Compensation Incentives and Clawbacks Pilot Program

Effective March 15, 2023, the new Pilot Program has two parts.

The first part requires that every corporate resolution entered into by the Division “shall include a requirement that the resolving company implement compliance criteria in its compensation and bonus system.” Such criteria may include (1) providing incentives to those employees who demonstrate and promote “full commitment to compliance processes;” (2) mandatory withholding of bonuses for employees who fail to meet “compliance performance requirements;” and (3) disciplinary measures for employees who violate applicable law and those who “both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct” (“Responsible Employees”). The Program gives prosecutors the discretion to “fashion the appropriate requirements” based on the facts of the case, but also directs them to “be mindful of, and afford due consideration to,” how the company’s existing compensation program is structured. Resolving companies will also be required to report annually to the Division about their compensation and bonus systems during the term of any resolution.

The Program’s second component permits fine reductions for certain eligible companies in instances where the company attempts to recover compensation from Responsible Employees. The amount of the corporate fine reduction is commensurate with the compensation the company successfully recoups from these Responsible Employees. To be eligible, a company must fully cooperate, timely and appropriately remediate, and demonstrate that it has implemented a program to recoup compensation from Responsible Employees. Related to the latter point, at the time of the criminal resolution, the company must have “in good faith initiated the process to recoup such compensation.”

Companies that take advantage of this Pilot Program pay a penalty equal to (a) the penalty they otherwise incurred under the resolution, less (b) the compensation they are attempting to claw back. If a company succeeds in recouping the full compensation amount, it can keep those proceeds and need not pay the government that part of the penalty. If it fails in recouping 100% of the deferred penalty amount by the end of the resolution term, the company will owe a deferred penalty equal to the portion it did not recover. However, under these latter circumstances, prosecutors have the discretion to credit companies up to 25% of the compensation they “in good faith” tried to claw back, as determined in the Division’s “sole discretion.” Considerations relevant to the that discretion may include whether a company incurred “significant litigation costs” attempting to recover the compensation, or “can demonstrate” that it is “highly likely” to recover the compensation “shortly after the end of the resolution term.”

Key Considerations

As DAG Monaco noted when announcing the Pilot Program, DOJ “intend[s] this program to encourage companies who do not already factor compliance into compensation to retool their programs.” DOJ’s calculus also is that “these policies empower general counsels and compliance officers to make the case to company management” that proactively implementing compliance metrics and clawback components into compensation arrangements “is money well spent.” Whether this initiative will, in practice, lead to further adoption of—and then actual attempts to utilize—clawback provisions in employment and other agreements remains to be seen.

Under the Pilot Program, the most tangible advantage to having clawback arrangements in place early is that the company is positioned to take advantage of potential penalty reductions (for pursuing compensation clawbacks from Responsible Employees) should a criminal resolution with a fine component become necessary in the future. Given DOJ’s focus on employee compensation, there may also be a more general benefit to having these clawback arrangements in place to demonstrate the effectiveness of a company’s compliance program.

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This is especially so for companies operating in environments that present a meaningful enforcement risk.

Although meeting and exceeding DOJ expectations about leverage employee compensation to promote compliance is unquestionably a positive, there are, however, several considerations on the other side of the ledger. For example:

The Jury is Out: To be sure, DOJ certainly is encouraging—indeed, pushing—companies to link compensation to compliance, even if that means adopting clawback arrangements with employees and executives. But the Pilot Program has just been rolled out and how it will work in practice is still quite uncertain.

Meaning of “Good Faith”: The Division’s policy on the Pilot Program twice incorporates a “good faith” standard, and it remains to be seen how the Division will exercise its sole discretion to apply that standard. As a starting point, it is unclear whether “in good faith initiat[ing] the process to recoup such compensation” will necessarily mean commencing litigation. Importantly, under the Pilot Program, although litigation costs are a factor for federal prosecutors to consider when deciding whether to award a 25% credit for non-successful recoupments, litigation costs are not part of what may be deferred from the actual penalty. Thus, it is worth considering that clawback litigation has historically proven quite expensive, and in many cases its costs can exceed what the company may hope to recover.

Moral Hazards: Beyond that, if litigation is required, there is concern that given DOJ’s position on the need for companies to claw back employee compensation, companies may feel compelled to engage in “scorched earth litigation” against Responsible Employees to recoup the maximum possible amounts of total compensation. That may be true even when the cost to litigate exceeds the value of the recoupment, thereby making settlement the most prudent outcome, especially when the company factors the time, cost, resources, distraction, bad press, and internal morale issues that may accompany continued litigation.

Litigation Time Horizon: Companies should also consider how likely it is that clawback litigations will be resolved within the term of the resolution. In cases where the company is unable to recoup 100% of the compensation at issue before the resolution period expires, the company can at most hope to receive a 25% credit toward its penalty—subject to the Division’s exclusive discretion.

Inability to Pay: Also, the Pilot Program does not speak to what a company should do when the Responsible Employee from whom the company seeks to claw back compensation and bonuses is unable to return the money in question. DOJ does not speak to whether it expects the company to proceed with litigation to obtain a judgment, even in the face of a Re-

sponsible Employee’s inability to pay. In addition, the cost of litigation cuts in both directions: The same way that the costs to litigate clawbacks can be expensive for companies, they can be equally—if not more—expensive for individuals. Thus, even if a Responsible Employee ensnared in litigation could have returned (or been willing to return) some compensation to the company, prolonged litigation could actually consume that employee’s personal funds, leaving the company in a net worse position from both a cost and recovery standpoint than had the company settled early on.

Conflicts with Corporate Charters, Bylaws, and State Law: It is commonplace for most (if not, nearly all) companies to authorize advancement of fees and indemnification for its officers and other key executives in accordance with applicable state law, say, the law where the corporation is chartered. Delaware law, for example, authorizes advancement of fees and indemnification for officers and key executives in the event of “any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative” so long as that “person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person’s conduct was unlawful.”⁵ In clawback litigations, which are actions or suits “by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation,” Delaware law states that a “corporation shall have power to indemnify [such] person” if the person “acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation[.]”⁶ But, a corporation’s option to provide indemnification evaporates—and becomes an obligation—when a “present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to [in this paragraph] or in defense of any claim, issue or matter therein[.]”⁷

Thus, a company cooperating with DOJ while under criminal investigation might decide to pursue clawback litigation against an executive, whether to demonstrate its commitment to cooperate or to otherwise fall within the scope of the new Pilot Program. That company could even wait until it resolves its criminal case and admits liability to pursue such clawback litigation. But, a company’s admission of guilt (or responsibility) cannot be imputed to an individual. Indeed, there are plenty of examples where a company has admitted guilt (or responsibility) because of an employee’s (or group of employees’) actions, only for a jury to subsequently exonerate that/those employee(s)—or in some cases, for the DOJ to even drop charges against one or more of those employees. Thus, rather than assume clawback litigation is appropriate under all (or most) circumstances where a company resolves its criminal case short of litigation, whether by guilty plea, deferred pros-

education agreement, or non-prosecution agreement, companies (and their counsel) would do well to consider carefully and objectively whether when put to the ultimate test, the evidence of any particular executive's actions will convince a jury (or judge) of the executive's liability. Not doing so could mean not only an unsuccessful clawback litigation, but that the company "shall" pay that executive's "expenses (including attorneys' fees) actually and reasonably incurred . . . in connection therewith[.]"⁸ in addition to having to bear the costs of litigation it has incurred for itself.

Cost and Ability to Implement Companywide: Companies will also face the issue of whether it is practical to implement this type of change across the organization. This is especially so for multinational companies with employees and executives located all over the world and subject to the local employment laws of various foreign countries, whether located, say, in Europe, Asia, South America, or the Middle East. Indeed, reworking employment agreements—or trying to do so after an employee has already started work—could be prohibited by the laws of a particular foreign jurisdiction. Were that so, companies could find themselves "between a rock and a hard place" in terms of trying to proactively (or reactively) please DOJ while at the same time adhering to the foreign law dictating the employment relationship between the employee and the company. Indeed, the issue is complicated all the more where employees are already working under existing employment agreements and making such changes would require renegotiating several (or many) different employment contracts all over the world.

Ability to Retain and Recruit: It is unclear what DOJ might expect a company to do if an employee refuses to agree to modify an existing employment agreement. An employee might argue that a company breaches an agreement if it unilaterally tries to change it or otherwise places enormous pressure on an employee to agree to a modification. Terminating an employee who refuses to comply may well lead to its own litigation. In the alternative, insisting on modifying an employment agreement might well cause a key employee to resign. And, if nothing else, companies also will have to consider whether requiring clawback provisions in employee contracts makes it more difficult to attract talent at key positions, especially in a competitive jobs market.

By design, the Pilot Program certainly presents a planning opportunity for companies to consider employee compensation changes. Compliance and in-house legal professionals (and the attorneys who advise them) should take this opportunity to evaluate the feasibility and appropriateness of a clawback element to their company compensation programs. Compliance and legal stakeholders should also sensitize management to the current DOJ's continued focus on individual accountability in the event compliance issues develop down the road. There is certainly no one-size-fits-all approach to implementing DOJ's policy initiative in this space; indeed, solving one issue might well create a new one, especially for companies with pre-ex-

isting (and heavily negotiated) executive contracts already in place. Thus, the topic of encouraging—and, in the case of corporate criminal resolutions, requiring—companies to implement compliance criteria in their compensation and bonus systems, to and including adding potential clawback provisions in employment agreements and pursuing clawback litigation against Responsible Employees, is exceedingly complex with various moving parts that require careful consideration and analysis.

Endnotes

1. This article is adapted from Andrew Boutros et al., *DOJ Criminal Division Announces Pilot Program Targeting Corporate Compensation Arrangements* (March 9, 2023), available at https://www.dechert.com/knowledge/onpoint/2023/3/doj-criminal-division-announces-pilot-program-targeting-corporat.html?utm_source=vulture&utm_medium=email&utm_campaign=onpoint.
2. Lisa Monaco, Deputy Attorney General, Remarks on White Collar Crime (Mar. 2, 2023), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.
3. Kenneth A. Polite, Jr., Assistant Attorney General, Remarks on White Collar Crime (Mar. 3, 2023), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national>.
4. The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks (Mar. 3, 2023), available at <https://www.justice.gov/opa/speech/file/1571906/download>.
5. 8 Del. C. § 145(a).
6. *Id.* § 145(b) (emphasis added).
7. *Id.* § 145(c)(1).
8. *Id.*

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- HIGHLIGHT AND REINFORCE POSITION AS A LEADER IN THE PROFESSION.



US Self-Defense Law Is Neither “Disappearing” Nor Exceptionally “Harsh”

By T. Markus Funk

The February 2020 murder of Ahmaud Arbery, the November 2021 Wisconsin trial of Kyle Rittenhouse, and the January 2023 shooting of a masked robber in a Houston taqueria predictably ignited media firestorms. Murder charges brought earlier this month against 73-year-old Arizona rancher George Alan Kelly after his January 30 “warning shots” allegedly killed 48-year-old Mexican trespassing migrant Gabriel Cuen-Buitimea near the U.S.-Mexico border only further fan these flames.

As these cases remind us, state laws concerning self-preservation continue to be among the criminal law’s most intuitive, controversial, and enduring topics for debate in the public square and halls of academia alike.

What is concerning about the legal commentariat’s steady drumbeat of analysis, however, is that the purportedly authoritative observers almost always get it wrong. Whereas those suspicious of self-defense laws (largely on the political left) regularly claim that U.S. state self-defense laws reflect an exceptional harshness and disregard for life, those in favor of more robust self-defense authorizations (largely on the political right) with equal confidence assert that self-defense is getting to diluted that it is “disappearing.”

First, let us examine the political left’s perspective. *The New York Times*, for example, offers that ever-expanding US self-defense law fails to “protect those who may be harmed by misjudgments and mistakes.” *Bloomberg*, in turn, observes that U.S. law encourages “citizens . . . to go on the offense,” and *New York Magazine* denounces the “anarchy latent in America’s . . . expansive self-defense rights” that create a “vast zone of permissible killing.” The clear picture being painted is of a law uniquely infused with a dangerous Wild West mindset, unconcerned with protecting life and reducing violence, and driven by a near-obsession with extreme individualism.

On the other hand, we have commentators on Fox who declare that “self-defense is becoming illegal.” According to the NRA, moreover, creeping limits on gun ownership foreshadow “a ban” on self-defense. These observers join prominent scholars like Robert Schopp in favoring deadly force to defend mere property and opposing safe retreat requirements.

Markus Funk is a former federal prosecutor (Chicago), now in private practice at Perkins Coie, who has taught criminal and comparative law.

The upshot of these polarities in perspective is that significant parts of the population now worry about callous lawmakers and courts who have announced “open season” on real and suspected lawbreakers. Their ideological opposites, on the other hand, fear that the right to self-defense is being so watered down by “creeping authoritarianism” that it is endangered.

As often happens with politicized discussions about matters of law, both sides miss the mark.

When compared to the laws of Germany and England, for example, U.S. self-defense law is—and historically has been—far more focused on overall violence prevention and protection of even fully criminal attackers than it gets credit for. While Germany permits deadly force to defend, say, a laptop or bicycle, in the U.S. deadly force to defend “mere property” has always been unlawful. (This is so notwithstanding Fox’s claims, made in support of rancher Kelly’s actions, that Arizona law “allows residents to shoot trespassers on their property”; neither the law in Arizona nor anywhere else in the US permits deadly force to prevent a simple trespass.)

And, unlike in England where the law gives even a grossly mistaken person a complete pass, in the U.S. a defender’s actions must always meet the key violence-reduction test of objective reasonableness.

In fact, even hot-button provisions like the “stand your ground” and “castle” doctrines that curtail retreat requirements are found in legally, politically, and culturally diverse countries from Argentina, Botswana, Canada, France, and Nigeria, to Ghana, Indonesia, Japan, Spain, and Sweden.

What we find, then, is that claims concerning U.S. self-defense law’s providing outsized leeway to violent impulses, though persistent, find little objective support.

Continued on page 9.

2023 GREENHALGH STUDENT WRITING COMPETITION

Topic:
 “What role do federal Constitution rights, such as the Fourth Amendment, as well as parallel state constitutional protections, play in protecting access to potential evidence?”

Deadline: July 31, 2023

WINNER WILL RECEIVE A \$2,500 CASH PRIZE

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 Criminal Justice Section

What's in a Word?

By Maggie A. Heim

Words have power, especially when they come from an authority figure like a judge, police officer, or prosecutor. To that end, courts have long recognized that using dehumanizing language to refer to someone accused of a crime can threaten their ability get a fair trial.

Now courts are turning a critical eye to the other side of the coin.¹ In the high-profile cases against Jason Van Dyke and Kobe Bryant, courts recognized that referring to one person as the victim throughout trial could risk the presumption of innocence due to the accused.

Victim as a Mixed Factual and Legal Assertion

The term victim is loaded with meaning and emotion. Recent years have seen studies into the connotations raised when the term is applied to survivors of sexual violence. The perceptions raised by the term impact both the survivors view of themselves and the assumptions of those who work with them.

In the context of a criminal trial, the term raises additional concerns. In most trials, there is little need to avoid the term because the parties agree about who was injured and the dispute centers on whether the government correctly identified the person who injured them.² Thus, there is no factual question to resolve about whether there was a victim or who the victim was.

However, in cases raising self-defense or consent, the factual dispute centers on which party is the victim or whether there was a victim at all. In such cases, the term is a both a factual assertion and a legal conclusion. It further communicates that the speaker believes the government's version of the facts. Thus, defense attorneys may remain aware of who is using the term in cases where it is a disputed factual matter.

The term can arise in witness testimony, in a prosecutor's questions or comments, or, most damaging, in a judge's comments or jury instructions. Each speaker adds its own potential for juror confusion.

Court Use

Judges embody the legal authority in jury trials. Jurors are expressly told that the judge decides the legal questions and

they decide the facts. This makes a judge's use of the term victim particularly risky in cases raising self-defense or consent.³ The judge's use of a legal term which assumes a disputed fact invades the province of the jury by effectively deciding a fact for them. Further, as the paragon of fairness in the courtroom, lay people may be hard pressed to ignore the implication that the judge believes the prosecution's witnesses.

Courts may unthinkingly use the term as a shorthand during rulings or in instructions to jurors.⁴ Both uses undermine the presumption of innocence by implying that the court itself agrees with the government's theory of the facts. This potential for error is easily avoided in jury charges by simply inserting proper names for the complainant or decedent. Overuse during rulings can be avoided by raising the sensitive nature of the term during pretrial motions and by requesting the use of proper names, complainant, decedent, or alleged victim.

Witness Use

It is the jury who decides which witnesses are believable. Witnesses themselves are not generally permitted to comment on whether they find each other credible, because this would invade the jury's domain. Thus, witnesses should not use the word victim in cases raising self-defense or consent.

When someone in the witness box uses the term, they effectively communicate that they believe the government's version of events.⁵ The harm is exacerbated when the complainant testifies. The jury's core task is resolving the credibility contest between the complainant and the accused. Thus, it is unfair for one side to present witnesses who imply that they believe the complainant's testimony.

This tends to arise most often when law enforcement witnesses testify. Historically, lay people tend to view police officers and detectives as experts and authority figures, so it is important that they not use words in the witness box that communicate their own credibility judgments. This would invite jurors to defer to the officers' credibility determinations rather than making their own.

A pretrial motion can limit use of the word victim in the witness box by requiring the use of proper names. Officers may be accustomed to using terms like victim and perpetrator as they are more easily remembered than specifics. But officers use their reports to refresh their memories as to dates and street names, so complainant name can be readily included as another important detail necessary to preserve the fairness of trial.

Prosecutor Use

Like witnesses, a prosecutor's use of the term victim improperly communicates the prosecutor's judgment on credibility.⁶ As

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the voice of the People, a prosecutor's words often carry significant weight before a jury. Thus, it is important that prosecutors are wary that their legitimate advocacy does not improperly undermine the presumption of innocence or the burden of proof.

The question of when a prosecutor should use the word victim permits a more nuanced answer since they are not expected to remain neutral at trial. However, prosecutors, like witnesses, cannot vouch for the credibility of witnesses. So their use of the term should not be without limits.

In opening statements, the parties are tasked with outlining what the evidence will show. As such, it is better for prosecutors to avoid the term victim given its mixed legal and factual significance. This will help avoid juror confusion in separating evidence from argument.

During questioning, the term is also better avoided to maintain clear lines between questioner, witness, and evidence. Further, if a prosecutor uses proper names, they can assist their witnesses in avoiding the term and the improper vouching implicit in its use by a witness.

Prosecutors reasonably expect wider latitude during closing arguments. At that point, jurors know that the evidence-portion of the trial is closed and that the lawyers are making arguments. Thus, jurors are more prepared to distinguish facts based on evidence from assertions made by someone whose job is to persuade.

Nonetheless, prosecutors still must be careful not to overuse the term. It is crucial that they do not use the term in a manner that communicates their personal beliefs on credibility. Additionally, they must be careful not to use the prestige of their office as a means of persuading jurors as to who was the victim. Finally, prosecutors must be careful not to invite conviction as a means of vindicating the victim. This type of argument is emotionally persuasive but it undermines the burden on the government to prove that they have properly identified the culprit and the facts of their conduct. This type of argument could improperly persuade a jury to convict based on which party is more injured rather than based on government's ability to disprove justification or consent.

Motions in Limine

Word choice is powerful. It carries subtleties that work on even an unconscious level. It is the vehicle for the metaphorical bell that cannot be unrung. Thus, in cases where the factual dispute is on whether a crime was committed or who was the victim, it is important to have the conversation about limiting use of the term victim before trial. In addition, courts and defense attorneys must remain vigilant in enforcing any pretrial limitations so jurors can fully distinguish between evidence and argument without being lulled into deferring to a judge or prosecutor's perceived opinion. This will ensure that

any convictions are obtained only after a fair trial where the government has fully met its burden.

Endnotes

1. *State v. Mundon*, 292 P.3d 205, 230 (Haw. 2012).
2. *People v. Zabrzanski*, 2023 IL App (1st) 220428-U, ¶¶ 77-78 (Ellis, J., concurring).
3. *Fritzing v. State*, 10 A.3d 603, 610 (Del. 2010).
4. *State v. Cortes*, 885 A.2d 153, 157 n. 4 (Conn. 2005).
5. *State v. Wigg*, 889 A.3d 233, 236-237 (Vt. 2005).
6. *State v. Sperou*, 442 P.3d 581, 587-594 (Or. 2019).

Articles Wanted for *The CJS Newsletter*

Practice Tips, Section/Committee News, Book Reviews
Submission Deadlines: Aug. 15, Dec. 15, April 15

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Funk, continued from page 7

Conversely, assertions that U.S. self-defense laws are so diluted that they are “disappearing” also do not square with reality. Judges and prosecutors apply the facts of a case to a state's self-defense enactments. These laws are very similar and have stood largely unchanged since the country's founding. Finding instances where prosecutors and courts might have gotten it wrong hardly signals the “end” of self-defense.

At the root of these misapprehensions there is an unfortunately common overreliance on our ideological priors. The political left erroneously conflates the *law* of self-defense with the *means* to exercise that right (namely, the proliferation of firearms due to supposedly lax gun laws). The political right, for its part, confuses the *law* with what it considers an overly limited *misapplication* of the law in particular cases.

But whatever the reason for such flawed understandings, common claims about U.S. self-defense law's “exceptionalism” and “inhumanity” on the one hand, and “erosion” and “weakening” on the other, crumble equally under closer scrutiny. Ultimately, such inaccurate caricatures distract us from engaging in a fully informed debate about the appropriate role of, and justification for, self-preferential deadly force in a modern, pluralistic society like ours.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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US Supreme Court Refuses to Weigh Ineffective Counsel Claims

- Plea deal negotiations central issue
- Government didn't offer a deal, appeals court said

The US Supreme Court won't look at when criminal defense attorneys are obligated to start negotiating a plea deal for their client. The justices refused Tuesday to hear a Florida man's claim that his attorney failed to adequately advise him on whether to plead guilty or go to trial for seven armed robberies he committed in 2010 at 18 and 19.

Quartavious Davis chose to plead not guilty and go to trial. He was convicted and sentenced to 159 years in prison for crimes he committed with other people. His co-defendants, however, pleaded guilty and got lighter sentences. Two people who participated in six of the robberies with Davis each got 32 years in prison, sentences which were then reduced to a little over 19 years.

Justice Ketanji Brown Jackson said she would have heard the case in a dissenting opinion joined by Sonia Sotomayor. Under the circumstances presented here, Jackson said it was exceedingly likely that Davis would have prevailed with his claim that he was prejudiced by his defense counsel's deficient performance.

Davis argued his attorney knew before his trial that the government planned to introduce evidence linking his cell phone to six of the seven robberies and that some of all of his co-defendants would be able to testify against him. The district court and the US Court of Appeals for the Eleventh Circuit denied his request to either vacate, correct, or set aside his sentence. The appeals court said Davis had not shown his attorney was ineffective and that he was prejudiced by his attorney's failure to negotiate a plea deal. Davis never alleged the government offered a plea deal, nor that he would have accepted one, the appeals court said. But Davis argues a defendant can establish prejudice absent a government offer.

The federal government countered that the Supreme Court has never recognized such a low standard for claims of ineffective assistance of counsel and shouldn't do it here. Jackson

said the case presented "a clear opportunity for the court to resolve a circuit split regarding whether having an actual plea offer is an indispensable prerequisite to making the necessary showing of prejudice."

The case is *Davis v. United States*, U.S., No. 22-5364. (Add Jackson dissent.)

DOJ Access to Justice Leader Makes Longevity a Paramount Concern

- Establishing permanency one of Rachel Rossi's "core goals"
- Rossi's office has boosted federal pro bono program

A re-booted Justice Department office that aims to expand legal services for people who can't afford lawyers is working to ensure its survival after being defunded under President Donald Trump. The Office for Access to Justice is reaching out to potential allies and spreading the word about its impact while seeing hope in legislation that would make the operation permanent, said Rachel Rossi, the office's director. "Longevity of this work is critical," Rossi said in an interview. "We can't be the office that is here four years and gone four years."

President Barack Obama's administration established the office in 2010 as part of an access-to-justice push. Under its first leader, Harvard Law School Professor Laurence Tribe, the office worked to increase funding for state access-to-court programs and filed legal briefs on asset seizure and right-to-counsel cases. Trump after his election effectively shuttered the office. Republicans criticized the operation as duplicating the work of legal aid groups and directing dollars to favored advocacy organizations. Soon after President Joe Biden's election in 2020, advocates with more than 45 groups, including the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, lobbied administration officials to revive the office.

Rossi, a former public defender, deputy associate attorney general and 2020 candidate for Los Angeles County District Attorney, has bulked up the office to 19 people, including seven attorneys. The office plans to hire eight more attorneys in the next two months. "We were blown away by the level of interest" when the office posted for attorney positions, Rossi said. "There was a starvation for this office after it shut down."

The office oversees the Legal Aid Interagency Roundtable, which brings together staff at about 30 federal agencies to work on legal aid and indigent defense issues. The office has

also re-launched Justice’s Language Access Working Group to help ensure non-English speakers can connect with department programs. Rossi’s team partnered with Justice’s Civil Rights Division to issue a statement of interest in a vehicle seizure case in Alabama.

The Biden administration moved the Federal Government Pro Bono program to the purview of Rossi’s office and added a second staff member to the unit. The pro bono program vets for conflicts of interest when government lawyers aim to take pro bono cases. Rossi said she would like to see Big Law firms increase pro bono efforts though noted that Justice must “walk a careful line” regarding partnerships with outside law firms it may litigate against.

State Visits

Those pleased to see the office resuscitated include lawyers around the country that seek to allow non-attorneys to own legal operations and compete with existing law firms.

In recent years, Arizona scrapped its rule mandating that only lawyers can own legal operations, and Utah set up a program to license and collect data on non-lawyer-owned legal service providers, to test whether consumers would benefit. At its core, reform proponents say, non-lawyer ownership is an access-to-justice issue because it allows consumers to benefit from lower prices and new technologies for basic legal services.

Rossi, who has been in her Access to Justice post since May, said she traveled to Utah in October to discuss that state’s regulatory experiment. She said she also plans to visit Arizona. Rossi said she isn’t yet prepared to take a position on whether her office is ready to actively support the efforts of those states and several others weighing whether to make similar rule changes.

“This is a big issue, it’s going to continue to be a big issue,” she said. Her office is in an information gathering role for now, Rossi said. Her office is trying to find the “best lane” for Justice and the administration to take as the issue moves forward, she said.

As for the Office for Access to Justice, Rossi said now is the time to make it work for the long haul. She expressed hope in a bill called the Office for Access to Justice Establishment Act, which would make the office permanent. “There’s a lot of support internally across the building but also externally to grow the work and to make it permanent,” she said.

ABA Outlines Choice-of-Law Issues for Multijurisdictional Ethics

- Litigation and non-litigation matters treated separately
- Factors to find predominant effect include client location

A lawyer won’t be disciplined if their conduct complies with the rules of a jurisdiction where the attorney reasonably believes their conduct will have the most predominant effect, the American Bar Association clarified on March 1, 2023. The ABA clarification, issued as a formal opinion, highlights that litigation and non-litigation matters are treated separately for the purposes of determining which disciplinary authorities govern certain alleged misconduct, and which rules are applicable.

Model Rule 8.5 in the ABA Model Rules of Professional Conduct dictates that, when there is a choice-of-law question in a case before a tribunal and a lawyer practices law in multiple jurisdictions, the lawyer must comply with the rules associated with the location of the tribunal. Conduct before a tribunal is considered under the disciplinary authority of the jurisdiction in which the tribunal sits, the association said.

In matters for which there is no litigation in effect, a lawyer’s conduct is determined by the location in which the predominant effect is felt, regardless of where the attorney practices law, the opinion says. The rule stands firm when applied to fee agreements, law firm ownership, reporting professional misconduct, confidential duties, and screening attorneys making lateral firm moves, according to the ABA’s Standing Committee on Ethics and Professional Responsibility.

“Factors to assess where that ‘predominant effect’ occurs may include the client’s location, where a transaction occurs, which jurisdiction’s substantive law applies to the transaction, the location of the lawyer’s principal office, where the lawyer is admitted, the location of the opposing party, and the jurisdiction with the greatest interest in the lawyer’s conduct,” according to the ABA.

Formal Opinion: [aboutblaw.com/6TG](https://www.americanbar.org/groups/professional_responsibility/publications/formal_opinion/decisions/formal_opinion_2023-01/)





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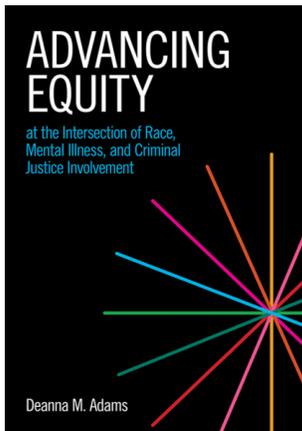
ABA Criminal Justice Section ... The Unified Voice of Criminal Justice

New Books

Advancing Equity at the Intersection of Race, Mental Illness, and Criminal Justice Involvement

By Deanna M. Adams

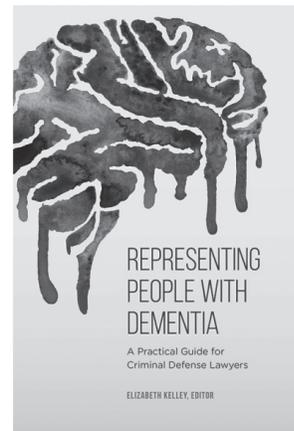
Mental illness and racial inequity are prevalent within the criminal justice system. This book provides key concepts necessary for attorneys to develop their own personal equity framework and approaches to their legal practice.



Representing People With Dementia: A Practical Guide for Criminal Defense Lawyers

Edited by Elizabeth Kelley

There is a growing recognition that people with dementia become involved with the criminal justice system. This book is a practical, easily digestible guide for lawyers working with this non-traditional type of criminal defendant.



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