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Criminal Justice Section

Criminal Justice Section Newsletter

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Report on the Implementation of the First Step Act

The American Bar Association Criminal Justice Section has released a report from its Task Force on the Implementation of the First Step Act (Chair Jim Felman) that includes three concerns surrounding the implementation of the criminal justice reform law that was enacted in 2018. The report has not been approved by the ABA's House of Delegates or the Board of Governors and therefore may not be construed as representing the policy of the American Bar Association.

The First Step Act (FSA) criminal justice reform bill was passed with bipartisan support from Congress and signed into law on Dec. 21, 2018, by former President Donald J. Trump. The bill, among other changes, reforms federal prisons and sentencing laws in order to reduce recidivism and decrease the federal inmate population. The Criminal Justice Section created the task force shortly after the bill's passage to monitor the progress of realizing the goals of the law. The task force includes a diverse cross section of defense attorneys, prosecutors, academics and judges.

The three concerns of the task force are:

The need for greater transparency. The data underlying the development and validation of the risk and needs assessment system should be disclosed. Why have some of the factors been so significantly changed in the January 2020 revision of Prisoner Assessment Tool Targeting Estimated Risk and Need (PATTERN)? When and how will we know whether PATTERN is resulting in racially disparate impacts? What additional suggestions of the Independent Review Committee have not yet been implemented?

The need for a needs assessment tool. Measuring risk is only the first step under the FSA; the critical next step is to evaluate the needs of prisoners and develop and provide programs and activities to meet those needs. By ignoring this piece, the DOJ is making the assumption that existing programming will reduce a person's risk of recidivism. But in reality, unless the person's criminogenic factors – those needs that relate to reoffending and that can be addressed through intervention – are addressed, there is no evidence to suggest that a person's risk to reoffend will actually be lowered. The DOJ's work must continue until it has completed a Needs Assessment Tool of the kind "Congress appears to have had in mind."

The removal of obstacles and parsimonious implementation choices. Numerous choices have been made in the implementation of the FSA that are unduly parsimonious and should be revisited. Too many prisoners are disqualified from eligibility. There are not enough eligible programs available, and the Bureau of Prisons' proposed time credits rule would dramatically reduce the benefits for participation in the programming and activities that are available. The PATTERN tool has been devised in a manner that is unduly parsimonious and unnecessarily eliminates a further swath of prisoners from having any early release benefits to show for their rehabilitative efforts.

The Task Force will continue its efforts to follow the implementation of the First Step Act, and is hopeful that the new administration will address the concerns expressed in its Report. The report can be viewed at www.americanbar.org/groups/criminal_justice/committees/taskforces.

A panel from the 2021 CJS Midyear Meeting program (see page 2).

Stay Connected ... With the CJS *via Facebook, Twitter, Instagram, LinkedIn, YouTube ... (hashtag #ABACJS)*

Midyear Meeting Highlights

The 2021 ABA Midyear Meeting was converted to a virtual meeting due to COVID-19. Many of CJS committees were able to meet during February 17-20 virtually and the Section cosponsored six resolutions that passed in the ABA House of Delegates. The CJS hosted three virtual programs:

- Data and Racial Justice: Using Data to Drive Change
- Military Justice – Learning and Leading Change in American Criminal Justice
- The Prosecution and Defense of Physicians in Civil and Criminal Opioid Death Cases

View the CJS Midyear programs on the CJS YouTube Channel at www.youtube.com/user/ABACriminalJustice.

Upcoming Events

Sept. 8-10: The Southeastern White Collar Crime Institute, Braselton, Georgia

Oct. 11-12: The London White Collar Crime Institute, London, the United Kingdom

Oct. 27-29: The National White Collar Crime Institute, Miami, Florida

(Scholarship intended to assist attorneys of diverse backgrounds in attending the Institute is available to members of the ABA and the Criminal Justice Section. The deadline for submissions is June 29.)

Nov. 19-20: Thirteenth Annual Fall Institute ("Community Corrections (Probation & Parole) Reform & Best Practices "), Washington, DC

For the complete list of CJS events, see www.ambar.org/cjsevents.

CJS Podcasts

The JustPod podcasts cover current issues in criminal justice reform, policy, and the Supreme Court. Additionally, the podcast discusses the work of the Section. The JustPod streams on iTunes, Spotify and Buzzsprout.

Recent episodes:

- Hate Crime: Challenges and Opportunity – featuring Jeff Tsai
- Violence Against Women – featuring Linda Seabrook, Rebecca Henry
- Trial Tips: Laying a Foundation – featuring Janet Levine
- Findings from the Women in Criminal Justice Task Force – featuring Maryam Ahranjani
- A Review of Policing – featuring Paul Henderson
- Congressional Investigations – featuring Trey Gowdy
- Questions of Ethics – featuring Bruce Green
- Cybercrimes – featuring Jason Gonzalez, Jody Westby, Matthew Esworthy
- A Review of Criminal Liability – featuring Joe Whitley

The ***Criminal Justice Section Newsletter*** is published three times a year (Fall, Winter, Spring). Articles and reports reflect the views of the individuals or committees that prepared them and do not necessarily represent the position of the American Bar Association, the Criminal Justice Section, or the editors of the Newsletter.

The American Bar Association
Criminal Justice Section

1050 Connecticut Avenue N.W.
Washington, DC 20036
Phone: (202) 662-1500
Fax: (202) 662-1501
Email: crimjustice@americanbar.org
Web: www.americanbar.org/crimjust

US Executive Order and Sanctions on International Criminal Court Personnel Revoked

On April 2, 2021, President Biden revoked Executive Order 13928 (issued June 2020), which had created a legal regime for travel and financial sanctions to be imposed against International Criminal Court (ICC) personnel, their family members, and civil and criminal penalties against those who support or assist sanctioned individuals. The Trump administration had designated and imposed sanctions on ICC Prosecutor Fatou Bensouda and another senior Office of the Prosecutor lawyer, Phakiso Mochochoko, in Sept. 2020. The administration had previously restricted Prosecutor Bensouda's visa to travel to the United States (other than in accordance with the UN headquarters agreement), which was also lifted as part of the repeal.

In a press statement, US Secretary of State Blinken said the revocation decisions "reflect [their] assessment that the measures adopted were inappropriate and ineffective," and that despite the administration's disagreement with certain International Criminal Court's investigations, US concerns "would be better addressed through engagement with all stakeholders in the ICC process rather than through the imposition of sanctions."

In a statement, ABA President Patricia Lee Refo welcomed the change, saying "[a]s the ABA said when the sanctions were first imposed, punitive measures, taken against persons performing their institutional duties under international law, weaken the rule of law globally."

Since 2019, three ABA Presidents have issued public statements urging the United States to refrain from and reverse threats and sanctions against legal professionals for their work pursuing accountability for atrocity crimes at the ICC, and urging all governments to respect and protect the Court's independence (*see* previous statements from Past ABA Presidents Bob Carlson and Judy Perry Martinez). In Aug. 2020, the ABA adopted policy (Res. 114) condemning such threats. As previously highlighted by President Refo, Executive Order 13928 and associated sanctions could have had potentially "severe consequences not only for ICC officials and staff, but also for the diverse groups of victims and legal professionals who contribute to the court's work." Members of the ICC Project's board of advisors wrote analyses and op eds in their personal capacities throughout 2020 highlighting the policy's damage to US leadership and interest in accountability for atrocity crimes.

The executive order and sanctions were also challenged in court in two separate suits by groups of law professors and civil society organizations whose work was limited by the sanctions regime (OSJI et al. v. Trump (S.D. N.Y. 2020) and Sadat et al. v. Trump (N.D. Cal. 2020)). In January 2021, a federal court granted a preliminary injunction preventing the government from enforcing civil and criminal penalties against the plaintiffs in *OSJI v. Trump*, finding the executive order was not narrowly tailored and enforcement was likely to violate plaintiffs' First Amendment free speech rights.

Secretary Blinken's statement also noted the review process ongoing at the ICC, calling it a "worthwhile effort." The Criminal Justice Section submitted comments in 2020 as part of the review process, which began with an extensive report by independent experts. A global group of civil society organizations (including the ICC Project) remains engaged in the review process, which is now led by ICC States Parties and the Court itself.

Part of the Atrocity Crimes Initiative, the International Criminal Court (ICC) Project is jointly supported by the ABA Center for Human Rights and Criminal Justice Section. For more information about the ICC Project, including ABA policy related to the ICC, visit www.aba-icc.org.

Navigating CARES Act: Legal, Compliance and Operational Risks

By Paul Peterson and Marcantonio Barnes

As borrowers and financial institutions advance further down the CARES Act loan program cycle, they should be aware of and prepare for impacts to the business as a result of legal and compliance risks from these programs. These risks are perhaps even more pronounced for entities that have not previously participated in either SBA or Treasury-sponsored loan program.

Throughout the CARES Act loan cycle, it is essential that these legal and compliance requirements are carefully considered and adhered to in order to help reduce operational risks to the business for both borrowers and lenders. These risks include denial of guarantees for lenders, rejection of forgiveness applications for borrowers, as well as litigation and sanctions from various state and federal oversight and enforcement authorities.

Strategy, Risk Advisory, and Application Concerns

As part of the CARES Act, the federal government required borrowers and lenders to make and adhere to certifications and statements made during loan origination, as well the complex web of interim and final rules, FAQs and developing case law on program administration and compliance. While the federal government has made significant progress in developing guidance for each of the many CARES Act loan programs, both borrowers and lenders face substantial risks in the coming months as they work to navigate both established and developing precedent for loan administration and compliance.

For example, as part of a broader effort to ensure program integrity, the federal government is requiring Paycheck Protection Program (PPP) loan recipients who are seeking loan forgiveness to submit documentation detailing how the PPP funds were spent. Businesses that received PPP loans in excess of $2 million will be subject to an increased level of scrutiny. More recently, the borrowers began receiving an SBA questionnaire that likely serves as a first step in their oversight evaluation process. The potential financial and operational risk of these events on forgiveness applications, loan guarantees and other parts of the CARES Act loan cycle cannot be understated.

For many entities, the CARES Act introduces compliance and regulatory considerations that were either not present or, if they existed, presented minimal or unknown risks to the business. Compliance and regulatory experts and resources can help evaluate, synthesize and manage the financial, legal and operational risks to the business resulting from a decision by either a borrower or lender to participate in one or more CARES Act loan programs. This applies to either making certifications to a CARES Act loan program or to borrower and lender due diligence processes and control environments throughout the loan cycle, including loan forgiveness applications and other post-closing loan administration requirements such as obtaining federal guarantees for each of these loans.

The guidelines and processes of Federal guarantees for PPP loans are still being developed. This delay in publishing these guidelines is creating an added level of concern amongst lenders. PPP compliance to reach the full guarantee status will be a top priority as lenders continue to work through post-closing loan activities. While we are not at the default stage yet, we are getting closer and PPP borrowers and lenders should prepare for enhanced scrutiny as the federal government starts processing PPP loan guarantees.

Litigation Concerns

The CARES Act establishes formal oversight through three regulatory bodies: (1) the Special Inspector General for Pandemic Recovery within the Department of the Treasury (DoT), (2) the Pandemic Response Accountability Committee, and (3) a Congressional Oversight Committee. Borrowers and lenders can also expect to see oversight from the Department of Justice (DOJ) as well as other regulatory bodies, such as the Security and Exchange Commissions' Division of Enforcement and the Office of the Attorney General of the SBA. Oversight will be focused on enforcing compliance with the various CARES Act programs, with a focus on fraud.

For example, the SBA has established, in some cases, unique administrative processes for appealing SBA loan review decisions, including decisions regarding borrower eligibility for a loan, a particular loan amount, or forgiveness in the amount determined by the lender. CARES Act loans potentially involve both administrative and judicial review issues that need to be carefully considered by both borrowers and lenders. The processes and procedures for appealing denials or other agency actions, such as questionnaires, require careful thought, experience and planning.

Administrative/Regulatory Audits and Investigations

From the inception of the CARES Act, the Justice Department and other government officials have communicated an intent to inquire into how CARES Act loan program funds, including PPP, are/were disbursed. The SBA has stated that it plans to audit all loans in excess of $2 million and will audit a sample

Paul Peterson is a partner in BDO USA, LLP Forensic Practice.
Marcantonio Barnes is a partner at Barnes & Thornburg, LLP.

of smaller loans. As previously mentioned, SBA issued its PPP Loan Necessity Questionnaire. While appearing to be a perfunctory administrative exercise, these and other similar communications present larger audit and investigation risks that should be carefully evaluated by both borrowers and lenders.

The SEC's Division of Enforcement has been focusing efforts on registered investment advisors and issuers that have received PPP funds. The SEC is scrutinizing the recipients' need and eligibility for federal assistance and representations made in loan applications, In addition, they are scrutinizing whether there are inconsistencies with public statements and disclosures prior to and after the receipt of PPP funds. Similar to the SBA, the SEC is also interested in and evaluating how companies are using PPP funds. We expect that the SEC will continue to actively focus resources to investigate and bring charges against companies and executives in carrying out its mission to protect the interests of investors.

In addition to government scrutiny being applied to PPP fund recipients, the SBA OIG's office will be assessing inappropriate lender activity and schemes as federal guarantees for PPP loans are processed. As borrower schemes continue to be unveiled on a daily-basis, the SBA's oversight body and other Federal CARES Act regulatory bodies will look closely at the level of care taken by lenders as these loans were being processed. If patterns are reveled identifying certain lenders having more "fraudulent" PPP loans than others, inquiries will likely follow that evaluate the practices of those lenders with greater scrutiny. These borrower schemes will come in all forms and may show lender culpability and involvement. A best practice at this stage would be for lenders to re-evaluate their PPP loan processing activities to understand risks and establish defensible positions.

Compliance/Risk Management Controls

It is essential for borrowers and lenders to understand and develop effective compliance programs and other proactive measures that test, evaluate and prepare the business for and against CARES Act audit and investigative inquiries by administrative and regulatory authorities.

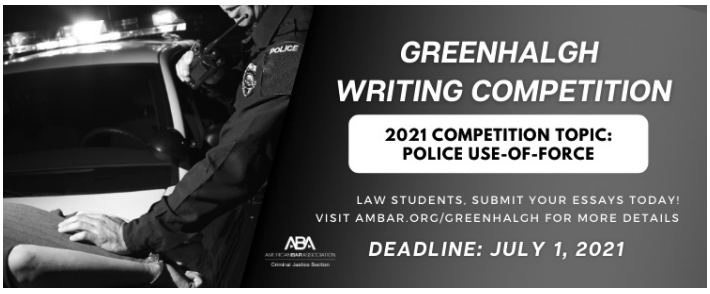
These proactive measures should be applied whether or not the PPP borrower is seeking loan forgiveness. We understand that the SBA will apply the same level of monitoring and oversight regardless if loan forgiveness is requested. Those companies choosing to forego loan forgiveness do not get a free pass and will still have to be prepared to demonstrate that guidelines were properly followed and borrower documents submitted during the PPP application process are accurate.

A measured, proactive approach is key to stay compliant with the many requirements of the various CARES Act facilities and stabilization programs. This approach includes managing the company's compliance and financial controls of these programs, implementing best practices, and reducing the risks of noncompliance associated with these relief funds. Overall, the costs involved in implementing a robust, proactive CARES Act compliance program and controls are less than a strategy of reacting unprepared to a government inquiry.

The PPP, Mainstreet loan programs, Payroll Support Program all have strict post-disbursement rules. These requirements cover areas such as use of funds, employee retention requirements, certifications, company compensation restrictions and financial reporting obligations. Important steps that should be considered include:

- Evaluating controls/processes, policies, and best practices such as rigorous board and management oversight and designating a CARES compliance officer or point person for all related matters to help maintain program compliance
- Working with company management to evaluate and remediate, if gaps are identified, the current control environment to meet contractual/compliance requirements
- Updating company management with risk management tactics, such as process improvement and control enhancement or design and monitor, evaluate and ensure compliance requirements are being met and raising significant issues to consider such as an entity's ability to continue as a going concern
- Performing analysis of the entity's environment to ensure ongoing compliance requirements are being satisfied
- Documenting the decision-making process that led to the filing of a loan application and the need for funds and tracking and documenting how PPP funds are spent
- Assessing and proposing enhancements to public company disclosure policies and controls particularly surrounding the impact of a PPP loan on an entity's operations and the circumstances that necessitated the loan in the first place to protect against the improper dissemination and use of material nonpublic information

Both borrowers and lenders should carefully evaluate their CARES Act legal and compliance risk strategies to develop an action plan that reduces operational and financial risks to the business.



Valuing Self-Defense

By T. Markus Funk, PhD

The argument that follows—one whose novelty may not be immediately apparent—is that it is high time that our legal culture comprehensively account for the bedrock values undergirding our state and federal U.S. self-defense laws. The reader may (reasonably) be surprised by this call to action: Surely our criminal justice system, often characterized as championing transparency and careful moral calibration, is already doing this? The truth is that our self-defense laws do not—and, in fact, never have—considered anything approaching the full spectrum of values that self-defense doctrine implicates. And, as with almost all things similarly reform-related, time is not our friend.

To level-set up front: It is no secret that our nation remains locked in a simmering debate about criminal justice reform. Signaling the reform movement's velocity, we already have witnessed the partial unwinding of some of the most purportedly fundamental precepts of criminal law. Among these proposed transformations gaining momentum, for example, are limits on the list of arrestable offenses and restrictions on pre-trial detention and qualified immunity.

Those challenging the status quo have unsurprisingly also focused attention on what Roman statesman Cicero aptly called the "first civil right," namely, the right of self-defense. Tying these strands together, the proposal made here is that developing a value-explicit analytical framework for addressing today's hot-button self-defense issues is a needed first step toward shoring up the justice system's battered moral credibility.

But first let's step back a bit to better understand the central claim being made here, namely, that "values matter." Few observers will dispute that inherently personal (and typically hidden, or at least undiscussed) value-judgments dictate how criminal law practitioners and the broader public evaluate the "justness" of self-defense laws and case-specific outcomes. And among the most contentious battlegrounds we find a set of core questions, including whether:

- a defender should be required to retreat or avoid conflict in the first place prior to deploying deadly self-preferential force;
- a threat to property alone can ever justify deadly force;
- a person's belief in the circumstances justifying defensive force must be reasonable; and
- there should be special rules for battered intimate partners who kill their abusers.

Bring up these admittedly rather indelicate topics at a dinner party and you are likely to witness a striking divergence of opinions, all traceable to differences in each guest's fundamental value-judgments and moral compasses.

Our history is in fact littered with cases beset with emotion and conflicting perspectives in the main held by otherwise thoughtful and good-hearted individuals. These include the high-profile recent tragedies involving Ahmaud Arbery, Breonna Taylor and Kenneth Walker, Diren Dede, Antonio DeJesus, Diego Ortiz, and Treyvon Martin. Everyone, whether legislator or layman, who has examined the facts of these cases will have a view, often passionately (and vocally) held, concerning how they should be resolved. And one thing these opinions always have in common is that they are based on deep and personal moral instincts.

Yet even those drafting our laws have, inexplicably, almost completely overlooked the wellspring for these outcome-determinative value judgments. More to the point, our law-givers rarely, if ever, advance their thinking beyond debatable, broad claims about "deterrence," the view that "all lives deserve protection," and (typically on the other side of the socio-political spectrum) notions about the primacy of the defender's "autonomy."

In contrast to, say, the German legal system, in the U.S. we never developed a shared, value-explicit language with which to engage in this vital dialogue. Instead, we simply defer to legislative drafters and politicians to tell us what the "rules" are. These law-makers, law-marketers, and their allies have relied on their own largely hidden normative judgments to advocate for, or against, "stand-your-ground," "castle doctrine," "duty to retreat," intimate partner carve-outs, and other contentious self-defense enactments.

By way of example, proponents of hard-edged self-defense laws, such as NRA President Marion Hammer, have expressed the perspective that today's laws "protect the criminals instead of victims and law-abiding citizens." In contrast, commentators like Professor Fiona Leverick contend that deadly force to ward off threatened rape or other serious bodily injury short of death should never be permitted. If only the choices were that simple.

Even the most thoughtful and scholarly law review articles on self-defense at best note that the justification is marked by a "clash" between the State's conflicting interest in protecting

T. Markus Funk, a former federal prosecutor (now in private practice), is an American Law Institute Fellow and co-founder of the ABA Criminal Justice Section's Global Anti-Corruption Committee.

both the defender's autonomy and bodily integrity and the attacker's right to life. It is true that such a largely obvious observation can appropriately initiate the analysis. But it does not help answer self-defense's more challenging questions. Without a more granular examination of the values/interests at issue, the goal of drawing an appropriate line between state power and individual use of force will remain out of reach.

Of course, identifying a problem is not the same thing as proposing a solution. Here, however, adjusting our present approach is not some impossible, pie-in-the-sky task. To the contrary, and as I have detailed elsewhere, all self-defense cases can be viewed through a value-explicit prism. Moral philosophy and contemporary legal theory, in fact, help us distill the values-as-decision-grounds most centrally at play.

Specifically, value-based interests such as (1) reducing overall societal violence by protecting the State's collective monopoly on force, (2) protecting the attacker's presumed individual right to life, (3) maintaining equal standing between people, (4) ensuring the primacy of the legal process, (5) reserving (as well as enhancing) the legitimacy of the legal order, along with (6) deterrence, and (7) protecting the defender provide the analytical building blocks for a more value-centric model of self-defense. Although one can reasonably disagree about the appropriate weighting of these values, and can reasonably believe that there are others that should be included, the position advanced here is that this list is a reasonable and defensible starting point that represents a far more nuanced approach than we have seen in any legislative proposal or scholarly commentary.

Putting theory into practice, consider the high-profile shooting of Ahmaud Arbery. Arbery, a 25yearold Black man, was chased by three armed white residents of a South Georgia neighborhood. One of the three pursuers' viral cellphone video shows the unarmed Arbery engage in what can reasonably be argued was lawful defensive conduct under Georgia law before Travis McMichael, armed with a shotgun, killed him.

Yet, Waycross Circuit District Attorney George E. Barnhill, who ultimately recused himself from the case, initially claimed the shooting was "perfectly legal" because the men were in "hot pursuit of a burglary suspect" and had "solid first-hand probable cause." Even media discussion about the case treated the claim that Arbery was exercising lawful self-defense as an afterthought, apparently overlooking that the possibility that, under Georgia law, the initial wrongful aggressor(s) (here, the men chasing Arbery) are precluded from claiming this justification.

Put in the context of our value-centric discussion, we must ask why legal and lay commentators, much like the politicians, have completely overlooked the central value-base questions. These questions include whether:

- Arbery's pursuers were improperly asserting a right to use force when the police were a viable alternative;
- permitting the pursuers/aggressors to exercise force in such circumstances threatens to diminish the law's moral authority and credibility; or
- such claimed "hot pursuit" authorization weakens the law's deterrent impact and ability to ensure the equal standing among people?

Perhaps there is a ready answer: Such a broad array of implicated values has never been considered by legislators making the laws (and the courts issuing jury instructions after the laws are on the books). Instead, what we have are blinkered public expressions in favor of purported "law and order," on the one hand, and blanket claims about the importance of equally protecting all life, on the other.

Stated bluntly, we need to rethink our approach to self-defense. Fundamental fairness, along with common sense, require us to take a closer and more democratic and transparent look at what constitutes "just outcomes." It is no overstatement to say that this is a precondition to a society capable of engaging in a more fully-informed discussion about procedural fairness and due process (not to mention appropriate limits on state power).

Today we stand at a crossroads, where in many parts of our society the credibility of our criminal justice system is eroding like never before. Lacking the ability to engage in a substantive value-based conversation, we predictably are left with undemocratic legislative and judicial sloganeering and (worse) decision-making.

The introduction of a value-centric dialogue is, of course, not a panacea. But by driving hidden normative judgments, biases, and false dichotomies out of the obscuring shadows, we can at least begin to move toward a more democratic and transparent approach that protects the law's moral credibility, creditworthiness, popular "buy in," and, ultimately, its effectiveness.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Garland Orders Entire Justice Department to Focus on Hate Crimes

- 'Disturbing trend' of violence against against Asian Americans
- Attorney general orders a one-month review of potential steps

Attorney General Merrick Garland directed Justice Department employees to give priority to investigating and prosecuting hate crimes and incidents, especially a recent outbreak of violence against Asian Americans. In a memo [on March 30] to all department employees, Garland ordered a review to be completed in a month to determine specific steps that can be taken to better combat hate crimes, including prioritizing criminal investigations and prosecutions and tracking and reporting incidents that might violate federal laws.

Garland cited in particular "the disturbing trend in reports of violence against members of the Asian American and Pacific Islander community" since the start of the coronavirus pandemic. Former President Donald Trump often blamed China for what he derisively called the "China virus" and "Kung Flu." The attorney general's directive comes amid an outbreak of violence against Asian Americans. A series of mass shootings on March 16 in the Atlanta metropolitan area left eight people dead, six of whom were Asian women.

It's also the first major public action that Garland has taken since he became the nation's top law enforcement officer. "We must recommit ourselves to this urgent task and ensure that the department makes the best and most effective use of its resources to combat hate," Garland wrote. The review will determine if the department can better utilize its civil enforcement authorities "to address unlawful acts of bias that do not rise to the level of hate crimes," according to the memo.

President Joe Biden announced new steps [on March 30] in response to anti-Asian violence, including a $50 million grant program for survivors of domestic violence and sexual assault. The FBI also will begin holding "nationwide civil rights training events to promote state and local law enforcement reporting of hate crimes," according to the announcement.

California Requires 'Ability to Pay' Inquiry in Setting Bail

- Court sides with civil rights groups, progressive attorneys
- Judges must properly balance public, individual rights

California judges must consider an individual's ability to pay bail when setting the amount required to release someone from jail before trial, a unanimous state supreme court said Thursday. State trial courts also must consider whether restrictions less than pretrial detention are enough to protect the public and victim, the justices held.

The California high court's decision is expected to have national consequences amid the debate over cash bail, which is seen by civil rights advocates, progressive prosecutors, and justices as a constitutional affront that falls hardest on those who can't afford bail. When a financial condition is necessary, the court must consider the individual's ability to pay the stated amount of bail and may not effectively detain the person solely because the person lacked the resources to post bail, the court said. The court concluded "that our Constitution prohibits pretrial detention to combat an arrestee's risk of flight unless the court first finds, based upon clear and convincing evidence, that no condition or conditions of release can reasonably assure the arrestee's appearance in court."

The decision was applauded by civil rights advocates and lawmakers, including Assemblymember Rob Bonta (D), who was nominated Wednesday as California attorney general to fill out the term of Xavier Becerra, now U.S. Department of Health and Human Services secretary. "The jail house door shouldn't swing open or closed based on how much money you have in your pocket," Bonta said in a statement. Bonta is backing legislation that would set a uniform zero-dollar bail for all but serious and violent felonies and spousal battery and require refunds for individuals not charged after arrest.

'No Less Restrictive Conditions'

Pretrial detention is subject to state and federal constitutional constraints. Such "detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests," Justice Mariano-Florentino Cuéllar wrote for the court. A superior court, when deciding bail, must look at individual factors, including protecting the public and victim, the seriousness of the charged offense, previous criminal record, history of complying with court orders, and likelihood of appearing at future court proceedings, the court said.

"The reality is for many, many years, too many judges have been using bail to detain people without saying so. And the impact of this is forcing people to give up their rights," San Francisco Public Defender Mano Raju told reporters. "Today is a huge step towards ending that practice." The "assembly line money bail system has continued to flourish in California and beyond," said Alec Karakatsanis, executive director of Civil Rights Corps, a Washington-based nonprofit working on justice issues.

Crime Victims United Charitable Foundation in a brief argued the lower court failed balance the rights and safety of victims. The California District Attorneys Association "has long believed that California's bail system needs to be thoughtfully reformed in a manner that balances both public safety considerations and the individual circumstances of the charged defendant, including, but not limited to, their financial means to post bail," CDAA Executive Director Greg Totten said. The organization didn't file a brief in the case but had asked the court to depublish the intermediate appellate ruling so the decision couldn't be cited as precedent.

$7 Bottle of Cologne

The ruling arose from a case involving a retired shipyard laborer who stole $7 and a bottle of cologne from an even older resident living in the same hotel. Kenneth Humphrey was held on $600,000 bail based on prior history, the most recent of which was 14 years old. The trial court dropped bail to $350,000, which was still out of his reach. The state supreme court agreed with the appeals court that ordered Humphrey released.

California in 2008 approved an initiative that included a requirement to consider the victim and victim's family's safety, and public safety, in setting bail. California last November rejected an initiative—Proposition 25— to end cash bail. The case is In Re Humphrey, Cal., No. S247277, 3/25/21.

George Floyd Death Drives Police Accountability Laws Nationwide

- At least 18 states enact new laws on police conduct
- Ban on chokeholds gaining traction across U.S.

More than a third of U.S. states enacted new restrictions on police power or oversight of law enforcement actions in the months after George Floyd's death, with additional legislatures diving into the politically fraught issue this year. Minnesota and 13 other states banned the type of chokeholds that led to Floyd's death outside a Minneapolis convenience store. And the state where Floyd died led the way in requiring officers to step in when they see excessive use of force by a fellow cop—a movement mirrored in at least 10 other states. "The killing of George Floyd was a watershed moment," said Scott Wolfe, Michigan State University associate professor of criminal justice. "The amount of policy changes and discussions of law changes concerning how the police interact with the public is like we've never seen in the past."

Floyd, a Black man, died May 25, 2020, as a White Minneapolis officer, Derek Chauvin, knelt on his neck for more than seven minutes. Jury selection in Chauvin's trial continues; he's charged with second-degree murder, third-degree murder, and manslaughter. [Editor's Note: Chauvin was convicted on all charges on April 20, 2021.] Three former police colleagues who were at the scene of Floyd's killing are scheduled to be tried in August on charges of aiding and abetting murder and manslaughter.

Swift Reaction

Floyd's death triggered Black Lives Matter protests nationwide and a call for changes in laws regarding how police interact with citizens. But it also fueled a political backlash in some circles, and skepticism about whether the legal changes go far enough to make any real difference. The Minnesota State Legislature convened a special session in July 2020 and in eight days approved legislation that—in addition to the chokehold ban and duty-to-intervene obligation—adopts an independent use-of-force investigation after any death involving an officer, and creates a database to track alleged police misconduct.

A slew of other changes included a ban on warrior-style training "intended to increase a peace officer's likelihood or willingness to use deadly force in encounters with community members." Gov. Tim Walz (D) signed the bill into law July 23. In Colorado, one of the nation's most comprehensive police-accountability laws was introduced in the state Senate just nine days after Floyd's death, sailed through both chambers, and was quickly signed by Gov. Jared Polis (D). It bans chokeholds, requires body cameras, limits tear-gas use, bars deadly use of force for nonviolent offenses, and bans a qualified-immunity defense for an officer charged with a civil-rights violation. A similarly sweeping Illinois bill was signed into law [in February]. In March, Utah Gov. Spencer Cox (R) signed several police accountability bills, including one requiring a report anytime an officer points a gun or taser at a person. And the Republican-controlled Kentucky Legislature approved a measure to decertify officers who commit misconduct.

National Trends

Most new state laws involving police were passed in the Midwest, West, and Northeast. But in the South, Virginia became the sole state in the nation to ban no-knock warrants that let

police enter a home without warning— a "Breonna's Law," named after Breonna Taylor, the Black woman shot and killed by police last March in her Louisville apartment. And Georgia joined a dozen other states in requiring investigation at the state level of all officer-involved deaths.

One change several states have made, including comparatively conservative Iowa and relatively liberal New York, is appointing a state attorney general rather than a local district attorney to investigate violent episodes involving police. Another widely adopted change requires police who witness an officer applying excessive force to step in. "I don't think of this as a new concept," said Taryn Merkl, senior counsel at the Brennan Center for Justice at New York University Law School. "What I think is new is how widespread people seem to be embracing this as a potential area for reform. And I think it's an important one to look at in terms of its potential power to change police culture and the need for officers to have cover from above if they do need to report another officer."

Cities nationwide—including in the South—also stepped in, with their lawmakers and at the ballot box. Austin, Texas, slashed police department funding to about $290 million from an initial proposed budget of about $434 million, moving several functions out of police jurisdiction and redirecting funds to support domestic-violence shelters. In Atlanta, Mayor Keisha Lance Bottoms imposed a duty-to-intervene policy and required de-escalation tactics before police use deadly force. She signed the order after the death of 27-year-old Rayshard Brooks, a Black man shot by a White Atlanta police officer less than three weeks after Floyd died.

'Nibbling Around The Edges'

Floyd's killing coincided with a pandemic and already volatile presidential race, and the role of police in American society became part of the political dialogue. In some states, Republican-led legislatures pushed back against what they dubbed "defund the police" efforts. But even some who specialize in criminal justice issues aren't convinced the steps to curb police power will make a significant difference, especially when it comes to law enforcement interactions with people of color.

The changes "will improve things, but they won't dramatically change things," said Ben Grunwald, a Duke University School of Law criminal procedure specialist. Black men in America are about 2.5 times more likely than White men to be killed by police, according to a 2019 study published in the Proceedings of the National Academy of Sciences. Research shows that "one in every 1,000 Black men will die at the hands of police," Merkl said.

"I think the laws we have seen so far, especially the legislation that has passed, has been more nibbling around the edges," said Seth Stoughton, a South Carolina School of Law associate professor, who is listed in court documents as a possible witness in the Chauvin trial. "And I think that's largely because of the political process."

"There's no one answer," said David Alan Sklansky, a criminal law professor at Stanford Law School. "We need to be doing a lot of other things which, quite frankly, aren't being done enough almost anywhere in the country."

Fundamental changes not addressed by most states would include redefining the role of police to decrease law enforcement responsibilities, especially in dealing with the homeless and mentally ill; changing how police are hired and police departments are held accountable for wrongdoing; and decriminalizing low-level offenses that are now routinely handled by cops, Grunwald and Stoughton said. "In some ways, all we've seen in policing is incremental change," Stoughton said. "I am of the view that policing is substantially better today than it was 50 years ago, despite the fact that we have many of the same issues. If we keep our attention on it, if we gain a sense of political will which we have lacked, policing will be better yet in another 20 or 50 years."

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Submission Deadlines: Aug. 15, Dec. 15, April 15

For inquiries, contact: Kyo Suh, Managing Editor, kyo.suh@americanbar.org

Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System

By Jed S. Rakoff

Published by Farrar, Straus and Giroux, 2021. Available on Amazon.

Reviewed by Elizabeth Kelley (*Criminal defense lawyer and a member of the editorial board of Criminal Justice magazine.*)

The Honorable Jed S. Rakoff, Senior Judge in the Southern District of New York, takes seriously Cannon 4 of the Code of Conduct for United States Judges. Specifically, Cannon 4(A)(1) states: "*Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Furthermore, the Commentary to Cannon 4 states:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become *isolated* from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is *in a unique position* to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and *improving criminal and juvenile justice*. To the extent that the judge's time permits and *impartiality is not compromised*, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. … (Emphasis added.)

Judge Rakoff is certainly not isolated. In fact, he is well-known inside as well as outside the legal community for his prolific writing as well as speaking about ways the legal system could and should be reformed.

Judge Rakoff is in a unique position to write this book. After graduating from Harvard Law School, Judge Rakoff served as a law clerk to Judge Abraham Freedman of the US. Court of Appeals for the Third Circuit. He has worked both sides of the courtroom, as a defense lawyer for two New York firms and as a federal prosecutor with the U.S. Attorney for the Southern District of New York. He was nominated to the federal bench by President Clinton and began his service in 1996. He has thought deeply and critically about the cases before him, for instance, declaring the death penalty unconstitutional in *U.S. v. Quinones* and refusing to accept the initial settlement agreement in *Securities and Exchange Commission v. Bank of America,* stating that it was "done at the expense, not only of the shareholders, but also of the truth."

The title of this book is drawn from a practice Judge Rakoff finds troubling, the ubiquitous plea bargaining in the federal system. Since 2010, less than 3 percent of all criminal cases went to trial. He believes that even the innocent are forced into pleading guilty by a multitude of factors including mandatory minimums and sentencing guidelines – what he calls "weapons to bludgeon defendants into effectively coerced plea bargains." (p. 23). During this time, prosecutors enjoy a huge advantage in terms of access to resources and information, in addition to charging power. Defense lawyers are not always in the position to challenge all of this, and this is one of the drivers of mass incarceration. Judge Rakoff believes that only a groundswell of opposition to the above practices will force change. And his book and other writings are part of creating that groundswell.

Make no mistake: Judge Rakoff's impartiality is not compromised, as cautioned by the Commentary. He does not reflexively standup for those suspected or accused of wrongdoing, and in fact, criticizes the Government for not having more backbone when it comes to prosecutions. In one chapter titled "Why High Level Executives are Exempt from Prosecution," Judge Rakoff faults the Government for not criminally prosecuting the banking and other executives whose actions caused the Great Recession. And in the following chapter "Justice Deferred is Justice Denied," he criticizes the growing practice of the Government's entering into deferred prosecution agreements with companies rather than prosecuting the companies outright as well as the high-level officials responsible for those actions.

Judge Rakoff's judicial career, on and off the bench, has been devoted to improving criminal justice. Those efforts have not always been free of challenge, for instance, his service on the National Commission on Forensic Science. Judge Rakoff was the sole representative of the Federal Judiciary from the time of its founding in 2013 until 2015 when he resigned as a matter of principle over the Department of Justice's decision that pre-trial discovery relating to forensic expert testimony was beyond the scope of the Commission's work. *Why the Innocent Plead Guilty* devotes a chapter to the shortcomings of forensic science, the overreliance on it, and the failure of the judiciary to understand it.

You might think that in a book arguing for improving the criminal justice system, a trial judge would use the lives of the individual litigants before him or her or that the book would be a collection of war stories. But instead, Judge Rakoff marshals facts and figures from across the criminal justice system to alert the public to the depth and breadth of the problems. One of this book's greatest advantages is that because of its relatively small size (less than 200 pages and footnote-free) and conversational tone, should an attorney recommend this book to a non-attorney, the attorney can be relatively confident that the other party will be enlightened and perhaps, inspired to be part of the groundswell of support for reform which Judge Rakoff believes is so necessary.

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