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224

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Winter 2020/2021

The Vermont Bar Association
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Published four times a year by the
 Vermont Bar Association
 Subscription rates: 1 year \$35. 2 years \$65.
 Printed by Stillwater Graphics
 VBA assumes no responsibility for claims
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PRESIDENT'S COLUMN

Pandemic Practice Diary

We made it through 2020. In late 2019 I had all sorts of big plans and aspirations for the year ahead. It is, perhaps, a touch of an understatement to say that those plans changed. And here we are again, at the beginning of a new year, and again I have all sorts of big plans and aspirations for the year ahead.

I'm inspired by and proud of how our profession – on very little notice – nimbly changed course and kept on working. Everyone has a story about how life and practice changed in 2020. I'm very curious to see what lessons and practices we decide to keep, what we improve, and what we replace.

I re-created part of my year last year, and thought I'd share.

March 9, 2020. In 2 days I'm supposed to travel to Chicago with Teri Corsones and Bob Fletcher for the ABA Bar Leadership Institute. Things are shutting down all over the place. As of now the conference is still on. Before I go to sleep I think about if I go how I'll get back to Vermont if I go and airlines stop flying. I mentally plan to rent a car and drive to Kalamazoo, Michigan where my parents live, spend the night there, and then drive back to Vermont the next morning. If I have to rent a car and drive back from Chicago I think about the fact I might not be able to cross the border if the virus gets worse, and I'll have to drive through Ohio and Pennsylvania (rather than cutting through Ontario like I usually do) to get back. Oh, and also that my own car will be at the airport in Manchester, New Hampshire. I probably shouldn't go. I'm concerned that the conference hasn't been cancelled yet. I'm pretty sure lots of people are deciding not to go.

March 10. The conference is cancelled. I'm disappointed but relieved. I go to court in Windsor County for an arraignment. There are a lot of defense lawyers in the building that morning, and we're all sort of chatty with one another. It's nice. At one point about seven of us are standing around, pointedly not shaking hands, talking about the fact none of us wants to get sick. Nikki South declares she's going to greet people with "jazz hands" from now on. I talk to a client in New Jersey later that afternoon. He comments that all of a sudden everyone is an epidemiologist.

March 16. I go to Burlington for some juvenile hearings. I'm a little iffy on go-

ing in person, but I have a language interpreter coming for one hearing first thing in the morning so I need to be there. I sit on a bench. The interpreter sits on another bench about 12 feet away from me and tells me that he's having a hard time finding a place to buy rice. Maybe he'll go to Plattsburgh. He heard there's a store there that still has some. I have my hearing, and then another. I'm scheduled for a hearing in the afternoon, but the court officer tells everyone we can leave and call in. I call my client and tell her we need to be on the phone for the afternoon hearing. She seems more than okay with that.

March 19. I meet a woman to help her sign a power of attorney so her neighbor can help make sure her bills get paid. She says that she's not afraid of the virus. "I'm 96. I've had a good run."

March 27. I agree to handle a stalking order case in Rutland. I have a bunch of exhibits we need to admit, and there isn't a great way to do it without being there. My client is afraid to attend in because of her health, and she's also afraid to skip the hearing because she really wants a final order. We decide I'll go and she'll call in. I wait on a bench for my turn to go into the hearing. The other party in my case doesn't show up but it's also not clear if he got served. We have to come back. I dread that; it feels dangerous to show up but there also really isn't a good way to have this particular hearing by phone. Ultimately the case gets done. My client is thankful. I never meet her in person.

April 2. I do an Odyssey training, since I'm in one of the WOW counties. I place a take-out order at Cloudland Farm in Pomfret for the next day. I know and like the farm owners and the chef. I'm concerned about our local businesses' ability to stay in business. When I pick up the order later in the week they tell me they've been able to figure out take-out, and it was going well. And in case you're wondering, it was beef stew, homemade bread, and blueberry cobbler, and it was fantastic.

April 6. My cat is really sick. My husband and I drive the cat to Williston for an ultrasound at PEAK. The stay-home orders unexpectedly created time to be able to do things like take the cat to the vet while still working a full day. I wander through the parking lot into a big field filled with solar



panels. I sit on a big rock and participate in a hearing by phone. While I wait for the cat's appointment to finish I make several phone calls to clients to let them know upcoming hearings in April are cancelled. Nobody really knows what's going on. People seem more confused than anything else. Every call ends with people saying some version of, "well, it's a sunny day, at least."

April 24. I coordinate a Zoom happy hour with some lawyers. We show off our cocktail creations to one another and have some laughs. We joke that we forgot what each other looks like.

July 1. I'm working at my desk in an upstairs spare bedroom. My husband, who is also an attorney, is in our kitchen doing a mediation via Zoom. I hear the cat walk up the stairs. He saunters over to my desk, carrying something in his mouth. From where I am it looks like his fluffy mouse toy. It's not. It's a squirrel. It's alive. The cat proudly and gently sets the squirrel on the floor. The afternoon de-evolves into chasing a live squirrel around the house. The squirrel runs through the bathroom, the bedroom, across our bed pillows. Eventually the squirrel gets away and gets back outside. The cat seems deflated. The Zoom mediation continues, only a little bit interrupted. (This is the same cat who went to PEAK. He refuses to believe he has kidney failure and will spend the summer and fall bringing us all sorts of treats.)

July 11. I have to meet a client to sign some paperwork. We meet at the Whale Tails in Randolph. He signs and puts the pa-

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pers on the hood of my car and puts a rock on top to keep them from blowing away. Then he backs away cautiously and I walk over to the papers on the car to notarize his signature. Then I meet my good lawyer-friend Kelly Green and we take a walk in a cemetery. She tells me about a witness interview she did the week before. She arranged to meet the witness at their home. The witness sat indoors and Kelly sat outside on the porch and they talked from a distance through an open window. The interview took a lot longer than expected and by the time it was over she was sunburned, dehydrated, and covered with bug bites. She suggests we all start keeping sunscreen, bug spray, and extra water in our briefcases, instead of the usual office supplies.

August 20. I'm a partner in a race horse named Out of Trouble, and she's running at Saratoga. The race track allows a limited number of owners to attend races, and we're allowed to go. We go early in the morning and watch horses jog and gallop in their morning workouts. Midday I find a bench away from everyone and participate in a meeting by phone. Then I have a hearing by phone. I'm outside, and where I am is quiet, and I realize I can do quite a bit of work from wherever I happen to be. Finally, it's time for our race, and it's the most normal things have felt in a while. I stand on the rail and scream "Go OOT! Go OOT!" as she runs down the stretch. She crosses the wire first. We get our picture taken in the winner's circle. The track has one bar open for owners, and the bartenders are worried that they aren't making a lot of tips. I buy a round of champagne for our partners and we toast to Out of Trouble.

September 30. I have to meet with a client in Rutland, but we're not sure where to go. We end up in the parking lot at Dunkin Donuts. We use the tailgate of her truck as a writing surface. It's really windy and between the howling wind, the traffic, and our face masks we can barely hear each other. It's good to see her, though, and we get things done.

October 1. It's the VBA's annual meeting, and I get to become the president! Thank you again to all the past presidents who participated in the gavel-passing video. It was a fun way to do it, and a good way for us all to remember we're people who also happen to be lawyers.

October 16. I meet some potential clients outside on a picnic table. It's raining. We don't care, and use an umbrella. We'll end up meeting again a few weeks later on the same picnic table in a "wintry mix" of precipitation. The second time we bring

blankets and a table cloth and get things done. I wonder what I'll do in the winter when meeting outside really isn't going to be possible, and meeting inside isn't allowed.

November 12. I was invited to talk to some Girl Scouts about Justice Ginsburg for their "I Dissent" badge. The troop meeting is by Zoom. I join during opening of the meeting and say the Pledge of Allegiance and the Girl Scout Promise with them. Once a Girl Scout, always a Girl Scout, right? The kids range in ages from Kindergarten through Sixth Grade. They ask amazing questions, and they seem completely unfazed by the virtual format. Some parents participate, and they ask questions, too. I look up the "I Dissent" badge and I really want one. The troop leader asked if I still have my sash, and I said I'm pretty sure I do. I would totally sew the badge onto my sash if I receive one. Or maybe I'd sew it onto my work bag because it's that cool. I then seamlessly switch platforms and teach a class at Vermont Law School via Teams.

December 14. I have 5 hearings today, all by Webex. It feels like "old times" having a day of hearings one right after another. It also feels entirely normal to do everything on a screen. I almost can't believe how much I get done every day without ever going anywhere.

I wish I had kept a better journal of the year. One day we'll look back try to remember how things worked, what we did, and how we changed how we do what we do. We have a rare opportunity right now to make significant changes in the way we do our work; changes that can make us more effective, more efficient, and potentially healthier. I'm interested to hear your pandemic practice stories, too. What were your successes? What didn't work? What would you like to see us continue to do in the future? I propose we make a bar-wide journal of this year's experiences. It doesn't have to be anything formal, but it would be a very interesting way to document our collective experience and could serve as a helpful resource for one another as we continue to go forward.

Elizabeth Kruska, Esq. is current President of the Vermont Bar Association. She maintains a solo practice in Woodstock, concentrating in the areas of criminal defense, family and juvenile law and is an adjunct professor at Vermont Law School.



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PURSUIITS OF HAPPINESS

Walking Man

JEB: I'm here at my home office virtually interviewing Rick Hubbard for our Pursuits of Happiness column. As you know, Rick, we interview people with interests, talents or passions outside of the practice of law, especially those who have been doing it while they're practicing law to help keep them balanced. There are so many things in what you sent me where any one could be a standalone article such as your accomplishments in skiing, biking and running, but I was thinking for Vermont lawyers we might want to talk about walking to all of Vermont's 251 towns.

So first question: had you made a goal at the onset to walk to every town or did you do one and then say, hey, wouldn't it be neat if I could walk them all?

RH: When I began my walk, I hadn't heard of the Vermont 251 Club. My walk was motivated by Granny D, then an 89-year-old woman from New Hampshire, who decided in 1999 she was going to walk across the entire country to advocate for and raise the issue of campaign finance reform. I had a back door window into that through my partner, Sally Howe, because a niece of Sally's in southwestern Connecticut is married to Granny D's grandson Joe. I learned about this a week before Granny D started her trip, when Joe, at an extended family Christmas dinner, was telling me about his crazy grandmother who had this harebrained idea to walk across the entire United States to advocate for campaign finance reform, and the family couldn't talk her out of it. Turns out in retrospect, her idea was very effective and generated a lot of national publicity that ultimately helped to result in the McCain Feingold legislation back in 2002.

JEB: Oh right, I think I have heard of her. She did the walk over a few years and died in 2010 at 100.

RH: Yes that's her! So, I followed her progress and actually went down and walked with her in Kentucky for most of a week and listened to her speech in front of Mitch McConnell's Louisville office about the influence of money on our US Senators. Ultimately, she motivated me to come back to Vermont and try to amplify that message. So I decided I'd walk three sides of Vermont and carry a sign that would garner attention.

JEB: Were your efforts effective?

RH: I think so! It got me into about 60



to 70 different media with opportunities to talk about that issue. And along with that, it motivated me to run on the same issues against Jim Jeffords in the 2000 US Senate race. So I started this walk basically for those reasons. But early on during the walk, I heard about the 251 Club, and decided to keep going after my unsuccessful US Congress run and peck away at it, seeing if I could actually walk from one town to the next town and cover the entire 251.

JEB: Were you carrying a sign the whole time?

RH: No. Only for the first three sides of Vermont that first year, so probably the first 500 or 600 miles.

JEB: This wasn't a one-year affair..

RH: No certainly not, it was completed in chunks.

JEB: But 600 miles in a year or so is still quite a feat.

RH: I'd walk about 20 miles per day back then, but I enjoyed it and in later years would multitask along the way. I took a little iPod and I'd listen to VPR news for a while and then I'd turn on my language lessons and learn and practice speaking German. And in later years I also worked on some French.

JEB: So anybody driving by would see this man always walking and often talking in a strange language to himself!

RH: Yes! They'd see some guy talking to himself as he walks along. But lots of fun

memories come from this too. I was alone walking down the center of Vermont via Route 100 on September 11th of 2001 when the twin towers were hit in New York. That night I happened to be tenting in a field in Shrewsbury where a pastor friend who lived near my route was having a quickly organized candlelight vigil at his church. So I went and it was very moving to participate in that. Then as I walked for the next several days, I started asking various Vermonters their thoughts about what had happened and how we should respond. Interestingly, there was a consistent theme to the way these folks replied -- they all said, they hoped the US wouldn't over-respond. In retrospect, their native common sense was pretty wise. We got in way over our heads first in Afghanistan and subsequently in Iraq, but these Vermonters could foresee those possibilities early on.

JEB: An experience you can never forget. This section back in September 2001, was it a chunk where you would bring a backpack and camp, or did you just do day trips?

RH: I walked alone that section of Route 100 with a backpack and camped on the way, except when I had a friend whose house I'd stay in. But most of the time if I walk with a friend, we can have two cars, one at either end of the day's walk. And when I'm on my own more, in recent years, I drive the day's route from where I last left off, with a bicycle in the back of my Prius. At the end I usually leave the bicycle, then drive back to the beginning, walk the day's

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route and then return by bicycle to the beginning to link up with my car.

JEB: Wow, so then you had to redouble your efforts, biking while tired! Would you still walk 20 miles in a day?

RH: Well, it depended on how old I was. In the beginning, it was closer to 20. But this past year I held it down mostly to between 10 to 14, but 14 is a little over four hours and then you have to bike back. So that adds another hour or more, depending the distance. But it's good exercise, which has been central to my life and I value it. So I try to keep it up.

JEB: Have you done some town-walking every year since 1999.

RH: No. There were big ups and downs. I did about 600 miles that first year in 1999. But then I pecked away at it some years. It took 21 years till the end, but there were 10 years when I did different hiking and bike trips and did nothing toward my 251 goal. For the remaining 11, most walking was at the beginning and the end of those 21 years.

JEB: And you just finished this last year, right?

RH: Yes, on July 24th! The entire walk totaled 1,666 miles. And if you estimate the

walking time at roughly three miles an hour, it's about 606 hours of walking during those 21 years since I first walked away from the Canadian border in Highgate on Thursday, September 30, 1999, and headed South on Route 7 towards the border with Massachusetts.

JEB: What's the last town you walked to?

RH: Norton this past summer. It was a two day walk from Canaan in the northeastern-most corner of Vermont, west to Norton. Sally came along and brought her bike. She parked at the other end of my daily walks, found back roads to bike on, and then arrived back at the car about the time I was to arrive. For those two nights we rented a cabin at Jackson's Lodge on Wallace Pond, partway to Norton. Uniquely, the Canadian border runs right through the center of Wallace Pond, so we were wondering about the protocol...

JEB: When you're not allowed to go to Canada during the pandemic.

RH: Exactly, so the rule is anybody from either side can get in their watercraft and go anywhere on the water they want, but the Canadians may not actually touch land on the American side and vice versa. So Sally and I launched a complimentary canoe and paddled across the border. We went

up along the shoreline, perhaps 50 feet out from the docks of the cottages, periodically having conversations with our Canadian neighbors at sunset.

JEB: This, after walking all day.

RH: Yes. And the next day was the final day when I walked to Norton where I ended at the border.

JEB: Lots to celebrate!

RH: Of course. We had a fancy dinner plus a bottle of wine out on the porch at Jackson Lodge.

JEB: Did you contact the 251 Club to memorialize that you're a part of it? Did you get your name in some book somewhere?

RH: Well, yes and no. The organization has existed a lot longer than I've known about it and I've known about it for 21 years. But membership in the 251 Club doesn't mean that you have finished traveling to every town in Vermont, it means simply that you aspire to do it. So there are a lot more people than you'd think. The Club's membership is huge. They have a website with an interactive map where you can self-record everything. For myself, I made up a form where if the town clerk was open, they could attest to my being there, but if they were closed, I'd self-report to keep track.

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JEB: Oh yes, I see the website. It says Peter Welch completed it in 2006, but I'm not finding you.

RH: I haven't gone on yet as I have a more extensive story to tell. The executive director is going to connect with me for one of their upcoming twice a year newsletters to share my story and, after that, a quick summary will also go on the website. And that reminds me, next time I speak with Peter Welch, I'll mention that we have this in common but encourage him to do it by foot or bicycle next time instead of by car!

JEB: By car is still impressive I suppose. Ray Obuchowski, my former law partner, worked very hard over the years to catch a photo of each of the 251 Town Clerk's offices, and he completed his photo journey when I worked there. Do you have pictures of each?

RH: No, I don't. I'm not as motivated to take pictures.

JEB: Do you have any sense of how many people in the 251 Club have actually walked rather than driven or biked?

RH: Very few have walked. But several have done it differently, like attorney Joe Cook of Dummerston. He's bicycled from one town to another and on every paved road in every one of the 251 towns.

JEB: So that covers a lot more mileage for sure.

RH: Yes for sure, and while that's impressive by itself, now that he's retired, he's vowed and already started to mountain bike on every one of the gravel roads in every town, provided it's shown on the state highway map.

JEB: That has to be many thousands of miles and you'd have to be snaking around the same town for hours.

RH: Correct. His paved quest took him 25 years and he says he went 10,000 miles!

JEB: But I still maintain that walking 1,666 is impressive. But that's just a drop in your

walking bucket, correct? My understanding is that you've done Vermont's Long Trail, twice?

RH: Yes.

JEB: And you've done the whole Appalachian Trail too?

RH: Yes the whole Appalachian Trail. The first time I hiked Vermont's Long Trail in chunks, like my 251 walk. But in 2002, I hiked it in 18 days. Plus one rest day in the middle because I broke my backpack and had to get the aluminum stay welded.

JEB: A forced break, but you still did 278 miles in 18 days which is quite impressive. And so many more hikes!

RH: Yes, I've done about 1200 miles on the Pacific crest trail, which goes from the Mexican border to the Canadian border. I've also walked from Ft. Lauderdale in southern Florida to Key West.

JEB: Isn't that like 200 miles?

RH: Yes, that winter, I'd had a foot operation and wasn't supposed to cross country ski for a while. So, if I wanted easy walking, I had to go find someplace without any snow. The walk was in an odd location but kind of fun. Most all of that trip is under six feet above sea level, so I walked along contemplating what a 3-foot rise in sea level would do.

JEB: Scary for sure. So many of these adventures you've been doing while you had your own practice for about 30 years. Right?

RH: Well I've always been very athletically active, and excelled in alpine ski racing during high school and at UVM. I began my military service shortly after graduating from UVM and before the Vietnam build-up, though not by much.

UVM, at the time had, mandatory ROTC training since it's a land grant school. I chose to complete four years of ROTC at UVM and thus entered military service as an officer in the spring of 1964 and was assigned to Germany. My tour was for two

years of active duty plus 4 years of reserve duty. The build-up in Vietnam commenced in the fall of 1964 and my service in Europe was idyllic compared to friends of mine a year or two behind.

Because of my athletic background, I was involved with two US military sports teams. The first was as officer in charge of the military alpine ski team for two winters. The other was first as a member and subsequently as officer in charge of a US team competing in a variant of military pentathlon for four summers. The first year I was fortunate to be a member of the winning USA team at the NATO CIOR (Congress of International Reserve Officers) competition in Copenhagen. And for the following three years when I was involved, mostly as officer in charge, one or another of our US CIOR teams won the entire NATO competition. That was a rarity of which I'm proud.

So well before my law practice, when still in the military, I was used to training nearly 8 hours a day, five days a week through spring, summer and fall. This was hard training which included running long distances most days, plus running obstacle courses, swimming for time over obstacles, and shooting for accuracy. When I returned stateside to first earn an MBA at Dartmouth's Amos Tuck School of Business, and then a J.D at Georgetown Law, I began with an awesome physical base.

JEB: Enough to run marathons when you came back as well, Right?

RH: Correct, I've run four. But before we go on, I'd like to make one more comment in relation to the ski team I was involved with. I can justify the summer sport athletics because it relates pretty directly to being in good shape for many aspects of military training and effectiveness. But the ski racing, I can't justify as a matter of public policy. It seems to be an obvious choice for cutting fat out of the military budget. And there are loads of items like that in our military.

JEB: I'm sure that's the case-- seems like that could be left to the Olympic competitions. So we won't have time to highlight the marathons, but we can at least add that to our list of mileage! Back to the law practice...

RH: Yes, when I first returned stateside, my MBA at Dartmouth's Tuck Business School was mostly covered by the GI bill, but when I went on to law school, the GI bill funding was exhausted after my first year. So I used my MBA degree and took a full-time job, doing economic consulting and moved into what actually is a really good program at Georgetown law during evenings and weekends. So I stretched my last two years of law over three years and combined full-time consulting plus my law



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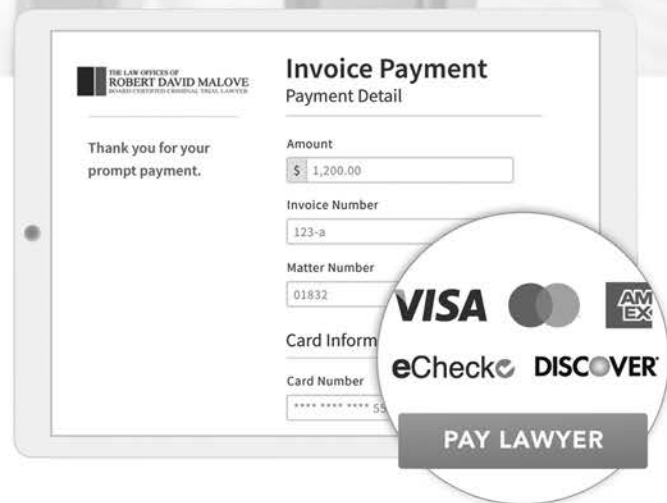
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studies. That kept me off the streets pretty effectively for my remaining three years in D.C.

JEB: But you did run on the weekends?

RH: I'd run to work and back and squeeze in activity everywhere I could. I was an early morning and weekend athlete during much of my thirty-year law practice. Tuesday and Thursdays there was a hike Mount Mansfield group. We'd meet at 6:30am at the Mt. Mansfield base lodge and hike or snowshoe up to the Octagon—usually via North slope, Center Lord and Upper Lord. All before work at 9am. And then I had a Wednesday early morning running group that ran five or six miles before work. So I could work my exercise in, but it meant getting up a bit earlier, plus doing some legal work later at night. Luckily, I always had control over my work because I had my own practice.

JEB: Exactly! And right on theme with this column. People find whatever relaxes them, motivates them or balances them and they find a way to squeeze it in, which has become more popular since when you were practicing.

RH: Certainly. I had to learn the hard way about balance while practicing law. I started my law practice in the beginning of 1974, and I worked really hard for the first three years. I didn't take any vacation break other than a day or two, but nothing like a week, for a good chunk of three years. And I burned out-- I really burnt out at year three, when I needed three weeks just to recover. And I remember spending the first week down in Antigua at a hotel where I mostly slept for the first three days.

JEB: Definitely sounds like burnout! Balance is so important to maintaining a law practice.

RH: Yes, after that, I was a little better at taking the time. But most of my marathons and hikes into at least the early 1990s were all just, you know, around the edges of everything with a full-time law practice. But as I was nearing the end of 30 years of practice, closer to retirement, I chose to end a first marriage and needed a break to re-balance things after that. So that's when I broke free and did the first chunk of the Appalachian trail.

JEB: True, much of your major mileage took place in your retirement years, which is equally impressive for other reasons. I mean didn't you bicycle across the entire United States and when you were 67?

RH: Yes, but I just went at a comfortable pace.

JEB: It's still 3,800 miles.

RH: I enjoy the exercise, and even more so now with my life partner Sally of 29 years. We both share an interest in outdoor activities. When she turned 70, for example, I said, well, it's a more significant birthday, how do you want to celebrate it? Is there anything bigger than normal you'd like to do?

And she thought about it a couple of days and said she'd like to hike the John Muir trail in California. So we hiked those 195 miles in the high Sierras over 20 days shortly after her 70th birthday. We've done a lot of hiking, bicycling and cross-country ski trips like that. Among others, we bicycled for three weeks around Provence in France, which was a wonderful bike trip, and five years ago we hiked from Lake Geneva, Switzerland to the Mediterranean along the French/Italian border.

JEB: Those had to be incredible experiences, and a way to see things up close and personal.

RH: Well, it's an amazing way to learn about other topics and enjoy new surroundings. With this pandemic, skiing or hiking is almost the only time we seem to socialize with other humans. During spring, summer and fall we still do the Thursday Mount Mansfield hikes, but in prior years we'd always go out to breakfast afterwards. We can't do that anymore with COVID, so we all bring our breakfasts plus beach chairs, and set them up and eat in a big, socially distanced circle in the parking lot. This helps to bridge the gap because we all need social and human contact.

JEB: For sure. I'm really enjoying cross country skiing this winter. I can go out my door or meet up with friends as we are always about 10 feet apart. Such an important release from daily work and pandemic fatigue.

RH: It really is so critical. We've been skiing a lot too and it's been lovely.

JEB: Well on that lovely note, I want to say thanks for this interview even though I know we didn't get to all the mileage. And thanks for motivating our readers to get out there, no matter their age!

RH: Thanks to you and the VBA Jennifer, for helping to emphasize the importance of balance between our legal and personal lives.

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RUMINATIONS

Nothing But Net: Matters of First Impression

"This is a matter of first impression in the court. We are not, therefore, bound by principles of stare decisis here."¹

You can spend an inordinate amount of time trying to find the central principle of the law, a key that sheds light on its darker corners, and ties the whole web together neatly. You are bound to fail, of course, but keep trying. One way to pry open the heart of the judicial mind is to see the fall-out—the dissents and concurring opinions, where justices speak for themselves rather than *ex cathedra*. Another way is to study the reversals of longstanding precedents, those fundamental doctrinal twitches that set the law on a different course. This time the focus is on matters of first impression.

Think of the law as an engine that grinds out decisions, reasoning from statute, common law, and precedent. In the majority of cases, once the facts are established, the outcome is all but predetermined. The statute has this meaning. A prior case or line of cases leads directly to the resolution of the present dispute. But then there is the occasional surprise—a question that hasn't come up before now. Suddenly the court recognizes this as a case of first impression.

This would be a question that has never been addressed before in the tens of thousands of cases in the Vermont canon. At first, when the Vermont Supreme Court was formed, beginning in 1778, everything must have been a matter of first impression. Curiously, the words "first impression" appear for the first time in the reports in *Sutton v. Tyrrell* (1838).² They appear in approximately 250 cases from that time to this year, and they are becoming very common of late.³ Of the 250, only thirteen appear in the nineteenth century cases. The twentieth century includes another 98, and the twenty-first century contains the remainder, fully 149. In the last five years alone, there are 55 cases identified as matters of first impression—22% of the total. By numbers alone, the use of "first impression" warrants a closer look.

Why the recent trend? Why are first impressions increasing epidemically? Westlaw, Lexis, and Casemaker may be one reason, providing greater investigatory powers of a court and its clerks. At the same time the world is becoming more complex, and lawyers more creative. To the extent that a party can persuade the high court that what it asks is as yet unsettled, it might improve its position by diluting the impact of pre-

cedents. But to say that the decision to label something a first impression is something parties increasingly request is too much. The choice belongs to the court, and is often, it seems, unexpected by the parties, who have their heads so tightly wrapped around their original positions.

When a court makes that declaration, its approach to resolving the case is no longer bounded by statute or precedent. It is free to make policy. The canvas is rarely a blank slate, a *tabula rasa*, of course. The court is not so liberated by the designation that it forgoes all connection to law, but there is a greater freedom to adopt maxims and address issues that might have lurked in the corners of decisions as dicta or as express refusals to answer questions in earlier cases that have not been properly raised in the pleadings.

Some matters of first impression are of great moment. Most are small questions that rock no one's world. As in, to what extent does Vermont's turn-signal statute apply to traffic in rotaries?⁴ The statute isn't clear. The issue hasn't come up before now, perhaps because rotaries are new to us. It turns out the court didn't decide it, remanding the matter to the trial court to hold a hearing on whether the motorist's exit constituted a change of direction to justify a traffic stop that led to an arrest for DUI.

The first impression is a large stone thrown into the deliberations. Some have serious consequences for masses of people, well beyond the individual parties. The general corporation law, for example, doesn't prevent members of the board of directors of a reinstated corporation to escape personal liability for actions taken while the corporation was terminated.⁵ Others involve questions not only of first impressions, but of fundamental ideas. In what was formerly known as a bastardy or paternity action, the jury instructions should explain that the degree of proof on the issue of paternity is preponderance of the evidence. Although in its form criminal, the matter is in fact a civil remedy.⁶ Justice Franklin S. Billings Jr.'s decision explained that the court couldn't find any policy reason to disagree with the trial judge's ruling. But this is a fundamental principle, that should have been decided long ago.

In other cases, while other jurisdictions' interpretations of legal questions are regarded as not dispositive, they can reinforce the conclusions of the high court.⁷

Sometimes these cases announce dra-

matic changes in the way the high court applies the law. After years of deference, the Supreme Court announced in 2016 that it would interpret a regional plan without deference to the Environmental Court because it presents a legal issue.⁸ *In re Mahoney's Estate* (1966) first concluded that the estate of a slain husband should be distributed to his estate, but as the wife had been convicted of his death by manslaughter, the court can charge the wife with a constructive trust for the benefit of his parents.⁹ *Chittenden Town School District v. Department of Education* (1999) recognized Article 3, prohibiting compelled taxpayer support of religious worship, renders unconstitutional a public school district's tuition-payment policy to the extent that it authorizes reimbursement to sectarian schools without appropriate restrictions.¹⁰

The trigger for first impression designation can come in a variety of ways. A new statute gets its first reading by the court, as when the law requiring professionals to report cases of child abuse was before the court.¹¹ Some matters of first impression may have been identified long before a case is actually resolved and the question decided.¹² First impressions need to ferment before they are decided. Interlocutory appeal is not available, even when the case is one of first impression.¹³

The Early History of First Impressions

The first Vermont case to identify an issue as one of first impression was *State v. Tyrrell* (1838), addressing an *audita querela* writ to set aside an execution and recover damages. The Supreme Court rejected the complainants' argument that it had power to revise a judgment using that writ, and stated, "This is a case of first impression, and not a single authority or analogous case is produced to sustain it."¹⁴

The next was *State v. Riggs* (1850). Two men had broken into a church and rung the bell to report the death of Zachariah Parker, Jr., who had not died, with the intent to annoy, harass and vex Parker and his family and friends. They were indicted following a grand jury hearing for disturbing the peace. Judge Isaac Redfield's decision concluded these acts didn't constitute an offence against the statute, that they sounded in libel instead by attempting to bring Parker into contempt and ridicule and public scandal, and reversed the conviction. Redfield explained,

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Viewed as an unseemly jest, and an attempt to turn a very serious matter into heartless levity and unfeeling merriment, it would no doubt, by some, be regarded as a shocking profanity. For however the hour of one's death, and the passing knell, and the solemn order of a funeral, may seem to us, in health and spirits, such matters certainly are fraught with the gravest, the most awful importance to all sober men. And in a Christian community any attempt to make one a mark for ridicule through such instrumentalities would ordinarily be regarded as an unwarrantable proceeding, a species of profanity. But the statute having made one kind of profanity punishable in a summary way, and defined blasphemy as a substantive offence, we are not aware, that it has ever been supposed, that other kinds of profanity, not defined in any statute, are punishable criminally.¹⁵

Redfield found another case of first impression in *Henry v. Vermont Central Railroad Company* (1858). Redfield wrote that the court was at a great disadvantage not having the issue before it—the damage caused by the erection of a railroad bridge which had changed the course of a stream—argued on the part of the plaintiff. The court ruled against the landowner. Redfield explained, "If we have failed to apprehend the true ground, or the best ground of the plaintiff's claim, it will not be matter of surprise, when it is considered that the action is one of new impression, and that no brief or argument has been submitted on the part of the plaintiff, and that our time will not allow us to make any extensive research during term, so that the decision is merely that of first impression, from our general reading upon the subject."¹⁶

To Hear or Not to Hear

The high court does not like to take up cases of first impression unless the trial

court has considered the issue. Parties attempting to raise such issues for the first time on appeal are likely to be ignored or face remands for the building of a record. In *State v. Mountford* (2000), the court admonished the parties for failing to anticipate the Supreme Court's need to settle the question of the meaning of the emergency exception to search warrant requirements.¹⁷ The decision in *In re A.G.* (1989) remanded a case relating to the conditional discharge of a patient from a convalescent center after concluding the lack of records that could aid the court in its decision proved the interlocutory appeal was improvidently granted.¹⁸

As tempting as it may be, the court refuses to address constitutional issues unless their determination is essential to the disposition of the case, even when the issues are of first impression.¹⁹ So with the question of whether a jailhouse interrogation is presumptively custodial under Article 10 of the Vermont Constitution, requiring *Miranda* warnings. The question was inadequately briefed, but remand was not ordered, as the court explained, "even if the issue had been properly briefed, there is no apparent merit to the appeal."²⁰ Remand is not always required. In *Davis v. Davis* (1982), the court decided a spouse was entitled to credit for the federal child support payments against his obligations under prior orders of the court. Cases from other jurisdictions were not uniform in their approach. The trial court had not ruled on the question, "which would have been the better course," but the Supreme Court didn't feel the need to remand it, as there was no "reasonable ambiguity" as to the intent of the rule in favor of the credit.²¹

What follows are a listing of the rulings in some cases of first impression, arranged by subject matter. Some have been subsequently overturned or made superfluous by changes in statute, but at the time they were made, they were new and dramatic and often surprising.

Land Use Law First Impressions

The former Environmental Board cannot exercise jurisdiction under Section 808 of Title 3, the Vermont Administrative Procedure Act, responding to a request for a declaratory ruling, and have it removed to the Superior Court, in Act 250. The 1974 decision by Justice Robert Larrow stated, "we are confronted with gross irregularities ... which would, in sum, make such 'egregious error' that we could not in conscience allow the ruling below to stand." He feared that injustice had been done. He also acknowledged Act 250 was a "rapidly developing field."²²

A neighbor can cut the roots and branches of a non-line tree encroaching over the boundary, even if the tree is killed in the process.²³ The total damages for calculating the timber trespass statute's treble damages provision are computed by determining the value of the trees cut, trebling the value, and then making any appropriate allowances for remediation or mitigation.²⁴

A fraternal organization cannot qualify for a "charitable use" exemption from the law of adverse possession on property not in active use.²⁵ The high court relied in part on a decision of the Missouri Supreme Court, found persuasive because Missouri had expressly adopted the language of Vermont statutes in writing their own law. Legislative history also played an important role.

A breached contract to construct a house with landscaping, which includes a provision for attorney's fees if litigation is required, will justify an award of damages and fees, even though plaintiffs failed to demand the fees in their pleading or evidence.²⁶ The court, not the jury, decides the amount of fees.

Where an otherwise permitted use fails to meet performance standards, the reviewing tribunal may properly rescind a permit, relying on relevant off-site factors. The appellant argued rescission is not an option, and that conditions should be used to regulate the use, rather than simply denying it, but the high court declined to accept that view.²⁷

Incidental benefits conferred on a neighbor as a result of a landowner's self-interested property development project did not constitute an unjust enrichment giving rise to liability in restitution.²⁸

Where lots are sold in reference to a recorded plat, lot purchasers acquire the right to keep open and use roads, streets, highways, and park areas as indicated on the plat.²⁹

Claim preclusion does not bar the Agency of Natural Resources from seeking penalties in a subsequent proceeding, when an emergency administrative order explicitly reserved that right.³⁰

Exercising a right of first refusal is not

malice, which is required to support a claim of tortious interference with contract.³¹

A neighbor's predecessor-in-title does not abandon an adverse possession claim when it was foreclosed and not redeemed, as long as the continuity element of adverse possession is met.³² Nonpossessory covenants, ignorant of their interests, cannot be dispossessed of their rights to title through adverse possession.³³ This case of first impression, unlike most, did not have a lasting impact on the law, as but three years later the Supreme Court declined to follow its ruling.³⁴

Administrative fact-finders may base findings on site visit observations, as long as those facts are not the exclusive basis for the decision.³⁵

The law exempting 'lands belonging to the state' from general statutes of limitation does not apply to prosecutions against polluters of ground water.³⁶ In this decision, the high court used the history of the statute's original enactment, its own cases, the language of the statute, and policy considerations to affirm the dismissal of a prosecution.

Evidentiary First Impressions

Science has provided new tools of evidence, challenging courts to accept expert testimony on emerging technologies. Polygraph tests have not been allowed into evidence, because they are substantially outweighed by the danger of unfair prejudice and confuse of issues as a matter of law.³⁷ The jury is the only lie detector allowed. Tracking dog evidence to prove the identification of a criminal defendant is sufficient probative evidence and admissible.³⁸ An expert on roof design who is not an architectural engineer may testify in spite of the law prohibiting the practice of engineering without a license.³⁹ There is nothing inherently prejudicial about a criminal trial where witnesses testify before a jury by videotape. Justice Rudolph Daley's decision from 1975 treated the use of videotape as a novelty, akin to a deposition, and not a "glaring error striking at the heart of defendant's constitutional rights."⁴⁰ Close aerial surveillance by a helicopter of a person's yard is an unreasonable intrusion of privacy.⁴¹ In 1996, in *State v. Batchelder* (1996), the high court ruled the lower court lacked jurisdiction to bar taped depositions and require them to be stenographically recorded.⁴²

The Innocence Protection Act does not permit DNA testing of a witness not formerly tested during an investigation, after conviction of the defendant.⁴³ "Reasonable probability," in the context of the Innocence Protection Act, means a probability sufficient to undermine confidence in the outcome.⁴⁴

A spouse cannot obtain copies of the

other spouse's tax returns for the purpose of putting her in a position to know whether or not she would be justified in requesting modification of support payments, as that constitutes an unwarranted harassment and impertinent intrusion into individual privacy.⁴⁵

The standard for harmless-error review in a forfeiture hearing is clear and convincing.⁴⁶

Before becoming entitled to discovery, defendants seeking to prove selective prosecution must make a threshold showing of facts justifying the claim.⁴⁷

Constitutional First Impressions

Without willful or outrageous misconduct, violating a taxpayer's constitutional rights, a Section 1983 civil rights claim that a school board's advocacy of a budget vote, including the expenditure of public funds, was wrong cannot be sustained.⁴⁸

Due process does not require a pre-termination hearing for state employees; a post-termination will satisfy the constitutional requirement.⁴⁹

After the state moved to compel a defendant convicted of a violent offense to submit to DNA testing, he challenged the statute on Article 11 grounds, arguing he was denied his right to counsel at the hearing. The high court called this a case of first impression, but then concluded that another case recently decided, applying the law to nonviolent offenses, settled the question. There was no constitutional infirmity.⁵⁰

The self-incrimination right recognized in Article 10 of the Vermont Constitution protects against coerced testimony in an internal police investigation, and a police department's promise of use and derivative-use immunity violates that right. The entry order asserts, "we shall not blindly accept the federal scheme," before taking up the state constitutional claim.⁵¹

The statute prohibiting knowingly giving false information to a law enforcement officer with the purpose of defeating an arrest did not criminalize protected speech.⁵²

A direct private right of action for money damages is available for violations of the state search and seizure provision.⁵³

The First and Fourteenth Amendments do not require that the qualified protections afforded the media in private defamation actions should be extended to actions involving nonmedia defendants (a credit reporting agency).⁵⁴

Actual knowledge of a collision and resultant injury is an essential element of the offense of leaving the scene of an accident (hit and run), although the statute omits the word "knowingly."⁵⁵ But the burden of proof is not stringent. The state only needs to prove constructive knowledge on the part of the defendant.

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A decision-maker may participate in making findings with other members of a public board based on the written record without hearing witnesses testify or observing their testimony.⁵⁶

The adoption of the land gains tax didn't violate Article 6 of the Vermont Constitution, which provides that "all Revenue bills shall originate in the House of Representatives; but the Senate may propose or concur in amendments, as on other bills." Where legislation creates revenue incident to other purposes, and not the general expenses and obligations of government, it may begin in the State Senate.⁵⁷

Article 10 guarantees use and derivative use immunity for compelled, incriminatory testimony, preventing its use at trial.⁵⁸

The Sixth Amendment to the U.S. Constitution guarantees the right to counsel at a presentence interview.⁵⁹

Criminal First Impressions

Search and seizure is a fertile area for first impressions. This year the court ruled the exclusionary rule didn't apply to a violation of a statute requiring the law enforcement officer executing the warrant to locate abused animals without a licensed veterinarian present during the search. It also decided, also a matter of first impression, that

the defendant bears the burden of proving the invalidity of the warrant for lack of probable cause.⁶⁰

State troopers had a reasonable suspicion of criminal activity necessary to initiate stops of vehicles after discovering the vehicle's registered owners had suspended driver's licenses.⁶¹ Reasonable suspicion doesn't require reasonable certainty, but only a reasonable belief that there is criminal activity.

A law enforcement officer's brief seizure of defendant, whose vehicle had been stopped next to a vehicle of another motorist suspected of DUI, was reasonable though defendant had not been suspected of criminal activity.⁶²

The automatic stay provisions of V.R.Cr.P. 62(a)(10) do not apply to appeals from post-conviction relief decisions.⁶³ The court left the question of whether a judge could order a discretionary stay to another day, to resolve in another first impression matter.

The offense of larceny from the person does not require that the stolen items be directly touching the victim, but when a defendant takes money from the victim's purse as it lay in the back seat of the car driven by victim, that's not larceny.⁶⁴ The high court relied on various sources of authority, from Blackstone to early Vermont cases, in reaching this conclusion.

Two lay judges, constituting a majority of the superior court, have the power to overrule the lawyer-trained presiding judge by rejecting a proffered plea bargain agreement.⁶⁵ With the judicial reorganization of 2000, assistant judges were excluded from the Criminal Division entirely, but in 1984, when this case was decided, it engendered controversy.

The trial court violated due process in accepting an agreement to revoke defendant's probation and modify his sentence without obtaining a waiver from the defendant.⁶⁶ Federal case law and that of other states clearly required knowing, voluntary, and intelligent waivers.

Motorists may challenge the reasonableness of a traffic stop, and reasonableness justifies a ruling that a stop of a vehicle having only one operating taillight is lawful but one for a vehicle with only one functioning rear license plate light is not.⁶⁷ Justice Denise Johnson explained that "[t]his Court has never implied, let alone held, that in allowing defendants to challenge whether the law enforcement officer had 'reasonable grounds to believe the person was operating ... a vehicle in violation of section 1201,' the Legislature intended to preclude defendants from challenging the reasonableness of the stop that led to DUI processing and prosecution." As important is removing drunk drivers from the highways, she wrote, this principle "may not be satified at the expense of our constitutional

right to be free from unbridled government interference in our lives."

A defendant has a right under the Confrontation Clause of the Sixth Amendment to be present and confront witnesses at a suppression hearing.⁶⁸

Sealing of records of a conviction for a crime committed before the applicant turns 21 year of age is allowed as long as the applicant has not been convicted of a listed crime or adjudicated delinquent for such an offense.⁶⁹

For the crime of grossly negligent operation of a vehicle, where the legislature defines it without reference to victims, there can be only one conviction arising from a single act of driving, regardless of the number of multiple victims.⁷⁰

Without active participation, a person can't be charged with accomplice liability, based solely of his passive acquiescence to the events that gave rise to a crime.⁷¹ The decision explained that it was of first impression because the court had never had occasion to interpret the statute.

Defendants are entitled to a jury instruction that any damages awarded would not be subject to federal or state income taxation, and the failure to so instruct is reversible error.⁷²

There is nothing in Section 40 of the Vermont Constitution that provides for denial of bail because of a defendant's dangerous propensities. Bail is to assure a defendant's attendance in court, not a means of punishing a defendant or protecting the public.⁷³ Cash-only bail violates Section 10 of the Vermont Constitution.⁷⁴

A sentence imposed in retaliation for a threat of appeal and in order to prevent the appeal violated due process. It is improper for the judge to inquire prior to sentencing whether the defendant intends to appeal.⁷⁵

The common law remedy of *coram nobis* is a viable means to challenge a criminal conviction.⁷⁶

Attempted voyeurism cannot be prosecuted if the one looking can't see the complainant's intimate areas.⁷⁷

A presentence investigation report containing a handwritten statement by petitioner written while undergoing psychiatric evaluation prior to sentencing, which was available to the trial judge but without the knowledge of petitioner, prevents him from exercising the right of allocution in a meaningful way.⁷⁸

When indigent defendants are denied counsel and sentenced to a suspended sentence and probation, their Sixth Amendment rights were violated.⁷⁹ In this decision, the court explained it was not announcing a "new rule, in the sense of overruling or significantly altering a prior decision; we merely interpreted the [public defender act] in a case of first impression."⁸⁰ In this view, cases of first impressions treated as putting an

other piece of a puzzle together, without disturbing what's already in place.

New rules can arise from cases of first impression. Addressing the recanted testimony of a government witness who may have committed perjury at trial, the Supreme Court created a new rule, mixing elements of both the probability and possibility standards adopted in other jurisdictions. This requires a new trial if the trial judge is reasonably well satisfied that the testimony of a material witness is false, that without that testimony the jury *probably* would have reached a different conclusion, and that the party seeking the new trial was taken by surprise when the false testimony was given or didn't know it was false until after the trial.⁸¹

Family Law First Impressions

The Family Court had the barred parties from conveying or encumbering marital assets during the pendency of a divorce. Before the husband died, he removed the wife as beneficiary of his insurance policy, and the wife sued. The trial court dismissed her claim, as the divorce proceedings had abated with the husband's death. On appeal, the high court found the abatement did not deprive the Family Court from jurisdiction under its equitable powers to enforce its pre-abatement orders.⁸² Death did not strip the Family Court of all jurisdiction over matters relating to the abated divorce.

In guardianship proceedings, personal knowledge of a developmentally-disabled adult's welfare is an essential prerequisite to qualify under the statute's definitions of "direct interest" and "interested person."⁸³

The Family Court does not need to hold a hearing on the reasonableness of attorney's fees in divorce proceedings, as it is a matter of routine. If a party feels aggrieved of the fees, it may bring a motion to amend or alter the decision.⁸⁴

A court may order retroactive modification of child support, commencing at a date determined in the trial judge's discretion but in no event earlier than the date of the motion seeking modification.⁸⁵ Justice Ernest W. Gibson III began his decision by noting that the controlling statute is silent on the question, and "there does not appear to be any relevant statutory history."

A spouse who sacrifices career opportunities in order to further the other spouse's attainment of a professional degree, only to see those expectations of financial security dashed when the other spouse shortly thereafter seeks a divorce, cannot claim the increased earning capacity of the other spouse as property subject to distribution as marital property, but Vermont's spousal maintenance statute is flexible enough to permit the court's consideration of the future earning prospects in that award.⁸⁶

A spouse's undistributed share of an estate may be considered as property for purposes of property settlement and maintenance award in a divorce.⁸⁷

A trial court has no authority or jurisdiction to entertain or grant any relief from final judgment while the denial of a previous request for relief is pending in the Supreme Court.⁸⁸

Insurance First Impressions

Prejudgment interest on money embezzled by a town employee is covered by a commercial blanket bond."⁸⁹

In 1942, the high court ruled that the construction of a public playground is the performance of a governmental or corporate function and the town entitled to sovereign immunity against its negligence.⁹⁰ Cases from other jurisdictions were conflicting. One decision, from Massachusetts, settled the question, an opinion that "so well and clearly sets forth the reasons why in our judgment a project such as the one here in question should be classed as a governmental function." In 1960, this precedent of first impression was narrowed by a decision that found a municipality immune from tort liability for negligence in the operation of a public playground with mechanical equipment.⁹¹ Matters of first impression would naturally be vulnerable to later clarification or alteration, before they can be enshrined in the pantheon of legal doctrines.

In 2018, the high court ruled municipalities are immune from nuisance claims when a sewer system backs up into private homes.⁹²

Bad-faith failure to pay the policy limit in underinsured motorist benefits claims is actionable.⁹³

Public Utilities First Impressions

The prior public use doctrine, which prohibits condemnation of a public use for another public use in the absence of express or implied legislative authority, doesn't prohibit condemnation of land devoted to a public use when the new use does not materially impair the prior use.⁹⁴

General Order 45, an important regulatory tool of the Public Service Board, was challenged in 1988 by a party to a purchase power agreement, who moved for expedited adjudication. The challenge was based on whether the federal Public Utility Regulatory Policies Act preempted the authority of the board to approve a purchase power agreement. Justice Frank Mahady wrote the opinion of the court. He began by acknowledging that these "issues are all of substance, and our determination with regard to them can be expected to have profound and lasting implications for the people of this state. A court which is final must

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be a court which is careful." The court won't be rushed, he wrote, particularly because this is a matter of first impression, denying the motion.⁹⁵

Significant increases in estimated costs for a natural gas pipeline project, coupled with changes in energy markets, do not amount to a "substantial change" requiring the project owner to obtain an amended certificate of public good.⁹⁶

Worker's Law First Impressions

The value of tuition-free college credits constituted an "other advantage" justifying treatment of them as part of the wages of a claimant for workers' compensation.⁹⁷ The ruling, deferring to the Commissioner's decision, was based on the Legislature's intent, the remedial nature of the program, and the need to liberally construe it to provide benefits to an injured worker. Justice Beth Robinson underscored that workers' compensation isn't a public welfare program or part of the social safety net; it's an insurance system.

The inclusion of wages earned during a base period from excluded employers is mandated in computing weekly benefit amounts of a claimant for unemployment compensation.⁹⁸

Loss of consortium cannot be part of a worker's compensation award.⁹⁹

The labor dispute disqualification in unemployment compensation applies only when, as a result of the dispute, the business is substantially curtailed by the dispute; otherwise, striking workers are entitled to compensation.¹⁰⁰

Resume fraud or misrepresentation during the hiring process constitutes just cause for dismissal.¹⁰¹

Tax First Impressions

A church claimed a tax exemption for its storage building, cabins, housing campers, the kitchen where meals were prepared, and the lands surrounding the church. At trial and on appeal, the claim was denied. In ruling on the question, the court noted that in matters of first impression, "we are cautious to rely on the ruling derived from distinct statutory schemes." As the Vermont law was narrower than the laws of other states that had decided the matter, the court didn't find them persuasive.¹⁰²

Receiving and subsequently televising films and video tapes supplied to a taxpayer for a fee by out-of-state distributors constitutes a taxable use under the sales and use tax statutes. Cases from other jurisdictions provided a genuine split of authority on the issue, but the high court relied on a decision from Arkansas as more persuasive than others cited.¹⁰³

A real estate firm is required to pay unemployment tax contributions of its sales

force.¹⁰⁴

A municipality may not tax business personal property of nonprofit corporations.¹⁰⁵

Trusts and Estates First Impressions

An executor has the power to partition or sell real property in a residual estate for purposes of distribution to devisees.¹⁰⁶ A conditional or contingent will, which is made contingent on the happening of an event so that the failure of the condition to occur means there is no will, is permissible in Vermont, but the decision on whether it is conditional must be made at the time the Probate Court considers the allowance of the will, as its jurisdiction hinges on there being a will.¹⁰⁷

Miscellaneous First Impressions

The Supreme Court won't regrade the examination papers of a candidate for admission to the bar. That's the business of the Board of Bar Examiners, who are the exclusive judges, and their decisions won't be reviewed by the high court without clear and unequivocal allegations of probative facts. "The result," explained the court, "is consistent with established principles of pleading and practice and in accord with the rule prevailing in other jurisdictions."¹⁰⁸

As a matter of first impression, the Supreme Court faced a question of whether a pretrial stipulation signed by the plaintiff, a union school district, and two of the defendants, a general contractor and roofing subcontractor, was a "Mary Carter" agreement, and so void as a matter of law. The remaining defendant was not a party to the agreement, which limited the maximum liability of the other defendants, diminishing the judgment proportionately and so increasing the liability of the defendant who was not a party to the agreement. The agreement had been filed with the court, and was not secret, which settled the question, as secrecy was the operative characteristic of a Mary Carter agreement. In ruling on the question, Justice William Hill's decision reviewed caselaw in other jurisdictions, but relied largely on the policy considerations underlying the use of such agreements.¹⁰⁹

A condominium unit owner may sue an association when another unit owner violates an obligation of the covenants or by-laws.¹¹⁰

A landowner who leased his land to the owner of a horse, for pasture, has no duty to prevent the horse from escaping and harming passing motorists.¹¹¹ "This view," wrote Justice Marilyn Skoglund, "is in line with centuries of Vermont statutory law."

A Vermont trial court may, *sua sponte*, in the absence of a party's request, waive the time requirements for a conditional order

for a new trial.¹¹²

The three-year statute of limitations applies to actions to recover for injuries to the person.¹¹³ A viable fetus, though later stillborn, is a "person" for purposes of construing liability under the wrongful death act.¹¹⁴

The Supreme Court has authority to sanction a retired judge for actions taken during his term, even if no complaint against him was filed until after he left the bench.¹¹⁵

An absentee landlord buying a propane tank for use in an apartment building is a consumer under the Uniform Commercial Code.¹¹⁶

Teachers are public employees and may be held liable for misfeasance resulting from an injury to a pupil under their charge and care.¹¹⁷

A person may recover for wrongful invasion of privacy when her employer, without her consent, runs an advertisement in a publicly-circulated newspaper displaying her name and photograph and a text, falsely attributed to her, that praises the employer.¹¹⁸

An exculpatory agreement releasing defendants from all liability from negligence is void as contrary to public policy.¹¹⁹

A retiring Governor may agree with the Secretary of State to seal all official correspondence for a reasonable period of time, in spite of the provisions of the Public Records Act.¹²⁰

The Use of Restatements as Authority

When case law is unhelpful, statutory history is missing or confusing, and statutes themselves unable to settle questions, the Vermont Supreme Court has turned to Restatements to provide direction to resolve first impression cases.

The Legislature never enacted these uniform "laws," although they are cited as authority by Vermont courts. It was 1938 when the Supreme Court first mentioned them, in *State v. Wilson*, where the Restatement of Contracts provided some direction to the Court in a criminal action against a man conducting a private lottery.¹²¹ Of course, there had been treatises on the law for hundreds of years before that time, including Coke, Blackstone, Kent, and even our own Isaac Redfield, whose treatises on Railroads and on other subjects made him a comfortable living after he retired as Chief Judge of the Vermont Supreme Court. But the Restatements of Contracts, Trusts, Torts, and Property, which are the product of the American Law Institute (first founded in 1923) seem to have a cachet that puts them on the same footing as a statute.

A sheriff's department is not vicariously liable for a deputy's misconduct under a theory of apparent authority.¹²² Justice Dooley explained, "This is a case of first impression in which we are discharging our traditional

role of defining the common law. Exactly because we seek to follow the common law as it has developed in the jurisdictions in this country, we have used the Restatement of Agency to find the appropriate law. See American Law Institute, I Restatement of the Law of Contracts, introduction at viii (1932) (explaining that the purpose of a Restatement is 'the preparation of an orderly restatement of the common law' to reduce uncertainty in the law). In saying this, we do not shirk from our duty 'to adapt the common law to the changing needs and conditions of the people of this state.'"¹²³

Determining whether a tortious act has been done as part of a common design with another tortfeasor requires a finding of at least some knowledge or awareness of the pertinent attendant circumstances.¹²⁴ The Restatement of Torts decided that point. In another matter both parties relied on the Restatement in making their arguments. The court explained, "We frequently have adopted provisions of this Restatement where our law is undeveloped."¹²⁵

Restatements sometimes carry greater weight than any other source. They have greater authority than caselaw from other jurisdictions, although when those other jurisdictions rely on Restatements, their cases grow in power. Ultimately, though, the Vermont Supreme Court is beholden to no authority in matters of first impressions. It may find support in Restatements or cases, but the court's independence at the moment of decision is essentially unrestrained.

The Use of "First Impression"

The phrase "first impression" has been used in several cases with a different meaning. Rather than identifying a new issue, the judges and justices told how their first impressions of cases were wrong. In 2012, the question of the use of *ex ante* instructions in a search warrant to protect the privacy interests of the person to be searched at first appeared to address the scope of protections of a constitutional provision, but on a second look was "more about the tools available to ensure that protection occurs."¹²⁶ In 1839, Judge Milo Bennett stated, "On the whole, then, though our first impressions might have been to the contrary, we come to the conclusion that there is error in the proceedings of the county court, and the judgment below is reversed and a new trial granted."¹²⁷ No one may criticize a judge or justice or court for considering and rejecting ideas before reaching a final conclusion.

When the court announces a question is a matter of first impression, it is not signaling any indecision. It is creating the space to articulate its own policy on a close question of law. Sometimes first impressions can be wrong. But once welded into place, the

court is unlikely to change its mind, as it does at times with reversals of longstanding principles. Unlike most decisions where precedents or statutes settle things, and more like the way the court handles legal questions on appeal, matters of first impression justify a review that is nondeferential and plenary about its own prior work.

There is no horn section in the Supreme Court chambers, but we could imagine an all-brass fanfare sounding and echoing throughout that building when a case is named a matter of first impression. A bright light shines down on the conference table, illuminating a void in the rich fabric of the law, insisting on being filled with ideas that knit other rules together. This must be the most difficult and delightful duty of the court. A deep conservative view would insist that new rules be adopted into statute by the General Assembly, questioning whether the separation of powers authorizes blatant lawmaking by the third branch. But it's too late for that argument. If the Legislature disagrees, it can always correct the principle by legislation. Curiously, that has rarely happened.

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¹ *Webb v. Navistar International Transportation Corporation*, 166 Vt. 119, 138, 692 A.2d 343, 353 (1996). This is from Justice Denise Johnson's dissenting opinion.

² *Sutton v. Tyrell*, 10 Vt. 87 (1838).

³ There are far more than 250 first impression cases where those words don't appear in the decision or head notes. One of the classic zoning cases, *Smith v. Winhall Planning Commission* (1981), for instance, settles the question of whether a pending application for a permit should be judged on the bylaws in place at the time the application is filed or subject to subsequent changes made after that date. The court decided to select the minority rule, that the application is immunized from a change in rules. *Smith v. Winhall Planning Commission*, 140 Vt. 178, 436 A.2d 760 (1981). The words "first impression" do not appear in the decision.

⁴ *State v. Harris*, 186 Vt. 225, 980 A.2d 785 (2009). ¶ 4.

⁵ *Daniels v. Elks Club of Hartford*, 192 Vt. 114, 58 A.3d 925 (2012). ¶ 59.

⁶ *Montgomery v. Watts*, 135 Vt. 464, 380 A.2d 75 (1977).

⁷ *State Farm Mutual Automobile Insurance Company v. Colby*, 194 Vt. 532, 539, 82 A.3d 1174, 1179 (2013).

⁸ *In re B.&M Realty, LLC*, 204 Vt. 438, 158 A.3d 754 (2016).

⁹ *In re Mahoney's Estate*, 126 Vt. 31, 220 A.2d 475 (1966).

¹⁰ *Chittenden Town School District v. Depart-*



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ment of Education, 169 Vt. 310, 738 A.2d 539 (1999).

¹¹ Packard v. State, 147 Vt. 256, 514 A.2d 708 (1986).

¹² Payne v. U.S. Airways, Inc., 186 Vt. 458, 987 A.2d 944 (2009).

¹³ State v. McCann, 149 Vt. 147, 541 A.2d 75 (1987).

¹⁴ Sutton v. Tyrrell, 10 Vt. 87 (1838).

¹⁵ State v. Riggs, 22 Vt. 321, 323-324 (1850).

¹⁶ Henry v. Vermont Central Railroad Company, 30 Vt. 638, 641 (1858).

¹⁷ State v. Mountford, 171 Vt. 487, 760 A.2d 639 (2000).

¹⁸ In re A.G., 151 Vt. 167, 559 A.2d 167 (1989).

¹⁹ State v. Baker, 145 Vt. 295, 487 A.2d 163 (1984).

²⁰ State v. LaFountain, 146 Vt. 649, 499 A.2d 796 (1985).

²¹ Davis v. Davis, 141 Vt. 398, 401, 449 A.2d 947, 949 (1982).

²² In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4, 9, 328 A.2d 667, 670 (1974).

²³ Alvarez v. Katz, 199 Vt. 510, 124 A.3d 86 (2015).

²⁴ State v. Singer, 180 Vt. 104, 904 A.2d 1184 (2006).

²⁵ MacDonough-Webster Lodge No. 26 v. Wells, 175 Vt. 382, 832 A.2d 25 (2003).

²⁶ Murphy v. Stowe Club Highlands, 171 Vt. 144, 761 A.2d 688 (2000).

²⁷ Terino v. Town of Hartford Zoning Board of Adjustment, 148 Vt. 610, 538 A.2d 160 (1987).

²⁸ Birchwood Land Company, Inc. v. Krizan, 198 Vt. 420, 115 A.2d 1009 (2015).

²⁹ Clearwater Realty Company v. Bouchard, 146 Vt. 359, 505 A.2d 1189 (1985).

³⁰ Agency of Natural Resources v. Supeno, 207 Vt. 108, 185 A.3d 1264 (2018).

³¹ Field v. Costa, 184 Vt. 230, 958 A.2d 1164 (2008).

³² Parker v. Potter, 197 Vt. 577, 109 A.3d 406 (2014).

³³ In re Estate of Neil, 152 Vt. 124, 565 A.2d 1309 (1989).

³⁴ In re Estate of Johnson, 158 Vt. 557, 613 A.2d 703 (1992).

³⁵ In re Quechee Lakes Corporation, 154 Vt. 543, 580 A.2d 957 (1990).

³⁶ State v. Atlantic Richfield Company, 202 Vt. 212, 221, 148 A.3d 559, 565 (2016).

³⁷ Rathe Salvage, Inc. v. R. Brown & Sons, Inc., 191 Vt. 284, 46 A.3d 881 (2012).

³⁸ Agency of Natural Resources v. Supeno, 207 Vt. 108, 185 A.3d 1264 (2018).

³⁹ South Burlington School District v. Calcagni-Frazier-Zajchowski Architects, Inc., 138 Vt. 33, 410 A.2d 1358 (1980).

⁴⁰ State v. Moffit, 133 Vt. 366, 340 A.2d 39 (1975).

⁴¹ State v. Bryant, 183 Vt. 355, 950 A.2d 467 (2008).

⁴² State v. Batchelder, 165 Vt. 326, 683 A.2d 1002 (1996).

⁴³ In re Wiley, 192 Vt. 393, 58 A.3d 966 (2012).

⁴⁴ In re Towne, 195 Vt. 42, 86 A.3d 429 (2013).

⁴⁵ Kaplan v. Kaplan, 143 Vt. 102, 463 A.2d 223 (1983).

⁴⁶ State v. Ferguson, 2020 WL 2791855 (2020).

⁴⁷ State v. Wesco, Inc., 180 Vt. 345, 911 A.2d 281 (2006).

⁴⁸ Putter v. Montpelier Public School System, 166 Vt. 463, 697 A.2d 354 (1997).

⁴⁹ In re Maher, 132 Vt. 560, 326 A.2d 142 (1974).

⁵⁰ State v. Ritter, 184 Vt. 565, 956 A.2d 1141 (2008).

⁵¹ Burlington Police Officers' Association v. City of Burlington, 166 Vt. 581, 581-582, 689 A.2d 1071, 1073 (1996).

⁵² State v. Albarelli, 203 Vt. 551, 159 A.3d 627 (2016).

⁵³ Zullo v. State, 209 Vt. 298, 205 A.3d 466

(2019).

⁵⁴ Greenmoss Builders, Inc., 143 Vt. 66, 461 A.2d 414 (1983).

⁵⁵ State v. Sidway, 139 Vt. 480, 431 A.2d 1237 (1981).

⁵⁶ Lewandoski v. Vermont State Colleges, 142 Vt. 446, 457 A.2d 1384 (1983).

⁵⁷ Andrews v. Lathrop, 132 Vt. 256, 315 A.2d 860 (1974).

⁵⁸ State v. Ely, 167 Vt. 323, 708 A.2d 1332 (1997).

⁵⁹ In re Carter, 176 Vt. 322, 848 A.2d 281 (2004).

⁶⁰ State v. Sheperd, 204 Vt. 592 (2010).

⁶¹ State v. Edmonds, 192 Vt. 400, 58 A.3d 961 (2012).

⁶² State v. Pierce, 173 Vt. 151, 787 A.2d 1284 (2001).

⁶³ In re Jones, 185 Vt. 638, 973 A.2d 1198 (2009).

⁶⁴ State v. Brennan, 174 Vt. 277, 775 A.2d 919 (2001).

⁶⁵ State v. Hunt, 145 Vt. 34, 485 A.2d 109 (1984).

⁶⁶ In re Jankowski, 203 Vt. 418, 157 A.3d 573 (2016).

⁶⁷ State v. Lussier, 171 Vt. 19, 32, 757 A.2d 1017, 1023-1024 (2000).

⁶⁸ State v. Grace, 204 Vt. 68, 165 A.3d 122 (2016).

⁶⁹ State v. Villeneuve, 202 Vt. 495, 150 A.3d 622 (2016).

⁷⁰ State v. LaBounty, 179 Vt. 199, 892 A.2d 204 (2005).

⁷¹ State v. Millette, 173 Vt. 596, 795 A.2d 1182 (2002).

⁷² Stowell v. Simpson, 143 Vt. 625, 470 A.2d 1176 (1983).

⁷³ State v. Pray, 133 Vt. 537, 346 A.2d 227 (1975).

⁷⁴ State v. Hance, 180 Vt. 357, 910 A.2d 97 (2006).

⁷⁵ State v. Thompson, 158 Vt. 452, 613 A.2d 192 (1992).

⁷⁶ State v. Sinclair, 191 Vt. 489, 49 A.3d 152 (2012).

⁷⁷ State v. Devoid, 188 Vt. 445, 8 A.3d 1076 (2010).

⁷⁸ In re Stevens, 144 Vt. 250, 475 A.2d 212 (1984).

⁷⁹ State v. DeRosa, 161 Vt. 78, 83, 633 A.2d 277 (1993).

⁸⁰ State v. Brown, 165 Vt. 79, 83, 676 A.2d 350, 353 (1996).

⁸¹ State v. Robillard, 146 Vt. 623, 508 A.2d 709 (1986).

⁸² Aither v. Estate of Aither, 180 Vt. 472, 913 A.2d 376 (2006).

⁸³ In re Guardianship of C.H., 208 Vt. 55, 194 A.3d 1174 (2018).

⁸⁴ Ely v. Ely, 139 Vt. 238, 427 A.2d 361 (1981).

⁸⁵ Towne v. Towne, 150 Vt. 286, 952 A.2d 404 (1988).

⁸⁶ Downs v. Downs, 154 Vt. 161, 574 A.2d 156 (1990).

⁸⁷ Osborn v. Osborn, 147 Vt. 432, 519 A.2d 1161 (1986).

⁸⁸ Kotz v. Kotz, 134 Vt. 36, 349 A.2d 882 (1975).

⁸⁹ Town of Ira v. Vermont League of Cities and Towns, 198 Vt. 12, 109 A.3d 893 (2014).

⁹⁰ Lemieux v. City of St. Albans, 112 Vt. 512, 28 A.2d 373 (1942).

⁹¹ Marshall v. Town of Brattleboro, 21 Vt. 417, 160 A.2d 762 (1960).

⁹² Lorman v. City of Rutland, 207 Vt. 598, 193 A.3d 64 (2018).

⁹³ Bushey v. Allstate Insurance Co., 164 Vt. 399, 670 A.2d 807 (1995).

⁹⁴ In re Vermont Gas Systems, Inc., 205 Vt. 509, 174 A.3d 1253 (2017).

⁹⁵ In re Investigation into General Order 45 Notice Filed by Central Vermont Public Service Corporation, 149 Vt. 285, 542 A.2d 288 (1988).

⁹⁶ In re Conservation Law Foundation, Inc., 207 Vt. 309, 188 A.3d 667 (2018).

⁹⁷ Haller v. Champlain College, 206 Vt. 86, 177 A.3d 497 (2017).

⁹⁸ Grenafefe v. Department of Employment Security, 134 Vt. 288, 357 A.2d 118 (1976).

⁹⁹ Derosia v. Book Press, Inc., 148 Vt. 217, 531 A.2d 905 (1987).

¹⁰⁰ Trapeni v. Department of Employment Security, 142 Vt. 317, 455 A.2d 329 (1982).

¹⁰¹ Sarvis v. Vermont State Colleges, 172 Vt. 76, 772 A.2d 494 (2001).

¹⁰² Brownington Center Church of Brownington, Vermont, Inc. v. Irasburg, 195 Vt. 196, 87 A.3d 502 (2013).

¹⁰³ Mount Mansfield Television, Inc. v. Vermont Commissioner of Taxes, 133 Vt. 284, 336 A.2d 193 (1975).

¹⁰⁴ In re Smith, Bell & Hauck Real Estate, Inc., 132 Vt. 295, 318 A.2d 183 (1974).

¹⁰⁵ Vermont Alliance of Nonprofit Organizations v. City of Burlington, 177 Vt. 47, 857 A.2d 305 (2004).

¹⁰⁶ In re Estate of Fitzsimmons, 195 Vt. 94, 86 A.3d 1026 (2013).

¹⁰⁷ In re Estate of Holbrook, 201 Vt. 254, 140 A.3d 788 (2016).

¹⁰⁸ In re Monaghan, 126 Vt. 193, 194, 225 A.2d 387, 387-388 (1967).

¹⁰⁹ Vermont Union School Dist. No. 21 v. H.P. Cummings Const. Co., 143 Vt. 416, 469 A.2d 742 (1983).

¹¹⁰ Watson v. Village at Northshore I Association, Inc., 207 Vt. 154, 184 A.3d 1133 (2018).

¹¹¹ Deveneau v. Wielt, 201 Vt. 396, 144 A.3d 324 (2016).

¹¹² May v. Breer Brothers, Inc., 144 Vt. 266, 475 A.2d 1082 (1984).

¹¹³ Rennie v. State, 171 Vt. 584, 762 A.2d 1272 (2000).

¹¹⁴ Vaillancourt v. Medical Center Hospital of Vermont, Inc., 139 Vt. 138, 425 A.2d 92 (1980).

¹¹⁵ In re Steady, 161 Vt. 636, 641 A.2d 117 (1994).

¹¹⁶ Barrett v. Adirondack Bottled Gas Corporation of Vermont, 145 Vt. 287, 487 A.2d 1074 (1984).

¹¹⁷ Eastman v. Williams, 124 Vt. 445, 207 A.2d 146 (1965).

¹¹⁸ Stanuski v. Continental Telephone Co. of Vermont, 154 Vt. 568, 581 A.2d 266 (1990).

¹¹⁹ Dalury v. S-K-I, Ltd., 164 Vt. 329, 670 A.2d 795 (1995).

¹²⁰ Judicial Watch, Inc. v. State, 179 Vt. 214, 892 A.3d 191 (2005).

¹²¹ State v. Wilson, 109 Vt. 349, 196 A.757 (1938).

¹²² Doe v. Forrest, 176 Vt. 476, 500, 853 A.2d 48, 67 (2004).

¹²³ Justice Dooley's quotation is from Hay v. Med. Ctr. Hosp. of Vt., 145 Vt. 533, 542, 496 A.2d 939, 944 (1985).

¹²⁴ Lussier v. Bessette, 189 Vt. 95, 16 A.3d 580 (2010).

¹²⁵ Birchwood Land Company, Inc. v. Krizan, 198 Vt. 420, 425, 115 A.2d 1009, 1012 (2015).

¹²⁶ In re Search Warrant, 193 Vt. 51, 63, 71 A.3d 1158, 1165 (2012).

¹²⁷ Town of Greensborough v. Town of Underhill, 12 Vt. 604, 607 (1839).



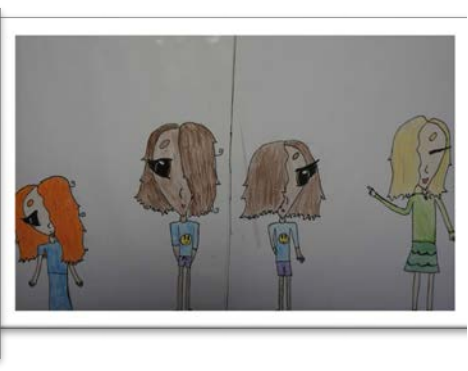
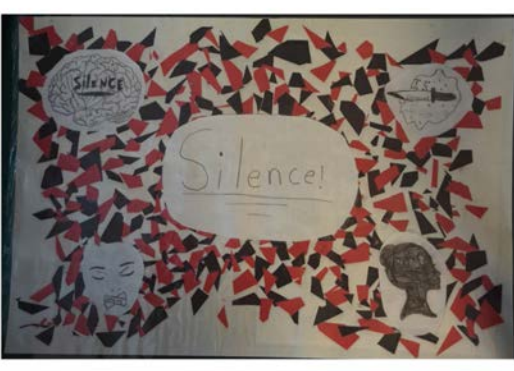
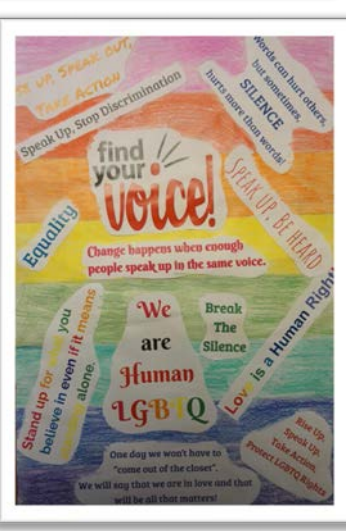
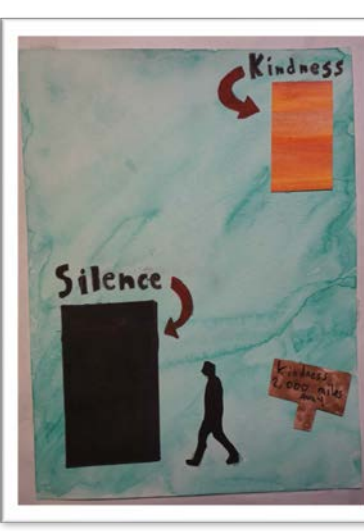
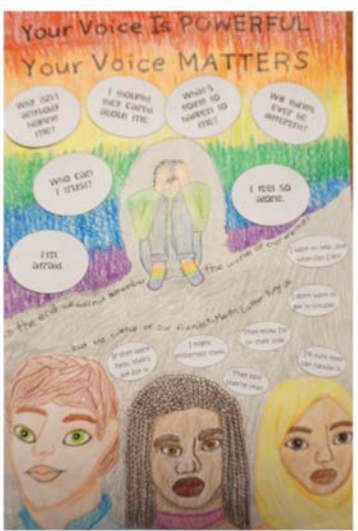
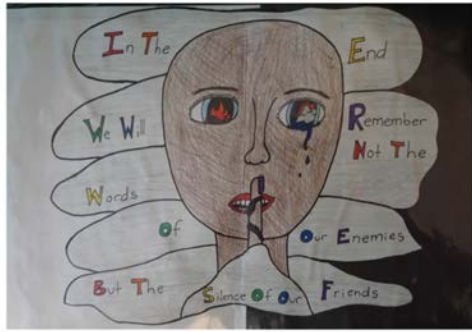
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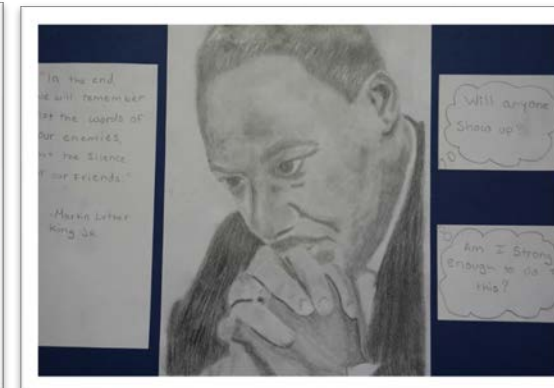
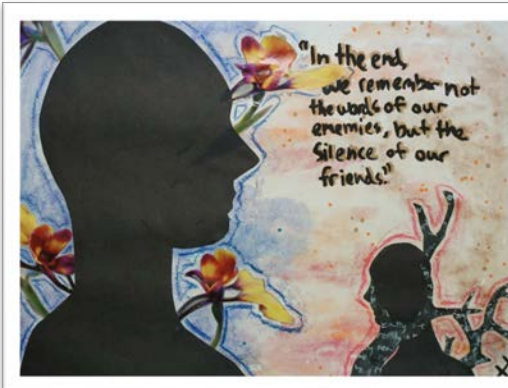
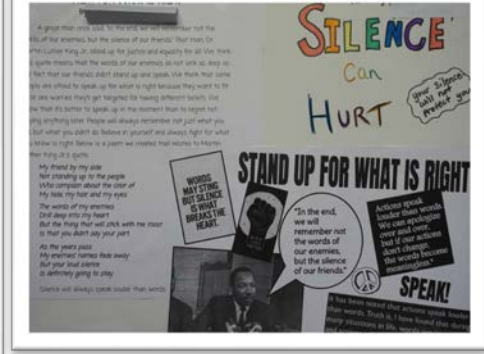
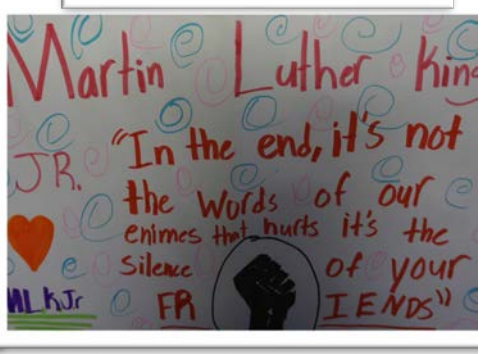
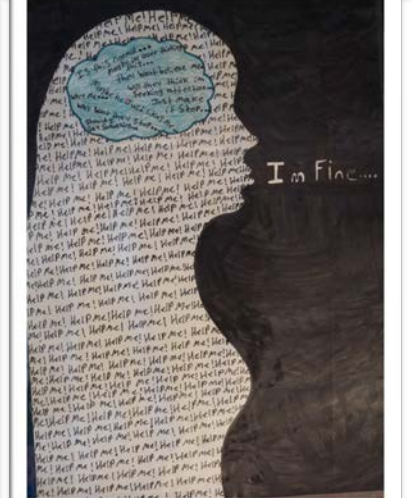
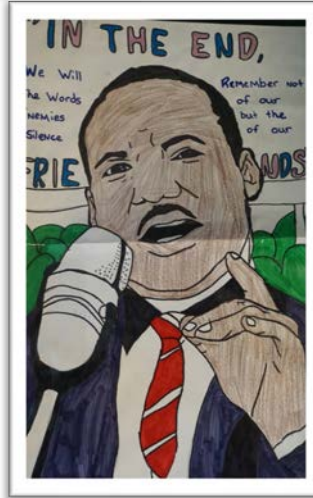
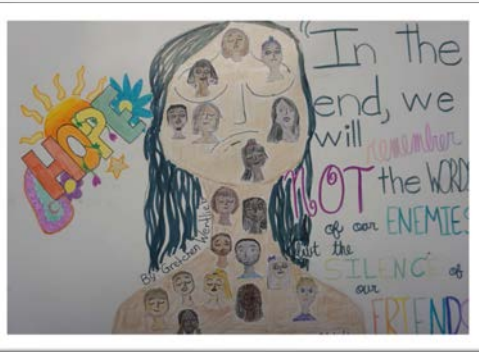
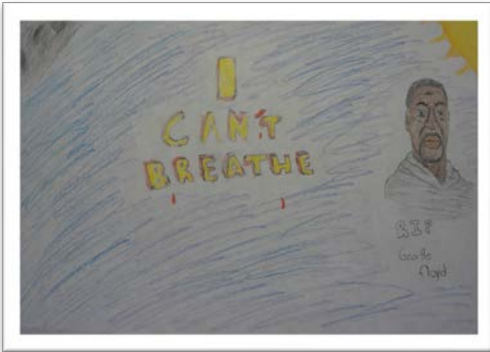
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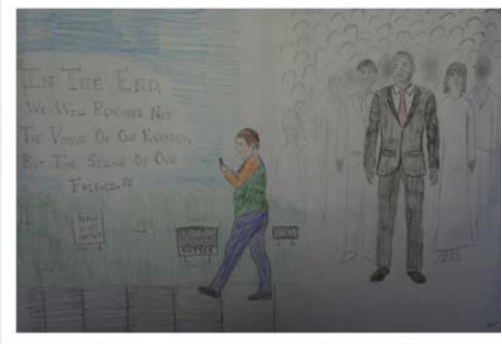
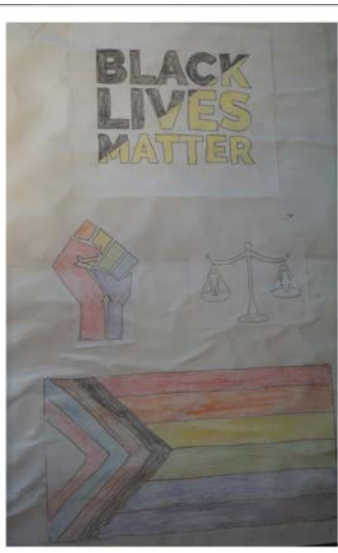
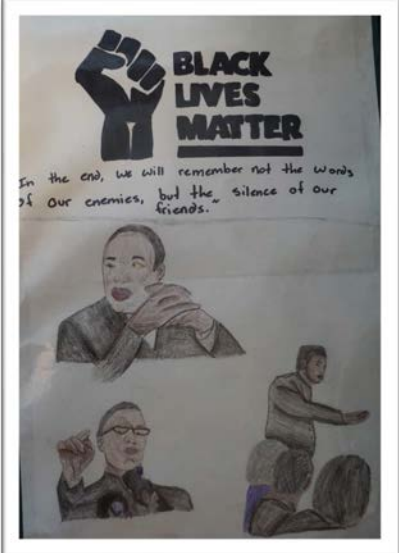
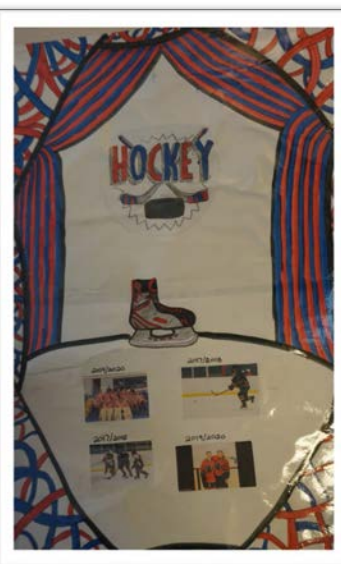
"In the end, we will remember not the words of our friends but the silence of our enemies" –Martin Luther King, Jr.

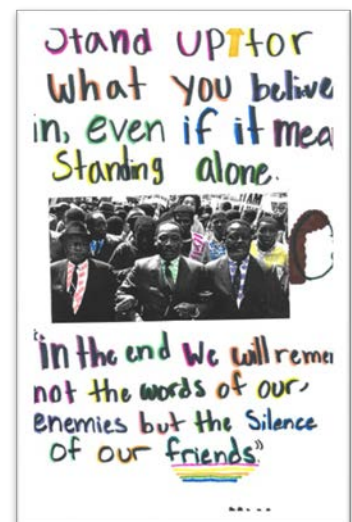
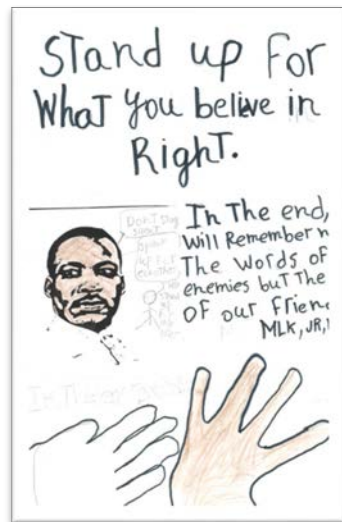
2021 VBA/YLD/Diversity MLK, Jr. Middle School Poster-Essay Contest





George Singh, Brandon Taylor, David McKeel, Dreagan Sean Reed, Michael Brand, Charles Francis, Kaiti Marie, Elijah Elias, Jamarri Dawson, Tanner Tyeen, Doss Tina Marie, Davis Kaiti, Jones Brandon, Dionte Roberts, Micah Lee, Claude Washington, Cain III, Ryan Simon, Earl Facey, Paroah Antonio, Davies David, Malera Kaitlan, White Darius J, Turner Piyonid, Lem Andrew T, Smyrna, Donnie Lee, Marcus Golden, Jordan James, Lisant Howard, Green Jr, Keith Leonard, Charles Foster Jr, Roman George, Arman Anderson, Jeremy Grayson, Joseph C, Jabel III, Matt, Kean, Felix, Kenech, Desmond Hayes, Anthony Taylor, Maval Ellis, Devin Ashton, Tussley, Elijah Jamal, Beames, Pfler M, Gines, Barry, Gaudin, Zachery Anderson Jr, Darnie, Sanders, Dertel, William, Abbey, SC, Dunen, Barret, Curran, Guy, William, Dein, Robert, Sumpkins, Lebaron, Ballou, Harold, Spencer, Michael, John, Daniel, Ryan, Travis, Grant, Parker, Gray, Bellman



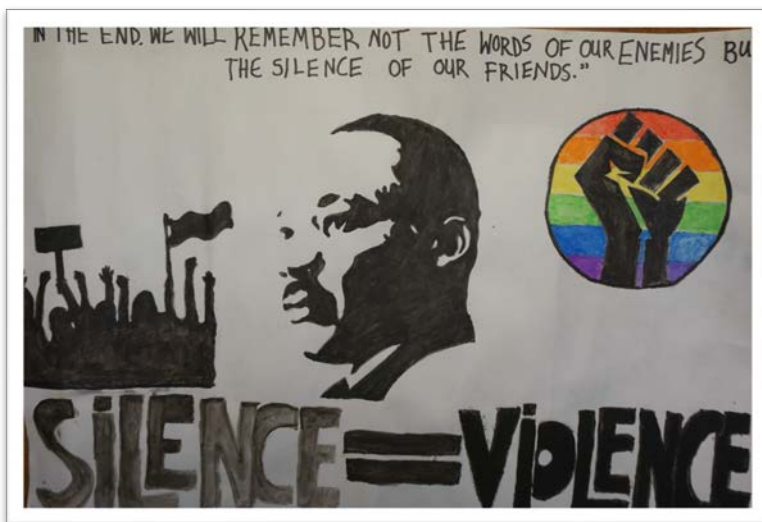


And for the WINNERS of the 2021 MLK, Jr. Poster-Essay Contest:



Elizabeth Cunningham and William Cunningham, Edmunds Middle School

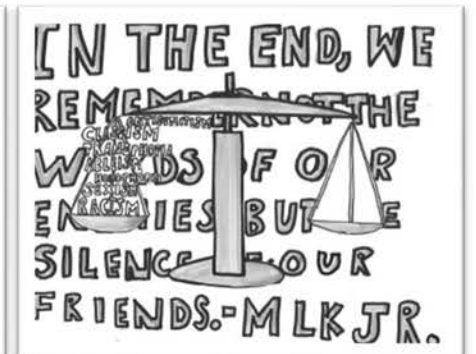
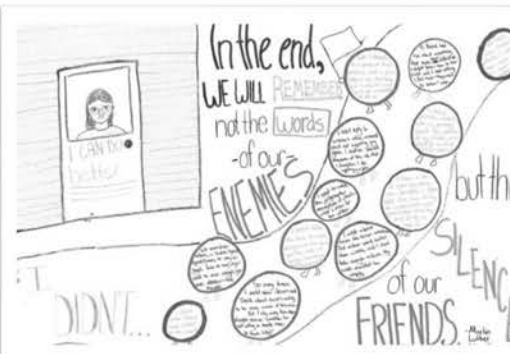
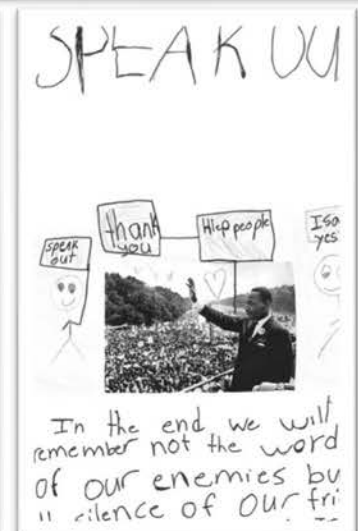
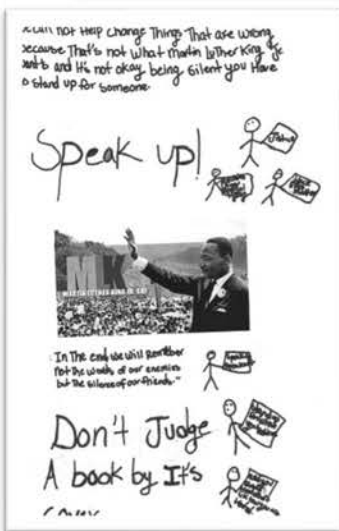
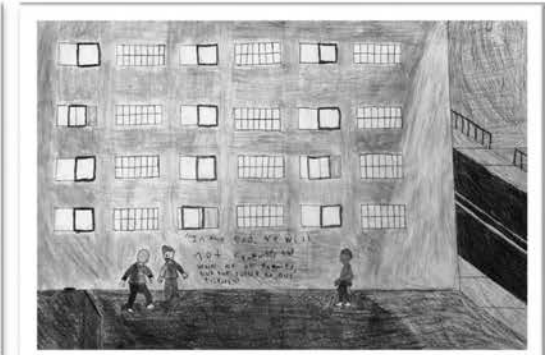
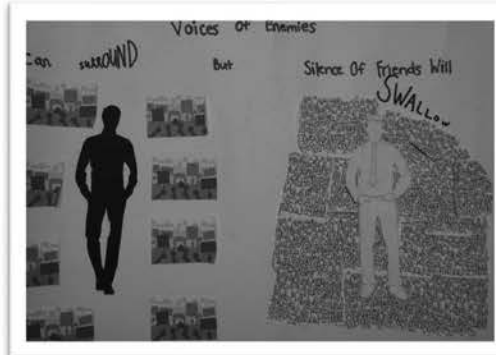
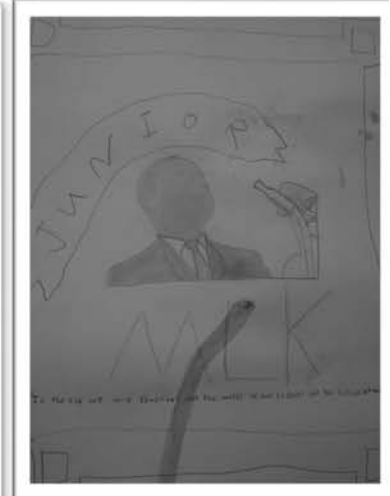
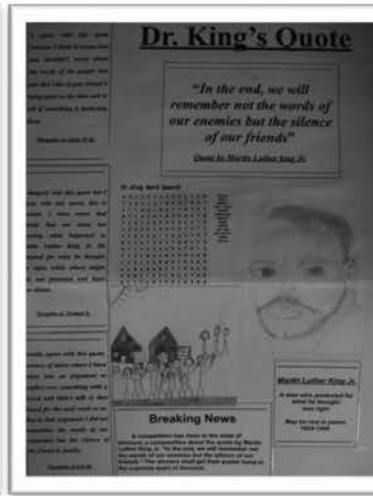
Winning essay reprinted in this issue!



First Runner Up: Maeve Parker-Clark, Hinesburg Community School



Second Runner Up: Isak Duncan U-32 Middle School



Congratulations to ALL of the students who submitted such thoughtful and stunning posters and essays!

WHAT'S NEW

Fourth Annual Martin Luther King, Jr. Middle School Poster-Essay Contest

The centerfold of this Vermont Bar Journal features thumbnails of the record number of submissions by middle school students for our 2021 Martin Luther King, Jr. poster-essay contest. Our blog story about the successful virtual ceremony is reprinted below (ICYMI), as a companion piece to the winning posters, submission images and winning essay, all printed in this issue. What is clear from the volume of thoughtful submissions is that the chosen quote by Dr. King not only resonated with students, it also sparked some incredibly profound introspection among Vermont's youth during these turbulent times.

The VBA, along with its Diversity Section and Young Lawyers Division, hosted the fourth annual Dr. Martin Luther King, Jr. Middle School Poster-Essay Contest. Each year, a committee comprised of representatives from the VBA, the VBA Diversity Section and the VBA Young Lawyers Division, chooses a quote by the late Dr. King to inspire the students to participate in the contest. This year's quote: "In the end, we will remember not the words of our enemies but the silence of our friends" served as inspiration to over 70 students who submitted a record number of entries!

The committee had a daunting task as 2020 came to a close of having to choose the top 3 Poster-Essay combinations, based on criteria such as relevance to theme, spelling and grammar, content, quality of design and creativity. Given the quality (and quantity) of this year's submission, this was no easy task! The contest winner, first runner-up and second runner-up are ordinarily invited to an in-person ceremony conducted by the Governor at the Statehouse and the Justices of the Supreme Court in the Vermont Supreme Court building. This year, however, the ceremony had to be conducted virtually due to the pandemic, but the students and families took it in stride.

VBA President Elizabeth Kruska kicked off the ceremony with introductions and a bit of history about the contest and the chosen quote. Next, Chief Justice Reiber continued the opening ceremony with some remarks about the importance of celebrating the Martin Luther King, Jr. holiday every year and how his message resonates today. Vermont Superior Court Judge Nancy Waples, who was the first chair of the VBA Diversity Section when the MLK, Jr. Poster-Essay Contest was established, then expressed how impressed she was that all



Martin Luther King, Jr. understood the power of words, but he also understood the weight of silence, especially from his friends. The eagle confined in a cage represents King and other black people in America. The cage is formed from words of hatred like the words shouted by members of the Ku Klux Klan when they burned churches, houses, and schools.

The eagle flying away symbolizes white townspeople who knew of the attacks. The key grasped in its talons signifies how bystanders could have used their privilege and power to protest, but they chose silence. The eagle soaring away from the cage is not looking back, but the imprisoned eagle is watching him, yearning for the free eagle to return and help.

The caged eagle is not scarred by the hateful words that confine it. It is hurt by the betrayal of a friend who carries the key, a key that could replace those words with support and hope.

In America, eagles are emblematic of liberty and power, just as the ideals and dreams of King made him a symbol of unstoppable freedom. The deep violet and azure-streaked sky promises freedom and justice for the confined eagle. In a similar way, King found hope for civil rights in each person who stood by his side and took his ideals to heart.

In the end, the confined eagle will not remember the degrading words that imprisoned it but rather the overwhelming silence of its departing friend.

of the submissions dealt with the subject of racial inequality with such insight, despite most not having experienced the discrimination that she and other people of color have experienced throughout their lives. Next to speak was Justice Beth Robinson, who had the honor of awarding the trophy to the contest winner. Justice Robinson emphasized how Dr. King's words and life's work are especially resonant during these tumultuous times and expressed hope that the students looked to have the qualities and power to "save us all" with their thoughtfulness and commitment to the values of Dr. King and their deep understanding that silence is complicity.

And on to the winners...

William Cunningham and Elizabeth Cunningham from Edmunds Middle School won the contest with the first place traveling trophy for their school and plaques. William and Elizabeth (6th and 8th grade) described the poster in detail and explained how the eagle in the cage, while caged literally and figuratively by the words of hate, instead looks through the bars to the free eagle, flying away with the key to unlock the cage. The students described how the free but silent eagle with the key has more power to hurt the caged eagle than the cage itself. Although the judging was completely blind and anonymous, Justice Robinson noted that Elizabeth Cunningham once won this contest and once came in second in prior years, showing her creativity knows no bounds! This poster and essay will be featured in the Winter Vermont Bar Journal being published within the month.

Maeve Parker-Clark from Hinesburg Community School (8th grade) received the first runner-up prize, presented by Justice Harold Eaton. Before awarding the plaque virtually, Justice Eaton noted that he was just a bit older than the contestants when Dr. King was assassinated, remembering that Dr. King was a beacon of light in very turbulent times and was a messenger of peace and tolerance, so fitting to be honored today with a record number of entries. Maeve then spoke and described her poster as relating Dr. King's words to modern-day bullying and harassment. She wrote about the need to speak up, becoming more aware that silence is powerful and can equal violence and that not speaking out gives rise to bullying.

Isak Duncan from U-32 Middle School (8th Grade) was the second runner-up prize winner, referenced by Judge Waples in her opening remarks as presenting a more personal take on Dr. King's quote. Justice Karen Carroll delivered his award, virtually, and asked Isak to give more detail about his poster and essay, drawn from person-

al experience. Justice Carroll stated that she felt so honored to award the prize to such a deeply personal piece of art and essay and how poignant both were. Isak then described his experience at the tech camp, noting that he'd be a rich person if he had a nickel for every time he heard comments such as "Asian nerd," but those comments have always been far easier to brush off than when one of his friends stood by in silence when those words were thrown at him. He noted that the essay was not meant to be a sob story or to be focused on the racial slur itself, but more toward the greater hurt caused by friends who were silent.

Closing remarks were given by Justice William Cohen, who made a special request for more prize winners next year so he'd get a chance, as the newest associate justice, to present an award himself! Justice Cohen thanked all of the students for their amazingly creative submissions and emphasized how proud they (and their families) should all be for tackling the quote with such insight and creativity. He tied all the posters to the Vermont motto of "freedom and unity" and how important it is for all Vermonters to support each other. President Kruska closed the ceremony noting how great it was to hear the kids describe their posters in detail and how each student interpreted the quote in a different way. Said Kruska: "We certainly have different ideas, but are unified in where we are all trying to go."

The video of the full ceremony is available on our YouTube page, also linked in our law blog (vbablawg.blogspot.com)!



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WHAT'S NEW

E-Filing Fees Status in Vermont State Courts

At roughly the same time that the COVID-19 pandemic began to dramatically impact life as we knew it, a new case management and e-filing system began rolling out in the Windham, Windsor and Orange Units. The new case management system was implemented in March 2020, and the e-filing fee aspects of the new Odyssey "File and Serve" system began operations in April 2020. The VBA immediately began receiving comments and concerns about the e-filing fees. Several days later, then-VBA Board President Elizabeth Novotny and VBA Executive Director Teri Corsones raised those concerns during a weekly phone conference with Judiciary and CAO leadership. The following day the VBA Board held a special meeting to review the concerns and voted to create an Ad Hoc E-Filing Fees Study Committee.

Nine months later, much has happened in the e-filing world in state courts in Vermont. The initial rollout to Windham, Windsor and Orange was extended to Bennington, Rutland, Addison, Chittenden and the Environmental Division in September, and is scheduled to be extended to Caledonia, Essex, Franklin, Grand Isle, Lamoille, Orleans, and Washington in March. Numerous Bar News items have been posted as events unfolded. We provided a brief overview of those events at this point in time, and provided a status report as to where matters regarding e-filing fees stand currently.

The VBA is deeply indebted to the many trial practitioners who have devoted hundreds of hours to e-filing fee topics since last Spring, starting with the Ad Hoc E-Filing Fees Study Committee established in late April 2020. The Committee was chaired by the then-VBA Board President-Elect Elizabeth Kruska. It included a broad spectrum of practice areas, including representatives from the Civil Division (Robert McClallen, Esq.), the Criminal Division (Matt Valerio, Esq.), the Family Division (Jordana Levine, Esq.), the Probate Division (Mark Langan, Esq.), the Environmental Division (Dan Richardson, Esq.), the Access to Justice community (Laura Bierley, Esq.), a Judiciary representative (Hon. Thomas Durkin), and two at-large representatives (Jerry O'Neill, Esq. and Laurie Rowell, Esq.). Attorneys Stephen Ellis, David Gurtman and Andrew Manitsky also dedicated many hours to the Committee. Elizabeth Novotny and Teri Corsones served as ex-officio members.

The Committee's Charge and Designation was to immediately review the e-filing fee aspects of the Odyssey e-filing system, including substantive concerns of bar members, ethical implications of the e-filing fee, and the training materials provided in conjunction with the e-filing fee aspect of the system. The Committee was also charged with making a recommendation to the VBA Board at its Board meeting in May with respect to a VBA position about e-filing fees following the Committee's review. The Committee acted expeditiously to prepare a detailed E-Filing Fees Study Report and the VBA Board voted on May 15 to approve the Report. The Report was then provided to the Vermont Supreme Court, to the Court Administrator's Office, and presented to the Senate Committee on Judiciary, which took an active and welcome interest in the topic.

The Report particularly noted access to justice concerns associated with the per envelope fee, including reduced access to pro bono and low bono services due to the cost and unpredictability of per envelope fees, the creation of barriers that impede access to an on-line system for self-represented litigants, and a lack of clarity regarding the scope of fees in particular situations that frequently arise for attorneys providing pro bono or low bono services. The Report's several recommendations included that the CAO engage with the bar and other court users to determine the best e-filing fee option for Vermont.

Following extensive testimony in Senate Judiciary, the Legislature passed H. 961 which was signed into law by Governor Scott on June 30 and became known as Act 120. Act 120 included three provisions related to the new Odyssey e-filing system, each based in part on the E-Filing Fees Study Report, including: "The Judiciary shall meet with representatives of the Vermont Bar Association and other court users to listen to and respond to court users' experience with the Odyssey File and Serve system and to examine alternatives to the current e-filing charges. The Judiciary shall report its efforts and recommendations for improving the rollout of the program and for improving court users' experience with the system, including costs, to the Joint Fiscal Committee and Joint Legislative Justice Oversight Committee not later than October 30, 2020." Other provisions provided that CARES monies would be used to fund a grant to cover e-filing

fees through December 30, 2020 and that the "User Agreement" that e-filers must sign to utilize the Odyssey File and Serve system was to be brought into compliance with 9 V.S.A. chapter 152, which prohibits unconscionable terms in contracts. Attorney Cabot Teachout was especially instrumental in bringing to light issues about the User Agreement.

With respect to the first provision, the VBA established two separate groups to meet with the Judiciary, one to present court users' experience with the Odyssey File and Serve system and the other to examine alternatives to the current e-filing charges. The Court Users' Group included a representative from State's Attorneys (Tracy Shriver, Esq.), Public Defenders (Jordana Levine, Esq.), the Civil Division (Samantha Snow, Esq.), the Family Division (Penny Benelli, Esq.), the Probate Division (Amelia Darrow, Esq.), the Judicial Bureau (Cabot Teachout, Esq.), the Access to Justice Community (David Koening, Esq.) and the Pro Se Litigant Community (Mary Ashcroft, Esq.). The Alternative E-Filing Fee Group included representatives from the Civil Division (Andrew Manitsky, Esq.), the Family Division (Amber Barber, Esq.); the Probate Division (Mark Langan, Esq.), Vermont Legal Aid (Jean Murray, Esq.), the private bar providing low bono representation (Matt Garcia, Esq.), and the Pro Se Litigant Community (Mary Ashcroft, Esq.). Input was also solicited from the membership at large, and many thoughtful and detailed comments were provided to the groups, that informed their meetings with Interim Chief Information Officer Doug Rowe over the course of several weeks' time starting in September 2020. The Judiciary also issued an on-line survey with questions geared to e-filing usability and the e-filing fee charge structure.

Mr. Rowe compiled the information gathered verbally and in writing from the Alternative E-Filing Fee Group, the Court Users Group and the on-line survey into an "Act 120 Review Findings Report," which noted that stakeholders found the per-envelope fee "untenable and unsustainable." It also noted that many court users agreed that e-filing fees should be assessed on a "per case" basis, either as a separate charge or added to the existing court filing fee.

Act 120 required the Judiciary to report its efforts and recommendations to the Joint Legislative Justice Oversight Committee and to the Joint Fiscal Committee



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inPERSON

VBA Conferences

The Vermont Bar Association offers many unique opportunities to connect with the legal community in Vermont. Our larger events such as our Annual Meeting, Mid-year Meeting and bi-yearly Solo & Small Firm Conference and Tech Conference can connect you or your company with the right people in the legal profession.



onLINE

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no later than October 30, 2020. The State Court Administrator's Report and the VBA Response to the Report were presented to the Joint Legislative Justice Oversight Committee on November 12, and the Joint Fiscal Committee reviewed the report on November 20. The Committee members agreed that the House Ways & Means and the Senate Finance Committees will review the e-filing fees issue during the current legislative session.

Thanks to a much-appreciated collaborative effort with the Judiciary in late December, the federal funds grant that had been paying for e-filing fees (previously scheduled to end on December 30, 2020) was extended to March 31, 2021, due to the continued impact of the pandemic on access to justice. In the meantime, the Judiciary remains in negotiations with Tyler to see if they can agree on a replacement of the current per-envelope e-filing fee with a one-time per-case fee paid by the initial filer, as requested by the VBA. Ideally, those negotiations will successfully conclude before March 31. We are indebted to all those who responded to the e-filing surveys, to the members of the Alternative E-Filing Fee Group and the Court Users Group who participated in the Act 120 meetings with the Judiciary to provide invaluable feedback in the process. Many thanks also to Court Administrator Pat Gabel for her work to support the extension.

As acknowledged in the E-Filing Fees Study Report, the bar appreciates the need for an updated case management and e-filing system to permit efficiencies for court users and the Judiciary. It is also very grateful to the Legislature for funding the implementation of a modern case management system integrated with an electronic filing system. We will continue to gladly work with the Judiciary to identify issues in the implementation of the system and to work together to resolve them, including issues surrounding the e-filing fee model.

Two webinar programs geared to the Odyssey e-filing system will be offered during the VBA Mid-Year Meeting program starting March 26; the first will address "Best Practices for E-Filing Processes" and the second will address the Vermont Rules for Electronic Filing. Each will include practitioners and court personnel, in the hopes that both perspectives will be helpful to attendees.



COMING SOON!

The VBA office will be migrating to a new Association Management Software in the next couple of months. We are excited to bring our members a cloud based, next generation platform as well as a new user-friendly VBA website. The new platform will not only provide the VBA staff with tools to streamline in-house processes and efficiencies but will also provide our members with an intuitive on-line member portal. Here's a sneak peak of some of the tools the new platform will provide:

ONLINE MEMBER PORTAL

Members can easily manage their profile, join sections, update contact info, change their password and renew membership.

ENHANCED ONLINE MEMBERSHIP DIRECTORY

An online pictorial member directory with an option to add biographical information.

CLE & EVENTS

Members can easily register, track their own CLE credits, link their webinar registrations and print certificates.

LAWYER REFERRAL SERVICE

Panel members will have fully automated online case tracking and status reporting as well as calculation of referral fees and online payments.

The launch of the new platform is expected to be in early April. We will keep you informed as we progress.

BE WELL

Mindful Ways to Create Habits, Resolutions and Intentions to Improve Your Well-Being

Despite it being February already, I still feel that I am preparing for 2021, looking at my life and determining what habits and behaviors are supporting me, and which ones are not. Essentially, that took me most of January, which is why I am finally getting around to finalizing my 2021 Positive Habits and Resolutions. As a mindfulness instructor, I not only want to use mindfulness, neuroscience, and science-backed research to support the absolute best outcomes in my own life, but I want to support others to do the same. I do not want to just create a list of aspirational positive tasks that fall by the wayside as life gets in the way. I want to learn how to integrate them fully into my life in a way that is sustainable, so they have the best chances of success. Thus, according to my quick study into the creation of sustainable habits and resolutions, the methodology I outline below should help all of us take some positive steps in the right direction in 2021!

First, we begin with habit formation and recognizing habits.¹ What is a habit? It is a routine or behavior that is repeated regularly and tends to occur subconsciously or involuntarily. Habits are done often and built into your daily routine without much effort. Habits stem from convenience as more than 40% of the actions people perform every day are not actual conscious decisions, but unconscious habits. A habit is different from an addiction, which is an action done over and over again, despite causing harm to our lives. Habits are an important force that our brains actually cling to, because they create neurological cravings where a certain behavior is rewarded by the release of “pleasure” chemicals in the brain.

Second, we must implement some “habit hacks” to cultivate better habits:

1. Think Small – Really Small:

- Create an atomic habit, or a really small habit.
- Thinking small is easier because once you get started, you can build.
- For example, Do not promise yourself you are going to read more books, instead commit to reading one page per day.

2. Create a Physical Reminder

A physical totem can make the habit or standard you are trying to hold yourself

to into something more than idea. (Example: AA chips)

3. Lay out your supplies (journal, running clothes, etc.)

You are less likely to take the easy way out if it’s embarrassingly simple to do the thing you want to do.

4. Piggyback New Habits on Old Habits

Use an existing habit and add something to it, like walking and picking up garbage. Instead of walking the dog, run with the dog.

5. Surround Yourself with Good People

We are the average of the five people we spend the most time with.

6. Commit to a Challenge

- It is easier to hand yourself over to a scripted practice where you just need to show up.
- Handing the wheel over to someone else is a way to narrow our focus and put everything into the commitment.

7. Make it Interesting

Find a way to stay motivated. I use the Insight Timer to track my meditations. BBOD workouts – 21 days, 80 days, 100 days.

8. It’s About the Ritual

Create the practice and then just repeat it in the exact same way.

9. It Doesn’t Have to be an Everyday Thing

What matters is the results average out.

10. Focus on Yourself

If you wish to improve, be content to be seen as ignorant or clueless about some things, like the news.

11. Make it About Your Identity

I am a writer, I am a meditator, etc.

12. Keep it Simple

Little things make a difference.

13. Pick Yourself Up When You Fall

Don’t quit because you aren’t perfect.

Third, we implement a simple trick to keep any new goal or resolution. What makes

people stick to their goals or resolutions? A study of 1,000 people arrived at a very simple tweak that increases the percentage of successfully implemented goals and resolutions: rephrase the goal or resolution as something positive that you would like to **COMMIT TO DOING**, rather than something you **would like to stop**.² So, think, “I will start to do _____”, as opposed to “I will quite or avoid or stop _____.” This reframes your goal or resolution as an Approach Goal and not an Avoidance Goal. The positive reframing of your goal or resolution works because it is extremely challenging, if not impossible, to erase a habit, but it is much easier to replace it with something else. Thus, if you want to drink less alcohol at night, pick another beverage that you will increase – such as tea or other non-alcoholic beverages. If you want to watch less television, commit to reading more. If you take the habit you want to change and replace it with another goal you can move towards, or approach, that new goal will not leave any space to retain the older habit or behavior.

In conclusion, when creating new goals or resolutions in 2021, do so with the disclaimer that we are all still really depleted and stressed because of the pandemic and do not have the energy and will-power to tackle too much significant change. So, be realistic and kind with yourself. Do not push yourself to make too many changes all at once. Prioritize any Approach Goals you would like to implement. Here is a positive approach goal that I have implemented in 2021: “In 2021, I will start to be gentle with myself.” Join me in this endeavor and find ways to cultivate new healthy habits that will support your overall well-being, in a mindful way.

¹ Adapted from *The Power of Habit: Why We Do What We Do in Life and Business*, by Charles Duhigg.

² Adapted from “A large-scale experiment on New Year’s resolutions: Approach-oriented goals are more successful than avoidance-oriented goals,” *PLOS ONE Journal*, published December 9, 2020 (<https://doi.org/10.1371/journal.pone.0234097>)



WRITE ON

The Importance of Finding Your Voice as a Writer

My writing students sometimes ask me for recommendations for books that will improve their writing. They are often just looking for books that will help them with grammar. In those cases, I recommend Strunk & White's classic or the Redbook. But every so often a student is not looking for a basic tutorial but is, instead, looking for a book that will turn their work into elegant, flowing prose, precise in its details, poetic in its phrasing, and, of course, persuasive in its legal argument. The truth is that no such book exists.

There are plenty of books that instruct on punctuation. They may also help students understand how to construct sentences or even paragraphs. Other books teach about the organization of a legal document. And finally, there are books that explore rhetorical and other techniques that can make writing sing. Each of these kinds of books has a place in legal writing instruction and usefulness to both the law student and the legal practitioner, but none of these really tell readers how to make the leap from correct writing to the kind of writing to which my students aspire. Elevating writing above the everyday requires that an author finds their own voice and allows that voice to come through in writing. That skill comes through practice rather than instruction. Nonetheless, this column will attempt to show why legal writers should be mindful of the voice that comes through their work, as well as give some tips on how to develop that voice.

The first step to great writing is correct writing. Correct writing is writing that follows the rules. Correct writing uses punctuation properly and follows common rules regarding word choice, sentence length, and general readability. There are many books that address correct legal writing. They instruct on how and why to keep sentences short, avoid passive tense and nominalizations, and, all other things being equal, choose simple over more complex phrasing. The focus of writing correctly is clarity: A correctly written legal work should be clear and easily understood by the reader. Each discrete element of correct writing is designed to enhance clarity, such that the author's intended meaning is unmistakable. Thus, for instance, legal writing texts tell students and practitioners to use the serial comma so that readers will understand at a glance that a list includes independent rather than connected

terms. Likewise, texts generally tell their readers to favor short sentences because shorter sentences are more likely to stick to the rule that each sentence should include a single thought; presenting thoughts in this mechanical manner ensures that readers will pick up each thought as it appears. Most students and practitioners have little trouble producing correct writing.

Once a legal writer has mastered the rules of correct writing, the writer can move on to the next step: writing with a strong authorial voice. Voice transforms correct writing into great writing. It does so by building connection with the reader. When a work has a voice, the reader gets a glimpse of the writer's mind at work and, for better or worse, some sense of who the writer is as a person. In *The Elements of Style*, Strunk & White wrote that "[a]ll writers, by the way they use the language, reveal something of their spirits, their habits, their capacities, and their biases."¹ While *The Elements of Style* is not dedicated to legal writing, this sentiment is more or less as true for legal writing as for any other kind of writing. And thus, the idea that "writing is communication through revelation—it is the Self escaping into the open" should be read to apply to all forms of writing, both creative and legal.² Great legal writers are mindful of the revelation inherent in their written work and craft a voice appropriate to their audience and the subject of their text.

Thus, the first step in adding voice to your writing is awareness that, like it or not, intended or otherwise, a sense of the author as a person will come through in written work. The author may come across as logical, organized, and attentive to detail; such qualities may be conveyed through writing that takes legal analysis one step at a time, includes thoughtful flow from one idea to the next, and uses correct citations. Or the author may come across as disorganized, scattered, and sloppy. These qualities may be conveyed through writing that is erratic, lacks connection between ideas or parts of the analysis, and pays little attention to citation form and accuracy. Both authors—the logical and the erratic—may write correctly in the sense that their writing follows the rules of grammar, sentence construction, and word choice so often set out in legal writing texts, but the author's voice, or lack of attention to voice, may nonetheless subtly tell readers that the au-

thor is, or is not, a credible authority.

This is not to say there is a single kind of voice all writers should attempt to capture. Voice is individual, and as each person has a different style of speaking, so too does each author have a different style of writing. This is obvious in creative writing; it may be less obvious a statement in legal writing, but it is no less true. Different styles and voices can teach us different techniques for finding and using our own voices in our written work. To that end, this column will now present three examples of strong voices in legal writing, and discuss the techniques that make each voice come through.

We begin with a selection from Justice Kagan's majority opinion in *Mathis v. United States*:

To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" or a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a whit about them.³

This paragraph is conversational legal writing at its finest, and Justice Kagan's voice is unmistakable. This reads as though Justice Kagan is delivering this orally, we readers are listeners, learning the basics of the law from her efficient, direct, and clear presentation. There are several qualities

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that make this paragraph as conversational as it is: chief among them are punctuation and word choice. Take the first sentence of the paragraph as an example, the colon linking the sentence's two halves makes clear that the first half of the sentence presents a term and the second half of the sentence defines the term. The sentence could replace the colon with a period, or overtly link the term and its definition with a comma and a phrase like "defined as." The overall meaning would be unchanged, but the colon, in place of a period or linking words, keeps the pace of the sentence moving with conversational rhythm. In effect, the colon is the long pause that a speaker would include if reading this paragraph aloud. As such, the choice to use a colon instead of some other construction gives this sentence timbre and cadence, marking it as the author's voice.

The em dash in the paragraph's third sentence performs the same function as the colon in the first sentence, setting up a term and its definition, but the em dash moves more briskly than the colon. Where the colon is a formal direction to pause, suited to the beginning of the statement and the slower pace at which oral delivery of this paragraph would begin, the em dash leads quickly from one item to the next, pointing like an arrow at the text that follows and conveying a quick pause of the kind that would occur as a speaker gathers steam and settles into a more animated and natural rhythm. Inclusion of these different kinds of pauses through different kinds of punctuation makes this passage one that readers can almost hear Justice Kagan delivering orally.

Justice Kagan's word choice also gives this passage voice. More specifically, the balance between legal terminology and ordinary usage takes this passage away from intellectual abstraction to a level that is understandable and immediate for the reader. For example, Justice Kagan's contrast between elements as defined by Black's

Law Dictionary and facts as "mere real-world things" helps the reader understand that elements are not the same as facts and thereby understand a little more clearly what is meant by "elements."⁴ Likewise, simple phrasing in the final sentence of this passage takes the legal terminology out of the abstract and makes it straightforward. Rather than writing something like "ACCA does not ask courts to consider the underlying facts of an act prosecuted as burglary," Justice Kagan has said fundamentally the same thing with the easy phrase "ACCA . . . cares not a whit about [facts]."⁵ This is plain language writing in practice. All modern legal writing texts tell lawyers to avoid legalese in their writing, but the truth is that words like "elements" and other legal terms of art are necessary for substantive clarity. They need to be included to some extent. But by pairing the legal terminology with ordinary usage and plain language, writing takes on a conversational tone, making it both easier to understand and significantly more fun to read.

We see a very different kind of voice from Justice Jackson in the *West Virginia State Board of Education v. Barnette* majority opinion. A whole legal writing curriculum could likely be created out of studying just this decision, as it illustrates some of the best writing that has come out of the U.S. judiciary. But for purposes of this column, I will highlight just one paragraph:

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual

was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.⁶

Justice Jackson's voice is as clear in this passage as Justice Kagan's is in the passage included above, though the styles of these two writers could not be more different. Here, the voice is not conversational, it is oratorical. This passage uses metaphor, rather than ordinary usage, to communicate complicated concepts. For example, the phrase "[t]hese principles grew in soil" is echoed in the phrase "must transplant these rights to a soil" and the word "withered."⁷ Despite the difference in techniques, the agricultural refrain in the passage above performs the same function as the plain language usage in Justice Kagan's *Mathis* paragraph: both aid understanding by grounding legal discussion on a non-legal hook. In this way, Justice Jackson's voice comes through in a way that it would not absent the metaphor.

The voice in this passage also comes

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through use of adjectives. Most conventional legal writing texts instruct writers to minimize adjectives. For example, in *The Elements of Legal Style* Bryan Garner writes that “[a]djectives often weaken nouns, and adverbs often weaken verbs.”⁸ This is generally true, and, as Garner advises, writers should not attempt to “warm[] up a tepid [word] with a qualifier.”⁹ But in this passage, the adjectives give rhythm and life where the writing could otherwise lack personality. For example, the second sentence of the passage above could be written without the adjectives. With that revision, the “generalities of the Bill of Rights” are no longer “majestic”; the “pattern” of our government is no longer “liberal”; and the “restraints on officials” are no longer “concrete.”¹⁰ Such changes would not necessarily change the meaning of the sentence, but they would remove the subtle clues as to how Justice Jackson and the Court, at least in this paragraph, viewed the Bill of Rights, government, and restraint on official action. Here, omission of adjectives would also minimize what can only be called the persuasive effect of this paragraph—this decision might have been different if the generalities of the Bill of Rights were banal rather than majestic, and the author wants the reader to have the right qualifier in mind while reading the Court’s decision. Adding the qualifier helps draw the reader into the Court’s reasoning and makes the Court’s ultimate holding that much more intuitive. As such, Justice Jackson’s use of adjectives, like his use of metaphor, lets us into his thinking and character.

Punctuation, stylistic flourishes, and choices about the application of conventional rules of legal writing are tools to develop author voice. We can see these tools in practice in the passages from Justice Kagan and Justice Jackson above. But voice can also come through restraint. This is shown in the passage below, from Chief Justice Roberts’s majority opinion in *Hollingsworth v. Perry*.

Petitioners argue that, by virtue of the California Supreme Court’s decision, they are authorized to act as agents of the people of California. But that Court never described petitioners as agents of the people, or of anyone else. Nor did the Ninth Circuit. The Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had the authority to assert the State’s interest in the initiative’s validity. All that the California Supreme Court decision stands for is that, so far as California is concerned, petitioners may argue in defense of Proposition 8. This does not mean that the proponents become de facto public officials; the authority they



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enjoy is simply the authority to participate as parties in a court action and to assert legal arguments in defense of the state’s interest in the validity of the initiative measure. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under our precedents.¹¹

This is, again, a very different authorial voice than that expressed in the two earlier passages from Justice Kagan and Justice Jackson. Here, the author’s voice lies in what is left out, rather than what is included. There is no artful punctuation or metaphor in this paragraph. There are no descriptive adjectives or adverbs. The author’s voice is, instead, conveyed through the craft of precision. Each sentence in this passage has a single purpose and conveys its meaning with straightforward phrasing, while the paragraph as a whole works methodically through the argument, presenting the conclusion at the end of the paragraph simply. The result is a paragraph as conversational as Justice Kagan’s *Mathis* paragraph. For example, in the first sentence of this paragraph Chief Justice Roberts uses italics to convey the emphasis the word “are” would receive if this paragraph was read aloud. And in the sixth sentence, he uses a semi-colon instead of a comma and the word “and” to preserve the pacing of speech. But the text here is also the most low-key and reserved of the three examples presented, and the author’s voice here makes the law seem simple by conveying the law in a level tone.

The key to good legal writing is finding your voice. Perhaps the brisk, animated, punctuated tone of Justice Kagan’s work resonates, or the level neutrality of Chief Justice Roberts’s work is appealing. Perhaps your voice thrives with a sprinkling of the metaphor and elegance of Justice Jackson’s work. Or maybe none of these examples works for your voice; good writing, like any other kind of beauty, is in the eye of the beholder. But whatever style appeals to you, the most important thing is

that you, as an author, find your own voice. Punctuation, rhetoric, and precision are the tools to accomplish this goal.

Reading your work aloud is another critical tool—if you have written something on the page that you would not say aloud, edit it and take it off the page. Substitute it with something that you would say aloud instead. Finally, remember that the rules of writing have evolved over time—it was once frowned on to begin a sentence with “and” or “because,” such usage is now common. And, occasionally, with a definite purpose, the rules *should* be bent, as with Justice Jackson’s exemplary use of adjectives to convey tone and tenor. In summary, writing with a strong voice will make your writing more dynamic, more understandable for readers, and simply more fun. The law is a literary profession, the least we can do for our readers is speak up to make our writing more enjoyable to read.

Catherine Fregosi is admitted to practice in Vermont. She clerked for the Hon. Justice John A. Dooley and the Hon. Justice Karen R. Carroll of the Vermont Supreme Court before joining the VLS legal writing faculty.

¹ William Strunk Jr. & E.B. White, *The Elements of Style* 66-67 (3d ed. 1979).

² *Id.*

³ *Mathis v. United States*, 136 S.Ct. 2243, 2248 (citations omitted) (alterations in original) (first quoting Black’s Law Dictionary 634 (10th ed. 2014), then quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999), then quoting Black’s Law Dictionary 709).

⁴ *Id.*

⁵ *Id.*

⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

⁷ *Id.*

⁸ Bryan A. Garner, *The Elements of Legal Style* 200 (2d ed. 2002).

⁹ *Id.*

¹⁰ *W. Va. State Bd. of Educ.*, 319 U.S. at 639.

¹¹ *Hollingsworth v. Perry*, 570 U.S. 693, 712-13 (2013) (quotations and citations omitted).



Samantha Lednicky: A Vermonter Comes Home to Do Good

Samantha Lednicky was born and raised in Shelburne, attended UVM and graduated from Northeastern School of Law. Then she returned home to Chittenden County to practice law. Many low-income Vermonters are glad she did. Attorney Lednicky is a recipient of the VBA's 2020 Pro Bono Service Award.

Most aspiring lawyers are introduced to criminal justice work when they are in law school. For Samantha Lednicky, the experience came earlier. As a political science and psychology undergrad at the University of Vermont, Samantha worked as an investigative intern at the Public Defender's Office in Burlington. It was very much law related—she called witnesses, prepped cases, and rubbed shoulders with local public defenders. “The experience solidified the fact that I wanted to go to law school,” she recalls.

After graduating from UVM, Lednicky headed to Boston and enrolled at Northeastern University School of Law. There she was infused with the culture of pro bono service, particularly in two fellowships. In the Prisoner's Assistance Project, where she was first a student then a teaching assistant, Lednicky represented clients seeking parole. In the Restorative Justice Clinic at Northeastern, she investigated cold homicide cases—lynchings—in Tennessee.

Following graduation from Northeastern, Lednicky returned to Chittenden County and was admitted to practice in Vermont. She started as an associate with DRM, then two years later she moved to Murdoch Hughes Twarog Tarnelli to take up a varied law practice. About half of her work is in criminal defense, often working with Attorney Frank Twarog on CJA federal conflict cases. Forty percent of Lednicky's work is in family law: divorces, parentage, custody and child support. Civil law comprises the remainder of the young attorney's practice.

It was in the Civil Division that Samantha Lednicky began volunteering with the Chittenden Rent Escrow Clinic. The clinic draws on volunteer attorneys to assist tenants threatened with eviction. The attorneys provide limited representation at the initial court appearances. They meet with the tenants, assess the case and identify defenses, outline options for the tenants, and either negotiate resolutions or litigate the rent escrow issue. Attorney Lednicky became a regular volunteer on rent escrow day, showing up every month for three years. And sometimes she would stay on as a pro bono attorney if the matter contin-

ued beyond the rent escrow hearing.

Samantha's work and dedication soon came to the attention of Hon. Helen Toor, who nominated her for the Pro Bono Award. “Samantha has put in a great deal of time, and has on occasion taken on a case pro bono after the initial clinic appearance,” wrote Judge Toor. “I have been very impressed with the time she has donated, and with her professional manner and dedication to her clients.”

During one rent escrow clinic in 2017, an intriguing matter was assigned to Attorney Lednicky. A tenant was being sued for eviction although the landlord had allowed her and her partner to live in the apartment rent-free in exchange for her partner's work fixing it up. The partner had since had his furlough revoked so he was no longer living with her. After a contested hearing was held in which Lednicky presented evidence of uninhabitable conditions at the apartment, the rent escrow motion was defeated. The underlying eviction matter continued, and Attorney Lednicky agreed to help the tenant pro bono.

As the case was pending, the landlord resorted to self-help tactics. He had the tenant's car towed—twice—and ignored problems with the apartment's heating system so that pipes froze, leaving tenant without heat or hot water. She was unable to shower, wash her hands, flush the toilet, or brush her teeth for 8 days. Samantha Lednicky helped the tenant countersue the landlord for damages, including punitive damages.

After three years, numerous appearances and hearings below, and two trips to the Vermont Supreme Court, the matter finally concluded. Samantha Lednicky had successfully won for her client compensatory and punitive damages, had defeated claims of the landlord for back rent, and was awarded attorney's fees for her efforts.

Attorney Lednicky used her experience and her taste for landlord/tenant law to develop a niche market for tenant services with MHTT. For about 5 years Samantha Lednicky has been handling referrals from Vermont Legal Aid and others. Sometimes these cases present as landlord/tenant matters but turn into personal injury cases. Samantha feels that this is an area of the law that many attorneys could get involved with, particularly with the possible award of statutory attorney's fees due to breach of habitability. “People who never had access to attorneys, who are struggling to pay the rent, can't afford to pay an attorney,” she notes. “But this is really great work.”

And she continued volunteering at the Chittenden Rent Escrow Clinic. “In a hand-



ful of cases, I stay in,” she said, “especially if I see some injustice.”

Rent escrow clinic work has slowed dramatically due to the COVID-19 pandemic. There was discussion at first about remote clinics, but when the eviction moratorium was extended that idea was dropped. “I definitely miss the work, and miss litigating and being in court,” she said. Since March of 2020, Attorney Lednicky has only been in person to court three times for RFA emergency hearings and once for an arraignment. “I miss the energy of court, of being with clients and seeing the judge.”

Attorney Lednicky's pro bono work is not limited to Civil Division. She also takes on family matters, recently completing a long struggle helping a homeless man win parental rights of his disabled daughter. It was a case that had been started by Frank Twarog, a partner in Samantha's law firm. In his letter nominating Lednicky for the Pro Bono Award, Frank noted that “Samantha brought a fresh perspective and her usual diligence to the case.” He observed, that thanks to Samantha's work, the previously homeless client “now has the ability to handle all of his daughter's medical and education needs, without hesitation or the necessity to obtain consent from his abusive ex-partner.”

Samantha Lednicky remembers this client as a black, low-income dad “who was doing everything right.” Dad was working with DCF, with family services, and was learning to be a better parent, and trying to manage the child's extraordinary medical and educational needs without help from the mother. But his child's mother had custody. After 5 years and a long process of multiple motions showing mom's corrosive pattern of behavior, the court gave dad custody.

Samantha repeated (without endorsing) the old saying ‘Criminal defense clients

are people who have done bad things and are on their best behavior in court. Family clients are good people at their worse in court.'

She acknowledges that family clients are the hardest to work with, but Lednicki has certain skills which have helped. Samantha has an undergraduate degree from UVM in psychology, and had conducted research at Woodside with the juvenile population incarcerated there. "I was looking at kids and their ability to empathize. I saw the connection between lack of empathy and criminal behavior."

There is little doubt that Attorney Lednicki empathizes with her family clients. She has learned how to work with clients who are struggling with multiple emotions. "When they are stressed out, taking the time to listen to client is what they really need." But she is also practical, and reminds clients that she can only help with legal issues. "Sometimes there is not a legal solution, so I encourage them to seek counseling."

Samantha Lednicki remains passionate about pro bono legal work. She considers VRPR 6.1—the pro bono rule—as a mandate. "I think every attorney should do 50 pro bono hours a year," she said. She also believes larger law firms should encourage pro bono work among their associates. Samantha credits DRM with getting her involved in the rent escrow clinic, and then Murdoch Hughes with continuing to support her pro bono efforts. "They [the partners] asked me what I wanted to do. When I said I wanted to continue to volunteer at rent escrow clinics, they said—'great, do as much as you want.'"

"Higher-up attorneys can do much to encourage younger lawyers," Lednicki points out. "They can engrain pro bono work into the firm's culture."

Looking five years into her future, Samantha sees herself still engaged in pro bono service. She has been guardian ad litem a few times in family court, and will continue to work on landlord/tenant matters. "It's easy to do on the side. I get the primary practice work taken care of, and in slower times can reach out to Legal Aid to see if I can help with anything."

"This work has engaged and energized me", Lednicki admits. "If I am able to help even in a small way, moving the needle of justice little bit, well, that's why I'm a lawyer."

Attorney Lednicki was admitted to the Vermont Bar in 2015 and is also admitted to practice before the U.S. District Court for the District of Vermont. She is a member of the American, Vermont and Chittenden County Bar Associations, and chairs the Women's Division of the VBA. She lives with her husband in Hinesburg, and in her spare time enjoys snowboarding, hiking, mountain biking and sailing.



Congratulations 2021 Pro Bono Service Award Winners

The Vermont Bar Association is proud to announce the 2021 winners of the VBA's Pro Bono Service Award. The attorneys being honored are Cristina Mansfield, Kathleen (Kate) Rivers, and Janet Van Derpoel-Andrea.

The Pro Bono Award is given annually to recognize attorneys who provide extraordinary legal services free of charge to indigent and disadvantaged clients in our community. All three of this year's honorees represent children in custody and relief from abuse matters in family and probate courts in southern Vermont.

Cristina Mansfield was nominated by Judge Kerry Ann McDonald-Cady of Bennington Family Division who cited Attorney Mansfield's willingness to serve either as guardian ad litem or attorney for children in relief from abuse or domestic cases. Judge McDonald-Cady noted that "despite taking on these difficult and time-consuming cases for little to no compensation, Ms. Mansfield, Esq. recognizes the need to serve this vulnerable population and gracefully accepts each time."

Kathleen (Kate) Rivers was nominated by Judges Kate Hayes, Michael Kainen and Jody French, with COMs Suzanne Borichevsky and Richard Perra of Windham Division, who noted that Attorney Rivers regularly represents children and families in juvenile matters in family and probate division. They wrote of Attorney Rivers: "Several times over the past year she has, without payment, assisted parents and children in reaching agreements or litigating parental rights and parent-child contact in complex domestic (divorce or parentage) cases, and in probate guardianship cases as well. Her commitment to her clients has been remarkable and has achieved excellent results."

Janet Van Derpoel-Andrea was nominated by Judge Cortland Corsones and Docket Clerk Nicole Burdick of Bennington Family Division for her frequent representation of children in relief from abuse and domestic relations cases. They wrote the following about Attorney Van Derpoel-Andrea: "Thanks to [her] dedicated service to the children of our county, children when they are at their most vulnerable, are provided with able and caring representation to help get them through what may be one of the most difficult periods of their life."

The VBA Pro Bono Service Award will be presented to these three attorneys during the VBA's virtual mid-year meeting beginning on March 25.

Why a Lawyer Should Never Try to Shoot from the Hip

As a kid, I always thought any Hollywood cowboy who could shoot from the hip and kill the villain was one tough hombre that no one in their right mind would ever want to mess with. I viewed those cowboys as heroes and would often pretend I was one of them when playing in the woods behind my childhood home. That was short-lived, however. As I got older, I came to realize there was a little movie magic behind those epic shootouts and my adulation of such heroes eventually waned.

As an adult, I still admire someone who has worked hard to learn to accurately shoot from the hip. I have no idea why, but it's a skill I find impressive. Perhaps this is why I've been wondering about the origin of the idiom "shoot from the hip" of late. I've come to learn that the phrase originated during the heydays of the American cowboy of the old West. Obviously, it alludes to shooting a gun from the hip; but what I wasn't aware of is this. The shot also occurs without ever taking the gun out of the holster. Of course, while this made firing quicker, the shot was not as accurate. It is with this context in mind that the current use of the idiom to refer to a decision that is reached and implemented without stopping to consider the possible consequences of the decision makes sense.

I wanted to share this because I have been cautioning lawyers to never shoot from the hip for years, and yet many still do. Some almost on a daily basis. I think one of the reasons why is due to the time demands of the legal profession. It is just too easy for lawyers to find themselves in situations where they feel compelled to take that quick shot, if you will. Take the shot, problem solved, move on to the next task. The problem is that taking that quick shot without regard to the accuracy of the shot is asking for trouble.

Perhaps a few examples are in order. Consider dabbling. It's a malpractice problem we continue to see. Time and again,

lawyers will take on a matter that is outside of the areas of practice they routinely practice in and they may decide to do so for any number of reasons. It might be an inability to say no to a good client. It might be the legal ask is viewed as a simple matter. Heck, it could even be out of a desire to make sure that revenue keeps coming in. Regardless, a decision to take a quick shot is made without stopping to think through the potential consequences. At a minimum, these lawyers often don't know what they don't know and therein lies one problem. Look at it this way. Even if that shot from the hip by happenstance ends up being close to the target, that is often still not good enough. Close doesn't cut it in the world of legal malpractice.

Blown deadlines can be another example of where unintended consequences arise when lawyers decide to take that quick shot. In follow-up to a remark I made during a recent CLE, a lawyer shared that his partner always used to say the following. If you think you know a filing deadline that is written in a statute or rule and rely on your recollection instead of looking it up, you have committed malpractice even if you were right. I couldn't agree more. Again, even if it was a close call, it's still a miss.

Other examples might include responding to an email to quickly or agreeing to take a matter on before giving any thought to whether you can actually meet the client's needs or work effectively with this new client. It could be giving legal advice in a vacuum because you didn't take the time to gather all the information you would need to know if your advice would actually be accurate. Regardless, I do understand why sometimes we all feel like it might be worth shooting from the hip, be it in our personal or professional lives. I will readily admit that I've done it more than a few times in my life. Time crunches happen; and when they do, I try to stop, take

a breath, and ask myself this. If I take that quick shot from the hip, is close enough an acceptable outcome or will I have only solved the problem for the short term and potentially created a bigger problem in the end? It's a question all of us legal hombres need to keep in mind because, particularly in the practice of law, accuracy matters, bigtime.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at: mbass@alpsnet.com.

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Whither a Remedy

When our august highest state judicial body makes decisions that involve important principles of law arising in fairly narrow circumstances, one wonders (I wonder) where our remedy lies, other than the legislature, to get a decision restated so that possible dictum can be fixed or removed to leave a correct and limited statement of the law that will not have widespread, perhaps unintended, adverse consequences.

I have in mind *Coburn v Cook* (97 A3d 892, 196 VT 410, 2014) in which the Court's opinion included a statement to the effect that a version of an enhanced life estate deed, "has not actually conveyed anything...." *Id.* at 415. It came up in a divorce appeal in which the inclusion as a marital asset was the defeasible remainder of one spouse. It would have been easy, it seems, for the court to say that because the remainder interest could be taken away (just as a Will or trust could be changed to eliminate a beneficiary or certain benefits), the expectancy nature of the spouse's interest made it too speculative an ownership right or interest to be considered in the division of property.

But the opinion says that the deed "has not actually conveyed anything." Think of that and the significance of a deed that doesn't convey anything. How do we get to the conclusion that a deed that does not convey is actually a deed; why is it not a nullity? What kind of instrument that conveys nothing can be a deed? It might be a Will or Will substitute but would typically fail both as to formalities of execution and lack of intention to create a Will. It could be wrestled into being viewed as some kind of revocable trust.

How do we arrive at the conclusion that a pre-27 VSA Chapter 6 enhanced life estate effects a conveyance of nothing? The new law at least makes clear that the conveyed remainder conveys no possessory rights and does not go as far as *Coburn* in its limitations of the nature of a defeasible remainder.

The problematic language in *Coburn* may come from the label "contingent remainder," which is a term that is useful for laymen but should not have the effect of creating misunderstandings in lawyers and judges. A contingent remainder suggests to me that a remainder could arise if a contingency were met, whereas a defeasible remainder (the proper term in my opinion) suggests that a remainder has been conveyed but that it can be taken away by use of a general power of appointment or some lesser version of a power of appoint-

ment (the reserved power of sale being a very limited version of the enhancement to a reserved life estate deed - we know that the power of sale is limited to what it says, a sale, whereas better drafting would include a broad spectrum of reserved rights (to mortgage, give away, take back, add other remaindermen, etc.)).

If the language in *Coburn* is a binding statement of the law, then serious adverse consequences follow. In part because of the *Coburn* decision, title companies will not insure a properly drafted enhanced life estate deed as a source of title, somehow interpreting that the remainderman who received nothing, has a sufficient interest that his or her participation in further conveyances during the grantor's life is required. They refuse to cover warranty deeds of the defeasible remainder (pre-27 VSA Chapter 6) because, notwithstanding very clear prior case law that the covenants of warranty cure any question of good title in the remainderman's interest (when the remainderman survived the grantor), the fear of challenges in subsequent transactions makes the risk of having to defend title too great to insure what the law clearly shows to be good title.

So now back to the purpose of this inquiry: other than going to the legislature (which has already severely limited the remainderman's rights in the new ELE statute, by prohibiting conveyance of the illusory remainder interest), how do we seek a fix of a Supreme Court decision to make it more palatable to the broader scheme of our law. The parties in *Coburn* would have had no interest in seeking reargument; the victor got what he wanted, the other party wouldn't have been helped by a better statement of the governing principle. The bar at large, and concerned practitioners, would have no standing to intervene and seek a better articulation of the necessary principles that were needed to reach the proper result, even if they knew about it immediately upon issuance.

The correct statement of the law, I believe, is that the enhanced life estate deed (which I use without regard to the recent ELE deed chapter in 27 VSA and as a general description of the instrument) conveyed a remainder, but one subject to defeasance. The new ELE deed chapter 6 prohibits a conveyance of this almost remainder; why, I have no idea - I objected at the time but without success and I finally withdrew my objection so those offering the bill could have their law and unblock the title insurance stranglehold on the use of ELE

deeds by raising chimerical specters of unspecified and unspecifiable title problems.

Why not be allowed to convey the defeasible remainder? One can convey no more than one got, so a reconveyance is still subject to defeasance but may accomplish important results without having to go back to a grantor for exercise of reserved rights, who might be unable (by incapacity, lack of a designated attorney in fact) to fix the problem that reconveyance would solve.

Perhaps, again, back to the point, is there a way for those without standing in a case, who don't even know about the legal principles enunciated in that case until it's already out there in the reported case law, to have an opinion resissued with a more limited or more correct statement of the governing and necessary law? Probably not. It's been six years since *Coburn* and I doubt if there's a procedural way to fix this kind of problem.

I am going to propose a legislative fix. I know other lawyers are disturbed by the ELE Deed law prohibiting the transfer of the "remainder," perhaps in the new law because of *Coburn*, instead of a provision that would fix the problems that *Coburn* has created.

My proposed solution, so far, is to make the following changes to new Chapter 6 of 27 V.S.A.:

1. Change §653(2)(C) as follows:

The grantor conveys and the grantee acquires a defeasible remainder interest such that prior to the death of the grantor, the grantee has no vested rights in the property, and

2. Delete the current version of §655(b) and insert in its place the following:

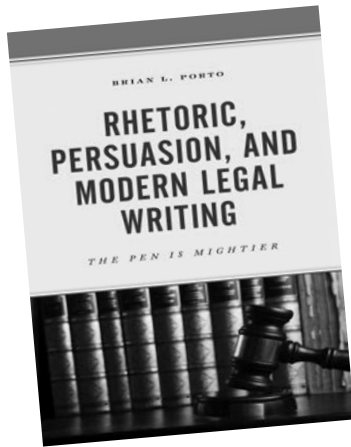
A grantee named in an ELE deed may convey the grantee's defeasible remainder interest during the grantor's lifetime, subject to the rights reserved to the grantor in the ELE deed.

Anyone who would like to support this or a similar change should let me know at rsp@vermontcounsel.com, and if there is enough interest, we might be able to persuade the legislature, and those who crafted the existing ELE deed statute, to get this into the law. I would prefer that it have retroactive effect.

Robert Pratt, Esq. is a co-chair of the VBA Probate Law Section and a partner at Pratt, Vreeland, Kennelly, Martin & White in Rutland.



BOOK REVIEW



“Rhetorical Elegance and the Machinery of Reasoning: A Review of Rhetoric, Persuasion, and Modern Legal Writing”

by Brian Porto

Reviewed by Daniel Richardson, Esq.

In the depths of our recent civil unrest many have held onto a kernel of hope in the belief that there is a common practice, which if widely adopted, would sprout into vines that might re-connect what others have sought to sever. This longing for greater connection stems in part from the severe disconnect that we have all experienced during COVID, but it also goes to a growing lack of common ground in American civil society. Concepts, such as bipartisanship or the common good, which used to be potent forces urging us away from the more extreme angels of our nature toward the center, have lost currency. Tracking discussions on social media between disparate groups has become a distorted window into the various manias of American life. The meme, it seems, has supplanted rational argument and dialogue. A picture of Biden looking clueless or Trump looking spastic have replaced our prior efforts to assure or persuade our friends and adversaries with facts, reasoning, and persuasion.

For generations of academics, the hope of common connection has traditionally resided in the “Great Books,” which have long come to define the enshrined basis of the methods and systems, if not the substance, of our culture. For decades, liberal arts programs have produced graduates weened on the idea of a single canon of books as the connective tissue not only uniting our society but linking us back to the roots of democracy in early Greek civilization.

Critical scholarship of the past 30 years has done much to knock down the idea of

a single “Western Canon” and has challenged the designation given to these “Great Books.” Freshman, who once were fed a steady diet of Virgil, Dante, and Milton are more likely today to be given contemporary and diverse writings that emphasizes multiculturalism and post-colonial critiques peppered with contemporary language and situations. This is, for the most part, a good and solid advancement on pedagogy. Newly minted undergraduates expected to decant the references and ideas of Homer was never a realistic expectation, and its implementation was just as likely to turn students away as to create the high-minded liberal artists that these curricula sought.

The shift in education, however, has not been without its critics and these changes are not without consequence. What has been lost in this shift and deconstruction of the Canon is exposure to the powerful and compelling structures of reasoning that these texts embodied. No matter the text, these pieces called back to the powerful techniques of reasoning and persuasion that the ancient Greeks pioneered beginning around 550 BC in the golden era of Athenian democracy. The art of rhetoric, like its more scientific twin, logic, has long been the thread through which successive generations hope to persuade or compel.

Social media—the electronic agora of ideas—is the place where this degradation is playing out most publicly, but it is an open question whether it is the driver of these changes or simply its most virulent symptom. Taking a McLuhanian view of the situation would put causation squarely at the feet of the medium. But close observation reveals a larger trend that both precedes and overtakes the language of social media. As Jonathan Swift wrote in the midst of a similar period of upheaval driven by competing cultural and religious forces:

But when a man’s fancy gets astride his reason, when imagination is at cuffs with the senses, and common understanding as well as common sense, is kicked out of doors; the first proselyte he makes is himself, and when that is once compassed the difficulty is not so great in bringing over others, a strong delusion always operating from without as vigorously as from within.¹

If the problem of today is that madness and fancy have gotten astride of reason, the last redoubt and keeper of traditional logic and rhetoric has been the legal profession. When what historians will likely dub the post-election crisis of 2020 was

at its most fevered, it was the legal profession, particularly in legal argument and judicial opinion writing, that stood united and held the line against the most devastating efforts to divide. Decisions like the opinion authored by Judge Stephanos Bibas were clarions and claxons calling out the bankrupt and illogical components of the “Kraken strategy”—regardless of party or ideological affiliation.² Time after time, the arguments and opinions that held sway were based on evidence, used logical reasoning, and expressed their findings and conclusions with elegant and impassioned rhetoric. Collectively, these efforts left little doubt or room for Trump or his team to reside with any credibility. When the eventual physical manifestation of this fever-dream converged on the Capitol on January 6th, the fight was over and the forces at play became isolated and ostracized from general public opinion.

The work of these lawyers and judges over the past few months were nothing short of a tour-de-force of the power of reason and persuasion. They were evidence that both still matter and that these structures are the potential salves for a society badly in need of repairing its discourse and dialogue.

In his latest book, Vermont Law School Professor Brian Porto crafts a timely paean to the art of rhetoric and offers the reader a straightforward introduction (refresher) to classical rhetoric by providing instruction on the various tropes, schemes, and frames that writers since Aristotle have used to compose compelling prose. Beginning with the three processes of Aristotelian rhetoric (logos, pathos, and ethos) and the five general parts of classical rhetoric (Invention, Arrangement, Style, Memory, Delivery), Porto dives into the various sub-components and describes each in clear prose.

Learning rhetoric is bit like learning color theory or the chromatic scale. The components do not necessarily teach the reader how to become persuasive, but they lay down the rules and forms that unlock how good writing and persuasive writing can be judged and studied as such. Knowing tropes and schemes such as alliteration (repetition of initial or medial consonants in two or more adjacent words), isocolon (parallel clauses that share the same number of syllables or words), or anadiplosis (repetition of the last word of a clause at the beginning of the next) can explain why a particular piece of writing is memorable. It tells us why speeches by Lincoln have survived in our shared memory and why many of his contemporaries’ speeches have not.³

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For the first two chapters alone, Porto's book is an important contribution to the world of legal writing, with his overarching point that good rhetoric makes good writing and good writing is persuasive and can be studied and understood in a methodical manner. Rhetoric is helpful to the craft of legal writing and a welcome contrast to the rudimentary IRAC writing formulas that often mark the alpha and omega of most lawyers' thinking about persuasive briefs.

The second and larger part of Porto's book seeks to explore the concept of rhetoric within a study of five Supreme Court Justices whose writing defined the 20th century of legal prose. In this section Porto conducts a survey of each justice giving an overview of their tenure and style. His selection of Oliver Wendell Holmes, Jr., Robert Jackson, and Antonin Scalia can hardly be faulted. Each of the three justices would make nearly any list of the best writers to serve on the bench and are rightfully regarded as arch stylists whose framing and approach to decisions have given us phrases like "falsely shouting fire in a theater"; "we are not final because we are infallible, but only infallible because we are final"; and "what I look for in a statute: the original meaning of the text."⁴

To these consensus examples, Porto adds Hugo Black and William Brennan. While both cast long shadows over the course and influence of the Court, particularly Brennan's ability to craft coalitions, they are less obvious choices on a rhetorical front. With writers like Cardozo, Kagan, Roberts, Stevens, and Ginsberg, the choice of two Warren Court stalwarts seems slightly redundant. Porto praises both Black and Brennan for their arrangement and clear, simple storytelling, but he acknowledges that they are not the stylists of either Holmes or Jackson's caliber. Porto's choice of Black and Brennan seems like an effort to contrast the high wire style of the former with the more workmanlike product of the latter.

The other issue that Porto faces in the second half is the choice between a deep dive into the decisions or a survey of each Justice to garner a flavor of their style and impact. Porto opts for the survey approach and ably works through the hits of each with solid essays preceding each survey on the history and larger rhetorical choices of each justice.

The problem with this method is the same issue that radio stations or documentary filmmakers face when creating pieces about musicians or musical periods. There is no feasible way to play even a small sample of the songs in full.⁵ For his part, Porto makes the most of his method offering a wide array of case summaries and focusing on exemplary pieces of rhetoric from each. This results in a steady pace for the book

and an opportunity to focus in on a particular section or phrase or to zoom out on the larger picture.

From these sectional analyses, the reader is likely to take away the larger points of rhetorical style. Porto makes the point repeatedly that thoughtful construction makes writing resonate. How you organize your ideas does not just have a flow of logic, but a flow of persuasion. Changing the normal order of a sentence to put the key idea up front, rather than burying it at the rear of the predicate makes the sentence more powerful.

Porto's book is ultimately a call for better legal writing. For those of us in the trenches, grinding out briefs, motions, and oppositions, the idea of careful and colorful prose may seem like something of an unnecessary and frivolous extension, like putting an actual blue ribbon on a report. But Porto's argument is that such language and arrangement are essential components of persuasion, and that as legal professionals, we have an obligation to master these classical rhetorical skills. Porto's point is correct. Just as Edward Everett noted, a 30-page brief is not nearly as effective as one that can reduce the issues down to pithy statements and then frame the legal analysis in a memorable and apt manner.

The deeper we go into the study of rhetoric, the more we understand of the power that each line, each word carries and how careful phrasing can speed up or slow-down the reader or listener's attention. In speaking with an opposing counsel, I recently characterized a particular area of business as bringing out the worst in people and the worst people. The counsel stopped at this semantic syllepsis and paused as he unpacked the two meanings. The process elicited a chuckle, but it also gave time for the phrase to sink into the listener's head and consciousness. To the extent that I was trying to persuade him (and I was), it was an effective way to communicate that this particular area encouraged people to engage in bad actions and was also a hot bed for criminal activity. I also implied that his clients might be of either category but left him to make that determination.

In the end, though, good rhetoric is not necessarily enough. Good rhetoric is not necessarily logical, and it is not necessarily ethical. Socrates and Plato railed against the Sophists who sold their prowess in persuasion to the highest bidder and sought to educate their students to make any position persuasive through rhetorical techniques. Rhetoric is content neutral. It is a mere set of tools, but given that the legal profession is in the business of persuasion, rhetoric is not a skill we can ignore or simply let arise naturally. If there was a point to the last few months, it is proof

that the legal profession, both the bench and bar, have an obligation to ensure that not only reason carries the day, but that it is done in such a manner that prevents the white noise of partisans from drowning out the message. The only way that happens is with the systematic application of the tools of logic and rhetoric, and the only way we ensure their uniform application is if we pledge our profession to its universal study.

This is not a call to begin implementing mandatory logic and rhetoric classes in law school, but such programs would not be wasted or out of place in the curriculum. If we endeavor to have and retain a truly common, basic set of persuasive skills, we need to equip ourselves with the knowledge that will support this enterprise. While undergraduate institutions and law schools have come to embrace specific area classes, this subject matter specialization has come at the expense of the core canon of concepts that support the profession. It is not unreasonable to suggest that every lawyer and law student should have a basic familiarity with syllogism and synecdoche before study in specific practice or policy areas. This training should be required either in undergraduate coursework or as a supplemental component to law school. As Porto notes, the role of formal rhetoric has largely dropped off and continuing cuts to the humanities at schools promises to forestall any reversal or revival from this trend. Yet, teaching and spreading logic and rhetoric remains as salient and central to the mission of legal education today as it was 300 years ago.

In this vein, Porto's timely tome is a welcome addition to the scholarship and literature of classical rhetoric. It is well-worth the investment of any student of the law, old, young, or in between to mine Porto's analysis and examination for the atomic elements and building blocks of good writing to both practice and to learn to identify. As both a bedside read and a permanent piece on the reference shelf, Porto's book offers an on-going and densely packed examination to give anyone the tools to begin improving and analyzing their writing and the writings of others.

Daniel P. Richardson, Esq., is a partner in the Montpelier firm Tarrant, Gillies & Richardson, a past-president of the Vermont Bar Association and the Vermont Bar Foundation and serves as Montpelier City Councilor for District 3.

¹ Jonathan Swift, *A Tale of a Tub* § IX, p. 82 (Oxford World Classics ed. 1999) (orig. pub. 1704).

² *Trump v. Commonwealth of Pennsylvania*, et al., Dckt. No. 20-3371 (3d Cir. Nov. 27, 2020) (Bibas, J.), available at <https://www2.ca3.uscourts.gov/opinarch/203371np.pdf>.

³ The famous story of Lincoln's Gettysburg Address is that it eventually overshadowed the lengthier keynote address of that day delivered

by former Senator Edward Everett. Everett was said to have remarked "I should be glad if I could flatter myself that I came as near to the central idea of the occasion, in two hours, as you did in two minutes." P.R. Frothingham, Edward Everett, Orator and Statesman. 454-58 (Houghton Mifflin Company 1925). Bob Newhart famously parodied this rhetorical power in his press agent talking to Lincoln routine:

Press Agent:

Abe, you've got the speech? You haven't changed the speech? [Pause.] Abe, what do you change the speeches for? [Pause.] A couple of minor changes? All right, what are they? . . . You changed 'four score and seven to 87? Abe, that's meant to be a grabber. Abe, we test-marketed that in Erie, and they went out of their minds

about it. [Pause.] Well, Abe, it's like Marc Anthony saying, Friends, Romans, countrymen, I've got something I want to tell you. [Pause.] What else? "People will little note, nor long remember.: Abe, what could possibly be wrong with that? [Pause.] They'll remember it. Abe, it's the old humble bit, you can't say, "it's a great speech, I think everybody's going to remember it." You come off a braggart, don't you see that. Abe, do the speech the way Charlie wrote it, won't you? The inaugural address swung, didn't it?

Bob Newhart, Abe Lincoln vs. Madison Avenue, the Button Down Mind of Bob Newhart (Warner Brothers Records 1960).

⁴ B. Porto, Rhetoric, Persuasion, and Modern Legal Writing 12, 57, 150 (2020). The quotes are

attributable to Justice Holmes (*Schenck v. United States*, 249 U.S. 47, 52 (1919)); Justice Jackson (*Brown v. Allen*, 344 U.S. 443, 540 (1953)); and Justice Scalia (A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (1997)) in that order.

⁵ An example to the contrary is Joel Najman's long-running public radio series *My Place*, which takes a minimalist's approach to documenting popular music one artist or theme at a time. <https://www.vpr.org/programs/my-place?page=1>. This minimalist approach is in direct contrast to even big sprawling documentaries like *Ken Burns Jazz*, which despite the series' length and subject, did not contain a single complete song in its more than 1,140 minutes of run time.



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IN MEMORIAM

Richard E. Dill

Richard E. Dill, age 90, of Newport died on January 14, 2014 after a long battle with cancer. He was born on May 14, 1923 in Detroit and married Claire Hebard on June 6, 1953 who predeceased him on March 4, 2000. Mr. Dill was a World War II veteran, having served in combat in Patton's army in southern Germany in the last three months of that war. After being honorably discharged in 1946, he pursued studies at Case Institute of Technology in Cleveland OH earning a degree in Mechanical engineering in 1949. He continued his studies at Harvard Law School, earning a law degree in 1952. He was a member of the MA, ME and NH Bar, practicing law in Portsmouth NH for many years. Mr Dill was awarded a 50 years of practice plaque from the NH Bar Association. Having become a member of the Vermont Bar in 1998 he opened his office in Island Pond and actively practiced law until his retirement in 2011. Mr. Dill enjoyed photography and in particular capturing steam locomotives in action. He is survived by his 3 children and their families including grandchildren and great-grandchildren. He also is survived by his companion of 10 years, Eileen Earp. He was predeceased by his wife of 47 years, Claire Dill, an infant son, his brother and his parents.

Marjorie J. Power

Marjorie J. Power (née Fisher), 78, died July 26, 2020, at McClure Miller Respite House in Colchester, of Acute Myeloid Leukemia. Born in Philadelphia, spending summers in Lake Fairlee, she attended McGill University in Montreal and studied history and economics at the University of London. While in England raising a family, she attended law school and later returned to Vermont achieving her J.D. from VLS in 1984. Marjorie worked as an attorney with the Public Service Board for over 20 years. She served on the Montpelier City Council for 4 years, served as Justice of the peace and spent many hours at the legislature advocating for single payer healthcare. Marjorie was a member of the Older Women's League, the Barre Historical Society, the Capital City Grange, Everybody Wins, the Council of Vermont Elders and Onion River Exchange. She enjoyed contra dancing, gadgetry, knitting and weightlifting among other things. Marjorie is survived by a son and daughter, cousins and 2 grandchildren.

Bradford Tyler Atwood

Bradford Tyler Atwood, 62, died unexpectedly at Dartmouth Hitchcock Medical Center on Monday, November 16, 2020 of previously undiagnosed pancreatic cancer. Brad was a partner in Hughes Smith Hughes Atwood & Mullaly in Lebanon, N.H. He graduated from Denison University and received his J.D. from Vermont Law School, Class of 1990. Brad was committed to community service and was a trustee and director of the Gifford Medical Center and vice-president of the board at Tri-Valley Transit. He served as president of the board at The Sharon Academy for many years and also served as chair of the Sharon selectboard. Brad was passionate about cooking and locally grown food and encouraged wilderness training of camping, skiing, hiking and fishing with his family. He is survived by his wife and four children, two stepdaughters, two nieces, his mother, his sister, his brother and many close cousins.

Douglas D. DeVries

Douglas D. DeVries, age 80, passed away in Durham, NC, with his family at his side on January 3rd, 2021. He was born May 2nd, 1940 in Holyoke, MA and moved to Montgomery Ctr in 1966 when he acquired the land that became his lifelong home. Doug graduated from U. Mass, Amherst. He was commissioned to the United States Marine Corps in 1962 and served in the Vietnam War. After his service in the USMC, Doug spent several years serving his country in Southeast Asia, where he made many lifelong friendships. Upon returning stateside, he received his law degree from Suffolk University in 1972, after having married his wife, Sharon, in 1971. Doug was a long-time member of the VBA, served as President of the Franklin & Grand Isle County Bar Association, and practiced law for more than 41 years in Enosburg Falls. He was on the selectboard for the town of Montgomery. Doug enjoyed being outdoors and spent much time fishing, hiking, and skiing. He was also a skilled builder who built the family home on the equestrian property that he and his wife developed as Burnt Mountain Farm. Doug and Sharon spent many years supporting their three daughters' athletic endeavors, particularly cross-country skiing and showing their Morgan horses throughout New England. He is survived by his 3 children, one grandchild, his sister, nieces, nephews and cousins.

Richard "Dick" Arnold Lang, Jr.

Richard "Dick" Arnold Lang, Jr. passed away on January 9, 2021 at the age of 82 at the McClure Miller Respite House after complications from a broken hip from a fall in his garage. He was born in New Rochelle, NY, the proud grandson and namesake of Captain Arnold, a Union soldier in the Civil War. Dick graduated from Cornell University and in 1964 from Cornell Law School where he served on the Board of Editors of the Cornell Law Review. Dick began his career at the 2nd Circuit Court of Appeals clerking for Judge Leonard P. Moore. Dick and Nancy Elizabeth Carvajal married in 1966 and lived in NY until their move to Burlington in 1972. Dick enjoyed his varied law practice as a partner at Samuelson Bloomberg, at Hoff Wilson, later with Bauer Gravel and finally as a part-time attorney with John Franco. In his early years in Burlington, he was the attorney for the formation and the building of 3 Cathedral Square senior and independent living housing. Dick served as Burlington Planning Board Chairman and Rotary member and served as a member of the Riverside Military Academy's Board of Visitors. He relished family trips on Lake Champlain in his boat, Solace. Dick is survived by his wife of more than 54 years, 2 children and their families including Dick's three grandchildren and his sister.

Margot L. Stone

Margot L. Stone passed away on January 9th at home in Newfane after a 31-year battle with cancer(s) with her devoted daughter by her side. Born on December 5, 1945 in New York City, she attended the Actors Studio with Lee Strasberg in NYC, and other private schools, happily counting Henry Winkler among her classmates. Margot made the pilot for the series 'That Girl' in her role as a double for Marlo Thomas, was in several commercials, and appeared as a regular character on Days of Our Lives until tragically killed off. She never lost her flair for drama. She especially loved helping to empower people, and was proud to graduate from Vermont Law School to become an attorney in her 50's. Her practice ranged from criminal defense to bankruptcy. Margot was a voracious reader, a deadly Scrabble player, and in recent years she got a lot of pleasure from volunteering for the Moore Free Library in Newfane. She was a life-long die-hard basketball fan and crowed about the time she was removed from courtside Celtics seats for yelling too loudly. Margot is survived by her daughter.

ter, her brother, her devoted dog Luna and her companion of 43 years James 'Jimmy' Sinon of Newfane. She was pre-deceased by her parents and an infant son, Kenneth, who died in an accident.

David Watts

David Watts. On January 16, 2021, David died in his sleep on the couch with the *New Yorker* magazine at his side, his heart failing after 75 active years. Born on April 23, 1945, David grew up in Usonia, N.Y., an experimental, collaborative community his parents helped to shape. The commitment of Usonian community to social justice and equity profoundly affected David's actions throughout life —pursuit of a legal career and volunteer activities focusing on social justice, economic and housing equity, disability rights, and family law. After graduating from Antioch School of Law in 1975, David began practicing at Vermont Legal Aid, acting on what he preached and believed. The majority of his law practice was shared with Stephen Blodgett, his mentor and friend. Paul Volk subsequently joined

their firm. David was active in outdoor activities and the law and was "thinking about retiring" December 2021. Of David's many community activities, perhaps most important to him was his shared leadership of Volunteer Vermont. In response to the racist arsons of southern Black churches during the mid-1990s, David helped to organize youth and adult service trips to Summerton, S.C., for 15 years, to rebuild community centers and places of worship. He was instrumental in founding the nonprofit, Volunteer Vermont, LLC, to raise money for building supplies and trip expenses. David is survived by his beloved wife and 3 sons and their families.

Douglas J. Wolinsky

Douglas J. Wolinsky, 69, of Burlington passed away at home surrounded by loved ones on January 29, 2021. Despite his serious illness for the past three years, Doug continued to live every day to its fullest. He was born in Saranac Lake, NY and was raised in Cleveland, OH. He graduated from UVM in 1973 and obtained his J.D.

from Cleveland State Law School in 1978. Doug married Anne McClellan on June 25, 1983 in Richmond, Vermont. He began practicing as a sole practitioner, starting his career as a commercial attorney with a focus on insolvency law. He was also one of the initial panel trustees under the Bankruptcy Code of 1979 and served as a Chapter 7 trustee for Northern New York and Vermont until his passing. In the 1980s, Doug joined Phillip Saxer and Arthur Anderson and formed the law firm later known as Saxer, Anderson, Wolinsky & Sunshine. In 2000, Doug joined the firm now known as Primmer Piper Eggleston & Cramer, having just recently concluded a six-year term on their Board of Directors, as a valued and respected member of the firm. Doug loved nothing more than spending summers with Anne and their son Max in South Hero, listening to Max write and record music, and was grateful to get to spend one last summer there. Doug is survived by his wife, his son, his mother and his brother.



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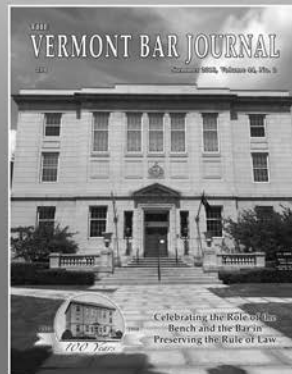
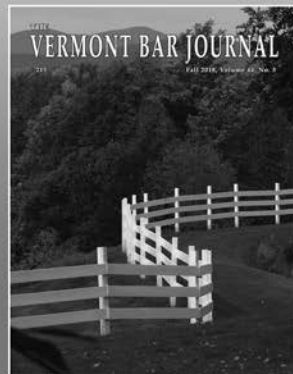
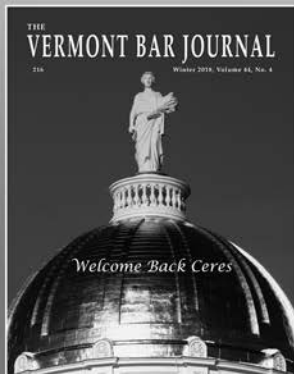
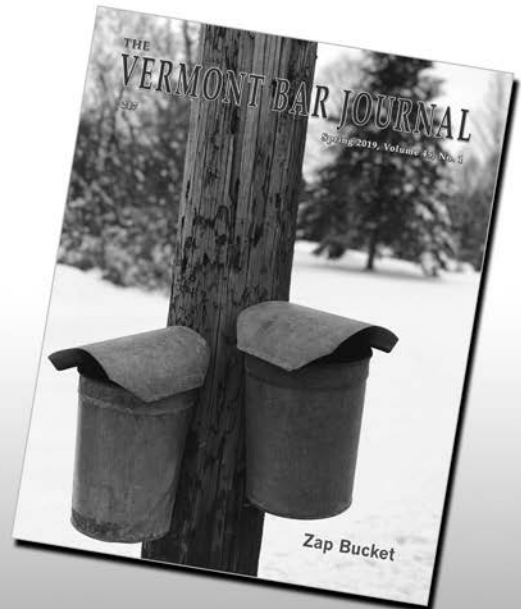
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