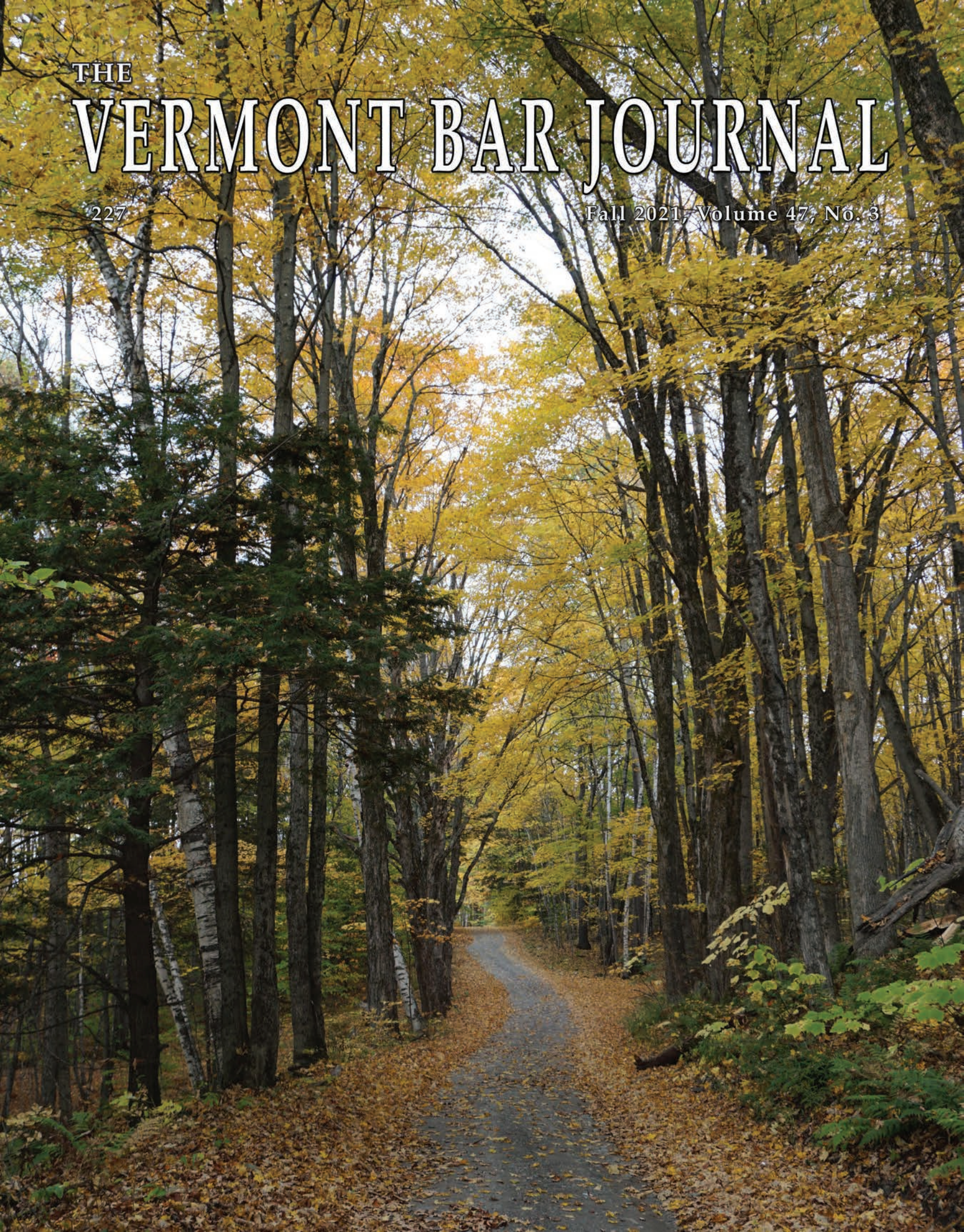


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PRESIDENT'S COLUMN

VBA's Board President Bob Fletcher

TMC: I'm meeting with the new VBA Board President Bob Fletcher. Bob, can you tell us a bit about your background. Where did you grow up and where did you go to school?

REF: I'm a Burlington native. I grew up in the South End – on Pine Street. I walked to Champlain School for elementary school, then went to Edmunds Middle School and Burlington High School. My college years were spent in Colorado at CU Boulder, and I returned to Vermont to attend Vermont Law School in 1977.

TMC: What led you to consider law school as a path?

REF: I can't pinpoint a specific time or date. I recall having some interest in the law while in High School. My father was friends with Ben Schweyer, and I had a chance to chat with him about the pros and cons.

TMC: Did you consider practicing anywhere else besides Vermont?

REF: No, not really. I went to undergraduate school in Colorado and loved the experience. Ultimately, though, I returned to Vermont to attend VLS and stayed.

TMC: What law jobs have you had during your career so far?

REF: My career has been focused on the civil practice. I was a summer associate, full-time associate and eventually a shareholder in the firm of McNeil, Murray, and Sorrell in Burlington. It was interesting and rewarding to work with Joe, Frank and Bill, and with the other lawyers in the firm. My time was devoted largely to representing Burlington Electric Department and the Water Department in all facets of their businesses from ratemaking and rulemaking to financing and permitting and construction of improvements.

I left MMS in 1987 to be the Executive Director of the Vermont Economic Development Authority. It was a pleasant and rewarding experience, but ultimately, I wanted to return to private practice and have more flexibility with my schedule for my then-youngish children.

In 1993, I joined my current firm as "Of Counsel," and eventually became an owner. Since then, I've represented municipal and school clients across the State.

TMC: Did you have the benefit of a mentor when you were first starting out?

REF: To my lasting benefit, my mentors were Joe McNeil, Frank Murray, and Bill Sorrell. They were patient, encouraging, and genuinely good people. They worked hard, but they balanced their work commitments with outside endeavors. I learned from them that one can advocate for a client without sacrificing civility.

TMC: What do you find most interesting about your work, currently? What do you find the most challenging?

REF: Our most immediate challenge is COVID. Navigating the shift to a more remote practice and the uncertainty of the pandemic's ebbs and flows has been taxing. Taking a longer view, the pace of practice is much different today.

Technology available to many of us (and competition in the profession) has created an expectation of constant availability and immediate delivery of service. One product of these expectations is increased stress for lawyers, and the possibility of decreased "free time." It can be a problem for a profession that is more prone to unhealthy lifestyles than most other professions. A commitment to wellness is not a worthy goal, it's a requirement if we're going to have a healthy and productive bar.

TMC: What's your favorite past time when you're not working?

REF: I ride bikes, I love being on Lake Champlain, I played, coached, and refereed soccer, and have skied (XC and downhill) most of my life. Fortunately, my family is also an active bunch and in many of the same sports. They're generally tolerant of me when I disappear for a few hours.

TMC: I know that you also regularly volunteer on different boards and committees. First, thank you for your service in that regard! Second, what would you recommend to new lawyers in terms of volunteer opportunities for them?

REF: No thanks are needed. I enjoy it and should have done it sooner. As for new lawyers, volunteer! There are any number of opportunities for us to give something back to our communities, and everyone should make an effort to find those opportunities.



TMC: When did you become interested in serving on the VBA Board?

REF: I practiced for 30+ years and was a VBA member throughout. I benefitted from VBA's services, attended its events, and generally "took" without "giving." Bob Paolini reached out a few years ago and solicited interest in serving on the Board. I responded that I was, and here we are.

TMC: What has been the most satisfying part about serving on the Board so far?

REF: Service on the Board has given me access to people and issues that I likely would never have had otherwise. The Board is made up of very good and committed people and the staff is terrific. I've found the non-Board VBA members I've worked with to be passionate, caring and willing to contribute their time and energy in support of the Bar's mission.

TMC: Has there been a least satisfying part?

REF: Honestly, no.

TMC: Sometimes VBA Board presidents have a focus or theme for their year in office. Do you have a particular focus in mind for your upcoming year in office?

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REF: I've thought about this quite a bit. Whenever I do, I always return to access to justice. I see that as more than simply courthouses reopening. It is citizens having the resources and technology to consult with counsel and the work-life flexibility to participate in remote hearings. It is young people being able to live and work in Vermont as lawyers and still pay their bills, buy houses, raise families, and retire. We need to come together as a bar and collaborate on and promote solutions to the challenges that keep folks from having the representation they need at prices they can afford, but at prices that enable our lawyers to live and work in Vermont. Our bar is growing older, and we need new lawyers, younger lawyers, healthy and happy lawyers.

Secondarily, but related, is the realization that we can't accomplish the previous goal if we don't work together as colleagues. We need to continue to support and partner with the Judiciary, the executive branch, and the legislature. We need to continue to work with and engage the broader community on civics, the rule of law and so many other subjects.

TMC: Bob, what advice would you give to a young person thinking about law as a profession?

REF: Explore your options and make sure you appreciate the responsibilities you will be taking on, and that you're committed to the law. Ours is a service industry, and our clients don't need our assistance only during regular business hours. You should be prepared to invest some of your time in service to the profession, to your community, and to the law. Otherwise, you will not be truly serving your clients.

TMC: Last question: What would you like to be remembered for, as the 142nd president of the Vermont Bar Association?

REF: It would be nice if at the end of my term, I have advanced work begun by my predecessors and contributed to efforts to keep the bar healthy, maintained a collaborative and supportive relationship with the Judiciary, and helped establish programs or initiatives to attract and retain younger lawyers from diverse backgrounds and cultures. Oh, and to have presided over an in-person meeting of the membership!



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PURSUIT OF HAPPINESS

Ultimate Interview with Sam Angell



Vermont law school team Frisbee: Ultimate Justice 1993.



Sam Angell, today, with his Cornell Buds Alumni T-Shirt.



Sam Angell (center) catching a Frisbee at Southern Regionals 1990.

JEB: As you know, Sam, we interview people with interests, talents or passions outside of the practice of law, and I want to interview you about Ultimate Frisbee. So let me just start at the beginning since I don't know much about it. Ultimate Frisbee is sort of like soccer with a Frisbee, right? Moving forward toward a goal as a team?

SA: I love talking about the game, so of course. Right, Ultimate is played on a field that's a little bit larger than a soccer field. It's 70 yards long and 40 yards wide, but it has two 25-yard end zones. I think the measurements are metric now, but it's still about that size. The end zones are huge and they are a big part of the game. You have seven players on a team and the offensive team tries to advance the Frisbee by throwing it to a teammate who cannot run with it. There is no running with the Frisbee, much like basketball, so you can only advance it by throws. And the objective is to throw it to a teammate in the goal you're going for. If there is a drop or a block or incomplete pass, it is an immediate turnover and the team that turned it over and was on offense immediately becomes a defensive team. And the team that was on defense gets to pick the Frisbee up and becomes offense right away at that spot without stopping.

JEB: So there's no change in personnel like football--like it's the same people that are playing offense and defense, depending on the play?

SA: Yes, you're on the field for two or three points at a time. And then you have to sub out because it's exhausting. It's basically a series of 20 to 40 meter sprints, depending on the position you play. But at the same time, you you're throwing a Frisbee, which is a very difficult thing to throw accurately because it can dip, dive, go up, bend in an arc--you can make it do lots of things. And it really depends on the wind. So there's lots of variables involved.

JEB: And can one person throw it to another, and then they throw it to another in a chain forward or is each play completed after gaining yards?

SA: Yes, a chain of throws. So you've got seven players and you can keep throwing it to anyone and there's no off sides. You can go anywhere on the field. But you have to throw it within ten seconds of catching it or it's a turnover, called a "Stall" in the jargon. The 10 second stall count is counted by the person that's guarding you.

JEB: Ah, so you can keep continuing a play which is more fluid than football and you don't have to pass backwards like rugby which makes no logical sense...

SA: Right! You're allowed to pass backwards. To start the game each team lines up on opposite goal lines, and one team throws the Frisbee to the other team to initiate play. And that's called a "Pull". And you start every point that way whenever there's a score. The team that gets scored

on has to walk the field of shame back to the other goal line. And the team that just scored gets to stay at the goal they scored in. And you can substitute players at that point between points.

JEB: The walk of shame and starting point is definitely different than soccer.

SA: Also, a great thing about Ultimate is the women's game and the game's inclusivity. Because of the nature of the difficulty of throwing a Frisbee, you don't have to be necessarily tall or fast. I mean, that can help, but it doesn't really matter as long as you can throw the Frisbee. It's really a huge advantage. And the women's division in particular that started about six years after the men's division has really grown. And it's also evolved to where there are now co-ed divisions. And when I say divisions, what I mean is the country is divided up into eight regions and then each region has sections. So you as a team go to sectionals and if you do well at sectionals, then you can advance to regionals. And if you're in the top two or three teams at regionals, then you advance to nationals. And there are different divisions, like the Open Division, the High School Division, the College Division and the Masters' (old-timers') Division. And each division has men's and women's teams, and some have co-ed teams.

JEB: Back to your point about co-ed players. So let me just clarify if it's truly a non-contact sport, as soccer was designed

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to be, but definitely is not. Is it just knowing how to catch, throw and run on offense and defense, or with a drop or a block is there actual physical muscling of people off of the frisbee?

SA: It is a non-contact sport. Ultimate does have quite a bit of incidental contact, however. I mean, if you've got two women

that are running down this field full speed and somebody throws a long pass to them and they both go up for the frisbee running at high speed, there's going to be contact, but you're not supposed to be touching the other person. What's interesting and what makes ultimate very different from any other sport, especially in its infan-

cy, was that there were no referees on the field, even at the highest level, even at the national championship levels. The constitution and bylaws of the sport written in 1979 specified that were not to be any referees.

JEB: No referees at nationals?!

SA: There's something called "Spirit Of The Game" defined in the original bylaws which is about competing to the highest possible level and showing the maximum amount of sportspersonship that you can have while playing. So if you foul someone you call your own foul, or the opposing player calls one on you. What that means in the game is that if I foul somebody, they can call a foul on me, they can say, you just fouled me and play stops. And if I agree that I fouled them, they would get to hold the Frisbee for longer; the stall count would go back to zero. So if the foul occurred when the stall count was at say 6, it would go back to zero and the passer then has 10 seconds to throw the disc. If I have the Frisbee and somebody is guarding me, they have to stay at least the diameter of Frisbee away from the thrower. So there's no contact. And if they count to 10 and I haven't thrown it, then it's a turnover.

JEB: Now wouldn't you just deny fouling? In soccer, the players are taught to play the whistle and would never admit to any wrong-doing on their own accord. (Irish fans worldwide are thinking Thierry Henry at this moment).

SA: Sure there are players who do not abide by the Spirit Of The Game and an immediate huge argument would erupt. But it wasn't a big community and if you're going to the national championships, you're seeing the same people over and over again, and you would get a reputation really quickly of somebody that calls fouls or denies fouls and violates the Spirit Of The Game. But in my game, we played really cleanly: people rarely called a foul on me and I rarely called a foul on people, even though there was physical contact, it was just incidental trying to go for the disc. And it was really fun that way; high competition and respect for your opponent. Friendships would develop.

JEB: But there is quite a bit of physical contact then?

SA: I'd say there was, but it was nothing purposeful at all. And some games really don't have much of it. The women's game is really beautiful because there's a very high emphasis on precision passing. And when you get multiple throws linked together very quickly, it's just a beautiful thing to see. It really is gorgeous. You get, you know, one player throwing to another, to another, to another, to another, and then a goal—it's kind of balletic. Linked passes

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like that are called "Flow", and that's what an offense is looking to establish. It's really a beautiful game.

JEB: And they say soccer is the beautiful game. But I can picture that now, the way you described it as balletic and just imagining the disc gliding and soaring like a bird.

SA: I mean, a ball can't do that, right? The frisbee can even go way out of bounds and then curve back inbounds in a lovely arc. So in terms of the history of the game, it all started at one high school in New Jersey, Columbia high school. And some people got together and actually formed the first Ultimate Frisbee team at their high school. What happened was when those people graduated, many of them ended up going to Ivy league type of schools and formed the very first formal ultimate teams in the world. And so for example, Cornell, where I went, had one of the earliest teams, also Yale, Rutgers etc. So the very first teams started as college teams on the East Coast...

JEB: Like intermural, right? I mean, it's not like it was a College varsity sport or something. Right?

SA: It was club. But it was such a great way to go through college because you would travel on weekends to Yale or Dartmouth and go to these tournaments where there would be seven or eight other teams. The tournament would be all day Saturday with 4 or 5 games, and then quarters, semis, and finals on Sunday. And of course, Saturday night, you've got a bunch of college kids together playing a sport they love. And it's co-ed, so Saturday nights were a lot of fun too.

JEB: I bet! Four or five games in a day!? I forgot to ask, how long is a game?

SA: Games are not timed. Games usually go to 15 points and you'd have a half-time at eight and generally you would have to win by two points. The temporal length of a game definitely varies. I've been in points, Jennifer, that have lasted like 20

minutes before a score and it is brutal.

JEB: And like you said, no subs until a point. Seeing how you play both offense and defense while on the field, are there actual positions?

SA: Yes. There are essentially three. There were handlers who stayed right around the Frisbee and made short passes. They tended to have really good throws, but didn't have to be fast or tall or anything. They just had good throws and hucks (in Ultimate a long pass is called a huck). Then you had mids, which were kind of like midfielders in soccer. They kind of play everywhere. You know, they're not necessarily handlers, they can handle but mostly they can set up the plays. And then you have longs and that's what I played. And longs are receivers. They're the people that make the long cut for the big pass. And I also focused on defense.

JEB: I assume longs have to be fast obviously to get to a good receiving spot and score, but do they also tend to be bigger to win those 50/50's and "non-contact" catches?

SA: Exactly. You want to be tall with some muscles so that you can absorb a bump here and there-- you don't want to just bounce off of people. When I played between 1983 and 2003, I played as a long in that distinct role. Ultimate has now evolved to the point where kids are learning how to play in grade school, and everybody knows how to throw and everybody's tall and fast. Now there are no set positions like when I played --everybody plays everywhere. Just real serious athletes. There's even a pro league where there are 12 teams around the country playing professionally and getting paid about \$30 grand a year each to play. Some of the better players get huge endorsements from various equipment, clothing and cleat companies --Nike and that sort of thing. And they get traded and drafted.

JEB: Definitely a different game now. I assume there are referees then, especially

in the pro league.

SA: Yes they do have referees. I think it was probably about 10 years ago where the highest level tournaments first started having what were called observers, where they wouldn't make active calls, but if there was a dispute, one of the captains of the team could say they want to defer to the observer to make the call. And the observer would settle the dispute (like a mediator!), but the Spirit Of The Game was still there. You still could make your own calls. But now they have active referees that call fouls.

JEB: So now let's talk more about your game. I know you said you played in Cornell and VLS, but how did you start playing?

SA: I went to Putney school here in Putney, Vermont and then I went to Cornell where I started running track. I ran the 200 and the 400 and I ran track all fall of my freshman year. And in the winter, I quit because I just didn't like running around in circles. It was just really boring. I had some success and set a freshmen record in the 4x200 --our team won the race and set a Cornell record, but it was boring, you know? Just circles. So I quit that.

JEB: That's a new story for me...someone who quit after setting a school record because running was boring!

SA: That was how I felt. I liked team sports. And then that spring, my girlfriend played pickup Ultimate at Barton Hall an indoor bubble at Cornell. And I played that winter and spring, and travelled to Washington, D.C. for one of the big tournaments, which really opened my eyes to the opportunities Ultimate offered. And then I took a year off from college and traveled around the world with a friend of mine. And when I came back, the Cornell team was really good, so I played with them. And we went to College Nationals three years in a row in 1985, 1986 and 1987. And every year we went to the semi-finals, which was awesome, but every year we ended up losing in the semi-finals to the team that eventually won the college national championships.

JEB: Oh, so close!

SA: Right, it was funny because the first year we were just psyched to be in semis. How did this happen? And then we lost but knew we could come back next year and win. And then the next year we lost again to the team that won the championships. And then the third year we did it again, we lost again. And that time we were just downright angry. Like it completely evolved from being happy the first year, just making it to being bitterly, bitterly disappointed the third year.

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JEB: It's all in the frame of mind and expectations!

SA: Exactly! But it was great to play all three years. At Cornell, the main team was called the Cornell Buds and the number two team was called the Cornell Shake. And we had a great women's team, the Wild Roses who also went to College Nationals when I was there, the two teams having sprung from an original team called the Rosebuds. And when the women's team formed, they took the "Roses" and left the men's team with the "Buds". And every weekend we were traveling somewhere playing in a tournament and we won a lot of tournaments.

JEB: So then you went to Vermont law school?

SA: Nope. Then I went to the University of Florida and got a master's degree in agronomy. And there we started the first University of Florida College team called the University of Florida Ultimate Club, or U.F.U.C., of course. And we actually went to College Nationals in 1989 but we didn't do very well. It was the first time the University of Florida had ever gone to College Nationals. There was an established club team in Gainesville called Vicious Cycle I was also on, and we were really good. We were one of the top three teams in the Southern region and went to Open Nationals twice in the three years that I was there. We won the Southern regionals in 1990, and a host of other tournaments throughout the south and the rest of the country.

JEB: Then VLS?

SA: And then I went to Vermont law school and played with Ultimate Justice, which was already established. It's a really great community. We hosted what became really kind of a famous tournament called the Homebrew tournament which was right around this time of year, around Halloween. It was a co-ed tournament, and everyone would come dressed up in costumes, and on Saturday night we would have home brewed beer and a bonfire. Middlebury College and Dartmouth would come, you know, there was sometimes there'd be a team from Boston or something, but everyone had a really great time.

JEB: Was the team just students or for alumni too?

SA: It was both. And the students I played with are now practicing law in Vermont and it's a great connection to have.

JEB: Did you continue to play as an alum?

SA: Not so much as an alum, but I played after law school and actually this was the one time I won the national championships! I played with a team in the Master's Divi-

sion, which was a newly created division for over 30 year-olds, basically an old and slow division...

JEB: 30?! I assumed it would be over 50 or something-- I guess it's a tough sport, but 30?!

SA: It's funny you say that Jennifer, because now the Master's cutoff is 40 years old and they have a Grand Masters division where you have to be 50 and a Great Grandmasters division where you have to be 60! Some folks just can't stop playing!

JEB: So you played in the Masters over 30 and went to nationals?

SA: Yes, I was 32, this was 1995. I played with a team called Squash from New York. And some of my old teammates from Cornell were on that team. We went down to Alabama to Nationals and we won the whole tournament. It was awesome; we beat Santa Barbara in the finals. After that, I played a couple of times on some Master's teams with my old Florida team vicious cycle. But by that time, I had kids and I was working at Fitts, Olson and Giddings here in Brattleboro. And I was really winding down. But as it turns out, Ultimate is one of the reasons I actually came to Brattleboro. I was working in Poughkeepsie, New York after law school. And one of my Ultimate Justice teammates at Vermont law school was Angela Prodan. And we were good friends—she was such a great player. Angela passed away unfortunately a few years ago, but there's a lot of us Ultimate players who think about her often. And she is the one who invited me to come back to Vermont to practice and raise a family.

JEB: What an amazing connection! So most of your playing days were prior to practicing in Brattleboro?

SA: Yes, I did a bit with a pick-up team here in Brattleboro, but by the time I got up here, I was pretty much done with my competitive playing days. I'll tell you, I have a replaced hip and a replaced knee. And it's a brutal game on your body, especially as a long receiver. I was diving and flopping around on the ground. But now I do all kinds of back country skiing, skinning and mountain biking and that kind of thing, but I don't really play Ultimate anymore. I play a lot of Frisbee golf which is one of the fastest growing sports in America right now.

JEB: Oh, I get it, but good to hear you still have a frisbee in your hand!

SA: Exactly. I have a lifelong love affair with Frisbees. No doubt about it. Thinking back on those days, I was like a rabid dog, obsessed with that disc. It was a brutally exhausting game, playing five games a day, it was something that you really had to love to do--we were going broke play-

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ing quite frankly. And it was about this rabid passion to play Frisbee and that's what it was. Back to my emphasis on it being a beautiful game, when you get a chance, just Google great ultimate Frisbee plays and you'll see some things that you just wouldn't even believe!

JEB: Yes, I was picturing it but will definitely have to do it. Unfortunately, googling 'frisbee golf' probably doesn't bring up the same balletic scenes.

SA: You'd be surprised. There's something called the PDGA, the Professional Disc Golf Association. And there are people that make hundreds of thousands of dollars a year playing, mostly through their endorsements. Just last year, the first person signed a \$1 million contract playing Frisbee golf.

JEB: Wow! But you play frisbee golf for fun, and it's way less brutal on the joints!

SA: Yes. In frisbee golf you have different kinds of Frisbees. There are putters and drivers you carry. When I play, I carry about 12 or 13 Frisbees around like a golfer would carry a bunch of golf clubs.

JEB: No caddy required!

SA: Super light for sure. You have three throws from the T to the basket—you make your first throw and you walk down to where your frisbee lands and then take your second throw from there. Just like regular golf.

JEB: And you play all summer?

SA: Yeah, I love it. Helps me relax and get things in perspective. Law practice is stressful.

JEB: Back to the theme of our column! This is a lifelong passion and even though you stopped playing Ultimate when you were practicing law, the love of the Frisbee continues, and you still find that it is part of your wellbeing.

SA: Well, it's even more than that. Even though I don't play Ultimate so much, there is that direct connection through golf, but there is an indirect connection to my current happiness through Ultimate, which is that I learned how to be at peace with myself whether I played well or not so well, and not get too high and not get too low. And that's really served me well as a litigator. Just trying not to get too emotional about things. Also, a person that I met playing Ultimate turned me on to meditation when I was in college. And I did it a little bit back then. Not very much, but now I do it all the time. It's funny because there's that indirect connection and meditation has definitely turned my life around in terms of controlling the anxiety that comes with being a litigator.

JEB: We've done many programs on mindfulness and meditation as it seems to be an essential tool for lawyers to aid us in the overall well-being.

SA: Yes, I still remember one of the CLE's you put on, like three years ago, and I remember the presenter said that she plays a little game with herself in order to get her-

self to meditate because it's not easy. She said that she doesn't drink coffee until she meditates in the morning. And I'll tell you, I don't remember what else I learned in that CLE but one thing I did that has absolutely changed my life is I followed her advice and I meditate every morning before I have that cup of coffee!

JEB: That's fantastic. The meditation connection from Ultimate is huge, but also what you were saying about your athletic mindset. We had another CLE from a psychologist called *lawyer like an athlete* where she applied to our practices some of those lessons learned from high performing athletes—lessons about endurance, mindset and how to avoid burnout, and about how you can balance the highs and lows and not take things too seriously.

SA: I absolutely learned those things from Ultimate and I still I think without that experience, I don't think I would have gone into litigation because it's really enabled me to have perspective. In high pressure moments as a litigator, I can just recalibrate for a moment and get rid of that anxiety. And it doesn't take very long, but I just think about some of the things that made me a successful Ultimate player and it calms me down, you know, it really still does.

JEB: This is great. That is why we interview people about all the other things that they do, because it is all about balance. And I'm glad you're still playing Frisbee golf. I'm sure you get to be in the woods with courses in really pretty areas.

SA: Yes there's a course here in Brattleboro that looks out over the Connecticut River valley. It takes two, two and a half hours to play walking through the woods and it's just really relaxing.

JEB: That's awesome. I appreciate you taking the time to share all these stories with me.

SA: Thank you. It's been really fun for me to go back and think about those times and that part of my life. It's funny because as I reflect back on it, I really do get a sense of happiness today from having lived it and it's really continued to help me.

JEB: Pursuits of happiness. That's why I interview people. Thanks so much.

Do you want to nominate yourself or a fellow VBA member to be interviewed for Pursuits of Happiness? Email me at jeb@vtbar.org.



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RUMINATIONS

Alienage

This summer the Legislature voted to override the Governor's vetoes of two municipal charter amendments. The Winooski and Montpelier city charters now provide that noncitizens may vote in city meetings. "Legal resident" is defined by the Montpelier amendment as "any noncitizen who resides in the United States on a permanent or indefinite basis in compliance with federal immigration laws." Winooski defines noncitizen voters as those who have registered to vote, are legal residents of the city, eighteen years or older, who have taken the Voter's Oath.¹

This is not some new progressive idea. For the first 90 years of its history, Vermont allowed noncitizen males to vote at town meeting as long as they resided in town for at least a year and paid taxes. The law did not require U.S. citizenship as a prerequisite for voting at school district meetings or town meetings. Noncitizens could also run for and hold local office. Even if they owned no real or personal property, every man over 21 and under 60 years of age was listed for purposes of the poll tax. Payment of that tax was another prerequisite to voting at town meeting.

The 1827 Council of Censors considered the issue of whether noncitizens could vote at state and federal elections, recognizing that the constitution had not addressed it:

Whether a person not owning allegiance to the United States, can or cannot be made a freeman under the constitution of this state, is a question which we have not known to be settled, by any authority whose decisions would extend through the state. The constitution, in terms of it, we consider equivocal, and we are informed that different constructions of it and different practices prevail in different parts of the state. We have thought it expedient, with a view of settling this question, to propose the annexed article. Doubting as we do whether any person can legally be made a freeman of this state, who owes no allegiance to the United States, especially as to the power of naturalization, is by the constitution of the United States vested exclusively in Congress, and considering the gross impropriety of admitting those to participate in the elective franchise, who owe no allegiance to the country, we have submitted the article in its present form;--at the same

time article as so framed, that no person, now a legal freeman of the state, will be disfranchised by it.²

The Council proposed an amendment that was adopted by the constitutional convention of the following year: "No person, who is not already a freeman of this state, shall be entitled to exercise the privileges of a freeman, unless he be a natural born citizen of this, or some one of the United States, or until he shall have been naturalized, agreeably to the acts of congress." This was the first amendment of the 1793 constitution. From that year forward a noncitizen could not be a "Freeman," unless he was already a Freeman. In 1994, the term "Freeman" was eliminated from the constitution. The Freeman's Oath became the Voter's Oath.

Section 42 now reads: "Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a voter of this state"

Vocabulary Lesson

"Freeman" originally applied to those men who could vote at elections of state, legislative, and federal officers. "Citizen" today means men or women who are citizens of the United States by birth or naturalization. Citizens who have reached the age of eighteen, established a permanent residence in a Vermont municipality, and taken the "Voter's Oath" are "Voters" at federal, state, and local elections. The exception is now in the two cities.

There are legal noncitizens and illegal noncitizens. Each category has rights and obligations under federal and state law. When "noncitizen" is used in this essay, it applies to legal noncitizens—those with green cards, or other authority, allowing them to reside here.

Before Vermont statehood in 1791, "citizen" meant one whose loyalty to the State was reflected in the original Freeman's oath, by which he "solemnly sw[ore] by the ever living God that whenever I am called to give my vote or suffrage, touching any matter that concerns the State of Vermont, I will do it so, as in my conscience, I shall judge will most conduce to the best good

of the same, as established by the constitution, without fear or favor or any man."³

Vermont's constitution is remembered for three new ideas, first expressed in 1777, before any other state or colony had done so by charter or constitution. It abolished slavery (Article 1). It expressly guaranteed compensation for the taking of private property for public purposes (Article 2). And it granted universal manhood suffrage, guaranteeing the right to vote to residents without having to own any real property in town.⁴ This last "first" applied only to Freeman's elections; to vote in town elections, from the beginning, there was a requirement that the voter be a taxpayer.

Section XXXVIII of the first constitution provided: "Every foreigner of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer, land, or other real estate, and after one years residence shall be deemed a free denizen of this State, except that he shall not be capable of being elected a representative, until after two years residence." Now we had two categories—"Freeman" for voting and "free denizen" for purposes of owning land. The oath of allegiance, which the constitution required of each executive, judicial, and military official, provided that such officers would "solemnly swear by the ever living God (or to affirm in the presence of Almighty God) that I will be true and faithful to the State of Vermont, and that I will not, directly or indirectly, do any act or thing, prejudicial or injurious to the constitution or government thereof, as established by Convention."⁵

The oath of allegiance has always been very serious business. In audibly pledging loyalty to the new state, it also served as the official act of repudiation of allegiance to Britain and the State of New York. Those branded traitors could convert by taking the oath, and in some cases have their sequestered property returned to them. They could vote and hold office once they took that oath.

The Vermont Constitution contains one way a voter may be disqualified to vote and another way a voter may be prohibited from running for office. Section 55 of Chapter II provides, "All elections, whether by the people or the Legislature, shall be free and voluntary: and any elector who shall receive any gift or reward for the elector's vote, in meat, drink, moneys or oth-

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erwise, shall forfeit the right to elect at that time, and suffer such other penalty as the law shall direct; and any person who shall directly or indirectly give, promise, or bestow, any such rewards to be elected, shall thereby be rendered incapable to serve for the ensuing year, and be subject to such further punishment as the Legislature shall direct.” Section 61 also explains “And if any officer shall wittingly and willfully, take greater fees than the law allows, it shall ever after disqualify that person from holding any office in this State until the person shall be restored by act of legislation.”⁶ Legislation adopted in 1796 gave the Vermont Supreme Court the authority to disenfranchise a Freeman for any “evil practice which shall render him notoriously scandalous.” The Vermont Council of Censors in 1800 condemned this act, concluding that the constitution’s treatment of the crime of bribery was the exclusive means of disqualifying voters. “The Council,” it explained, “are fully of opinion, that the framers and adopters of the constitution, contemplated to preserve inviolate the right of suffrage to every freeman, unless he should in fact forfeit the right, by acting wickedly and corruptly, relating only to the inestimable privilege.” The act was not repealed until 1832.⁷

“Noncitizen” is a strange concept, as it defines individuals by describing what they are not. The distinction was in place when Vermont entered the union in 1791. The first act of the first Congress after the adoption of the U.S. Constitution was a law requiring “Every member of a State legislature, and every executive and judicial officer of a State ... before he proceeds to execute the duties of his office, take an oath in the following form, to wit: ‘I, _____, do solemnly swear that I will support the Constitution of the United States.’”⁸ The 1793 Vermont Constitution, adopted two years after statehood, didn’t change much from the 1786 version. Few changes reflected that Vermont was no longer a sovereign country. But the requirement of the federal oath in place in federal law solidified the connection for officials.

Worse than an illegal alien is an “alien enemy.” In 1816, the Supreme Court heard an appeal in which two men both named Stanhope were indicted for larceny. In their defense they made a plea of “alien enemy.” They maintained that the goods they took were an act of war, as the respondent was acting in the character of an enemy. This argument failed to persuade the Supreme Court on appeal that the defendants should escape prosecution, where they failed to allege facts justifying their claims.⁹

“Alien” connotes one who is not part of us. We deny them full access to our rights and liberties. A noncitizen is an alien; so

are citizen nonresidents, compared to residents. We are all aliens somewhere.

The Constitution’s Reach

In 1789, Chief Judge Nathaniel Chipman wrote the court’s decision in *State v. Marsh*. John Marsh was accused of assaulting Joseph Marsh, a town constable, rescuing a horse that the constable had distrained for unpaid taxes. John Marsh argued Joseph Marsh hadn’t been legally elected to the office of constable as the vote at town meeting was by voice, not paper ballot. Chipman concluded that the requirement of election by ballot applied only to elections in the legislature, and those for state, legislative, and federal officials, not to “lesser corporations” such as towns.¹⁰ The Constitution didn’t cover local elections in his view.

In *Woodcock v. Booster* (1863), Joel E. Bolster was sued for taking a wagon, one neck yoke and two straps, one whiffletree, one evener and two clevises from Elmer J. Woodcock.¹¹ Bolster was collector of taxes for a school district. Bolster argued the grand list was defective, as the Prudential Committee of the district consisted of one official, Patrick Duane, an unnaturalized Irishman, a resident and owner of personal and real estate, who had been elected to that office at the district’s annual meeting vote.

Chief Judge Luke P. Poland wrote the decision on the appeal. He explained,

Notwithstanding the very plain terms used by the statutes to define the qualifications of voters in town and school district meetings, the plaintiff insists that none but *freemen*, who are entitled to vote for representatives to the legislature, and for county and state officers, are really entitled to vote at such meetings. The argument is that the qualification required by the statute is synonymous with that of the old constitution as to freemen, and that when the amendment to the constitution was adopted in 1828, which excluded aliens from becoming freemen of this state, until they had been duly naturalized according to the laws of the United States, it worked the same change in the qualification of voters in town and school meetings.

But the very starting point assumed in this argument is untrue. The old constitution provided that “every man of the age of twenty-one years, having resided in the state for the space of one whole year next before the election of representatives, and is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a free-

man of this state.” Under this provision of the constitution an alien might become a freeman of this state, and entitled to vote for representatives to the legislature and for state officers, without being naturalized according to the acts of Congress, by residing one year in the state and taking the freeman’s oath. But this requirement was by no means synonymous with that of a voter in town or school meeting. A man could be a freeman without being a tax payer, but must have resided in the state a year, while no man could vote in town or district meetings without being a tax payer, but might, though his residence in the state had been less than a year.¹²

He went on to state that it “was never required that a man should be a freeholder to be a freeman, or to be eligible to any office provided for in the constitution.”

Bolster had also argued “that, upon general principles of public policy, unnaturalized foreigners should not be allowed this limited right to vote and hold office; that with so little education as they usually have, and such limited knowledge of the principles and policy of our government as they possess, there is danger in allowing them to exercise even so small a share in the government and management of our educational and municipal institutions.” This is a familiar theme—that the poor and the immigrant are unworthy of being granted the vote. Blackstone went further, casting doubt on the ability of the poor to exercise independent will in voting, as they would likely owe allegiance to an employer.¹³

For Chief Judge Poland, however, that was a policy decision to be left to the legislature. “By the liberal principles adopted by our government, foreigners, who come to reside among us, after five years’ residence, and after complying with the laws of Congress in relation to naturalization, become equally entitled with native born citizens to participate in all the affairs of the government, both in making and administering the laws. It has been the policy of our government to encourage emigration from abroad, and, at as early a period as may be, to extend to such emigrants all the rights of citizenship, that their feelings and interests may become identified with the government and the country.” Voting would be important training to participate in local government, as they were likely later to seek citizenship. “We cannot see the threatened danger to our institutions,” he said, given that they had no influence or participation in the law-making power at General Elections. “[I]f we have mistaken the intent of the Legislature, we have the satisfaction of knowing that it can be easily and speedily corrected.”¹⁴

The correction came in 1869. The first sentence of the law on town meetings changed that year from "Every male person of the age of twenty-one years, whose list shall have taken in any town the year preceding his voting ... shall, during their residence in such town, be legal voters in town meeting" to "Male citizens, twenty-one year of age, whose lists are taken in any town at the annual assessment next preceding a town meeting ... shall, while residing the town, be voters in town meeting."¹⁵ From 1869 until this year, noncitizens could not vote at local elections.

Residency

Citizenship is not the only filter separating noncitizens from the rights enjoyed by citizens. It also separates nonresident citizens from resident citizens in voting at town meeting. Even before 1869, when voting rights of noncitizens at town meetings were rescinded, you had to have paid taxes to the town to be admitted to vote. Today, residency is defined as a "person who is domiciled in the town as evidenced by an intent to maintain a principal dwelling place in the town indefinitely and to return there if temporarily absent, coupled with an act or acts consistent with that intent."¹⁶

Paupers, if they were settled in a town, became the obligation of the town. They weren't denied support because they were noncitizens or had not paid taxes or taken any oath, but they did have to prove residence or, in the words of the poor laws, "settlement." Dozens of Vermont Supreme Court decisions wrestled with what constituted settlement. In 1856, for instance, the court clarified the derivative rights of a pauper born here to a father who had once settled in Vermont but hadn't come back into the state after the birth of the pauper. Judge Pierpoint Isham wrote the decision, and explained, "The pauper, during his life, could be regarded only as an alien, and subject to all the incapacities of one. He was under no natural allegiance to this country, and the correlative duty of protection was not due from this country to him, except such as is due to all aliens during the time they are within its jurisdiction."¹⁷

Judge Asa Aldis attempted to clarify the rights of the alien pauper in 1858. He wrote, "The alien pauper is admitted to all the benefit of our laws for the relief of the poor equally with the native citizen. If he is not sent to the place where his father had a settlement, he is practically settled in whatever town he may happen to be—having thus perhaps an advantage over the native citizen in that he may choose his poor house or place of support."¹⁸

Checklists

Another precipitating factor in the exclusion of citizens from local elections was the checklist. Even if the legislature had not settled the question in 1869, some citizens could be excluded from the voter checklist. First authorized by legislation beginning in 1866, checklists could be created and used if approved by the electorate.¹⁹ There was just one list for all elections. If you were prevented from voting at town meeting as a delinquent taxpayer, your name was stricken from the checklist. When the General Election was held, some who would otherwise be qualified were disenfranchised from voting for state or federal officers, in error. That shouldn't have disqualified citizens from Freeman's elections, but as there was one list, it had that effect.²⁰

Poll Tax

Vermont adopted the poll tax in 1787.²¹ Every male resident, whether owning taxable real and/or personal property or not, whether a citizen or not, was liable to pay it. The tax that year was three pence. In 1791, the tax was raised to \$20.²² In 1825, the tax was \$10.²³ In 1841, it was lowered to \$1.00.²⁴ Then it was changed to \$2.00 the following year.²⁵ The legislature clarified the meaning of "citizens" in the poll tax law to mean "inhabitants" in 1850.²⁶ An act from 1852 added an exemption, to be granted by the town listers, to relieve "such persons as are extremely poor, and such persons as well in their judgment be most likely to leave the town before the tax could be collected" from the grand list.²⁷ By 1966, the poll tax was set at \$10 per person. In 1978, the legislature finally abolished the poll tax entirely, although it allowed towns to vote to reinstate it for a limited four-year period.²⁸

The Old Age Assistance Tax, another head tax, was enacted in 1935.²⁹ First set at \$1.75, it rose to \$5.00 before it was repealed in 1966, when social welfare became the sole responsibility of the state, largely relieving the towns of caring for the poor.³⁰

Noncitizens paid these poll taxes, just as they paid property taxes on what they owned in a municipality. Citizens who did not pay these taxes were not allowed to vote, until Vermont repealed the law that prohibited voting by delinquent poll taxpayers in 1957.³¹ That year Governor Joseph Johnson had proposed a special poll tax to balance revenues with expenditures, and the legislature spent several days revisiting the idea of restricting voting to those who paid the tax. State Senator Graham Newell argued this was "a violation of democratic principles to put a price tax on the right to vote." Others opposed

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to repeal sounded "local control," believing towns should save their financial troubles in their own way, through that type of tax.³² Ultimately the decision was to enfranchise (or not disqualify) delinquent taxpayers from voting, even though they had not paid taxes.

By the adoption of the 24th amendment to the U.S. Constitution in 1964, the "right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."³³

Andrew and Edith Nuquist, authors of the classic study of *Vermont State Government and Administration* (1966), explained the connection between voting and taxes: "It has always been the belief in Vermont that no citizen should cast a vote which calls for spending a neighbor's money unless that citizen himself has a financial stake in the matter."³⁴ But noncitizens were not included in that belief, at least not until 2021, when Montpelier and Winooski passed amendments that reflected that thought.

Alienage as State Policy

Citizenship has its privileges and rights; noncitizenship has limitations. The Barre City Clerk refused to issue a *resident* fishing license to Abramo Bondi because he wasn't a naturalized citizen and didn't own any real estate in Vermont. Bondi claimed the protection of the Fourteenth Amendment. His 1913 appeal was denied. Justice Loveland Munson ruled that Vermont law prohibited the issuance of a license to a noncitizen, although nonresident citizens could qualify. He explained:

The first question is whether the petitioner is a bona fide resident of this state within the meaning of the statute. It is not necessary to inquire regarding the meaning of the word "resident" as used in statutes relating to

the qualification of voters or the support of the poor. The meaning of the word as used in this statute is determined by the statute itself. The word "resident" "is intended to cover all citizens of the United States who have lived in this state" the required period, and is intended to exclude all persons who are not within this definition, as is manifest from the accompanying definition of nonresident. This plainly confines the class who are entitled to the cheaper license to citizens of the United States. The case finds that the petitioner has been a bona fide resident of this state the prescribed period; but this is immaterial in his case because of his want of United States citizenship. It is not necessary, in this branch of the inquiry, to consider the word "resident" as synonymous with or distinguished from the word "inhabitant" on the one hand, or the word "citizen" on the other hand. It will not avail the petitioner to treat the word "resident" as used in section 48 as synonymous with "inhabitant," unless the word "citizen" as used in the definition contained in section 1 is given the force of "inhabitant." If this were done, the provision would be that all inhabitants of the United States who had been bona fide inhabitants of this state for six months were entitled to a license on payment of the smaller fee. But it is not to be supposed that the Legislature, in referring to citizens of the sovereignty which has the exclusive power of converting aliens into citizens, used the word "citizens" in the sense of "inhabitants."³⁵

An unlicensed tin peddler convicted of peddling without a license prevailed on appeal by showing that as a noncitizen he was prohibited by law from obtaining a license in 1887. He also was obliged to pay taxes on sales of goods from other states and countries, while the law exempted the sale of goods of Vermont growth and manufacture from the tax. These laws, according to the Vermont Supreme Court, were a viola-

tion of the Supremacy clause of Article 6 of the U.S. Constitution. The conviction was reversed and the peddler discharged.³⁶

A noncitizen resident in Vermont was denied a resident hunting license in 1913. The statute that limited resident licenses to citizens of the United States contradicted neither the Vermont Constitution nor the federal constitution, according to Judge Loveland Munson, who ruled that wild game "belongs to the people of the state in their collective and sovereign capacity," and the legislature has the right to "take measures for the preservation and increase of this common property," including the "reasonable discrimination" against a person who comes to resident here "without taking on the full obligations of citizenship."³⁷

Before the United States entered the war in 1941, Vermont law prohibited the regular hiring of aliens in state government. Persons who had applied for naturalization might be considered eligible.³⁸ In its present form, the prohibition against employment of aliens in state government is ameliorated by exemptions for "physicians and other qualified health personnel required to have specialized or graduate training, each of whom has filed a declaration of intention to become a citizen." The Secretary of Transportation is also authorized to employ engineers who are aliens, in times of a nationwide shortage of engineers, but not to exceed ten qualified aliens, who also have to have filed a declaration to become a citizen.³⁹

Private businesses are not as restricted. It is illegal to employ an "illegal alien."⁴⁰ Noncitizenship, however, is not within the category of statutory elements deemed worthy of anti-discrimination protection, although the list includes place of birth and national origin.⁴¹

In 1989, the Vermont Supreme Court reversed a decision of the bar examiners to deny an applicant for admission to the bar because she was a noncitizen, a resident of the Netherlands. This was a violation of the Supremacy and Equal Protection Clauses of the U.S. Constitution, and the court struck down the Vermont rule (a rule previously adopted by the Court).⁴²

Resident noncitizens can obtain driver's licenses, provided they can produce a passport and visa, alien registration receipt card (green card), or other proof of legal residence. Even a citizen of a foreign country who is unable to establish legal presence in the U.S. who can furnish reliable proof of Vermont residence and provide name, date of birth, and place of birth, can obtain a license.⁴³

From 1778 until the repeal of the Vermont law in 1845, every male inhabitant 16 years or older (originally not to apply to those 50 years or older) was obliged to serve in the Vermont militia.⁴⁴ Noncitizens

(aliens) were not allowed or required to enroll in the state militia.⁴⁵

Noncitizens and nonresidents cannot serve on juries. The Vermont Constitution grants the right to a "speedy public trial by an impartial jury of the country," which prevents jury service by noncitizens. The later discovery that one of the jurors in a civil case was an alien was sufficient to justify a new trial in *Richards v. Moore* (1888). The juror was not a citizen at the time of trial, although he had been naturalized subsequently. Justice Russell Taft ruled that alienage is a disqualification of a juror.⁴⁶

Nonresident noncitizens have equal rights to voters in filing petitions to lay out, alter, or discontinue town highways.⁴⁷

The railroad built a bridge over the Connecticut River, and the State's Attorney of Orange County sued the company for failing to obtain permission from Vermont to connect to the western bank of the river. He sought to have the lands the railroad owned in Vermont escheated to the State on a claim of *quo warranto*. Chief Judge Isaac Redfield denied the claim. He explained,

The escheat of estates to the sovereign, in consequence of a conveyance to an alien, is a result of purely feudal character. It was so held, because an alien, owing a foreign allegiance, was regarded as incapable of performing the feudal military services to the king, as lord paramount of all the land in the realm. Hence the conveyance having carried the title out of the former proprietor, and the grantee being incapable of taking the estate, it was held to vest in the king, absolutely, at the death of the first grantee, as an alien could have no heirs to be invested with his bare possession, which was all the estate which ever existed in him; and which was always liable to be divested, at any moment, upon office found, as it was termed. Now none of these reasons exist in this country. There is no express prohibition, in the constitution of this State, against aliens holding real estate. But it has been supposed by some that there is such an implied prohibition contained in the thirty-ninth section, in these words,—"Every person of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means, acquire, hold, and transfer lands," &c.

Redfield concluded that there is nothing in the Vermont Constitution to justify the action as there is no prohibition against aliens holding real estate here. If such a

right to restrict this exists, it belongs to the federal government, not the state, as the federal constitution prohibits interference between states. As the plaintiff in this case was a corporation, the court recognized that while corporations are not "absolutely citizens, owing a 'natural foreign allegiance,'" yet they are citizens of the United States and "thus entitled to all the privileges of citizens of this State."⁴⁸

Alienage is protected in some instances. Convicted of sexual assault, a nonresident alien sought relief from a policy that forbade such defendants from receiving treatment when they are subject to deportation and another policy that the Parole Board wouldn't release non-programmed persons, thereby "converting a sentence of 12 years to life to life without possibility of parole." This violated the sixth amendment of the U.S. Constitution, according to the Vermont Supreme Court, and with bad advice from his attorneys led the high court to reverse the conviction and order a new trial.⁴⁹ In sentencing, the fact that a defendant may be deported following release from prison, however, need not be treated as a mitigating factor.⁵⁰

Vermont may levy income taxes on nonresidents for income earned here and that earned in another state using a higher progressive rate than residents without income from sources outside Vermont. This is no offense to the U.S. Constitution.⁵¹

Clearly the rights of noncitizens vary by subject, and the course of litigation and legislation is not based on a general or consistent approach to alienage. It all depends.

The Veto Messages

Governor Philip Scott's veto messages on Acts M-5 and M-6 explained his decisions this way: "This is an important policy discussion that deserves further consideration and debate. Allowing a highly variable town-by-town approach to municipal voting creates inconsistency in election policy, as well as separate and unequal classes of residents potentially eligible to vote on local issues. I believe it is the role of the Legislature to establish clarity and consistency on this matter. This should include defining how municipalities determine which legal residents may vote on local issues, as well as specifying the local matters they may vote on. Returning these bills provides the opportunity to do this important work."⁵²

For many years, advances in municipal legislation could be predicted by the ideas advanced in charter amendments. Charters are incubation chambers, where novel ideas are presented for action by the General Assembly. Sometimes those ideas blossom into general legislation. In 2010,



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for example, the legislature adopted a statute allowing any municipality to adopt the representative form of annual or special meeting, providing for elections of members to represent the voters within established districts, an idea that was first advanced with the Brattleboro town charter of 1960.⁵³ Laws can mandate or authorize changes in policy, giving authority but not requiring the town to change.

But the legislature has traditionally been wary of attempts to adopt policies affecting certain issues, such as taxes, where a consistent state policy seems the sounder policy. Noncitizen voting is an issue that rides along the cusp between local control and state policy. As with other issues, the legislature could accomplish this with a general law allowing municipalities to open the polls to those citizens of other states or countries who reside in town and whose property will be taxed as that of citizens. This could still happen in coming sessions.

The World Has Too Many Boundaries

The best community is one that is cohesive, that respects each member's rights, that seeks inclusion, not exclusion. Vermont's recent policy is to welcome strangers, whether they be millennials who want to live here while working remotely for firms in the urban centers south of here or immigrants from Bosnia and other places where war and turmoil have led them to seek their homes in the United States. Governor Scott has said, we don't need more taxes, we need more taxpayers.⁵⁴ Our population is aging and shrinking. Extending the franchise to noncitizens is likely not the solution to this problem, but it shows a grand generosity of spirit, a willingness to share essential powers of governance with those who choose to live amongst us.

Former Governor Deane Davis once said that those who have chosen to live in Vermont are more apt to preserve Vermont values than natives. Nativism has had its day in Vermont. Some say you aren't a true Vermonter unless your family has resided here for many generations, as if a family tree is some indication of righteousness or worth. But once you've arrived, and unfurled your flag with an intent to maintain Vermont as your home, you're in: there are no privileges for those with deeper roots other than bragging rights. It's best to remember that the most important figures in early Vermont—Ethan and Ira Allen, Nathaniel Chipman, Isaac Tichenor, for example—weren't born here, nor were 44 of the state's 84 governors nor 81 of the state's 136 Supreme Court judges and justices natives. They came here from other places, but they became Vermonters and citizens upon arrival (and an oath or two).

Vermont was not unique in granting non-

citizens voting status. Some states retained the practice as late as 1928, largely based on the xenophobia that arose during World War I. Other jurisdictions have recently extended the franchise to noncitizens, including New York City and Chicago, where noncitizens may vote in school district elections, and small towns in Maryland, for all local elections.⁵⁵ Jamin B. Raskin has argued the U.S. Constitution reserves the issue of noncitizen voting to the states in Article 1, and believes the lack of any decisions of state or federal courts that find the practice unconstitutional (and many that actually endorse the idea) justifies the conclusion that a constitutional attack will fail.⁵⁶

History reveals a policy of expanding the franchise, rather than a narrowing, as occurred in 1869. Women were first eligible to vote in school district meetings and be elected or appointed to the office of town superintendent of schools or town clerk beginning in 1880.⁵⁷ The nineteenth amendment to the U.S. Constitution recognizing the right of women to vote allowed Vermont women who would take the freeman's oath and pay a poll tax to vote in all elections.⁵⁸ The 1921 legislature voided all laws prohibiting women from serving in public office.⁵⁹ Focusing on the qualification of voters for the Primary, the 2010 amendment to the Vermont Constitution authorized persons who had reached their 17th birthday, who would become 18 on or before the date of the General Election, to vote in the Primary.⁶⁰ Coupled with the 1957 repeal of the poll tax as a disqualification for voting, these changes reflect a commitment to expanding the voting franchise. The recent two charter amendments are an extension of this policy.

Citizenship isn't the exclusive means of proving loyalty to a state or nation. Citizens, even those who come by that status by birth or have passed the test and taken the oath through naturalization (an interesting term in itself) are not necessarily more loyal than those who have chosen to live in a place where they aren't citizens, who have invested in that place, and chosen to reside there. That's the problem with labels. They are so imprecise. They give sustenance to discriminatory behaviors. You are not one of us. You can stand outside. You can look in the window, but you aren't invited to the dance. Winooski and Montpelier have opened their doors and removed the barriers to noncitizen voting. Let them go first. Their experience will prove whether the idea makes sense, again. We'll be watching.

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¹ "An act relating to approval of an amendment to the charter of the City of Montpelier," No. M-5 (Montpelier); "An act relating to approval of amendments to the charter of the City of Winooski," No. M-6.

² *Records of the Vermont Council of Censors* (Montpelier, Vt.: Secretary of State, 1991), 318-319.

³ Vt. Const. 1777, Chapter II, Section VI.

⁴ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, 2009), 40-41. Keyssar explained that Vermonters "took such an unprecedented step" as "a reflection both of the region's relatively egalitarian social structure and the rather unruly political—and military—process that led to the writing of a constitution."

⁵ *Ibid.*, Chapter II, Section XXXVI.

⁶ Vt. Const., Ch. II, Sections 55, 61.

⁷ "An act, dividing the State into Districts for electing Representatives to the Congress of the United States, and directing the mode of their election," *Acts and Resolves of the General Assembly of the State of Vermont at their October Session, 1832* (Montpelier, Vt.: Knapp & Jewett, 1832), 13; *Records of the Vermont Council of Censor*, 156, 174.

⁸ This is now codified at 4 U.S.C.A. § 101.

⁹ *State v. Stanhope*, Brayt. 20 (1816).

¹⁰ *State v. Marsh*, N.Chip. 28 (1789).

¹¹ A whiffletree, evener, and clevis are attachments to a wagon pulled by two or more horses, equalizing the power of the pull (draft).

¹² *Woodcock v. Booster*, 35 Vt. 632, 638-639 (1863).

¹³ William Blackstone, *Commentaries on the Laws of England* (Chicago and London, 1765), 165; Keyssar, *The Right to Vote*, 34, fn. 28.

¹⁴ *Ibid.*, 35 Vt. 640-641.

¹⁵ "An act defining who shall be voters at town meeting," *Acts and Resolves of the General Assembly of the State of Vermont passed at the Annual Session, 1869* (Montpelier, Vt.: Freeman Steam Printing House and Bindery, 1869), 52.

¹⁶ 17 V.S.A. § 2122(b).

¹⁷ *Town of Lyndonville v. Town of Danville*, 28 Vt. 809, 815-816 (1856).

¹⁸ *Town of Albany v. Town of Derby*, 30 Vt. 718, 721 (1858).

¹⁹ "An act providing for a check list of voters," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Annual Session, 1866* (Montpelier, Vt.: Freeman Steam Printing Establishment, 1866), 29-30.

²⁰ Andrew and Edith Nuquist, *Vermont State Government and Administration* (Burlington, Vt.: Government Research Center, University of Vermont, 1966), 65-67.

²¹ "An act for the purpose of levying the taxes therein mentioned," *Laws of Vermont 1786-1791* (Montpelier, Vt.: Secretary of State, 1966), 114-115.

²² "An act ascertaining the principles on which the list of this state shall be made, and directly lists in their office and duty," *The Laws of Vermont of a Publick and Permanent Nature*, ed. William Slade (Windsor, Vt.: Simeon Ide, 1825), 387.

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Ide, 1825), 11.

²⁴ "An act, relating to the Grand List," *Acts and Resolves Passed by the Legislature of the State of Vermont at Their October Session, 1841* (Montpelier, Vt.: E.P. Walton & Sons, 1841), 11.

²⁵ "An act, in addition to, and in alteration of an act relating to the Grand List, approved Nov. 11, 1841," *Acts and Resolves Passed by the Legislature of the State of Vermont at Their October Session, 1841* (Montpelier, Vt.: E.P. Walton & Sons, 1842), 5.

²⁶ "An act relating to the grand list," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the October Session, 1850* (Montpelier, Vt.: E.P. Walton & Son, 1850), 27-28.

²⁷ "An act relating to the grand list," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the October Session, 1852* (Montpelier, Vt.: E.P. Walton & Son, 1852), 41-42.

²⁸ Louis Berney, "Few Localities Reinstate Poll Tax at Town Meeting," *Burlington Free Press*, 9 March 1978, 24.

²⁹ "An act levying taxes for old age assistance," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Thirty-Third Biennial Session 1935* (Montpelier, Vt.: State of Vermont, 1935), No. 36.

³⁰ Michael Sherman, ed., *Vermont State Government Since 1965* (Burlington, Vt.: University of Vermont, 1999), 396.

³¹ "An act to provide for retention of certain voting rights in the state for a specified period after removal of residence therefrom and to amend section 3499 of V.S. 47, as amended," *Acts and Resolves Passed by the General Assembly of the State of Vermont at the Forty-Fourth Biennial Session 1957* (Montpelier, Vt.: State of Vermont, 1957), 196-197.

³² "Poll Tax Vote Rule Change Given Nod," *Burlington Free Press*, 8 May 1957, 1.

³³ U.S. Const., Amendment XXIV. Vermont's poll tax was finally repealed in 1978. *Acts and Resolves 1977* (Adj. Sess.), No. 118. Legal challenges to the tax had not been successful. In 1974, the Vermont Supreme Court declined to rule the poll tax unconstitutional, as had been the judgment of the trial court, but agreed that failing to pay the poll tax couldn't justify refusing to issue a motor vehicle operator's license, without notice and an opportunity for a hearing. *Aiken v. Malloy*, 132 Vt. 200, 315 A.2d 488 (1974). The following year Chief Justice Albert Barney wrote the decision in a second poll tax case, upholding the tax on constitutional grounds. *Bieling v. Malloy*, 133 Vt. 522, 346 A.2d 204 (1975).

³⁴ Nuquist, *Vermont State Government and Administration*, 66.

³⁵ *Bondi v. MacKay*, 87 Vt. 271, 275, 89 A. 228, 229-240 (1913).

³⁶ *State v. Pratt*, 59 Vt. 590, 9 A. 556 (1887).

³⁷ *Bondi v. MacKay*, 87 Vt. 271, 89 A. 229 (1913).

³⁸ "An act requiring employees of the State to be citizens of the United States," *Acts and Resolves passed by the General Assembly of the State of Vermont at the Thirty-Sixth Biennial Session 1941* (Montpelier, Vt.: State of Vermont, 1941), 277.

³⁹ 3 V.S.A. § 262.

⁴⁰ 21 V.S.A. § 444a. "No employer shall knowingly employ any alien unless the employer determines that the alien possesses the required certificate under the Federal Immigration and Naturalization Act or regulations issued thereunder, or has authorization from the immigration services."

⁴¹ 21 V.S.A. § 495.

⁴² *Dingemans v. Board of Bar Examiners*, 152 Vt. 494, 568 A.2d 354 (1989).

⁴³ 23 V.S.A. § 603.

⁴⁴ "An act for forming and regulating the militia, and for encouragement of military skill, for the better defence of this State," February 16, 1779,

State Papers XII, 37-65.

⁴⁵ *Barrett v. Crane*, 16 Vt. 246 (1844).

⁴⁶ *Richards v. Moore*, 60 Vt. 449, 15 A. 119 (1888).

⁴⁷ 19 V.S.A. § 708.

⁴⁸ *State v. Boston, C. & M.R. Co.*, 25 Vt. 433, 438-441 (1853).

⁴⁹ *In re Jones*, 211 Vt. 443, 229 A.3d 365 (2020).

⁵⁰ *State v. Avgoustov*, 185 Vt. 610, 969 A.2d 139 (2009).

⁵¹ *Wheeler v. State*, 127 Vt. 361, 249 A.2d 887 (1969).

⁵² Xander Landen, "Scott vetoes noncitizen voting measures, setting new record," *Vermont Digger*, June 1, 2021.

⁵³ 24 V.S.A. § 2640a (representative town meeting general authority); Brattleboro Town Charter, 24 Appendix, § 107-2-4; *Acts and Resolves 1959* (Adj. Sess.), 428-433.

⁵⁴ Kevin McCallum, "In Break From Past Pledges, Scott Pitches New Taxes and Fees," *Seven Days*, January 24, 2019.

⁵⁵ Gabriela Evia, "Consent by All the Governed: Reenfranchising Noncitizens as Partner in America's Democracy," *Southern California Law Review*, 77 SCALR 151, 170-171 (2003).

⁵⁶ Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," 141 U. Pa. L. Rev. 1391 (1993).

⁵⁷ "An act giving women the right to vote and hold office in school districts," *Acts and Resolves passed by the General Assembly of the State of Vermont at the Fifth Biennial Session 1880* (Rutland, Vt.: Tuttle & Co., 1881), 102.

⁵⁸ "An act to amend section 3916 of the General Laws, relating to qualifications of voters in town meeting, providing that women voters shall take the freeman's oath and pay a poll tax, and also to amend section 677 of the General Laws, relating to the listing of polls," *ibid.*, 102. See also the August 26, 2020 Women's Equality Day Proclamation of Governor Philip Scott.

⁵⁹ "An act relating to eligibility of women for holding public office," *Acts and Resolves passed by the General Assembly of the State of Vermont at the Twenty-Sixth Biennial Session 1921* (Montpelier, Vt.: Capital City Press, 1921), 6.

⁶⁰ https://ballotpedia.org/List_of_amendments_to_the_Vermont_Constitution.



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Justice Louis Peck and the Rhetoric of Dissent

Introduction

In a 2010 law review article, Justice Ruth Bader Ginsburg quoted former Chief Justice Charles Evans Hughes on dissents. Hughes had written in a 1936 book, "A dissent in a court of last resort is an appeal ... to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."¹ Prominent examples include the dissents of John Marshall Harlan in *Plessy v. Ferguson*² and of Louis Brandeis in *Olmstead v. United States*.³

Dissents can benefit not only audiences outside the Court, but also the author of the majority opinion. "There is nothing better than an impressive dissent," Justice Ginsburg wrote, "to lead the author of the majority opinion to refine and clarify her initial circulation."⁴ She cited as an example Justice Scalia's dissent in *United States v. Virginia* (the VMI case), concerning whether the Equal Protection Clause of the Fourteenth Amendment required Virginia Military Institute (VMI) to admit women students.⁵ Ginsburg, who wrote the majority opinion, noted that her "final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent."⁶

But dissents involve burdens as well as benefits, as Judge Diane Wood of the Seventh Circuit Court of Appeals has noted. They may portray a court as "just one more political institution—but a scary one that is populated by unelected officials with life tenure."⁷ "A related cost arises when separate opinions become too passionate in tone, or worse, degenerate into *ad hominem* attacks on other judges on the court."⁸ "Such separate opinions inflict a cost on the judiciary 'in the form of a general loss of respect, that goes well beyond the immediate case.'"⁹ Dissent also creates the potential for "personal tensions within the court" and, "if the dissenter is a frequent complainer on some issues," the possibility that the dissenter "may lose credibility and be discredited."¹⁰ This article will explore the benefits and burdens of dissent as reflected in Justice Scalia's VMI dissent and in dissents by the late Vermont Supreme Court Justice Louis Peck in cases involving confessions, interrogations, and searches and seizures.

Justice Scalia's VMI Dissent

In the VMI case, Justice Scalia's dissent repudiated the majority's decision requiring VMI, on equal protection grounds, to admit qualified women to its all-male student body.¹¹ Professor Michael Frost has observed that "successful arguments depend on more than substantive merit."¹² They also depend "on the advocate's credibility and the emotions he or she invokes, both of which are substantially affected by the advocate's writing style."¹³ Indeed, rhetoric—the art of persuasion that dates back to the Fifth Century B.C.E.—features three modes of persuasion: *logos* (logical reasoning), *pathos* (appeals to emotion), and *ethos* (demonstrations of the advocate's character and credibility).¹⁴

The *logos* in Justice Scalia's VMI dissent criticized perceived judicial interference in a state's legislative process and system of public higher education, a failure to honor traditional practices in higher education, "inexplicable and unclear shifts in the standard of review," and the improper weighing of evidence.¹⁵ According to Professor Frost, such arguments are "hardly novel," but they stand out nonetheless because of the rhetorical devices Scalia uses to illuminate them.¹⁶ For example, the dissent's opening paragraph exhibits *pathos* by trying to "create a sense of outrage" in its readers.¹⁷ It states:

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings ... sweeps aside the precedents of this Court, and ignores the history of our people.¹⁸

Key to creating a sense of outrage are Scalia's verb choices, including "shuts down," "rejects," and "sweeps aside," which reveal "an emotionally invested advocate," not "an objective, disinterested Justice."¹⁹ Those choices reflect a rhetorical device known as *hyperbole*, which is "the use of exaggerated terms for the purpose of emphasis or heightened effect."²⁰ The clearest example of hyperbole in Scalia's opening paragraph is the reference to "shut[ting] down" VMI even though the Court did no such thing; it merely required the institution to extend the vaunted bene-

fits of its "adversative" educational philosophy to women as well as men.

Scalia's verb choices also reflect *parallelism*, which is a "similarity of structure in a pair or series of related words, phrases, or clauses."²¹ Recall his use of "shuts down," "rejects," and "sweeps aside," a trio of verbs that give his opening sentence a memorable rhythm it would otherwise lack.²² Later, Scalia uses parallelism again, reasoning that the Court's purpose "can only be achieved ... if there are some women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands."²³ Metaphors also figure prominently in this dissent. A metaphor is "an implied comparison between two things of unlike nature that yet have something in common."²⁴ Scalia uses metaphors to accuse the Court of intellectual dishonesty ("loading the dice" and "politics smuggled into law") and amateurism ("do-it-yourself ... factfinding"), among other things.²⁵

Even if Scalia's accusations rate high in *pathos*, they "fall[] short of the classical [rhetorical] ideal regarding *ethos*, which concerns the author's character and credibility with the audience."²⁶ In Professor Frost's view, "[Scalia's] word choices are 'questionable, his claims are hyperbolic, and his irony is mean-spirited.'"²⁷ Some of his words are so colloquial that "they seem to reflect a contempt for the Court's deliberative processes," and to lack "the propriety befitting the dignity of the Court."²⁸ And they serve as a poor model for the practicing lawyer, who would likely alienate judges and hurt a client's interests by using such words in court or in print.²⁹

Thus, Justice Scalia's VMI opinion illustrates the benefits and burdens of dissent. Evidently, it prompted Justice Ginsburg to improve her majority opinion, but its needless disparagement of the integrity of the Supreme Court as an institution and of the Court's individual members has tarnished the legacy of Justice Scalia.

Dissent at Home: Justice Peck's Criminal Procedure Opinions

Like Justice Scalia's VMI dissent, Justice Louis Peck's criminal-procedure dissents reflect a negative ethos evidenced by sharp, persistent criticism of his colleagues' wisdom and integrity. The foundation for Peck's critiques was his adherence to the "Crime Control Model" of criminal pro-

cedure.³⁰ Under this model, the suppression of criminal conduct is paramount. If law enforcement fails to deter criminal conduct, public order breaks down, precipitating the disappearance of an important precondition for human freedom. Thus, effective crime control—a high rate of apprehensions and convictions—is a guarantor of human freedom.³¹ In contrast, the Due Process Model stresses the possibility of error by law enforcement in the investigatory (i.e., factfinding) process; hence, it emphasizes the need to protect the rights of suspects and the accused.³² If the Crime Control Model resembles an assembly line, the Due Process Model suggests a factory that emphasizes “quality control,” reducing both errors and “quantitative output” (i.e., arrests and convictions).³³

Justice Peck filed a bevy of dissents between 1984 and 1991, several of which are featured here. In *State v. Brunelle*, a jury convicted the defendant of DUI with death resulting and DUI with injury resulting after a two-car, head-on collision.³⁴ A police officer obtained a blood sample and a statement from the defendant, who was the driver of one of the cars, without advising him of his *Miranda* rights.³⁵ The defendant moved to suppress both the sample and the statement, and the trial court granted the motion.³⁶ Later, in rejecting the defendant’s motion *in limine*, the trial court held that if he denied, on either direct or cross-examination, that he was driving under the influence, the State could use the blood sample to impeach his testimony.³⁷ The defendant did not testify at trial; after his conviction, the court denied his motion for a new trial, and he appealed.³⁸ At issue was whether (1) the Vermont Constitution prohibits the introduction of previously suppressed evidence for any purpose and (2) the prosecution may use that evidence to impeach or rebut testimony by a defense witness on direct or cross-examination.³⁹

The Court construed Chapter I, Article 10, which states “[t]hat in all prosecutions for criminal offenses, a person has a right to be heard by himself and his counsel,”⁴⁰ to “explicitly include[] the right to testify on one’s own behalf.”⁴¹ Therefore, “previously suppressed evidence is unavailable to the State for impeachment purposes except when ... the defendant has testified during direct examination in a manner contrary to the suppressed evidence.”⁴² Therefore, defendants have greater rights under the Vermont Constitution than the United States Constitution; under the latter, the prosecution may use previously suppressed evidence to impeach a defendant’s testimony first made on cross-examination.⁴³ Based on this reasoning, the *Brunelle* Court reversed the defendant’s convictions.

Dissenting, Justice Peck used hyperbo-

le to charge that the Vermont Court “has placed its imprimatur upon a constitutional right to commit perjury.”⁴⁴ Using an analogy (specifically, a literary allusion), Peck observed that the Court’s apparent discovery of such a right in the Vermont Constitution, like Hans Christian Anderson’s classic tale, *The Emperor’s New Clothes*, “discloses clearly what it is meant to conceal: the conclusion is reached by a result-oriented approach.”⁴⁵ Using a second analogy, Peck then equated the majority to a magician, accusing it of having “simply plucked a legal bunny from its hat.”⁴⁶

The reader can lose sight of the *logos* of the dissent—an alleged misreading of Chapter I, Article 10—amidst its appeal to *pathos* by a flurry of rhetorical devices. Sounding at times like a political candidate instead of a judge, Peck referred to crime as being “virtually out of control,” with a “staggering” cost to the public, whose members “cry out for relief and for better protection.”⁴⁷ He lamented that courts persist in “sapping effective law enforcement with technicalities, and adding more and endlessly more escape routes for the criminal, which are not necessary to protect the truly innocent defendant.”⁴⁸ The references to “technicalities” and “escape routes for the criminal” seemed geared to catch the eyes of constituencies beyond the Court and win their support for the Crime Control Model.

In *State v. Brunell*, not to be confused with *Brunelle*, police officers questioned at a police station parents whose child’s death had been ruled a homicide.⁴⁹ The officers told the defendant father that he was not in custody and was not required to speak to them.⁵⁰ After he made incriminating statements, the officers read him his *Miranda* rights, which he waived.⁵¹ Later, the defendant moved to suppress all statements he made during the interrogation; the trial court, concluding that the defendant was in custody during the investigation, granted the motion.⁵²

On appeal by the State, the Court endorsed the trial court’s conclusion that a reasonable person in the defendant’s place would not think he could refuse to answer the officers’ questions.⁵³ The defendant had agreed to go to the station only because the officers told his mother in his presence that he “had” to go there immediately.⁵⁴ Besides, a thirty-minute ride in a police cruiser late at night, the officers’ refusal to let the defendant’s brother accompany him, and the long interrogation without his wife present, taken together, could lead one to believe he was not free to refuse the trip to the station or questioning.⁵⁵ Thus, the Court affirmed the granting of the motion to suppress.

Justice Peck’s dissent was dismissive of the Court’s reasoning, hyperbolic, and in-



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dicative of his devotion to the Crime Control Model. Indeed, his opening paragraph reflects all three characteristics, plainly using *pathos* to trigger emotional reactions to the Court's alleged excesses. He wrote:

The majority opinion is socially irresponsible. A homicide investigation is not a sporting event; it is triggered by an irrevocable *fait accompli*: the extinction of a human life. Today's decision not only ignores, it demeans, the importance of one of the greatest, if not the greatest, of all constitutional rights—the sacred right to life itself.⁵⁶

To Peck, the facts suggested the defendant was not in custody “nor did he believe himself to be, prior to his formal arrest the following day.”⁵⁷ Therefore, the trial court erred in granting the motion to suppress for lack of a timely *Miranda* warning.⁵⁸ And the officers’ refusal to let the defendant’s brother and wife be present during questioning hardly warranted the defendant’s conclusion that he was in custody during questioning. Turning to *antithesis* (“the juxtaposition of contrasting ideas, often in parallel structure”) ⁵⁹ he wrote, in evident exasperation:

For heaven’s sake! The police were not investigating a raid on a cookie jar by a pair of roguish five-year-olds! They were investigating one of the most outrageous and brutal crimes known to the criminal code; the defendant has been charged with murder in the first degree of his own infant child. Such an investigation is not a tea party, to which the whole family of a possible suspect is invited, or allowed to attend, for small talk and petit fours.⁶⁰

Peck then shifted from demeaning the decision to warning of its likely consequences. He wrote that because of decisions like *Brunell*, “[l]aw enforcement authorities are so harassed by the courts with technicalities and fine lines that it is a wonder to me they perform as well as they do.”⁶¹ He concluded that “[t]he majority has slapped the police in the face...and seriously impeded legitimate criminal investigation.”⁶² This language suggests that if Peck had ever hoped to persuade his colleagues to his way of thinking in criminal cases, he had lost that hope by the time of *Brunell*.

In *State v. Kirchoff*, the defendant appealed from a conviction for cultivating marijuana, asserting that a warrantless search of his land violated Chapter I, Article 11 of the Vermont Constitution.⁶³ Based on an informant’s tip, two officers entered the defendant’s rural property and conducted a warrantless search that dis-

covered marijuana growing approximately one-hundred yards from the defendant’s house.⁶⁴ The land was posted with signs that prohibited trespassing, among other things.⁶⁵ The officers left the property, obtained a search warrant, then returned and conducted a search of the land and the house that yielded numerous marijuana plants.⁶⁶ The defendant moved to suppress, alleging that the search violated the Vermont Constitution, but the trial court denied the motion.⁶⁷

On appeal, the Vermont Supreme Court acknowledged that the warrantless search was permissible under the federal Constitution, which does not protect privacy in “open fields” beyond the immediate surroundings of the home. Furthermore, the United States Supreme Court held in *United States v. Oliver*⁶⁸ that the word “effects” in the Fourth Amendment’s reference to “persons, houses, papers, and effects” includes only personal property—not land—so it did not apply here.⁶⁹ Conceding that “generally there is not an expectation of privacy in open lands,” the *Kirchoff* Court nevertheless held that such an expectation exists when “the landowner has taken steps, such as fencing or posting, to indicate that privacy is exactly what is sought.”⁷⁰ Thus, the officers’ warrantless search was unconstitutional, and the evidence obtained from it was inadmissible in court.⁷¹

Justice Peck’s dissent characterized *Kirchoff* as “one of the most result-oriented opinions I have ever been exposed to.”⁷² It construed the word “possessions” in Chapter I, Article 11, which protects Vermonters’ persons and their “houses, papers, and possessions” from unlawful searches, to include not only personal property, but also land.⁷³ The *logos* of the dissent was that “[o]pen fields are simply not within the scope of Article Eleven or the Fourth Amendment.”⁷⁴ Rather, “[t]he word ‘possessions’ in Article Eleven, like ‘effects’ in the Fourth Amendment, should be interpreted to mean ‘personalty,’ and should not be deleted as meaningless.”⁷⁵

But Peck appealed to *pathos* too. He wrote that the only beneficiary of *Kirchoff* was “the owner of open fields who conducts criminal activity thereon” and that “the majority has given birth to a right of privacy to commit crime.”⁷⁶ He even ascribed to his colleagues a dubious motive for their constitutional interpretation. “The majority has chosen the possible prestige with which it may be honored by law reviews and other constitutional activists among the courts, and legal writers [over] a recognition of the rights of the individual inhabitants of the State of Vermont”⁷⁷ He thus suggested that his colleagues’ devotion to the Due Process Model resulted more from ambition than conviction.

Finally, in *State v. Oakes*,⁷⁸ the Vermont Supreme Court considered whether the exclusionary rule applicable to violations of Chapter I, Article 11 should be limited by the “good faith” exception announced by the federal Supreme Court in *United States v. Leon*.⁷⁹ The *Oakes* Court held that *Leon* does not limit the scope of Vermont’s exclusionary rule.⁸⁰

A warrant-based search of the home of the defendant’s girlfriend yielded a large plastic bag that held twelve smaller bags of marijuana.⁸¹ The defendant, who was charged with felony possession of marijuana, moved to suppress the evidence for lack of probable cause.⁸² Despite holding that probable cause did not support the warrant, the trial court denied the motion to suppress because the officer who conducted the search reasonably believed it was lawful.⁸³

The Vermont Supreme Court agreed that the warrant affidavit lacked probable cause to justify issuing a search warrant.⁸⁴ The Court declined the State’s request to follow the rule of *Leon*, though, and exempt from Vermont’s exclusionary rule evidence seized in reliance on a later-invalidated warrant.⁸⁵ It reasoned that the federal and state exclusionary rules are judicial creations rather than constitutional rights, so, like the rule announced in *Leon*, they are subject to a cost-benefit analysis. Expressing a lack of confidence in the analysis conducted in *Leon*, it did not apply that analysis to Vermont’s exclusionary rule.⁸⁶ Thus, the *Oakes* Court reversed the trial court’s denial of the suppression motion and remanded the case for further proceedings.

In his *Oakes* dissent, Justice Peck again used hyperbole. “The majority opinion is additional evidence,” he noted, “if any is needed at this point in time,” that within the boundaries of the law of search and seizure, the only individuals enjoying any constitutional rights recognized by this Court are the criminals. This approach is characteristic of most of the activist-oriented state courts today.”⁸⁷ Analogizing his colleagues’ rejection of the good faith exception to “the sulking of a spoiled child suddenly denied its own way,”⁸⁸ he emphasized that such an exception to the exclusionary rule is merely “putting the breaks on the runaway liberalism which has characterized several decades of judicial thinking, restoring some sense of balance between competing rights and interests in the criminal law.”⁸⁹ Ironically, in Peck’s view, decisions like *Kirchoff* and *Oakes* “purport to be based on the protection of ‘individual’ rights.”⁹⁰ Disgusted with that irony, Peck exclaimed, “What an absolutely farcical distortion of the truth!”⁹¹ The use of the word “farcical,” followed closely by an exclamation point, suggests that Peck was so exasperated with his colleagues that he

was willing to publicly disparage their jurisprudence to sound an alarm about it. Despite their insistence to the contrary, he charged, they had refused to balance public safety and individual freedom in *Kirchoff* and *Oakes*.⁹²

Conclusion

Like Justice Scalia's opinion in the VMI case, Justice Peck's opinions featured here highlight the benefits and the burdens of dissent. Peck's well-reasoned, literary dissents likely spurred his colleagues to write more persuasive majority opinions, just as Scalia's dissent prompted the maximum effort from Justice Ginsburg in the VMI case. And Peck's dissents presumably buoyed conservative Vermonters, just as Scalia's VMI dissent pleased supporters of his jurisprudence.

But Scalia's dissent calls his professionalism into question because of its mocking, strident tone, and Peck's dissents raise similar concerns. Like Scalia, Peck could joust effectively with his colleagues, taking them to task for faulty statutory construction and constitutional interpretation. Thus, Peck could have advocated well for the Crime Control Model while largely confining himself to *logos*.

Instead, he pursued *pathos* intensely, accusing his colleagues of endorsing a "constitutional right to commit perjury,"⁹³ creating a "right of privacy to commit crime,"⁹⁴ and tailoring their decisions to the legal academy and civil rights activists.⁹⁵ Such rhetoric may have garnered him some acolytes, but it did not change his colleagues' minds during or after his tenure.⁹⁶ And it left him vulnerable to the same charge of courting an external constituency that he levelled at them. Thus, If Judge Wood's observations about the "costs" of dissent are correct, Peck's rhetoric may have spawned "personal tensions" within the Vermont Supreme Court and damaged his credibility.⁹⁷ The passage of time and the rhetorical focus here preclude informed judgments on those matters. A more reliable conclusion is that Justice Peck pursued *pathos* too aggressively, obscuring the *logos* of his opinions and weakening their *ethos* in the process.

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¹ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minnesota Law Review 1, 4 (2010) (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT* 68 (1936)).

² 163 U.S. 537 (1896). In *Plessy*, the Court upheld a Louisiana law that required racial segregation in public accommodations such as railroad cars. Harlan's dissent, which memorably stated that "[o]ur constitution is color-blind and neither knows nor tolerates classes among citizens," 163

U.S. at 559, was vindicated in 1954 when the Supreme Court invalidated racial segregation in public schools and the doctrine of "separate but equal" that was its foundation. *Brown v. Board of Education of Topeka*, 347 U.S. 483.

³ 277 U.S. 438 (1928). In *Olmstead*, the Supreme Court held that the use of evidence obtained from private telephone conversations via electronic wiretapping did not violate the Fourth or Fifth Amendments. Brandeis objected to the Court's decision for several reasons, including that government should not act lawlessly to catch criminals. He wrote that "[o]ur government is the potent, the omnipresent teacher"; therefore, "[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. at 485.

⁴ Ginsburg, *supra* note 1, at 3.

⁵ 518 U.S. 515 (1996).

⁶ Ginsburg, *supra* note 1, at 3.

⁷ Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 California Law Review 1445, 1462 (2012). The best example of this tendency, according to Judge Wood, is *Bush v. Gore*, 531 U.S. 98 (2000), in which, by a 5-4 vote, the Supreme Court stopped the counting of disputed ballots in Florida, ensuring that Governor George W. Bush of Texas, not Vice President Al Gore, would become the forty-third president of the United States.

⁸ Wood, *supra* note 7, at 1463.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 Kentucky L.J. 167, 171 (2002-03).

¹² *Id.* at 175.

¹³ *Id.*

¹⁴ *Id.* at 177.

¹⁵ *Id.* at 181.

¹⁶ *Id.*

¹⁷ *Id.* at 182.

¹⁸ *Id.* at 183.

¹⁹ *Id.*

²⁰ EDWARD P.J. CORBETT AND ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 403 (4th ed. 1999).

²¹ *Id.* at 381.

²² Frost, *Justice Scalia's Rhetoric of Dissent*, *supra* note 11, at 185.

²³ *Id.* at 191.

²⁴ CORBETT AND CONNORS, *CLASSICAL RHETORIC*, *supra* note 20, at 306.

²⁵ Frost, *Justice Scalia's Rhetoric of Dissent*, *supra* note 11, at 190-191.

²⁶ *Id.* at 197.

²⁷ *Id.*

²⁸ *Id.* at 198.

²⁹ *Id.*

³⁰ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158-59 (1968).

³¹ *Id.*

³² *Id.* at 163.

³³ *Id.* at 165.

³⁴ 148 Vt. 347, 348 (1987).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Vt. Const., Ch. I. Art 10, cl. 1.

⁴¹ 148 Vt. at 352.

⁴² *Id.* at 353.

⁴³ *Id.* Regarding the rule under the federal Constitution, see *United States v. Havens*, 446 U.S. 620 (1980).

⁴⁴ 148 Vt. at 358.

⁴⁵ *Id.*

⁴⁶ *Id.* at 362.

⁴⁷ *Id.* at 365.

⁴⁸ *Id.*

⁴⁹ 150 Vt. 388, 389 (1988).

⁵⁰ *Id.* at 389.

⁵¹ *Id.* at 390.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 391.

⁵⁵ *Id.* at 392.

⁵⁶ *Id.* at 393.

⁵⁷ *Id.* at 399.

⁵⁸ *Id.*

⁵⁹ CORBETT AND CONNORS, *CLASSICAL RHETORIC*, *supra* note 20, at 382.

⁶⁰ 150 Vt. at 403.

⁶¹ *Id.* at 405.

⁶² *Id.* at 406.

⁶³ 156 Vt. 1, 2 (1991).

⁶⁴ *Id.* at 2-3.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ 466 U.S. 170 (1984).

⁶⁹ 156 Vt. at 4.

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 14.

⁷² *Id.* at 19.

⁷³ *Id.* at 20.

⁷⁴ *Id.* at 22.

⁷⁵ *Id.* at 24.

⁷⁶ *Id.* at 22.

⁷⁷ *Id.* at 34.

⁷⁸ 157 Vt. 171 (1991).

⁷⁹ *Id.*, citing *Leon*, 468 U.S. 897 (1984).

⁸⁰ *Oakes*, 157 Vt. at 172.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 173.

⁸⁵ *Id.*

⁸⁶ *Id.* at 183.

⁸⁷ *Id.* at 184.

⁸⁸ *Id.* at 185.

⁸⁹ *Id.*

⁹⁰ *Id.* at 188.

⁹¹ *Id.*

⁹² *Id.* at 197.

⁹³ *State v. Brunelle*, 148 Vt. at 358.

⁹⁴ *State v. Kirchoff*, 156 Vt. at 22.

⁹⁵ *Id.* at 34.

⁹⁶ Nathan Sabourin, *We're from Vermont and We Do What We Want: A 'Re'-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 Albany Law Review 1163, 1165 (2008).

⁹⁷ Wood, *supra* note 7, at 1463.



WHAT'S NEW?

VBA Annual Report 2020-2021

The VBA Annual Reports cover VBA activities during the September 1 – August 31 time frame. Since August 31, 2020, we continued to face pandemic-related challenges that shifted somewhat when the state of emergency was lifted in Vermont in June and we continue to shift as we enter the Fall. Thanks to so many members and staff who have selflessly dedicated their time and talents to meet those challenges, we are proud to include in this report the different ways your VBA was able to continue helping legal professionals in weathering the pandemic storm while “Serving the Public and the Profession.”

Thank you for your patience as we launched our new mobile-friendly **website, membership database system and portal** in May. The new platform provides VBA members with an intuitive online member portal that allows them to update contact information and their directory profile; join sections and renew memberships; register for CLE's and track CLE credits; and for Lawyer Referral Service members, track cases, submit status reports and process referral payments online. The new system also allows staff the tools to streamline many in-house processes.

The **VBA COVID-19 Committee** moved from weekly to monthly meetings to continue to ensure that the interests of lawyers were well-represented during the Judiciary's continual amendments to AO 49 and courthouse safety protocols. It served as a liaison and provided input and feedback to the Judiciary and the Executive Branch on issues including law office safety protocols, the resumption of in-person hearings and criminal and civil jury trials, vaccination protocols, broadband and digitization of land records projects and remote hearings. The Committee also worked to develop numerous COVID-19 related volunteer opportunities for lawyers as well as opportunities for bar examinees faced with the challenge of remote bar exams.

Similarly, we moved from weekly to monthly **Section/Division Chairs and County Bar Presidents Conference Calls**, whose participants provided invaluable input for the ACCD guidance, the Judiciary's emergency orders, the Legislature's emergency legislation and critical information for the monthly phone conferences that VBA President Elizabeth Kruska and I

had the privilege of holding over the last year with Chief Justice Reiber and other Supreme Court Justices, Chief Superior Judge Brian Grearson, CAO Pat Gabel and other members of the Judiciary leadership team.

The **Odyssey Court Users Group** that formed as a result of H. 951 helped achieve the end of the per-document e-filing fee, replaced by a per-case e-filing fee in April 2021. It also contributed to the efforts in the Legislature that resulted in S.39 that requires the Judiciary to include e-filing fees in the Judicial Branch Fee Report. The Group was reinstated in the Spring to serve as a liaison to a new Standard Practices Committee that the Judiciary created to address issues with the Odyssey system. The Group has submitted a detailed “Prioritization of Odyssey Issues” report to the Committee and is awaiting the scheduling of an initial meeting with the Committee.

The **Commission on the Well-Being of the Legal Profession** issued its **Second Annual Report** on July 1, detailing what each committee on the Commission has accomplished since the CWBLP State Action Plan was submitted to the Vermont Supreme Court on December 31, 2018, and the First Annual Report was issued on July 1, 2020. Included in the Report are recommendations regarding important next steps in implementing the new Bar Assistance Program.

Thanks to the generosity of so many lawyers and judges who are willing to share their expertise, the VBA was able to offer a full smorgasbord of **CLE Programs** covering the gamut of legal topics. Over 6,700 total registrations show how many of you took advantage of VBA CLE offerings, including 5,782 for webinars, 938 for digital programs and 71 for teleseminars this past year. Many thanks to the amazing VBA section chairs who organized at least one CLE during the year at the Annual Meeting last September, at the Mid-Winter Thaw in January, at the Mid-Year Meeting in March, during the Annual Meeting in October and during the numerous stand-alone programs held throughout the year. Please don't hesitate to let us know what CLE offerings you'd like to see offered, or if you'd like to present!

We were pleased to offer the Fifth Annu-

al **VBA Trial Academy** in a modified format due to the pandemic restrictions in place in July. Five trial judges and participating veteran trial practitioners from the criminal, civil, family, probate and juvenile dockets offered individual webinars geared to different aspects of trial practice in their respective dockets. Stay tuned for the Sixth Annual Trial Academy in the Summer of 2022!

In January of 2021, Casemaker merged with **Fastcase** to combine their full research capabilities and to improve access. VBA Members have automatic access to Fastcase, a leading legal research services provider with intuitive search capabilities. Fastcase libraries work similarly to Casemaker but the navigation is much more simple. Members should know that Fastcase uses Vt for Vermont Statutes rather than VSA, so please use the Vt notation when searching for specific titles in the Vermont Statutes. The tutorial videos in the “help” section of the Fastcase website are concise and informative and include specific tutorials to help former Casemaker users find the Fastcase equivalent of their preferred search methods. There was an hour long Fastcase webinar training during our Annual Meeting week on October 13th and another session will be on December 8, 2021. Check out the Fastcase tutorials, or you can call or email Jennifer Emens-Butler for personal training!

VBA membership includes unlimited access to section activity through our on-line communication platform “**VBA Connect**.” Developed in response to members' requests for the ability to archive and to search the invaluable information shared among section members, VBA Connect allows members to easily search and retrieve whatever information has been shared in all communities to date. VBA Connect has been an especially convenient way for members to stay abreast of the ever-changing legal landscape during the COVID-19 era. You can join any section with the click of a button, and easily set delivery preferences. If you haven't yet experienced the benefits of VBA Connect, please call or e-mail the VBA office at any time for personal training.

We're honored to work closely with all three branches of the Vermont Government, to ensure that your and your clients'

interests are well-represented. The VBA serves as a resource to the Legislature, government agencies and the Judiciary which helps insure our members' needs are considered. The VBA monitors the legislative sessions for any proposals affecting our members and helps coordinate testimony from section chairs and members when needed. Although we were once again prevented from co-hosting Legislators' Days with the Judiciary due to courthouse restrictions, we hope to be able to resume hosting a **VBA Legislators' Reception** in January and a Legislators' Coffee and Donuts event in March. At the time of this writing, legislators continue to work on protocols for returning to the statehouse in January.

VBA Access to Justice initiatives have proven invaluable to disadvantaged Vermonter during this time of pandemic. Our A2J projects use grant funds to pay private attorneys to represent low-income Vermonter and crime victims in certain priority cases. This year we have increased the payment to \$75 per hour for between 3 to 10 hours per case. We now have 150 attorneys on our low bono referral panel. The Vermont Bar Foundation funds our county low bono and foreclosure defense projects statewide, and a grant from the US Department of Justice helps us provide representation to crime victims. We recently finished using up two 3-year grants from the Vermont Supreme Court for representation in adult involuntary guardianships and for PACA negotiations. We are very grateful to all of our funders who have made low bono representation possible. On average, over 400 cases are referred to the VBA low bono projects each year, and we successfully place about 85% of them. Our thanks go to the many lawyers who participate in our low bono projects, and we ask more of our colleagues to join the effort. For more information and to sign up contact Mary Ashcroft, Esq., VBA's Legal Access Coordinator, at mashcroft@vtbar.org.

Our Vermont **Lawyer Referral Service** continues to work well for clients in need of Vermont counsel, and for the 138 LRS panel members who earned more than \$1 million in LRS revenue this past year! The VBA fielded 6472 LRS requests, averaging 539 requests per month. We printed and distributed VBA business cards with the LRS 800 number, the VT Free Legal Answers website, and the "Modest Means" website to all of the Vermont state courthouses, numerous public libraries, and many veteran centers throughout Vermont. If you're not already an LRS member, consider joining for the low cost of \$70.00 per year. Your next big case could be an LRS referral!

A continuing focus in the arena of pub-

lic education was to encourage lawyer presentations in conjunction with **Constitution Day** in September. The VBA has now provided over 6,000 copies of "Pocket Constitutions" for lawyers and judges to distribute at presentations they give to school and civic groups throughout the state. We were pleased to organize a sixth annual Constitution Day Panel Presentation, with an esteemed panel including justices, trial judges and a Vermont Law School Constitution Law Professor, moderated by VBA President Elizabeth Kruska in September. The panel presented a "virtual" one-hour basic overview of the Constitution, with a focus on "Advancing the Rule of Law". Links to the videos of each Constitution Day presentation are on the VBA website. The VBA is happy to provide this and other resources to whomever would like to make a presentation in their community this year.

The Young Lawyers Division and the VBA Diversity Section organized a **Martin Luther King, Jr. Poster-Essay Contest** for Vermont middle-school students in the Fall. Chief Justice Paul Reiber presented awards to the winners at the Vermont Supreme Court in January; the students and their families also toured the Vermont Supreme Court Building. Materials for the 2022 MLK, Jr. Poster-Essay Contest have just been sent out and are available on the VBA website.

The VBA continues to partner with Vermont Law School in the **VBA/VLS Incubator Project**. The project provides support for new lawyers starting solo practices in underserved legal and geographic areas of Vermont. The VBA/VLS team provides day-to-day mentoring, review of business plans, small start-up grants, referral of pro bono and low bono cases, and weekly check-ins. This year, our incubator lawyers are setting up practices in Orwell, Weybridge, Montpelier and Randolph.

Since 2012, the VBA has offered training for and has coordinated the **Foreclosure Mediation Program** where interested

lawyers receive specialized training to be foreclosure mediators and agree to be part of a state-wide pool that is offered to eligible litigants who opt for mediation in their foreclosure cases. There was a moratorium on foreclosures due to the pandemic for much of the past year. Since the moratorium ended recently, courts have begun to once again refer foreclosure cases to the VBA for mediators.

As always, we strive to bring you the latest membership products and services, as evidenced by the numerous sponsors and exhibitors at our major meetings, and as detailed in the **"Member Benefit"** section on the website. Be sure to take advantage of the substantial discounts available for legal research, practice management software, professional liability insurance, retirement program, credit card processing, insurance needs, investigative research, solo/small firm practice, shipping services, legal document/time and billing, ABA publications and software training.

None of the above accomplishments would have been possible without the hard work and complete dedication of the **remarkable VBA team**, whether working at the VBA office, or remotely! I am deeply indebted to them, as well as to the VBA Board of Managers for providing excellent leadership for your Vermont Bar Association. Please know that we are all at your service (to meet whatever challenges the next reporting period may have in store) and appreciate whatever recommendations you have to bring even more value to your VBA membership.



WHAT'S NEW?

Section Chair Reports

APPELLATE LAW SECTION

Chairs: Bridget Asay and Ben Battles

Change was the theme for Vermont appellate practice over the past year, with the adoption of e-filing, major rule changes, and remote oral arguments. Appellate Division co-chairs Ben Battles and Bridget Asay have done their best to keep members informed about the practice changes, with appellate CLEs during the mid-winter thaw and the annual meeting and periodic updates on VBA Connect. Bridget served on the committee that proposed the rule revisions needed for e-filing. Bridget and Ben also helped organize and present a well-attended e-filing training sponsored by the Judiciary in August.

BANKRUPTCY LAW SECTION

Chairs: Alexandra Edelman and Don Hayes

The Bankruptcy Bar had another exciting year. Our virtual Holiday CLE was a huge success. Taking place online over three successive Fridays we covered small business reorganizations, preparing for Chapter 13 hearings, technology, and wellness. The online sessions were very attended, but the bar is looking forward to an in-person holiday CLE this coming December. The bankruptcy court and the bankruptcy bar also worked through a local rules update. About 15 members of the bar participated in the task force. Finally, the bar learned of the upcoming retirement of the Honorable Colleen A. Brown. Judge Brown will call it a career after 22 years on the bench February 2, 2022. As we look ahead to 2022, we are planning a cross-discipline CLE involving mental health professional and bankruptcy practitioners with a focus on the mental health impacts of debt.

CRIMINAL LAW SECTION

*Chair: Mary Kay Lanthier
(Report by Alfonso Villegas)*

The Criminal Law Section had a couple of webinars this period. First, there was an overview of DUIs and Suspensions. The program was intended to provide new practitioners (and old) a general walk-through on a DUI case. DUI case work is rewarding for new attorneys: lots of court room exposure; relatively short timelines; plenty of opportunity for motion practice and trial work; and the case law is plentiful. Many thanks to Attorney Zachary Weight (Burke Law) and Deputy State's Attorney

Alfonso Villegas (Washington County) for providing their expertise. The webinar was well attended and the presenters provided the audience with a look at how both the State and the defense look at a DUI case.

Second, at the online portion of the Annual Meeting, the Criminal Law Section hosted an "All Things Treatment Court" presentation. Vermont is in the midst of a drug epidemic. 2020 ended with 157 opioid overdose deaths – more than any year since 2010. Of the 96 Vermonters that fatally overdosed from opioids between January and June of 2021, 87 ingested fentanyl. In response, the Vermont Legislature introduced Adult Drug Courts in 2003. Yet many attorneys are unfamiliar. Both with the concept and that Vermont even has them. Treatment Courts exist in 3 out of the 14 Vermont counties. Audience members heard from panelists who work with Treatment Courts in Vermont: Hon. Judge Mary Morrissey; Defense Attorney Sarah Reed (Chittenden County); Court Coordinator Elliott McElory (Washington County); and Deputy State's Attorney Alfonso Villegas (Washington County). This presentation was a practical skills course. Attendees learned what Treatment Courts are, how they operate, risks and benefits to clients, and how to get someone into Treatment Court.

In other news, the Vermont Legislature is hard at work making changes to Title 13. The first iteration was the Justice Reinvestment Act. Part II should come out soon. Significantly, the Legislature changed how credit is applied to "to serve" sentences, including both Furlough and Incarcerative sentences. This is called Earned Time Credit – which is a rebranding of "Good Time Credit." Now, for every month a person serves without a major disciplinary violation, that person also earns and additional 7 days credit. The Legislature is now exploring whether credit should also be applied to probation sentences.

Keep your ears close to the ground – the winds of change are blowing in Montpelier with regards to criminal law. And I encourage you to submit your questions/comments/concerns to the Criminal Law Section on VBA Connect. If you have ideas or requests for a criminal law topic, event, or panel, please let us know!

DISPUTE RESOLUTION SECTION

Chairs: Neil Groberg, Richard Hecht, and Erik Wheeler

Chairs Rick Hecht and Neil Groberg welcomed Erik Wheeler as a Co-Chair. With new vitality, the Section seized the few opportunities available during the continued pandemic and presented four well attended and well received CLEs entitled "Chewing on Conflict." To date, these cyber conversations have included the Vermont Attorney General, a discussion on the law enforcement controversy in Burlington, confidentiality, and apologies in mediation. The section hopes to continue these discussions and welcomes ideas.

With over 120 members strong, the Dispute Resolution Section continues to strive to make mediation, arbitration and facilitation more utilized, accepted and publicized in Vermont's legal community and the public in general. The Section welcomes suggestions from all Bar members regarding opportunities for the Dispute Resolution Section to enhance its mission.

DIVERSITY SECTION

Chair: Alfonso Villegas

Greetings! First, let me introduce myself. My name is Alfonso Villegas and I am the new chair of the Diversity Section from September 2021 to August 2022. I am honored and excited to take on this important role. And I look forward to engaging with you on issues that impact Diversity, Equity, and Inclusion in the Vermont legal community. First, I want to thank Alycia Sanders for her work the previous year. I have some big shoes to fill! Second, I encourage every one of you to reach out with any questions, concerns, thoughts, and ideas for programs you want to see this upcoming year. Finally, an update on the MLK Poster contest: it is under way. The team has met to discuss next year's essay topic and we are looking forward to seeing how students in Vermont interpret it.

ELDER LAW SECTION

Chair: Glenn Jarrett

The Elder Law Section sponsored an "Elder Law Day" in November 2020. Topics included Pre-Crisis Planning (Traditional Estate Planning with Elder Law Focus), Special Needs Trusts (1st and 3rd party trusts, ABLE accounts), Basic Medicaid Eligibility (Crisis Planning and Long-term Care Med-

icaid Overview), Advanced Medicaid Planning (Asset Preservation) and Post-Eligibility Issues (Estate Recovery and Protection of the Community Spouse). The presentations were excellent and were well-received.

ENVIRONMENTAL LAW SECTION

Chair: Gerald Tarrant

For almost four years members of our Section have worked diligently with many State agencies, organizations, private lawyers and interested Vermonters on Act 250 resulting in legislation that did not become law. Change is difficult, perhaps especially so when updating major environmental laws. It not only takes time and energy, but it also requires patience and understanding. Vermont's environment is complicated. It is especially so in the area of environmental laws and the procedures that allow Vermonters the opportunity to participate in a meaningful and fair manner. It often requires that we take small steps to gain the greater good. Our court system, State agencies, boards and commissions, Vermont lawyers and their clients, as well as advocates for the environment and for many Vermont activities or endeavors such as farming, housing, downtown development and small businesses to name but a few – understandably have different views of how Vermont should look and how it should respond to change. It sometimes appears we should consider smaller steps in bringing our environmental laws up to date even when we see larger changes demanding faster action. Thank you for all of your hard work and patience. If any of you have ideas on relevant CLE's for the coming year please contact me at gerry@tarrantgillies.com, or for ideas as to relevant new and improved laws, please contact your favorite Vermont Legislator.

HEALTH LAW SECTION

Chair: Elizabeth Wohl

As co-chair of the Health Law Section this past year, I attended numerous Section Chair Conference calls to support the work of the VBA. In addition, I coordinated and contributed to the Health Law Section's recent Panel at the VBA Annual Meeting entitled "It's All About Vaccines" with myself, Ben Traverse and Alexa Clauss. The panel was well-attended and the audience was quite engaged, peppering the panel with questions for the entire session.

INSURANCE LAW SECTION

Chair: Doreen Connor

It has been a quiet year for the Insurance Section, but we are planning an Insurance CLE for 2022. If you have ideas for a CLE or

articles, please start a thread on VBA Connect or let me know.

LABOR AND EMPLOYMENT LAW SECTION

Chair: Steve Ellis

The Labor and Employment Law Section began the year by partnering with the Young Lawyers' Division to present a webinar at the (virtual) mid-winter thaw in January. Not quite a year into the pandemic, we looked at the changing workplace, including remote work, vaccine mandates, and the disproportionate impacts on women and communities of color. By that time VBA Section Chairs and County Bar Presidents had been participating for months in weekly conference calls to provide input into the ever-evolving AO 49, and some of us had also been working with a separate VBA COVID Committee to monitor the general well-being of the Bench and Bar and the people we serve. Although these committees began meeting less frequently over the summer, their work has continued, and continues.

At the annual meeting in October, our Section assembled an in-person panel of Vermont's foremost experts to take a more focused look at the impact of the pandemic on progress toward diversity, equity and inclusion in the workplace in general, and to consider the role and responsibility of the law and the organized bar in addressing these issues. We briefly touched on a very recent report from the VBA's Committee on Workforce Development which provides some data points around the aging of the Vermont Bar, a lack of racial diversity and special challenges for women in the profession. These are difficult issues and the data sometimes appear to be moving targets. However, one idea around which there is little debate is the value of a healthy (physically and mentally), diverse, equitable and inclusive Bar and Judiciary, if we are serious about fostering healthy, diverse, equitable and inclusive workplaces in Vermont.

With this idea in mind, over the next year we will be looking for opportunities to establish connections and relationships between our LEL Section and young Vermonters, a group that is significantly more diverse than the population as a whole and, if we can keep them, will produce the next generations of Vermont Labor and Employment lawyers, legislators, and judges. We will continue looking at challenges and opportunities for equity, inclusion and retention, and we will be watching for developments in labor and employment law in response to mask and vaccine mandates, exhaustion of stimulus supports, federal infrastructure initiatives and the next swing of the ideological pendulum following the

midterm election cycle. And, as always, we welcome ideas, input and participation from our membership, so please stay well, and stay in touch!

LAWYER WELL-BEING SECTION

Chair: Samara D. Anderson

As we entered into another year of living in a global Pandemic, the Lawyer Well-Being Section continued to focus on ways to provide tools to stressed attorneys to navigate their lives with more attention to their overall well-being. As 2021 began, the Mindful Moments for Wellness CLE series continued every other Tuesday with every 30-minute session FREE of charge and the 60-minute sessions required only payment for the first session, with all subsequent sessions FREE of charge! These sessions continue to this day and have increased in number to include attorneys in multiple States, all mindfully practicing how to de-stress and support each other during this unprecedentedly stressful time. This Section has also supported attorneys with an Attorney Wellness CLE at the Virtual Mid-Year Meeting in June and an in-person Training Your Brain and Body for Mindfulness and Well-Being CLE during the Annual Meeting in October. This Section also continued the "Be Well" section in the Vermont Bar Journal with published articles on the topics of: Happiness Hacks that take less than 5 minutes and The Hand Brain Model for Brain Integration and Increased Well-being. Samara is so excited to continue to provide attorneys with mindful tools to increase their overall self-awareness as a path to finding inner calm and peace amidst our chaotic world and lives.

PARALEGAL SECTION

Chair: Carie Tarte, RP®, AIC

The focus for the Paralegal Section continues to be exploring paralegal licensure in Vermont and returning paralegal programming and education to Vermont.

Vermont law firms have been struggling to fill Paralegal positions with qualified people. This is due in large part to the lack of paralegal educational programming in Vermont and the questionable integrity of many short-term on-line programs. Champlain College no longer has a paralegal program. Woodbury College has not existed for a decade, and the University of Vermont never offered a Paralegal program. Late last year, Marni Leikin Assistant Director of Adult Education at Burlington Technical Center worked with Castleton University to offer a Paralegal degree and certificate program starting in the fall of 2021. Ultimately, because of the Vermont State College system overhaul and financial concerns, Castleton University was not in a po-

sition to add new programming. I, along with Paralegal Section member, Tina Wiles, VPO President Laurie Noyes, and Attorney Jim Knapp have continued our conversations with Burlington Technical Center under new Assistant Director Stacey Clark to develop a paralegal education and training program at Burlington Technical Center, rather than through an accredited educational institution like Castleton.

Exploring paralegal licensure has been slightly more difficult. The Paralegal Section has been working on a Vermont Su-

preme Court Petition requesting the establishment of an *ad hoc* commission to study the need in Vermont for a new category of qualified, licensed non-lawyer able to offer limited legal services to the general public as a solution to increasing access to justice. Any attorneys interested in partnering with the VPO on this petition should contact Carrie Tarte at carie@maleyandmaley.com.

PROPERTY LAW SECTION

*Chairs: Benjamin Deppman
and Jim Knapp*

Upcoming VBA Programs

Watch our website and save these dates!

Holiday Shoulder Season Week:

Join us for a week of webinars including Mindfulness on December 7th, Fastcase training on December 8th, Cyberattack protection and Overcoming burnout sessions on December 9th.

Bankruptcy Holiday CLE

A full day of in-person CLE on December 17, 2021, at the Capitol Plaza in Montpelier.

VBA MID-YEAR MEETING 2022

Starting in-person Friday March 25th and continuing through March 30th, virtually, we will have a whole host of offerings for our hybrid Mid-Year Meeting, both in person and via webinar!

Basic Skills in Vermont Practice and Procedure
March 31-April 1, 2022!

Mindful Moments for Wellness

Approx. every other week: upcoming—
December 7 & 21 and January 4 & 18, 2022.

Chewing on Conflict Dispute Resolution Series:
Continues with Tracy Dolan the week of December 12th.

Real Estate Law Day Mini-Series
Coming in February

Procrastinators' Day Coming in June

*And don't forget to check our website
for the LIVE webinar and webcast
options as well as the latest titles
in our digital library!*

The past pandemic year continued to be extremely active for attorneys practicing real estate in Vermont. The Real Estate Section was unable to provide an in person Real Estate Law Day in 2020 but did offer a number of webinars, including a well-attended program offered jointly with representatives of the Vermont Department of Taxes. Other topics included transferring and mortgaging properties with solar collectors, regulation of non-complying and non-conforming properties, a panel discussion on COVID Closings, and a basic title examination program.

There was not a lot of activity in the Legislature impacting real estate other than the grants provided to some towns to implement or expand digitization of the land records.

The Title Standards subcommittee of the Real Estate Section published new, revised and updated Standards in September of 2020 which are available on the VBA Website.

SOLO AND SMALL FIRM SECTION

Chair: Michael Caccavo

The Solo/Small Firm Section has not been very active this year. But with a return to "new normal" and at least some in-person meetings, there are hopes for another Solo/Small Firm Retreat in the future. The Listserv has not been very active, but members are encouraged to share ideas and engage in discussion there. It could be a great place to ask questions, share tips, recommendations, book/website/app info, etc. If you find something that has helped you, in your practice or otherwise, please post and share it!

WOMEN'S DIVISION

Chair: Samantha Lednicki

The Women's Division held its Annual Meeting on October 15. We are planning three events for the 2021-2022 year and resuming the VLS Mentorship Program. More information to come soon, look out for more posts on VBA Connect!

WORKERS COMPENSATION SECTION

Chair: Erin Gilmore

Due to the pandemic, the workers' compensation section was unable to meet during the past year. Hearings at the Department of Labor were able to continue, via Microsoft Teams and via telephone, even though the staff at the Department of Labor has not fully returned to the office. We are looking forward to having our annual bench/bar meeting in 2022.



BE WELL

Gratitude

As we enter into November and my favorite holiday, Thanksgiving, it is a powerful month to start the daily mindful practice of gratitude. What is gratitude? It is the acknowledgement and appreciation for the things, people, and circumstances of your life. We do not need to wait for a surprise or act of kindness from a friend to feel grateful for what we have. We can exercise gratitude every day, celebrating the small things that we often take for granted, such as our senses and physical capabilities. Think about what your life was prior to the Pandemic and now. Think about all the things you took for granted in your normal pre-Pandemic daily routine. Most of us may have operated on auto-pilot, going through the motions of our life and daily routines without truly appreciating all of the aspects that just flowed from home to work and then home again.

A daily gratitude practice has been proven to change the neural pathways of the brain.¹ Neuroscience has proven through research that the brain cannot process gratitude and anxiety at the same time. Our brains are conditioned to function in a repeated way, but positive and negative processes cannot occur simultaneously. If we train our brain for negative thinking, we will continue to create patterns of negative thinking since we have created channels in our neural pathways that become familiar and easy to travel. Likewise, if we train our brains toward positive thinking, we will create and maintain more positive neural pathways, so it is easier and easier to stay positive about external events. You change your perspective to the potentially negative external situations, not the external situations themselves – which, you most likely cannot change. A gratitude practice literally changes our brains on the neural level by serving as a catalyst for our “feel good” neurotransmitters to activate. The focus is on abundant gratitude and not lack. You start to focus more on what you have than what you do not have.

There are many scientifically proven benefits of being appreciative and thankful in a gratitude practice, which makes it an incredible practice to increase your overall well-being. You can improve your overall physical and psychological health – your mental and emotional well-being, but the practice also improves your sleep quality and increases your mental strength. Thus, the symptoms of depression and anxiety decrease as your overall sense of happi-

ness increases. It also keeps you healthier by boosting your immune system and decreasing your perception of chronic pain.

Focusing on gratitude encourages other positive habits to blossom within. These habits help us cultivate health and happiness, not only for ourselves, but for those around us. When we are cultivating positive energy and radiate it outward, those around us feel that energy and it affects their interactions with you and others.² This positive energy:

- Strengthens friendships and opens the door to more relationships
- Enables us to more fully appreciate and celebrate the accomplishments of others
- Helps us operate from a place of complimenting, rather than competing or comparing
- Encourages humility
- Reduces envy and jealousy
- Increases a sense of fulfillment in your life
- Reduces selfishness
- Improves physical and emotional well-being
- Increases empathy and
- Strengthens overall self-esteem.

But, do not take just take my word for it, conduct your own experiment during the month of November and experience the rewards of a gratitude practice yourself with this Gratitude Practice, which requires a quiet location, a chair to sit in, a table and paper to write on, and a paper/pen:

- Take an Aligned Seat
- Eyes Closed - Start to think about all of the things you have to be grateful in your life.
- Open Eyes – Make a list of these things you have to be grateful for (3-5 mins)
- Look at the list and pick 3 things that stand out for you, that you are particularly grateful for today. Memorize them.
- Close eyes and say the 3 chosen things you are grateful for either out loud or quietly to yourself. Just keep repeating these three things. (3-5 mins)
 - I am grateful for #1 _____
 - I am grateful for #2 _____
 - I am grateful for #3 _____
 - NOTE: Saying things out loud actually creates an energetic vibration in our body that can enable activation or downregulation of your nervous system and repro-

gramming of our brains.

- Notice what it feels like to say things silently to yourself vs. saying it out loud and notice any differences you experience.
- Let the grateful items go, and just feel any shifts in your body or mind, just from being grateful (1-2 mins)
- Now you have a list, you can add to it whenever you wish, and continue to choose three things daily to be grateful for.
- Whenever you are feeling stressed, overwhelmed, anxious or worried, know that you have this gratitude practice in your mindful toolbox to help you breathe through it, alter your nervous system reaction, and shift the neural pathways of your brain.

If you are ready to improve your overall wellbeing and need someone to help support you, please contact Samara Anderson at thehappyhumanprojects@yahoo.com to discuss opportunities to incorporate mindfulness and wellness into your stressful lives as attorneys through private group workshops, courses or 1:1 coaching.

¹ The Neuroscience of Gratitude, Huffington Post, by Emily Fletcher (posted November 24, 2015).

² 7 Scientifically Proven Benefits of Gratitude, Psychology Today, by Amy Morin (posted April 3, 2015).

³ This practice was expanded upon a Sharon Salzburg Gratitude Meditation.



Your Emoji Can Be Used Against You

I. INTRODUCTION

Language and text of the internet has evolved into communication that extensively uses images to project emotions, feelings, ideas, and much more. This cultural change has resulted in the use of images, emojis, GIFs, and/or memes to carry on full conversations. As emojis and other pictographs are increasingly used in electronic communication, it has become inevitable that they also appear more often in courtrooms. Because there is no standard dictionary to define these creatures of communication, much is left open for interpretation. The subjective nature of emojis create challenges for courts.

The number of emoji or emoticon references in cases has grown over the past few years. In 2019, there were over 100 court cases that referenced the word emoji or emoticon.¹ Eric Goldman, a law professor at Santa Clara University who focuses on Internet, IP, and advertising law,² addressed this issue in his Washington Law Review article, *Emojis and the Law*.³ Goldman states that 92 percent of the online population uses emojis and 2.3 trillion mobile messages incorporate emojis each year.⁴

This evolution of communication comes at an evidentiary price. While many find these various types of pictures useful or fun ways to communicate, courts struggle with how to deal with the same concept. Pictographs have taken over the internet, leading to unforeseen evidentiary issues. Courts struggle with how to interpret these pictographs without a clear definition, while interpreting them within the specific context in which they appear.

As the use of emojis occurs more frequently in legal actions, so does the need to learn how to deal with and overcome these evidentiary issues. Evidentiary issues may arise with respect to relevance, authentication, and even hearsay issues.

Also increasingly problematic are the various technical factors surrounding the use of pictographs and the cultural and technical differences in emoji icons among different technology platforms.⁵ The Unicode Consortium sets standards for each emoji's design. However, each character may appear differently across different operating systems and devices.⁶ This inevitably creates an ambiguity that attorneys and courts must resolve.

Emoji or Emoticon—that is the question

It is important to differentiate between

an emoji and an emoticon. While the two terms may often be used interchangeably and may even appear as synonyms, there are key differences between the two terms.

Merriam-Webster defines an emoticon as a “a group of keyboard characters (as:)) that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (as e-mail).”⁷ While the dictionary definition defines emoji as “various small images, symbols, or icons used in text fields in electronic communication (as in text messages, email, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc.”⁸

Emoticons are a bit simpler in how they “portray emotion in environments where nothing but basic text is available,” while emojis are “actually extensions to the character set used by most operating systems today Unicode.”⁹ An emoticon is a “typographic display of a facial representation, used to convey emotion in a text only medium,” while an emoji is a creation of “actual pictures, of everything from a set of nails to a slightly whimsical ghost.”¹⁰ In other words, the emoji is an advanced and enhanced version of its predecessor, the emoticon.

II. THE INVASION OF THE EMOJI— Emoticon on the rise

The emoticon first appeared in a United States court in 2004. In *MicroStrategy Inc. v. Bus. Objects, S.A.*, a software manufacturer sued a competitor for misappropriation of trade secrets.¹¹ The emoticon appeared when MicroStrategy accused Business Objects of having a “spy” inside MicroStrategy.¹² The allegations were based on the use of the term “spy” in an email that was followed by a “smiley face” emoticon.¹³ The term was intended to be playful and the “spy” in question was simply a friend of a Business Objects employee.¹⁴ Although this case involved emoticons rather than emojis, it was the first case that referenced emoji-like pictographs in the courtroom. Emojis had not yet surfaced. The emoticon predecessor paved the way for emojis as evidence.

Since *MicroStrategy*, there has been an increase of the use of pictographs in the U.S. courts. In 2018 there were upwards of fifty-three cases that contained references to emojis, compared to the prior year in 2017 where 33 cases referenced emojis.¹⁵

Then, in 2019, over 100 court cases referenced the word emoji or emoticon.¹⁶

There are typically two ways the emoji appears in the court system: (1) as the subject matter of a lawsuit, such as a copyright or trademark infringement issue;¹⁷ or (2) as evidence of a person's intentions or actions. In 2019, the band Nirvana sued Marc Jacobs, a fashion brand, for copyright and trademark infringement.¹⁸ Marc Jacobs used a smiley face logo on its clothing that very closely resembled Nirvana's trademarked smiley face logo.¹⁹ Nirvana alleged Marc Jacobs violated copyright and trademark infringement laws by placing virtually identical “smiley face” designs and logos on their clothing.²⁰ Nirvana's designs were specifically unique to the company and notable to the brand because of the symbolic Xs in the smiley face's eyes.²¹ Marc Jacobs appeared to use virtually the same smiley face logo and replaced the image's eyes with a “M” and a “J,” instead of the two Xs used by Nirvana.

An emoji may also be used as evidence of a person's intentions or actions. For example, in *Harrison v. City of Tampa*, a temporary employee working for the City of Tampa sued the City of Tampa for sexual harassment over the behavior of two coworkers. The plaintiff alleged she was harassed and provided messages that included the use of multiple smiley face and winking face emojis.²² These emojis, along with other words and communications, were used to help prove the coworkers' alleged intentions.

In 2018, another case appeared with references to emojis. In *United States v. Edwards*, the defendant was indicted for retaliating against a witness in violation of 18 U.S.C. § 1513(e).²³ The defendant posted an image to her Facebook account. The image was a photo of a criminal informant on the body of a person holding a T-shirt with a badge printed on it.²⁴ The caption below the photo read “[t]his nigga look like he just snitching for fun” with laughing faces and a skull emoji.²⁵ The images and comments, which both included the depiction of emojis, were both used to prove that the defendant had taken action to harm the criminal informant “. . . knowing[ly], with the intent to retaliate.”²⁶ As in *Harrison v. City of Tampa*, the emojis were used to help prove the defendant's actions and intent, but not exclusively used to do so. In both cases the emojis were not the sole factor in determining the defendant's intent to commit the alleged acts.

III. AN EMOJI IS WORTH A THOUSAND WORDS

While an emoji can add a playful nature to an internet conversation, that same emoji can also cause confusion among multiple parties. Between the changes to the emojis themselves across alternative platforms, to the sender and recipient's potential different interpretations, to the context behind the conversation—the emoji's true meaning is left open for debate.

a. Cross-platform confusion

An emoji as sent could potentially appear very different to the receiver and end up conveying a completely different message, depending on whether the recipient uses the same platform. Consider the four emoji below. These four emoji below depict the differences across just three widely-used platforms. They all depict the same emoji, but show how they appear to viewers with Apple, Google, and Samsung phones.

b. To each their own

Not only can one emoji cause misunderstanding because of the diversity across different platforms, but one seemingly simple emoji can leave open much interpretation by the receiver as well. Consider this: a handshake emoji icon may to one party just be a playful character, but to the other party that emoji was an affirmative action sealing a contract. Then there's the issue of the prayer hands, or is it a high five? In deciphering the sender's emoji message, the receiver must know both the emoji's meaning and the user's true intent. That is easier said than done.

Take this misunderstanding a step further and consider a situation where one party sends the other party a gun emoji. Maybe from the sender's point of view this was a joke, but the receiver takes it as a threat. Can the gun emoji constitute a threat? Can the kissing face emoji constitute sexual harassment? These situations can build on the ambiguity that one emoji has. Not only can one little emoji create





ji, rather than just orally described.³¹

3. Judges should display the actual emojis in court opinions where applicable.³²

An important question is whether an emoji can be used to show intent or form *mens rea*. Can that same kissing face emoji reference above be used to prove a co-worker intended to sexually harass someone? Can that gun emoji be used to prove the *mens rea* to a threat of violence? While the use of emojis seems admissible under some standards, the U.S. courts have yet to directly address whether emojis can exclusively be used to prove intent.

In *United States v. Cochran*, evidence of internet communications including the use of emoticons were used against the defendant to prove that he intentionally used the internet "to entice a purported minor to engage in criminal sexual activity."³³ The online communication included the defendant sending "romantic emoticons" and details about what he was doing while fondling himself.³⁴ Although the emoticons were used to prove the defendant's intent and ultimately resulted in a charge, they were not the sole factor in proving the defendant's intent, but rather supporting evidence to help show the defendant's intent in committing the crime.

In *State of Vermont v. Harwood*, the defendant appealed the court's finding of a violation of probation.³⁵ The defendant was initially charged with one count of aggravated domestic assault, 13 V.S.A. § 1043(a)(2), and two counts of disturbing the peace by phone, 13 V.S.A. § 1027(a).³⁶ Here, the defendant sent several threatening and disturbing messages to his ex-girlfriend via Facebook Messenger.³⁷ The defendant's ex-girlfriend reported receiving additional threatening messages, including several messages that included the gun emoji.³⁸ As in *Cochran*, the emojis were not the sole factor in determining the defendant's intent, but instead only part of the picture. This raises another issue: does the context behind the gun emoji matter? If the defendant had sent the gun emojis to his ex-girlfriend with no other message, would it have resulted in a different outcome?

The Emoji	Emoji Example Across Platforms ²⁷	What does this mean? ²⁸
Rolling eyes		Way to miss the point? Oh boy? Hehe?
Drooling face		So good? So incomprehensible? So disturbing?
Fearful face		No way? Oh dear? Yikes?
Clapping hands		Pay attention? Polite applause? Hushed appreciation?

As you can see, where one user's "rolling eyes" emoji may seem playful, to the receiver it may appear to be the expression of annoyance or disbelief. An emoji can appear dramatically different from phone to phone. The Unicode Consortium is attempting to standardize emoji across platforms but so far covers fewer than 3,000, which is only a small part of the emoji universe.²⁹ This is only part of the confusion that one little emoji can cause.

such misunderstanding among parties, but it can cause potentially detrimental outcomes and unintended meanings.

The general vagueness of emoji renders it difficult to interpret the intended message. In an attempt to combat this issue, Professor Goldman offers three suggestions for clarifying emojis in court cases:

1. Because the sender and recipient could be seeing different symbols, lawyers should present the actual depictions of what their clients saw as evidence.³⁰
2. Fact finders should see the actual emo-

c. Context matters, or does it?

In addition to the confusion that has already been created, let us add context to the situation. Should context matter? Does context matter? Can context clear up these inconsistencies? The fair assumption may be that putting context behind an emoji, rather than in isolation, would help clear up some ambiguities. However, when comparing emojis in isolation (standalone) to emojis embedded in a textual context, studies proved that no real difference in understanding was rendered.³⁹

One online survey allowed participants to judge 20 standalone emojis and then a group of 20 random emojis, where in-context wording was included.⁴⁰ The survey allowed participants to judge the expressed sentiment on a scale of Strongly Negative (-5) to Strongly Positive (5).⁴¹ In rendering the online survey, there were two main findings:

1. Emoji interpretation is not made clearer when adding context to the standalone.⁴²
2. There is no directional trend. Some emojis are less ambiguous in context, while others are more ambiguous in context.⁴³

Another recent study that hypothesized examining emojis in their natural textual contexts would substantially reduce the observed potential for miscommunication, was in fact unsupported by the study itself.⁴⁴ The study examined a controlled study with 2,482 participants who interpreted emojis both in isolation and in multiple textual contexts.⁴⁵ The end result—people interpret emoji characters inconsistently, creating significant potential for miscommunication.⁴⁶

SO WHAT'S THE BIG DEAL?

Emojis and other pictographs have become something of second nature to this generation, with 92 percent of the online population using emoji and 2.3 trillion mobile messages incorporating emojis each year.⁴⁷ While emojis seem fun and playful—we've all indulged—among certain parties, to the parties in the courtroom the same fun and playful icons can cause much chaos and confusion. With the increasing use of these pictographs, the courts have struggled with how to interpret and deal with these emojis.

Emojis pose both confusion among the parties, attorneys, courts, and jurors. This results in both evidentiary issues, as well as issues on how to interpret these new-aged creatures. There is yet to be much direction or precedent on how courts interpret and use emojis. As Professor Goldman states "as emoticons and emojis play an increasingly important role in how we communicate with each other, they will increasingly raise legal issues."⁴⁸ Moreover, the rise of emojis is only likely to increase and as a result will increasingly rise in the number of court appearances. Thus, practicing attorneys, attorneys, judges, courts, and jurors will need to learn how to overcome these emoji-posed courtroom issues. As technology grows and communication molds into a new era, judges, and attorneys are posed with new challenges as the result of the emoji's rise. Therefore, it becomes crucial to learn how to deal with these issues. Proceed with caution when you are faced with

these cute creatures of communication.

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¹ The Court System's Increased Analysis of Emojis and Emoticons in 2019, <http://www.aublr.org/2020/03/the-court-systems-increased-analysis-of-emojis-and-emoticons-in-2019/> (last visited Apr. 22, 2021).

² Eric Goldman, <https://law.scu.edu/faculty/profile/goldman-eric/> (last visited May 1, 2021).

³ Epiq, *Ambiguity of Emojis Can Complicate Cases*, JD Supra (May 22, 2019), <https://www.jdsupra.com/legalnews/ambiguity-of-emojis-can-complicate-cases-73153/>.

⁴ *Id.*

⁵ Mark Walsh, *Emojis Head to A Courthouse Near You Use of the Pictographs in Lawsuits Increases*, ABA J., October 2017, at 11.

⁶ *Id.*

⁷ *United States v. Cochran*, 534 F.3d 631, 632 (7th Cir. 2008) citing MERRIAM-WEBSTER ONLINE DICTIONARY (2008), <http://www.merriam-webster.com/dictionary/emoticon> (last visited Mar. 30, 2021).

⁸ MERRIAM-WEBSTER ONLINE DICTIONARY (2021), <https://www.merriam-webster.com/dictionary/emoji> (last visited Mar. 30, 2021).

⁹ *Id.*

¹⁰ Don't know the difference between emoji and emoticons? Let me explain (2015), <https://www.theguardian.com/technology/2015/feb/06/difference-between-emoji-and-emoticons-explained> (last visited Mar. 30, 2021).

¹¹ *MicroStrategy Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 404 (E.D. Va. 2004).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Ambiguity of Emojis Can Complicate Cases*, <https://www.jdsupra.com/legalnews/ambiguity-of-emojis-can-complicate-cases-73153/> (last visited Apr. 21, 2021).

¹⁶ The Court System's Increased Analysis of Emojis and Emoticons in 2019, <http://www.aublr.org/2020/03/the-court-systems-increased-analysis-of-emojis-and-emoticons-in-2019/> (last visited Apr. 22, 2021).

¹⁷ The Court System's Increased Analysis of Emojis and Emoticons in 2019, <http://www.aublr.org/2020/03/the-court-systems-increased-analysis-of-emojis-and-emoticons-in-2019/> (last visited Apr. 22, 2021).

¹⁸ *Nirvana, LLC v. Mark Jacobs Int'l, LLC*, No. LACV1810743JAKSKX, 2019 WL 7817082, at *1–2 (C.D. Cal. Nov. 8, 2019).

¹⁹ *Nirvana, LLC v. Mark Jacobs Int'l, LLC*, No. LACV1810743JAKSKX, 2019 WL 7817082, at *1–2 (C.D. Cal. Nov. 8, 2019).

²⁰ *Nirvana, LLC v. Mark Jacobs Int'l, LLC*, No. LACV1810743JAKSKX, 2019 WL 7817082, at *1–2 (C.D. Cal. Nov. 8, 2019).

²¹ *Id.*

²² *Harrison v. City of Tampa*, No. 817CV01369T02CPT, 2019 WL 2358791, at *2 (M.D. Fla. June 4, 2019).

²³ *United States v. Edwards*, No. 2:17-CR-170, 2018 WL 456320, at *1 (S.D. Ohio Jan. 17, 2018), *aff'd*, 783 F. App'x 540 (6th Cir. 2019).

²⁴ *Id.*

²⁵ *Id.* Also it should be noted that the skull emoji is synonymous with 'dying laughing' at this time, which interpretation has also evolved and blurred over time.

²⁶ *Id.*

²⁷ See 22 Emojis That Look Completely Different on Different Phones, <https://www.mentalfloss.com/article/516048/22-emojis-look-completely-different-different-phones> (last visited Apr. 20, 2021) for emoji pictures.

²⁸ See *Id.* for emoji meanings.

²⁹ *Ambiguity of Emojis Can Complicate Cases*, <https://www.jdsupra.com/legalnews/ambiguity-of-emojis-can-complicate-cases-73153/> (last visited Apr. 21, 2021) referencing Eric Goldman's *Emojis and the Law*.

³⁰ *Ambiguity of Emojis Can Complicate Cases*, <https://www.jdsupra.com/legalnews/ambiguity-of-emojis-can-complicate-cases-73153/> (last visited Apr. 21, 2021).

³¹ *Id.*

³² *Id.*

³³ *United States v. Cochran*, 534 F.3d 631 (7th Cir. 2008).

³⁴ *Id.*

³⁵ *State v. Harwood*, 2020 VT 65, ¶ 2, 238 A.3d 661, 664 (Vt. 2020).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ How Much Does Context Matter in Understanding Emojis? <https://medium.com/research-summaries/how-much-does-context-matter-in-understanding-emojis-e2759aab6be8> (last visited Apr. 21, 2021).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Understanding emoji ambiguity in context: The role of text in emoji-related miscommunication, <https://experts.umn.edu/en/publications/understanding-emoji-ambiguity-in-context-the-role-of-text-in-emoji> (last visited Apr. 21, 2021).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Ambiguity of Emojis Can Complicate Cases*, <https://www.jdsupra.com/legalnews/ambiguity-of-emojis-can-complicate-cases-73153/> referencing Eric Goldman's *Emojis and the Law* (last visited Apr. 21, 2021).

⁴⁸ *Id.* referencing Eric Goldman's *Emojis and the Law*.



Hallowed Walls?

Vermont Law School's Mural Controversy

I. Introduction

Vermont does not usually find itself at the forefront of art law. However, the mural controversy at Vermont Law School (VLS) shows that major art law cases can crop up even in our rural state. Sam Kerson's mural in VLS's Chase Center illustrates slavery in America through the lens of Vermont's role in the abolitionist movement. Kerson wished the mural to stand as a reminder that social change can be brought by persistence and struggle. Many feel this message is undercut by the mural's caricaturistic depictions of Black bodies. After a series of objections to the mural's imagery culminated in a petition signed by nearly two hundred students and alumni, VLS resolved to remove or permanently cover the mural. Kerson wishes the mural to remain and has asserted his rights under the Visual Artists Rights Act (VARA).

A. The Mural

Until VLS temporarily covered it with a tarpaulin, Sam Kerson's mural, *The Underground Railroad, Vermont and the Fugitive Slave*, dominated two walls on the upper level of the Chase Center at VLS. Students generally use this out-of-the-way space to study or eat lunch, often doing both at the same time. Sometimes classes or study groups meet in the space. While the area is somewhat hidden from campus visitors, the mural's bright-hued presence was inescapable. Kerson painted the mural with the help of three assistants in 1993 and 1994.¹ The work consists of two panels containing four scenes each. Each panel measures eight by twenty-four feet and is painted in acrylic, directly on the sheetrock.² The first panel moves through the history of slavery in America, depicting the enslavement of Africans, an American slave market, slave labor, and a subsequent insurrection.³ The second panel's four scenes progress through the abolitionist movement, illustrating slave bounty hunters and Vermonters who sought to outwit them.⁴

In the third scene on the second panel, a golden-haired, white woman in a brilliant green dress attempts to block a group of escaping slaves hiding under a South Royalton bridge from a slave bounty hunter's searching eyes.⁵ The bounty hunter's vicious dogs are menacing red caricatures with jagged outlines. Like the red dogs, Kerson

illustrates Black bodies through emotive elements. The figures under the bridge cower in fear of the bounty hunter.⁶ In the first scene of the first panel Africans are forced into slavery by a white man brandishing a bullwhip.⁷ The Africans have bulging white eyes, thick lips and bare-muscled torsos, a motif repeated throughout the mural. The mural's critics have noted the similarity between the mural's racially insensitive imagery and Sambo, the minstrel era stereotype with exaggerated features, portrayed as a naïve character in need of white guidance.⁸ Should such imagery adorn VLS's hallowed walls, influencing its next generation of attorneys? VLS no longer thinks so.

B. Chase Mural Lawsuit

Triggered by the death of George Floyd, VLS decided to act.⁹ In July 2020, VLS announced plans to paint over the mural.¹⁰ However, before doing so, VLS became aware of Kerson's potential rights under VARA. VLS gave the artist ninety days to remove the mural after which the school would remove or cover it.¹¹ Kerson employed carpenters to examine the work. The carpenters concluded that the only way to remove the mural would be to cut the sheetrock into sections, which would effectively destroy the work.¹² VLS decided instead to cover the mural with acoustic panels.¹³

Kerson filed a complaint against VLS in Vermont's United States District Court on December 2, 2020 asserting his rights under VARA.¹⁴ Subsequently, on January 20, 2021, Kerson filed a motion for preliminary injunction asking the court to enjoin VLS from permanently covering the mural.¹⁵ VLS filed a motion to dismiss on February 1 arguing that VARA protects the mural from destruction, but does not prevent the law school from covering the work.¹⁶ The parties met in court on February 24 for a hearing on Kerson's request for a preliminary injunction. The judge outlined the parties opposing stances stating to Kerson's lawyers, "[y]ou want permanent display...they want permanent entombment."¹⁷ Kerson's lawyers argued that VLS should have to wait until after the case is decided to place acoustic tiles over the mural, but allowed that, in the meantime, they are willing to accept the tarpaulin that currently covers the work.¹⁸

On March 10, the court denied Kerson's

motion for a preliminary injunction.¹⁹ The court concluded that VARA protects Kerson's mural from mutilation or destruction, but held that VLS's plan to conceal the work behind acoustic panels would not modify or destroy the work in violation of VARA.²⁰ The court concluded that Kerson was unlikely to succeed on the merits of the case and changed VLS's motion to dismiss to a motion for summary judgement.²¹ Kerson successfully moved for additional time to engage his own expert to determine whether the panels will cause the work to deteriorate.²² The parties will meet again on October 8 at VLS for a hearing on the law school's summary judgement motion.²³

II. VARA background

The legal basis for the mural controversy is the Visual Artists Rights Act of 1990.²⁴ VARA recognized an artist's moral rights for the first time in federal law.²⁵ Specifically, VARA grants artists the rights of attribution and integrity. The right of attribution allows artists to claim work created by them, or to deny authorship of work falsely attributed to them. The right of integrity—our focus here—allows artists to prevent or recover damages for the intentional destruction of their work.²⁶ VARA grants these rights for the artist's lifetime, even after the artist no longer possesses the protected work.²⁷ VARA's enactment recognized the unique predicament faced by visual artists. Unlike musical composers or literary authors, visual artists' reputations are frequently tied to a physical artwork. VARA also recognized the public's interest in encouraging artists to create by ensuring the preservation of their works.²⁸

A. Pre-VARA: Richard Serra's *Tilted Arc* and Moral Rights in America

The case of Richard Serra's *Tilted Arc* illustrates the challenges artists face in the absence of moral rights. In 1979, during the Carter administration, and prior to VARA's enactment, the General Services Administration's (GSA) art-in-architecture program commissioned Serra to create and install a permanent, site-specific sculpture at 26 Federal Plaza in Manhattan.²⁹ Serra created a 120 foot long and twelve foot high arc made of Cor-Ten Steel, a material Serra chose for its propensity to oxidize and

turn a rich, golden color.³⁰ The sculpture's detractors were not fooled by fancy words describing what, to them, was rust. The detractors were infuriated by Serra's sculpture, which they viewed as an intrusion on the public square.³¹

In March 1985, during the Regan administration, the public outcry over Serra's sculpture led to a GSA hearing during which supporters and detractors had their say. Supporters, such as the art historian Benjamin Buchloh, hailed Serra as "the most important sculptor of the post war period," in line with Picasso and Brancusi.³² Buchloh countered the detractors stating that "if the pathology of prejudice becomes policy, even if only in one single case, you might as well start purging the contents of the Museum of Modern Art."³³ Nevertheless, the GSA sided with the views of local residents and federal employees who felt Tilted Arc interfered with their use of the plaza, and decided to remove the sculpture.³⁴

Richard Serra sued the GSA in the United States District Court for the Southern District of New York in December 1986 seeking an injunction to prevent the GSA from removing Tilted Arc, a declaratory judgment that his rights had been violated, and over \$30 million in damages.³⁵ Serra claimed that the GSA violated his First Amendment right to free speech and his due process rights under the Fifth Amendment. Rudy Giuliani, then a U.S. Attorney representing the GSA, argued that Serra sold his free speech to the federal government along with his sculpture.³⁶ The District court granted summary judgement against Serra's constitutional claims. On appeal, the Second Circuit agreed with the GSA and held that even if Serra did retain free speech rights, the sculpture's removal was permissible, even if partly motivated by aesthetic concerns, because the government had a significant interest in preserving the plaza for public use.³⁷ The court determined that Serra's Fifth Amendment claims failed as a matter of law because Serra no longer had a property interest in the sculpture and was therefore not deprived of liberty or property. Furthermore, the court stated that the GSA public hearing provided Serra with "more process than what was due."³⁸

The GSA removed Richard Serra's Tilted Arc from 26 Federal Plaza on March 15, 1989.³⁹ Serra later stated that had he known the U.S. government would claim Tilted Arc as its own speech, he never would have created it.⁴⁰ Serra stressed the danger in allowing government officials and lawyers to determine an artwork's worth.⁴¹ Serra agreed with the Second Circuit on one, albeit facetious, point—the lawsuit was "an invitation for a new rule...that an artist retains a constitutional right to have per-

manently displayed at the intended site a work of art that he has sold..."⁴² That new rule described the moral right of integrity, which was later granted to artists in VARA. Had VARA existed before the Tilted Arc controversy, the court would have had to consider whether removing the site-specific Tilted Arc from its intended spot essentially destroyed it and thus violated Serra's right to maintain the integrity of his work.

European moral rights focus on artists' rights to control and protect their creative output and artistic reputation. Moral rights recognize that even after an artwork leaves an artist's possession, the work retains the artist's "creative persona."⁴³ Therefore, what happens to the work in the future—where it is displayed and in what context—reflects back on the reputation of the artist.⁴⁴ Moral rights are thought to have originated in France during the nineteenth century. Given European history's relatively long arc, French artists were perhaps more acutely aware of their artistic legacies than their American counterparts. As French artists absorbed and interpreted the works of previous centuries, they kept a keen eye on their own reputations relative to art history.⁴⁵

Classic moral rights grant artists the rights to (1) have their work attributed to them, (2) maintain the integrity of the work and prevent its mutilation or distortion, (3) control disclosure or publication of the work, and (4) withdraw or alter the work.⁴⁶ The Berne Convention for the Protection of Literary Works and Property was first adopted in 1886 in Berne, Switzerland. With respect to moral rights, parties to the convention must recognize artists' rights of attribution and integrity. The Berne Convention states: "Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."⁴⁷ The United States was late to adopt Berne, in part because of a historical preference for economic rights over moral rights. However, in the 1980s the tide began to turn.⁴⁸

B. VARA

During the 1980s, states, following California's example, began to pass moral rights legislation. The states recognized that artists, like Richard Serra, may be reluctant to make art without a guarantee that the work is protected from later destruction or mutilation.⁴⁹ Additionally, the state legislatures recognized the broader goal of preserving cultural heritage.⁵⁰ In 1987, Senator Edward Kennedy introduced VARA.⁵¹

In 1988, the United States joined the Berne Convention. With Berne in mind, legislators debated the contents of VARA, specifically the right of integrity, resale rights (*droite de suite*), and a recognized stature standard based on expert opinion for covered works. The original bill failed, but a subsequent version was adopted. This version did not include resale rights, but retained the right of integrity and a recognized stature standard.⁵²

The relevant provisions of VARA are stated in 17 U.S.C. § 106A(a)(3)(A) and (B). These sections set out that artists shall have the right to prevent the "intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."⁵³ Section 113(d) specifically addresses works "incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work..."⁵⁴ Incorporated works or murals are protected under VARA unless the work was installed prior to VARA's enactment or the artist agreed to waive his rights under VARA.⁵⁵ The artist's ability to waive his rights differs from the approaches of other members of the Berne Convention. Under VARA, artists have a right to prevent the intentional or grossly negligent destruction of works of "recognized stature."⁵⁶ The recent Second Circuit opinion, *Castillo v. G&M Realty L.P.*, addressed the recognized stature standard in the context of graffiti art.⁵⁷

C. 5Pointz

Castillo centered on the 5Pointz aerosol art center in Long Island City, New York. The defendant, Gerald Wolkoff, owned several run-down warehouses, which he turned into an exhibition space for artists in 2002. The space became renowned for aerosol art, or graffiti, and it attracted media attention and visitors from around the world.⁵⁸ Graffiti is known for its impermanence, but 5Pointz provided "longstanding walls" which were reserved for "the best works at the site."⁵⁹

Eleven years later, Wolkoff decided to demolish 5Pointz and erect luxury apartments in its place.⁶⁰ The aerosol artists sued under VARA to prevent the destruction of the site. The artists' request for a temporary restraining order was granted, but their subsequent motion for a preliminary injunction was denied. Wolkoff immediately—the same night, in fact—white-washed the art.⁶¹ In this hostile context, the Second Circuit determined that the artists' work had recognized stature based on "a plethora of exhibits and credible testimony."⁶² The court held that a work has recognized stature when it is "of high quality, sta-

tus, or caliber that has been acknowledged as such by a relevant community...comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts."⁶³ Wolkoff's willful destruction of the work seemingly annoyed the court, which held that the artists' rights were violated and upheld the district court's maximum damages award of \$6.75 million.⁶⁴

D. MASS MoCA

In addition to recognized stature, courts must consider whether a work has been modified or destroyed as prohibited under VARA. The First Circuit opinion *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* examined whether a museum's decision to conceal a work modified it and violated the artist's right of integrity under VARA.⁶⁵ The Swiss conceptual artist Christoph Büchel is known for large scale installations "which compress masses of material and objects into historically charged labyrinthine environments through which viewers walk, climb and crawl."⁶⁶ In 2006, the Massachusetts Museum of Contemporary Art (MASS MoCA) agreed to work with Büchel to install an ambitious project titled *Training Ground for Democracy* in an exhibition space the size of a football field.⁶⁷ Incredibly, MASS MoCA and Büchel never formalized their relationship or financial arrangements. The exhibition's cost ballooned to \$300,000, more than a third of the museum's annual operating budget.⁶⁸

MASS MoCA eventually balked at Büchel's demands, including that the museum purchase and install the fuselage of a 727 jetliner.⁶⁹ The museum cancelled Büchel's exhibition and decided to display the unfinished work as part of an exhibition exploring collaborations between artists and museums. Büchel objected to the display of his unfinished work, fearing harm to his reputation. In response, MASS MoCA covered the work with tarpaulins and sued Büchel in federal court, seeking a declaration that the museum was entitled to present the unfinished work under VARA. Büchel brought five counterclaims, including a request for damages under VARA on the premise that the museum's tarpaulins only partially covered the work and tempted viewers to peer beyond the coverings. Büchel claimed the tarpaulins "hid an elephant behind a napkin" and that this inadequate veil was an intentional modification or distortion of his work.⁷⁰

The district court noted the unstructured arrangement between MASS MoCA and Büchel and held that Büchel could not expect to retain a right of artistic integrity in a work he made largely with the museum's resources.⁷¹ On appeal, the First Circuit agreed and held that "the mere covering

of the artwork by MASS MoCA...cannot reasonably be deemed an intentional act of distortion or modification..."⁷² The court reasoned that the museum would have covered the work anyway to prevent viewers from seeing the work before the exhibition's formal opening. Thus, the court concluded that MASS MoCA's tarpaulins did not amount to distortion or modification of Büchel's work under VARA.⁷³ The Vermont district court considered this decision, as well as *Castillo*, before denying Kerson's motion for a preliminary injunction.

III. Implications of VARA application in Chase Mural Lawsuit

In its order, the court agreed with Kerson's claim that his mural is a work of recognized stature. The court concluded that the mural met the criteria set out in *Castillo*: "a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community."⁷⁴ The court recognized the relevant community surrounding Kerson's work, including favorable reviews of the mural published in the *Christian Science Monitor* and the *Boston Globe*. The reviews praised the mural's themes of social justice and activism, qualities VLS promotes in its students.⁷⁵ The court also acknowledged declarations submitted by the Hon. Marilyn Skoglund and David Schutz, Vermont's State Curator, that supported the mural's importance. Justice Skoglund noted her belief that the mural's subject matter remains important today.⁷⁶ VLS did not provide evidence to counter Kerson on the issue of recognized stature, perhaps because it did not view the issue as pivotal. The court concluded that Kerson would likely succeed at trial in proving that the mural has recognized stature and is protected under VARA.⁷⁷

The court further held that concealing the mural is not an act of modification or destruction prohibited by VARA. The court closely reviewed the terms "modify" and "destroy" and found that neither of these fates would befall the mural under VLS's plan to cover the work.⁷⁸ The court referenced MASS MoCA's finding that the cover the museum placed over Büchel's unfinished installation was not a willful distortion or modification.⁷⁹ In the court's view, VLS's plan to cover Kerson's mural is not irreversible because "interior walls are rarely permanent."⁸⁰ The court reasoned that VLS's acoustic panels would not touch the work and therefore would allow the mural to remain unchanged without risk of deterioration, and available for future display at VLS's discretion.⁸¹ Kerson disagrees and feels the panels would subject the mural to damaging and destructive humidity changes. Kerson will have a chance to argue his

point and present expert testimony in October.⁸²

The court's reasoning as to whether VLS may cover the mural makes sense. If evidence suggests the panels would preserve the work, VLS's decision is no different than a museum placing a work in storage. VLS's plan does not amount to "permanent entombment."⁸³ Should VLS wish to display the work again, it may remove the wall. Moving walls is common practice in art museums and galleries. In some cases, walls may be moved several times a year to accommodate new exhibitions. Büchel's unfinished exhibition at MASS MoCA, for example, involved the construction of entirely new walls and architectural structures.⁸⁴ We cannot reasonably prioritize the risk of harm to an artist's reputation over the ability of an institution to manage its own exhibition spaces.

While the court's reasoning is appropriate for the facts surrounding Kerson's mural, the holding does not address a gaping hole in VARA—what happens when you cannot remove or cover the work without destroying it? Before Wolkoff whitewashed the 5Pointz artwork, he faced the possibility that he would be unable to tear down his warehouses to make way for luxury apartment buildings. While it may be difficult to sympathize with a wealthy developer who destroyed the works of multiple artists in a single evening to avoid losing out on a real estate investment, the situation poses a difficult question.⁸⁵ Should we prioritize an artist's rights over a property owner's rights? Arguably, the *Castillo* holding made it less likely that property owners will seek out or allow collaborations with artists because of the possibility that their free use of the property will be limited. Of course, artists may waive their rights under VARA. Though required waivers may also limit artistic collaboration if an artist is unwilling to sign. It certainly seems that Richard Serra would not have signed such a waiver had the GSA requested one prior to the commission of *Tilted Arc*.⁸⁶

Last August, the Burlington City Council removed a mural titled *Everyone Loves a Parade* from the Church Street Marketplace. Like the mural at VLS, the Burlington mural was heavily criticized for its racially insensitive imagery. Specifically, critics claimed the mural depicted mainly white Vermonters throughout the state's history, and ignored people of color, including the Abenaki tribe.⁸⁷ When the mural was installed in 2012, it covered up a pre-existing mural by artist Gina Carrera. Carrera claimed she never gave the city permission to cover her work and that it is protected by VARA. Burlington allowed Carrera to touch up her underlying work after it removed *Everyone Loves a Parade* last September. However, it is unclear whether the

city will try to commission another work to cover Carrera's mural.⁸⁸

The VLS and Burlington mural controversies demonstrate that VARA is part of the legal dialogue in Vermont. Vermont institutions should continue their support of artists with VARA in mind. Likewise, artists should be aware of their rights under VARA, the protections VARA offers and the consequences of waiving those rights. Whatever its outcome, the VLS mural controversy is a lesson for artists and the institutions that support them to plan for the future of their artistic collaborations.

IV. Conclusion

Where should the arts rank in our society's value system? I suggest high. The arts are fundamental. Not everyone will agree, and some feel the arts are elitist, perhaps with good reason. But as the prominent art dealer Richard Feigen said, "...what we leave behind in terms of the arts is what really matters...not the bombs we make and the craters we dig and the structures we build, which will turn into rusty piles in time."⁸⁹ The *Tilted Arc* controversy reminds us what we will lose if artists do not feel society will protect their work. As Serra said, he would never have agreed to the GSA's commission had he known the *Tilted Arc* would be destroyed.⁹⁰ If the court grants VLS's summary judgment motion, the Chase mural may be obscured. VLS has found a workable solution, balancing the rights of the artist with the present concerns of the community. While Kerson has not achieved "permanent display," he has likely avoided permanent destruction.

Postscript: Following the October 8 hearing at VLS, the United States District Court for the District of Vermont granted the law school's motion for summary judgment. The court determined that VLS's proposal to conceal the mural with a wall of acoustic tiles does not violate VARA. Lawyers for the artist, Sam Kerson, said that he will appeal the ruling.

Kristin S. Saroyan recently received her J.D., summa cum laude, from Vermont Law School. She looks forward to practicing law pending bar admission in Vermont and New Hampshire. Kristin wrote this article during her final semester at VLS with the expert guidance of Professor Oliver Goodenough.

¹ Sam Kerson, <https://www.samkerson.com/murals/undergroundmural.html> (last visited Apr. 26, 2021).

² Order on Mot. for a Prelim. Inj. at 2, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Feb. 1, 2021).

³ Sam Kerson, <https://vimeo.com/27516054> (last visited Apr. 26, 2021).

⁴ Id.

⁵ Sam Kerson, <https://www.samkerson.com/murals/undergroundmural.html> (last visited Apr. 26, 2021).

⁶ Id.

⁷ See Sam Kerson, <https://vimeo.com/27516054> (last visited April 26, 2021) (referencing James Mellon's oral history of slavery, *The Bullwhip Days: The Slaves Remember* (2002)).

⁸ Decl. of Jameson Davis, Kerson v. Vermont Law School, Inc. at 2, No. 5:20-cv-00202 (D. Vt. Feb. 3, 2021); Richard Siegesmund, On the Persistence of Memory: The Legacy of Visual African American Stereotypes, *STUDIES IN ART EDUCATION*, vol. 48, no. 3, at 324 (2007).

⁹ Order on Mot. for a Prelim. Inj. at 3, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Feb. 1, 2021).

¹⁰ Vermont Law School, Inc.'s Mot. to Dismiss at 5, Kerson v. Vermont Law School, Inc., 2020 WL 7074570 (D.Vt.).

¹¹ Id.

¹² Id.

¹³ Id. at 6.

¹⁴ Compl., Kerson v. Vermont Law School, Inc., 2020 WL 7074570 (D.Vt.).

¹⁵ Mot. of Pl. Samuel Kerson for a Prelim. Inj., Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Jan. 20, 2021).

¹⁶ Vermont Law School, Inc.'s Mot. to Dismiss, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Feb. 1, 2021).

¹⁷ Alex Hanson, Vermont Law School, muralist in court over cover-up plan as lawsuit plays out, *VALLEY NEWS* (Feb. 24, 2021), https://www.vnews.com/Motion-hearing-in-Vermont-Law-School-murals-lawsuit-39054099?mc_cid=7d2d230968&mc_eid=6731c66415.

¹⁸ Id.

¹⁹ Order on Mot. for a Prelim. Inj., Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Feb. 1, 2021).

²⁰ Id. at 8-10.

²¹ Id. at 11.

²² Order, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. April 22, 2021).

²³ Notice of Hearing, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. July 30, 2021).

²⁴ Visual Artists Rights Act, 17 U.S.C. § 106A (1990).

²⁵ Christopher J. Robinson, The "Recognized Stature" Standard in the Visual Artists Rights Act, 68 *FORDHAM L. REV.* 1935 (2000).

²⁶ Id. at 1936.

²⁷ Id.

²⁸ Id.

²⁹ *THE DESTRUCTION OF TILTED ARC: DOCUMENTS 4* (Clara Weyergraf-Serra and Martha Buskirk, eds., 1991).

³⁰ Serra v. U.S. General Services Admin., 847 F.2d 1045, 1047 (1988).

³¹ Id.

³² Benjamin H. D. Buchloh, Public Hearing Testimony, in *THE DESTRUCTION OF TILTED ARC: DOCUMENTS 91* (Clara Weyergraf-Serra and Martha Buskirk, eds., 1991).

³³ Id.

³⁴ Serra, 847 F.2d at 1048.

³⁵ Id.

³⁶ *The Destruction of Tilted Arc: Documents 14* (Clara Weyergraf-Serra and Martha Buskirk, eds., 1991).

³⁷ Serra, 847 F.2d at 1049.

³⁸ Id. at 1052.

³⁹ *The Tilted Arc Controversy*, 19 *CARDOZO ARTS & ENT. L.J.* 39.

⁴⁰ Id. at 45.

⁴¹ Id.

⁴² Serra, 847 F.2d at 1051.

⁴³ Robinson, supra note 25, at 1938.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. at 1939.

⁴⁷ Article 6bis, Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971, 25 U.S.T. 1341; 1161 U.N.T.S. 3.

⁴⁸ Robinson, supra note 25, at 1941.

⁴⁹ Id. at 1942.

⁵⁰ Id. at 1943.

⁵¹ Id. at 1944.

⁵² Id. at 1947.

⁵³ Visual Artists Rights Act, 17 U.S.C. § 106A(a)(3)(A).

⁵⁴ Id. § 113(d).

⁵⁵ Id. § 113(d)(1)(B).

⁵⁶ Id. § 106A(a)(3)(B).

⁵⁷ Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).

⁵⁸ Id. at 162.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Id. at 163.

⁶² Id. at 167.

⁶³ Id. at 166.

⁶⁴ Id. at 171.

⁶⁵ Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel, 593 F.3d 38 (1st Cir. 2010).

⁶⁶ Roberta Smith, Is it Art Yet? And Who Decides?, *N.Y. TIMES* (Sept. 16, 2007), <https://www.nytimes.com/2007/09/16/arts/design/16robe.html>.

⁶⁷ Massachusetts Museum of Contemporary Art Foundation, Inc., 593 F.3d at 42-43.

⁶⁸ Thomas Micchelli, Christoph Büchel, Training Ground for Democracy, *THE BROOKLYN RAIL* (Sept. 2007), <https://brooklynrail.org/2007/09/artseen/buchel>.

⁶⁹ Id.

⁷⁰ Massachusetts Museum of Contemporary Art Foundation, Inc., 593 F.3d at 46.

⁷¹ Id. at 47.

⁷² Id. at 61.

⁷³ Id.

⁷⁴ Castillo, 950 F.3d at 166.

⁷⁵ Order on Mot. for a Prelim. Inj. at 7, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. Feb. 1, 2021).

⁷⁶ Id. at 8.

⁷⁷ Id.

⁷⁸ Id. at 9.

⁷⁹ Id. at 10.

⁸⁰ Id.

⁸¹ Id.

⁸² Notice of Hearing, Kerson v. Vermont Law School, Inc., No. 5:20-cv-00202 (D. Vt. July 30, 2021).

⁸³ See Hanson, supra note 17.

⁸⁴ See Smith, supra note 66.

⁸⁵ See Castillo, 950 F.3d at 163.

⁸⁶ See *The Tilted Arc Controversy*, 19 *CARDOZO ARTS & ENT. L.J.* 39.

⁸⁷ Ellie French, Burlington's Controversial Church Street Mural Comes Down, *VTDIGGER* (Aug. 28, 2020), <https://vtdigger.org/2020/08/28/burlingtons-controversial-church-street-mural-comes-down/>.

⁸⁸ Katya Schwenk, Burlington's Controversial Mural Downtown is Gone—But the Wall's Future is Uncertain, *VTDIGGER* (Sept. 28, 2020), <https://vtdigger.org/2020/09/28/burlingtons-controversial-mural-downtown-is-gone-but-the-walls-future-is-uncertain/>.

⁸⁹ Neil Genzlinger, Richard Feigen, Gallerist and Champion of Art, Dies at 90, *N.Y. TIMES* (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/arts/richard-feigen-dead.html>.

⁹⁰ See *The Tilted Arc Controversy*, 19 *CARDOZO ARTS & ENT. L.J.* 39.



How to Avoid Ever Thinking "Oh, I Shouldn't Have Said That"

I once asked several of our claims attorneys to identify the top habits they felt new lawyers should develop from day one. With one exception, the list they provided covered the habits I expected they would prioritize. And yet, the more I thought about that one exception, the more I realized how spot on they were. In short, every lawyer should make writing well a habit and here's why.

The professional writing you do, be it an email to a client, a brief filed with a court or a response to opposing counsel can too easily say more than you might intend. For instance, think about the hastily written email composed with little forethought, a legal brief impetuously penned under a time crunch or an emotionally written response to opposing counsel. In short order, you could come to realize that, well as the Hagrid character from the Harry Potter series would sometimes say, "I shouldn't have said that."

The correct choice of words and proper grammar matter because poor writing often results in the sending of a secondary and unintended message that says something about your competency, civility or even your integrity. The better the writing, the lower the risk.

Start by being intentional, as opposed to impulsive. To allow your emotions to get the better of you with any work-related writing is simply asking for trouble. Better yet, if time permits, read aloud what you've written or set it aside and come back to review it a day later. Either approach can help you avoid saying something you might later regret.

Next, be concise and write to your audience. For example, if your audience is a nonscientist, which of the following two

sentences more clearly answers the question what color is the sky? 1) "Only on days when the sky isn't completely saturated with an aerosol of a visible mass of minute liquid droplets, the gas molecules that make up the earth's atmosphere will, through a process called Rayleigh scattering, absorb light waves with shorter wavelengths then radiate this energy back out into the sky in many different directions which will result in anyone standing on the ground on such a day seeing a blue sky," or 2) "On clear days, the sky is blue." The second sentence is always going to be the better choice.

In a similar vein, use plain English instead of confusing legalese because any writing full of gobbledygook serves no one. Consider poorly drafted legal documents. If the understanding you intended to convey is eventually misinterpreted by one or more of the parties due to the inclusion of such gibberish, you may eventually have a serious problem on your hands.

Finally, proofread everything you write and don't rely on spellcheck. Better still, have someone else review what you've written for two reasons. First, a fresh set of eyes can often catch a few typos you've been missing; and second, it's a great way to confirm that your words are being interpreted correctly.

Mark Bassingthwaighte, Esq., ALPS Risk Manager.

Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, the nation's largest direct writer of professional liability insurance for lawyers. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented numerous con-

tinuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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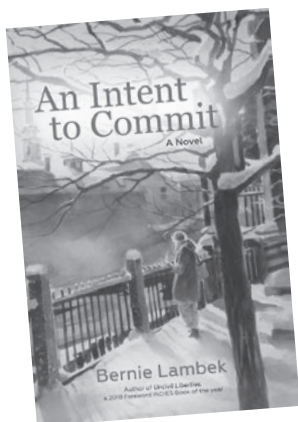
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Young Lawyers Division 2022 Mid-Winter Thaw

The results from our recent flash survey are in. Many of you are excited about the return of the Thaw, and we are pleased to open registration. Join us Friday January 14, 2022 and Saturday January 15, 2022 for a weekend of top-notch CLE's, yoga, cocktail receptions, brunch and a keynote with Erica Heilman of Rumble Strip and Susan Randall. Registration is open on the VBA website.

BOOK REVIEW



"An Intent to Commit"

by Bernie Lambek

Reviewed by Jennifer Emens-Butler, Esq.

Montpelier attorney Bernie Lambek has released his second novel, *An Intent to Commit*, and I was fortunate (and overjoyed), once again, to be given an advanced reader copy. His second novel focuses on the daughter of the main character from *Uncivil Liberties*, rather than the attorney Sam himself, and more surprisingly brings back the client, Ricky, from the prior novel.

Readers of *Uncivil Liberties* will remember Ricky whose rigid intolerance and faith-based homophobia demonstrated how

being true to free speech and protecting freedoms can have unpopular consequences. His evolved character, who came to realize before the start of the second novel that justice for some, rather than for all, is an impossibility, is woven perfectly into the novel's exploration of fairness, equal treatment and freedom of speech. And while *An Intent to Commit* appears to lean more politically to one side than *Uncivil Liberties*, Ricky himself exemplifies the spectrum of experiences and beliefs along the endless rocky road to actual equality.

Being a true legal thriller, Bernie sets the stage with a kidnapping, whose criminal intrigue and temporal grounding gives readers a welcome periodic regrouping between in-depth explorations of finer points of free speech litigation and case law. The central character is Sarah who is steeped in racial justice causes but was not expecting to be quite so steeped as a kidnapping victim. The central legal issue surrounds the raising of a Black Lives Matter flag at a local high school and the protests and court cases stemming therefrom. Public forums; free expression; second amendment rights; threats with the intent to commit; financial motivation; and inclusivity discussions all permeate this courtroom drama.

And just as I described Bernie's first novel as "cozy and familiar," *An Intent to Com-*

mit is even cozier and more familiar with more plays on local names and places, but also some unaltered places and facts as the novel weaves in stories from Vermont's own flag-raising cases. Fellow attorneys will appreciate being brought right into realistic settlement discussions and litigation strategy, feeling like we are truly at the Vermont table for those heated negotiations. The novel seamlessly transitions the reader from action to local Vermont legal practice, to nationally significant hot topics, to personal relationships and to textbook constitutional analysis at an enjoyable pace. It serves as a quick and entertaining read with a healthy dose of first amendment case law without being too heady. The central flag issue of local significance in Vermonters' recent memory segues beautifully into today's continuing national discussions about civil rights, freedom, race, and the ensuing polarizing political discourse.

An engaging novel, perfectly balanced between the expected fast-paced action and character development of a well-written legal thriller and the higher-level exploration of first amendment issues meant to satisfy the legal scholar in all of us. Local attorney Bernie Lambek has done it again! You can find your copy at Bear Pond Books or go to www.bernielambek.com.



IN MEMORIAM

John L. Primmer

John L. Primmer, of South Ryegate, Vermont, passed away, August 29, 2021. John was born February 21, 1941, in Iowa and attended University of Oklahoma, Morningside University, and Southern Methodist University (SMU), Dallas, TX. In 1966, he received his BA from SMU and law degree from Southern Methodist University School of Law, where he also was editor-in-chief of SMU Law Review, 1965-66. Upon graduation from law school, John practiced corporate law at Dewey, Ballantine, Bushby, Palmer & Wood, New York City from 1966-1971. John then joined the law firm of Yandell, Page & Archer, Burlington, VT 1971. He was recruited by Downs, Rachlin & Martin, served as corporate attorney, managing partner, and developed the captive insurance industry in state of Vermont. In 1982 he was a founding partner of Primmer & Piper in St. Johnsbury, VT. This firm lat-

er evolved into Primmer, Piper Eggleston & Cramer PC, with offices in 3 states and with more than 40 attorneys. In the 1990s John and his wife Donna owned and operated the South Peacham Store. He sang in the North Country chorus and recorded radio jingles during college. He enjoyed his family, cooking and being outdoors, fishing, camping, golfing, and travelling. John loved his dogs—Roy, Merle, and countless dogs before them. John is survived by his first wife and his two sons and grandchildren and his 2 siblings. John was predeceased by his wife and his brother.

Karl W. Neuse

Karl W. Neuse, born on July 27, 1941, in Middlebury, died at home surrounded by his loving family, on September 14, 2021. A man who prided himself on "not getting very far," he spent his life in Middlebury, leaving only to attend Northfield-Mount

Hermon, Williams College and Georgetown University (JD, 1966). Karl was a law clerk in Underwood and Lynch before opening his own practice in 1972, serving as a public defender. Karl served on the selectboard for nine years, as chair for 2, and was the Town Attorney for Middlebury from 1988 until his retirement in 2016. He was on the Board of the Addison County Chamber of Commerce, served as President of the Middlebury Rotary Club, incorporator and organizer of the United Way of Addison County and Middlebury Volunteer Ambulance Association. Karl was co-founder, Director, and President of the Middlebury Land Trust and delegate for Middlebury on the Addison County Regional Planning Commission. He was a Little League coach and President and fundraiser for Friends of Hockey. In addition to practicing law and community service, Karl served in the Vermont Army National Guard from 1966-2001, retiring with the rank of Colonel. His favorite activities included fanta-

sy baseball, playing golf, playing fiercely competitive family games and traveling extensively. In 1963, Karl married his college sweetheart, Diane Willis, after only three dates, and they have lived the last 55 years in the same old house. There they raised their two daughters, while growing flowers, and an abundance of vegetables, fruit and berries, from which he proudly made pies for all to enjoy. Karl is survived by his wife, his daughters and many grandchildren.

Michael David "Mike" Danley

Michael David "Mike" Danley, 75, passed away on September 23, 2021, at UVM Medical Center. Michael was born December 1, 1945, in Illinois. Mike's first job out of high school was working as a guide U-505 captured German submarine at the Museum of Science and Industry in Chicago. This job catalyzed a life-long passion for military vessels. He enrolled in the ROTC program at the University of Wisconsin-Madison (Go Badgers!) and as a student, managed the crew team, setting him up for a lifetime of avid crew fandom. Mike graduated in 1968 and enrolled in the army. He served actively beginning in 1968, including a tour of duty in Vietnam at the MACV Headquarters MI Group. By 1972 he had earned the rank of Captain and a Bronze Star. Upon return, Mike enrolled in the University of Maryland-Baltimore law school, graduating with a JD in 1975. During his 46-year law career, he focused on real estate law and contributed to a number of local law firms including Arthur Law Firm; Kolvoord Overton and Wilson; Bergeron Paradis & Fitzpatrick; and Wiener & Slater Law Offices. Mike followed Badger sports, Formula 1 racing, historical model airplanes and American history. Michael was preceded in death by his sister, his father, and his mother. He is survived by his brother, with whom he lived and toured revolutionary and civil war sites, his sisters, his three nieces and his great niece and great nephews.

Sheilla C. Files

Sheilla C. Files, 74, passed away on September 26th, 2021, after a courageous battle with cancer. Over her lifetime, Sheilla attended 26 total schools, and maintained an A+ average throughout; graduating from Windsor High School in 1965. She wed David Files in 1966 and they had 3 children. While working full time as a paralegal, and being a mother and wife, a colleague told her that women would never make good lawyers. In what would become her trademark in life – she would do "it", and do "it" better than they, because they said she couldn't. Sheilla went on to college, becoming the first female to graduate from Vermont Community College with an Associate's degree (with honors), and then on to receive her BA from Boston University. At 47, she graduated from Vermont Law School. She worked her way up to partner in a prestigious law firm and went on to become a sole practitioner. In addition to her legal career, she was active in the Business and Professional Women's group (BPW), becoming President of the Windsor chapter. After retiring from law practice, she co-founded with daughter Chris, Christine's Bridal & Prom in Hartland, VT. She took great joy in helping young girls and women find the perfect dress. However important her professional career was, her family was her top priority. She prided herself on hosting every holiday event. Sheilla is predeceased by her husband David, her parents, and her sister. She is survived by her three daughters and sons-in-law, 3 granddaughters, 3 brothers and a sister.

Carl Olney Anderson

Carl Olney Anderson, 78, formerly of Rutland, died Oct. 11, 2021, at his home in South Carolina. A graduate of Rutland High School, he was first string All State End and qualified for New England Track Meet. At Allegheny College, he was Phi Gamma

Delta Fraternity and graduated from Boston University with a Juris Doctor. Carl returned to Rutland and became an attorney and worked at several law firms before he started his own practice. He was a veteran of the U.S. Air Force National Guard. Very involved with youth sports, he was a coach for Little League baseball and junior hockey for several years and high school golf. Carl enjoyed reading, watching college football, playing golf and became a rules official where he enjoyed talking rules to people. He was president of Rutland Regional Chamber of Commerce and PEGTV and a director of the Vermont Golf Association (VGA). Carl moved to South Carolina when he retired from being an attorney, but he wanted to keep busy, so he worked as a probate paralegal for a Myrtle Beach firm. Carl is survived by his wife, Candy, a brother, his sons and stepdaughter and is predeceased by a son and his mother.

Susan L. Morale

Susan L. Morale, 65, of Rutland, died Oct 26, 2021, after a six-year battle with frontotemporal dementia. Susan graduated from Castleton College with a BA in 1982, then read for the law with Joseph M. O'Neil, Esq, and later after admission to the Vermont Bar in 1988, practiced law at DeBonis & Wright in Poultney and then opened her own practice in Pittsford, then Rutland. She went back to school and obtained an RN in nursing from Castleton College in 2001, an RN to BSN at Norwich University in 2002, and an MS in healthcare management from Champlain College in 2013. She was a traveling nurse for a time and later worked for the State of California in nursing home quality control then for the VA in New Mexico. Susan loved to kayak, ski and travel with her son and had a passion for horses and dogs. Susan is survived by her son, Harley Morale, of North Clarendon, nieces and cousins. She was predeceased by her parents and a sister.



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