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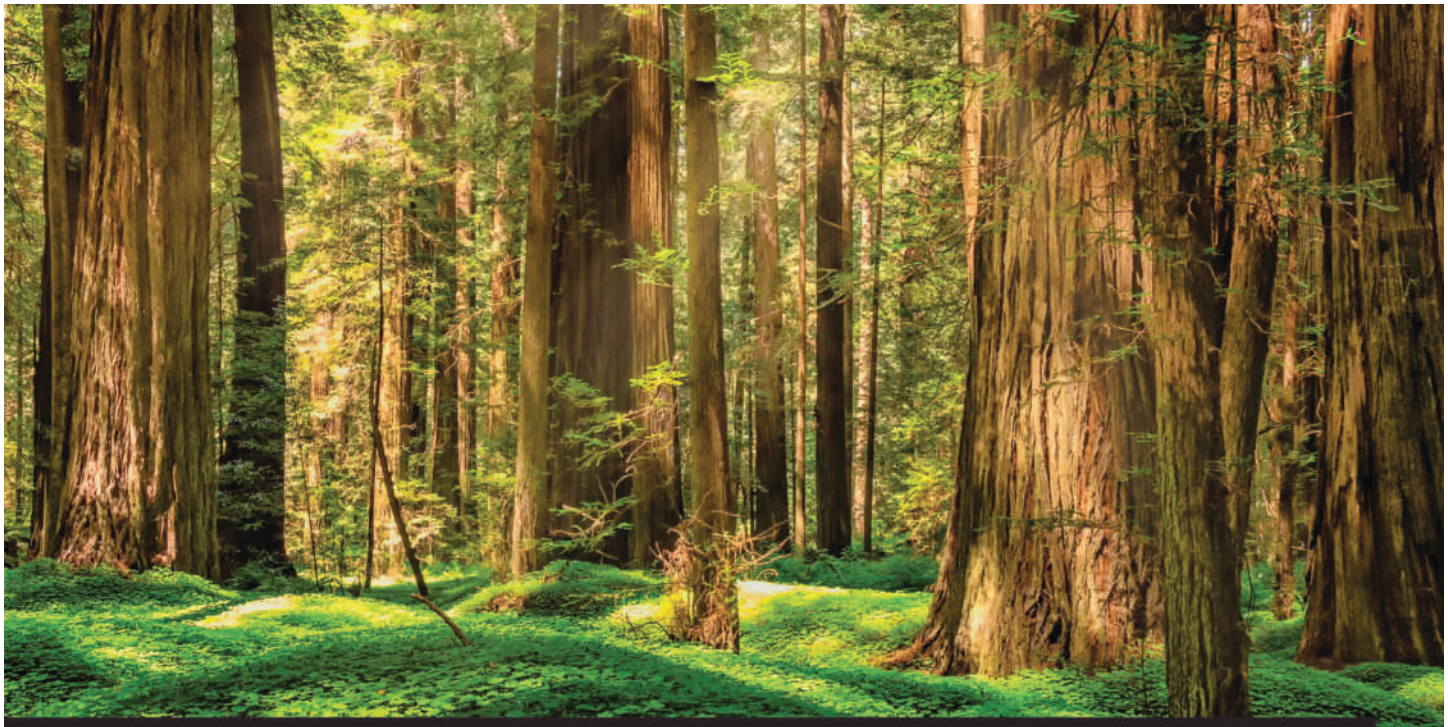

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FROM THE CHAIR

by Brianna Strange

At the entrance to Elysian Park, colorful cars lined either side of the street, glittering in the sun. In blues, browns, and greens—some with custom license plates, others bouncing on massive suspension systems—the cars shone against a backdrop of palm trees and metallic-colored birthday balloons and smokey barbeque grills. It was a quintessential winter day in Los Angeles, with lukewarm sun and clear skies.

I grew up in the L.A. area in the 1990s and 2000s when the War on Drugs was raging (some say drugs won), but I was far removed from the violence that plagued many of L.A.'s communities. I certainly was never pulled over for looking a certain way or driving a certain type of car, but for decades many Angelenos were targeted for driving a lowrider. Laws were passed under the guise of safety but ultimately had racist underpinnings that targeted a subculture in L.A.—the L.A. Police Department and the media successfully equated lowrider with gang member. Although L.A.'s ban on cruising remains in place (Municipal Code 15.78.010), recent efforts have overturned ordinances that target lowriders in cities around California.

In October 2022, San Jose made lowriding legal again for the first time in nearly three decades. A local news station covering the announcement quoted the San Jose Police lieutenant who opposed lifting the ban: "This is a tool we use to ensure the safety of the public, and this is something that while right now it is not a tool being used very often, this is not something we want to lose out of our toolbox."[1] San Jose City Councilmember Raul Peralez, who helped overturn the ban, said, "The prohibition on cruising served as a tool to perpetuate and give legal credibility to racial discrimination and the enforcement and criminalization that followed."[2] Last August, the California State Legislature approved a resolution that celebrates lowrider culture and encourages cities to end cruising bans.[3]

I spoke to one of the lowriders in Elysian Park who explained that the suspension systems on the cars grew out of laws that required cars to be a certain height from the ground; if police were nearby, the suspension system could lift the car above the legal minimum height. While looking into lowrider laws, I found an article about CRASH, a wing of the LAPD that operated from 1979 to 2000 during the peak of discrimination against lowriders. Originally, "CRASH" was called "TRASH"—Total Resources Against Street Hoodlums. After community outrage, the LAPD agreed to swap the T for a C—Community Resources Against Steet Hoodlums. The unit was eventually disbanded in 2000. In November 2000, a person shot and framed by a CRASH officer was awarded $15 million in a police misconduct action.

An unknowable number of laws are designed to punitively target certain groups of people under the guise of public health and safety (felon voting rights, abortion laws). As lawyers, we should be aware of the origins of laws we uphold. Of course, we are not legislators, but we can help educate others by educating ourselves on certain racist and sexist stereotypes spun into law. I for one hope that lowriders are allowed to cruise again—we have plenty of laws that prevent the harms the anti-cruising laws purportedly addressed, and our police attention is perhaps better focused elsewhere. ■

[1] LaMonica Peters, *San Jose could repeal car-cruising ban, advocates say it discriminates against Latino lowrider culture*, KTVU News (May 12, 2022), https://www.ktvu.com/news/san-jose-could-repeal-car-cruising-ban-advocates-say-it-discriminates-against-latino-lowrider-culture.
[2] *Id.*
[3] ACR-176 Cruising (2021-2022).

A partner at Strange LLP, a boutique plaintiffs' firm focusing on mass torts, class actions, antitrust, and select high-profile civil disputes, Brianna Strange is the 2022-2023 chair of the Los Angeles Lawyer *Editorial Board.*

PRESIDENT'S PAGE

by Ann I. Park

A very happy February, members of the Los Angeles County Bar Association! Serving on the *Los Angeles Lawyer* Editorial Board has been a highlight of my time as LACBA president. I first served on the editorial board in 1992, and it is wonderful to again work with such an outstanding group of caring and committed lawyers devoted to the craft of legal writing. I am particularly proud of this issue of the *Los Angeles Lawyer*, as I recruited two of the authors of its excellent articles.

Professor Jacob Charles of the Pepperdine University Caruso School of Law has authored an informative article analyzing how the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* could imperil California's gun control laws. Professor Charles very ably explains how the Supreme Court's new interpretation of the Second Amendment in *Bruen* makes it likely that legal challenges to California's strict gun control laws will prevail and how attempts to regulate and restrict ownership of firearms and those who own them will fail.

In the wake of the horrific January 21 Monterey Park mass shooting, discussion of weakening of our gun control laws is particularly timely and important. Our hearts go out to victims of this terrible tragedy, and we are grateful to all our members and members of our affiliate and affinity bar organizations, including the Southern California Chinese Lawyers Association and the Asian Pacific American Bar Association, who have worked to help victims and their families. If you would like to help victims of the Monterey Park shooting, please visit the Asian Americans Advancing Justice Southern California website, https://www.ajsocal.org.

Another important article in this issue concerns legal protections for gender-affirming care for minors, authored by my friend, civil rights lawyer Mary Kelly Persyn. She examines efforts by state and local legislators to restrict and prohibit gender-affirming care for transgender youth, analyzing the constitutional underpinnings of legal challenges to those efforts. This topic is of great concern to all who believe it is wrong to attack transgender youth and the families who love them. We in the legal profession should work to uphold the rule of law and basic human rights of identity, dignity, and bodily autonomy for all human beings. If you would like to help, please donate to the Trevor Project, https://www.thetrevorproject.org, and to organizations leading the legal fight, including the ACLU, Lambda Legal, and the National Center for Transgender Equality. For more information regarding organizations active in the fight for transgender rights, visit the resources page of the LGBTQ+ Lawyers Association of Los Angeles: https://lgbtqlawyersla.org/Resources_new.

As for our beloved Association, I am happy to report that LACBA is financially healthy and emerging from the pandemic stronger than ever. LACBA has moved into our new downtown offices at 444 South Flower Street, 25th Floor. On January 26, we held our first event on our beautiful outdoor terrace—a reception for affiliate bar associations. The conference facilities at 444 South Flower, accommodating up to 60 persons, are available for you to host your section and committee meetings as well as CLE events. Please reach out to your Member Services or event services liaison to schedule an in-person event in our new Conference Center.

I am excited to announce that the board of trustees has approved the formation of LACBA's 30th section: the Animal Law Section. Many thanks to Past President Brad Pauley and new Section Chair Terri Macellaro. The new section offers an exciting opportunity for legal practitioners to gather together and work on legal issues involving animals, including laws pertaining to animal welfare, agriculture, and commerce.

I am also thrilled that the board of trustees has approved the formation of our newest committee, the Racial and Social Justice Committee, chaired by Judge Lynne Hobbs of the Los Angeles Superior Court. This committee is in the process of organizing many important programs, including LACBA's Summer Law Immersion Program for HBCU students and a program on the disturbing rise in anti-Semitism in our nation. If you would like to get involved, raise awareness, and promote action on racial and social justice issues, please join the committee!

In addition, preparations for LACBA's April 21, 2023 Diversity and Inclusion Conference at Loyola Law School are proceeding well. We have some terrific speakers and panel discussions lined up, and many law firms have already agreed to sponsor the conference. We hope you can join us! For more information on sponsorship opportunities, please contact Terrina Scott, tscott@lacba.org.

Finally, I am delighted to report that LACBA membership is up for the first time in over a decade. More lawyers are joining LACBA because they understand and appreciate the many positive benefits of fellowship, networking, education, career development, and mentoring that LACBA membership provides. Thank you for being part of LACBA and for everything you do to help make the legal profession and our community better, stronger, and fairer. ■

The 2022-2023 president of the Los Angeles County Bar Association, Ann I. Park is a partner in the Los Angeles Office of Foley & Mansfield PLLP, where she specializes in the defense of complex toxic tort actions. Active in LACBA for more than 30 years, she previously served as president of the Korean American Bar Association of Southern California and on the California State Bar's Commission on Judicial Nominees Evaluation and Council on Access and Fairness.

BARRISTERS TIPS

by Robby S. Naoufal

Every client needs to feel confident that his or her counsel knows the law, and mastering the law is itself a tall order. Understanding pleadings, civil procedure, motion practice, discovery, and rules of evidence takes years of study and experience. Nevertheless, any seasoned litigator will insist that knowing the law is not enough. Thoroughly knowing one's client as well as the industry in which the client works is crucial to giving sound legal advice. Thus, the best tip for any attorney is: "Get to know your client and you'll give better legal advice for it."

Clients rarely pursue (or get entangled in) litigation on the basis of personal crusades. The leadership of even a closely held company has a duty to make decisions based on what is best for the business, which typically means what is best for the bottom line. So, each time a new client seeks counsel, that counsel should get to know the client even before diving into those treatises we know so well. This exercise is twofold. First, counsel needs to understand the industry in which the client is working. Second, counsel needs to understand what makes his or her client unique in this field and what success means to the client.

The Industry

Litigation is a uniquely interesting and sophisticated practice because every new dispute presents an opportunity to become a quasi-expert in the field at issue. Knowing the law is undoubtedly a starting point. Yet, in commercial law, for example, understanding the client's business realities is inescapable; whatever notion of success one may have as an attorney must translate into commercial success for it to have meaningful impact.

While the law is meant to function equitably and predictably, different industries present entirely different value systems and rules. If the client operates in an industry with which counsel is unfamiliar, the attorney must start by reading press coverage from reputable sources. What are the latest government regulations to impact that industry? Which companies are driving the discussion in that space and what have they done to change the field for better or worse? Reviewing high-quality coverage from publications like *The Economist*, *The Atlantic*, *Wall Street Journal*, and others is the most effective path to discover how to speak about and analyze issues topically given the contemporary climate.

The best tip for any attorney is: "Get to know your client and you'll give better legal advice for it."

Besides press articles, counsel should identify the most prominent industry publications and subscribe to their releases. This will help counsel become versed in industry vocabulary and other jargon that hold valuable insights for a case. This in turn will help counsel to understand how best to relate with the client. Legal jargon is routine with opposing counsel and for court hearings, but winning a case on the facts requires a good handle on the world one's client inhabits. Knowing the industry well presents a clear edge over the opposition even when in the courtroom. Judges are uniquely exposed to a wide range of industry practice, so showcasing knowledge of how a legal decision may impact the entire industry can help earn even more credibility before the court.

The Client

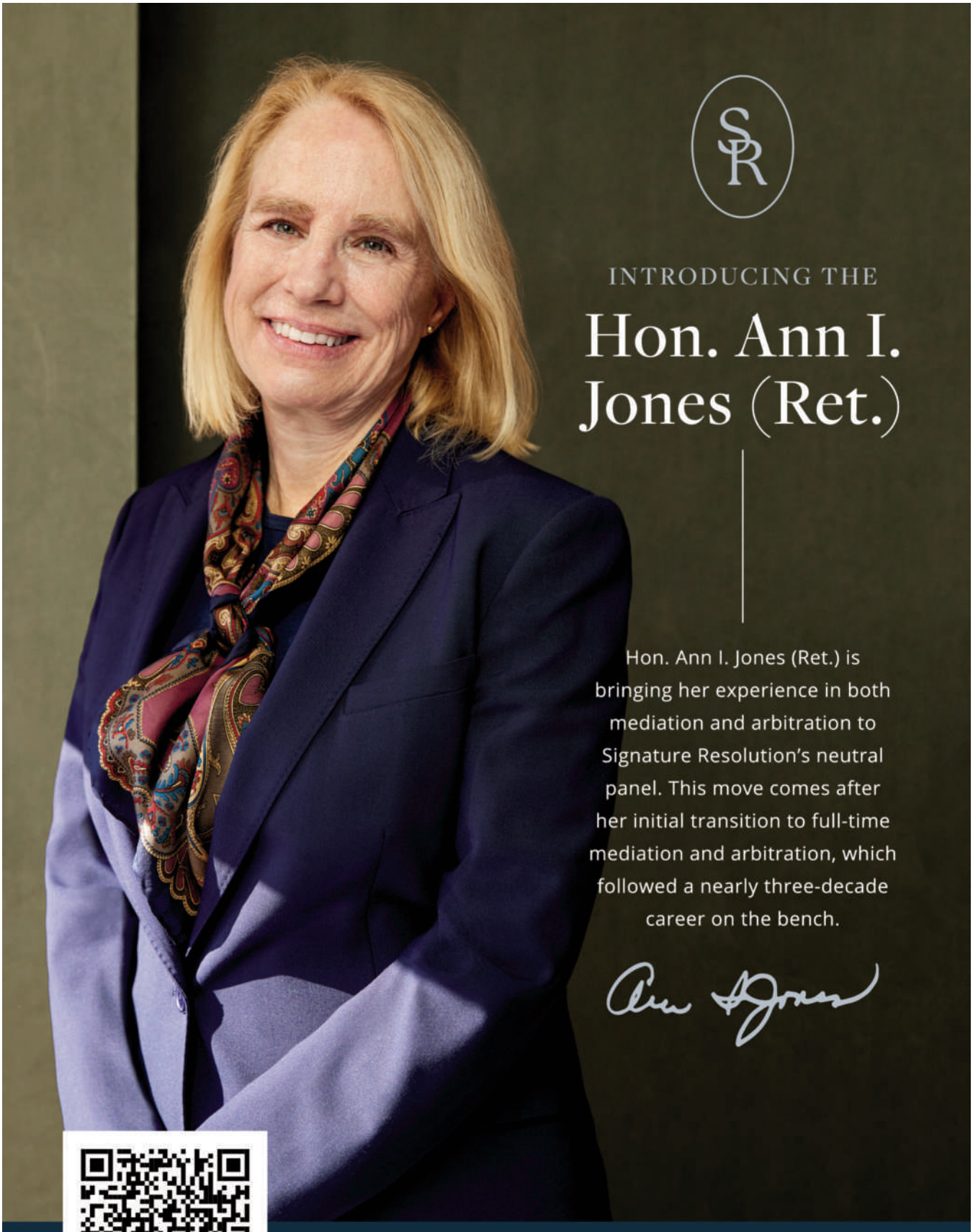
Mediators hoping to settle disputes often tell clients that there are no winners in litigation. Thus, it will be helpful for counsel as an advocate to know whether this adage is actually true in a particular case. Counsel needs to establish early on what a successful outcome looks like for the client and understand the internal decision-making process required to get there.

Litigation outcomes are often difficult or even impossible to predict with the certainty that clients want. The path to victory, if one is fortunate enough to get there, can be as impactful as the final verdict. Counsel must take time to explore different scenarios that might play out during the course of litigation and determine how receptive the client would be to each.

The appetite for litigation costs—both financial and psychological—can dramatically change a case's strategy. It is important to be prepared to address these issues early on and chart a path from the outset that identifies the most significant and difficult milestones the client will likely face. The answer to these questions will differ dramatically among clients; a well-established company concerned with maintaining its image will approach a dispute very differently from one whose motto is to move fast and break things. Legal counsel that can guide the client through these difficult issues is better positioned to offer sound advice throughout the entire process.

To effectively represent a client, counsel must fully understand the client. Complex commercial industries are difficult to grasp, and becoming an expert on demand is a major challenge. Counsel needs to spend time between cases following the developments and trends capturing the industries in which clients work. That is where the client's disputes are born. Counsel must understand that ecosystem before being asked to analyze it, synthesize it, and potentially revolutionize it in order to obtain success. ■

Robby S. Naoufal is a business litigator at Miller Barondess LLP. He represents clients in complex commercial litigation, regulatory inquiries, and corporate investigations.



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LACBA Educational Travels to Nuremberg & Krakow 2022 and upcoming Oxford & Merton College August 2023

LACBA MATTERS

by Caroline Vincent

The educational travel programs offered by the Los Angeles County Bar Association are opportunities of a lifetime. Participants dive deeply into legal topics that are timely and geographically relevant as they travel to countries, cities, towns, and museums to experience first-hand historical sites, forge lasting relationships with fellow LACBA travelers, and interact with local guides and lecturers. At the same time, they stay in first-class accommodations and enjoy the local culture, museums, shops, and culinary delights.

The June 2022 LACBA trip to Germany and Poland to commemorate the 75th anniversary of the Nuremburg Trials was the first post-Covid annual trip organized by LACBA Executive Director Stan Bissey, who previously organized educational travel for judges when he served as executive director of the California Judges Association. The LACBA travelers braved travel delays and lingering challenges from the COVID pandemic, as well as concerns about traveling to Poland due to the refugees flowing into Poland from Ukraine as a result of the Russian war. None of these concerns were problematic for the tour participants who wholeheartedly ventured on this historic trip to remember the justice that was brought to bear on the perpetrators of the Holocaust war crimes.

The first destination was Nuremberg, where lawyers and their spouses stayed for several nights at the Grand Hotel, across from the historic train station and adjacent to the medieval castle walls. Cultural tour highlights included the castle grounds, optional tour of Renaissance artist Albrecht Dürer's house nearby, and stopping to listen to hundreds of musicians perform a weekly Sunday concert in the town plaza.

Tour guides and special lectures by Creighton University professors included an interactive lecture on international war crimes and tribunals, the history of Nuremberg and its signifi-

Opening night dinner. (All photos courtesy of Stan Bissey and Caroline Vincent)

Caroline Vincent is an attorney mediator, arbitrator, and neutral evaluator with ADR Services, Inc., specializing in complex business, real estate, employment, tort, professional liability, and other matters. She also serves as a trustee of the Los Angeles County Bar Association and is co-chair of the LACBA Lawyer Well-Being Project.

cance to Adolf Hitler as an important seat of the Holy Roman Empire, and touring the Nazi Rally Grounds. The LACBA travelers met with members of the California Judges Association on a companion tour at the public seating area of Courtroom 600 of the Palace of Justice—the International Military Tribunal where the Nazis who had not fled or committed suicide were tried. Travelers browsed through exhibits in the Documentation Center upstairs from Courtroom 600, where the outcome of those who were tried was displayed. A trunk filled with documents evidenced the Nazis' fastidious documentation of their deeds.

The Grand Hotel was also the site of a series of lectures by international law professors and experts on the history of the prosecution and defense of the Nazi defendants accused of war crimes and crimes against humanity. The hotel had hosted both the prosecutors for the Allies and counsel representing those accused of war crimes in 1945. It was fascinating to learn how this team had collaborated in the same hotel ballroom as the present-day lecturers and agreed upon a fair process for the trials.

A treat for the LACBA travelers was hearing the story of how U.S. Supreme Court Justice Robert Jackson was persuaded by President Harry S. Truman to take leave from his position as associate justice to serve as chief U.S. prosecutor of the International Military Tribunal known as the "Nuremberg Trials." Justice Jackson's opening statement at the tribunal in Nuremberg on November 21, 1945, was as follows:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

After a day trip to Rothenberg to visit another medieval castle and town including a Torture Museum and more local fare, travelers embarked by air to Krakow, Poland. On boarding the tour bus from the Krakow airport, travelers learned from

TOP PHOTO: Post lunch with judges. BOTTOM PHOTO: Lecturers at the Grand Hotel.

the local guide that the Ukrainian refugees taken into their homes were not called "refugees" by the locals but were referred to as their "guests." As peoples with a shared cultural tradition and linguistic familiarity with the Ukrainians, the Poles were willing to provide food and shelter as well as welcome Ukrainian children into their schools. With that sign of humanity at its best, travelers proceeded on a walking tour of the Wawel Royal Castle just a short walk from their hotel and ambled through the central plaza, hunting for the best perogies and wiener schnitzel as well as savoring the local beer.

The next day's tour to the Jewish Quarter began with a review of its long history. The travelers toured the renovated Old Synagogue originally built in the 1400s, with political and religious significance in the region prior to its devastation by Nazi Germany during World War II, including looting its artwork and Jewish relics. Restored as a museum, it provided hope, history and context to LACBA travelers, bracing for the next day's somber, sorrowful visit to the complex of the Auschwitz-Birkenau concentration camp and its extermination center.

It is said that history if not remembered repeats itself. Touring the scene of the horrors of the Holocaust primarily directed at the Jewish population cannot be put into words, but remembering what happened provides optimism that future generations will succeed in overcoming antisemitism and other forms of prejudice that unfortunately continue to occur in our own backyard. A shoutout to LACBA for being one of the leading voices of the Los Angeles legal profession in condemning antisemitism and discrimination of all kinds, and championing diversity, equity, and inclusion.

Upon arrival in Krakow, travelers learned that the Poles not only were willing to welcome their Ukrainian neighbors fleeing Russia into their homes and schools but also undertook the task of recording their testimony as eyewitnesses and victims of the ongoing war crimes by Russia. This takes place in preparation for the potential future prosecution of war crimes and crimes against humanity by Russia at the International Court of Criminal Justice in The Hague. The wheels of justice continue to turn.

The history experienced in the place where it happened through lectures by

PHOTOS FROM TOP: Auschwitz-Birkenau entrance, Krakow Jewish quarter, Auschwitz, and Nazi Party rally grounds.

At the unfinished Congress Hall.

View of Nuremberg Castle.

Above: Enjoying beer with bratwurst and sauerkraut. Bottom right: Touring Rothenburg.

law professors, local historians, local guides, and tours of historic sites will be long remembered by the LACBA travelers commemorating the 75th anniversary of the Nuremberg Trials. The comradery developed with fellow travelers continued at a reunion dinner in Los Angeles some months after the trip.

LACBA's travel programs afford an opportunity to learn and experience legal history first-hand in the place where it happened, and sometimes to witness history in the making. On August 12-20, 2023, LACBA visits London and Oxford University. (Extra credit if you are a Harry Potter fan!) Included are legal education by Oxford alums and professors on the English system in operation, Oxford through the ages, UK and EU complex social and legal issues, BREXIT, and even Shakespeare! The tour offers a performance at the Royal Shakespeare Theatre in Stratford-on-Avon and visits to the Royal Courts of Justice, Middle Temple Inn of Court, the Houses of Parliament, Blenheim Castle, and Bletchley Park, where British scholars cracked the Nazi Enigma cypher in 1939. For more information contact LACBA Executive Director and CEO Stan Bissey at sbissey@lacba.org or call (213) 627-2727. ■

Alon Becker, author, and Stan Bissey pose after the farewell dinner in Krakow.

Farewell dinner party, Krakow.

by Jacob D. Charles

Practice Tips

Will *Bruen* Imperil California Gun Laws?

Jacob D. Charles is an associate professor of law at Pepperdine University Caruso School of Law and an Affiliated Scholar with the Center for Firearms Law at Duke University School of Law. He writes and teaches on the Second Amendment and firearms law and is a co-author on a forthcoming law school casebook on the subject.

In June 2022, the U.S. Supreme Court significantly expanded the scope of Second Amendment protections.[1] In *New York State Rifle & Pistol Association v. Bruen*, the Court struck down New York's restrictive concealed carry licensing law and generated a new test for resolving Second Amendment claims.[2] These dual aspects of the decision—the substance and the method—are important to the future of legal challenges and public debate over gun rights and regulation.

On substance, the Court struck down New York's requirement that an applicant for an unrestricted concealed carry license show "proper cause," which the state courts had read to mean a heightened need for self-defense distinguishable from the community at large. New York's law thus narrowed the set of those individuals who could qualify for a license and vested discretion in licensing officials—state court judges in much of the state and law enforcement in other parts—to determine whether the standard had been met. For that reason, New York's law, as well as similar laws in other states, were often called "may issue" licensing laws. By contrast, most states with gun carry licensing at the time of the Supreme Court's decision had "shall issue" laws that listed a set of objective criteria (*e.g.*, training requirements and background checks) and required officials to issue a concealed carry license whenever those criteria were met. The trend among states has been to relax restrictions, including eliminating the requirement to obtain a license for carrying guns in public at all. Twenty-five states at the time of the ruling had already jettisoned all licensing requirements for concealed carry.[3]

The *Bruen* decision faulted "may issue" laws like New York's for making the license available only to a subset of the law-abiding population and vesting too much discretion in government officials. The ruling invalidated New York's law and the similar statutory framework then existing in about six states, including California. Though a minority of states, these jurisdictions included around one quarter of the U.S. population. The immediate impact of the decision was therefore quite substantial.

On method, however, *Bruen* is nothing short of revolutionary. The decision mandated that the constitutionality of modern-day gun laws be measured solely by their historical pedigree. It imposed a two-part approach on all future Second Amendment challenges. First, courts must assess whether the challenged conduct, person, and weapon fall within the Constitution's "plain

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text." If so, then the challenge presumptively succeeds, and the government can prevail only by showing that its regulation is consistent with the U.S. historical tradition of firearms regulation. Because this methodological framework is likely to have the most long-lasting and widespread effect, it is important to carefully consider that aspect of the decision.

Bruen's New Method

To appreciate the seismic shift in methodology, it is useful to understand what that new test replaced. In 2008, in *District of Columbia v. Heller*, the Supreme Court first announced that the Second Amendment protects an individual right to keep and bear arms for non-militia-related purposes, like self-defense against crime.[4] The Court struck down a D.C. ban on possessing operable handguns in the home. That case did not, however, contain a detailed roadmap for future courts to use in reviewing other types of Second Amendment challenges. To fill that gap, lower courts coalesced around a method for resolving claims that they borrowed from First Amendment case law.

Their method had two stages. First, courts examined whether the challenged activity fell within the scope of the Second Amendment. Judges occasionally held that conduct, like possessing hand grenades, fell clearly outside the Amendment's scope and thus upheld a law at the first stage.[5] However, if courts concluded the activity fell within the Second Amendment's scope (or were uncertain whether it was), they proceeded to the second stage of the inquiry. That second stage employed conventional constitutional tools of intermediate and strict scrutiny. Courts assessed whether a challenged law advanced a compelling or important interest and whether the means chosen were a substantial fit with the government's interest. They often relied on empirical evidence about whether, for example, challenged regulations reduced gun deaths or injuries. Some laws were struck down at this stage, like those prohibiting all forms of gun carrying in public; many were upheld.[6]

In the decade and a half after *Heller*, all the federal courts of appeals that addressed the issue—about 11 of the 13 circuits—adopted this two-part framework.[7] Nevertheless, in *Bruen*, the Supreme Court discarded that framework. The majority concluded that *Heller* did not permit courts to engage in the type of means-end scrutiny that intermediate and strict scrutiny entail. Instead, said *Bruen*, courts must apply a test grounded only in text, history, and tradition. Specifically: "[W]hen the Second Amendment's plain text covers an individual's conduct…the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[8] The *Bruen* test itself has two stages of inquiry. First, there is an inquiry into the "plain text." Second, if the challenged activity falls within the plain text, the government bears the burden of producing sufficiently analogous historical regulations to support the law at issue.

At the first stage, *Bruen* directs courts to decipher whether the type of person subject to regulation, type of conduct engaged in, and type of weapon at issue are covered by the Second Amendment's plain text. Beyond that bare description, however, the Court did not provide guidance to lower courts tasked with this interpretive endeavor. For example, how should courts determine whether unlawful drug users, undocumented immigrants, or those with prior felony convictions form part of "the people" protected by the Amendment? Does the phrase "keep and bear arms" encompass purchasing or manufacturing a firearm? Are ammunition and magazines "arms"? Lower courts have confronted all of these questions in the wake of *Bruen* and have found little in the Court's opinion to guide their decision-making.

At the second stage, the government must show that its challenged law is part of the historical tradition of firearms regulation. It must point to laws around 1791 or 1868 (when the Second Amendment and Fourteenth Amendment were ratified, respectively) that show the existence not merely of an outlier law that looked similar but also of an enduring tradition of which the modern law can be said to be a part. The past regulatory landscape dictates the options available to lawmakers today. *Bruen*, however, did recognize that times have changed. Searching the past for something tantamount to the current National Instant Background Check System would turn up zilch. The Court thus underscored that the government need not produce a "historical twin" to support a current law.[9] Instead, the government need only "identify a well-established and representative historical analogue" to support a modern-day regulation.[10]

However, finding an analogy requires some metric on which to compare whether the items are relevantly similar. To judge whether a proffered precursor is sufficiently analogous, *Bruen* directed courts to focus on two non-exhaustive metrics of relevant similarity: how the challenged and historical law burdened the right to armed self-defense and why they did so. The Court thus set up a twin focus on burden and justification and instructed courts to "reason by analogy" in reviewing Second Amendment challenges.[11]

One area the Court used to exemplify its new approach is what has been called "sensitive places doctrine." That doctrine was derived from *Heller*'s stipulation that its decision did not call into doubt "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[12] *Bruen* listed several additional places where guns had historically been prohibited—legislative assemblies, polling places, and courthouses—and said that lower courts could "use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible."[13]

In setting out its test and applying it to New York's law, *Bruen* made historical silence speak volumes. Under its framework, novelty is damning. Unless prior generations regulated firearms in a similar way, a contemporary law cannot stand. History does not just inform the Second Amendment inquiry; it determines it.

Historical Method in Practice

Bruen left open a plethora of questions about its historical method. It gave no guidance on answering the initial "plain text" inquiry and left lower courts guessing about the way to judge whether historical laws the state provided were old enough, sufficiently widely adopted, enforced adequately, and were overall qualified to provide the constitutional foundation for a modern law. Lower courts have struggled in the months since the decision.

For example, numerous courts have faced challenges from individuals charged with unlawfully possessing a firearm after a prior felony conviction. Every court to rule on the issue so far has upheld the federal law, but on varying rationales. Some have concluded that *Bruen* left in place prior case law upholding the law and held that the decision

"does not obfuscate the requirement that, as a threshold matter, to receive Second Amendment protection, one must first and foremost be law-abiding."[14] Others, by contrast, have considered *Bruen* to undermine prior assurances that the felon prohibition is constitutional and undertaken a fresh historical inquiry.[15] Several judges in these types of cases have remarked on the difficult path *Bruen* set courts on, with one insisting that judges "are not experts in what white, wealthy, and male property owners thought about firearms regulation in 1791."[16] After identifying criticism of the *Bruen* decision from historians, that court continued, "not wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter" under Federal Rule of Evidence 706.[17] Several other courts have considered appointing historians as consulting experts as well.

When looking to history, lower courts have not agreed on basic questions, such as how many laws the government must produce to constitute a "tradition." Some have suggested the government must show a historical law's adoption in roughly half the states at the relevant point in history.[18] By contrast, another court expressly "decline[d] to adopt a 'majority of states' standard" and instead settled on three precursors as the magic number to constitute a tradition.[19] Still others have suggested seven laws might be what it takes to form a tradition.[20] A few courts have said that the geographic coverage and population density of jurisdictions with a historical law are relevant.[21] Whatever they have said about that history, courts have still been faced with the difficult task of deciphering whether those old laws are sufficiently analogous to the challenged provision. Do they construe *Bruen* strictly, requiring a close fit between the old and new law, or flexibly to give leeway to governments regulating in light of changed social and technological circumstances?[22]

Bruen's history-oriented test has even led to some startling lower court rulings. In *United States v. Perez-Gallan*, the defendant challenged his indictment for violating the federal law barring firearm possession for those subject to domestic violence restraining orders.[23] Prior to *Bruen*, federal courts had upheld the law as constitutional. However, the District Court for the Western District of Texas read *Bruen* to invalidate the law. The

new test focuses on history and, said the court, "glaringly absent from the historical record—from colonial times until 1994—are consistent examples of the government removing firearms from someone accused (or even convicted) of domestic violence."[24] The founding generation did not disarm domestic abusers, so neither can today's legislators, QED.

The *Bruen* decision is transformative. Judges are now faced with the difficult tasks of interpreting the Second Amendment's sparse 27 words, deciphering the historical landscape of firearms regulation, reasoning analogically across time, and yet not losing sight of the vast changes in weapons and society since the Amendment was ratified two and a half centuries ago.

An Imperiled Regulatory Landscape

All those changes will come home to California. The state maintains some of the strictest gun laws in the nation and has continued to enact more legislation in the lead-up to and wake of *Bruen*. The state became a key battleground for Second Amendment claims after *Heller*, and *Bruen* has already ushered in many more challenges.

In the past, California's gun laws have fared well before the U.S. Court of Appeals for the Ninth Circuit. Although a few laws had been declared unconstitutional by a three-judge panel, the en banc court reversed those decisions. All the state and local gun laws in California challenged post-*Heller* ultimately survived review under the now-deposed methodological paradigm that employed strict and intermediate scrutiny. What *Bruen* portends for those laws only time will tell, but its method places those previously settled questions back on the table.

Because *Bruen* makes historical pedigree the constitutional touchstone, California laws that seek to respond to novel social phenomena, like the rise of mass public shootings, place added burden on the laws' defenders. To be sure, *Bruen* stated that a "more nuanced approach" to its analytical method may be necessary for laws that arise from "unprecedented societal concerns" or "dramatic technological changes," but both what triggers that nuanced approach and what the nuance entails are debatable—and have divided lower courts.[25] The answers may simply be in the eye of the decider.

To name just a few of the state laws for which *Bruen* introduces substantial

uncertainty, and for which the state is in the minority among contemporary jurisdictions, California requires background checks on nearly all firearms transfers, including those between private parties that are exempted under federal background-check law, mandates the safe storage of firearms, bars the possession of weapons classified as assault weapons and magazines holding more than 10 rounds of ammunition, imposes a ten-day waiting period on new firearm acquisitions, forbids openly carrying firearms, and generally permits the purchase only of those new handguns listed on a roster of handguns certified as safe.

After *Bruen*, Governor Newsom signed a series of new gun regulations into law, including statutes permitting certain types of lawsuits against gun manufacturers, barring firearms marketing to minors, imposing greater restrictions on unserialized and homemade firearms (i.e., "ghost guns"), and providing a private right of action against individuals who violate current laws governing specific types of weapons, including those classified as assault weapons or ghost guns. These laws have already been subject to constitutional challenge, and their ultimate fate is still unsettled.

California's most sweeping change post-*Bruen*, however, failed to pass in the immediate aftermath of the case. The proposed law, SB 918, would have modified the state's concealed carry permit requirements and barred guns from a host of locations, including "courts, places of worship, zones around schools, hospitals, public parks, libraries, airports, public transportation and bars as sensitive places."[26] Although lawmakers had enough votes to pass the legislation, they did not have the additional votes necessary to pass the law as an "urgency measure" that would enable it to take effect immediately. Because they added the urgency designation, the votes came up short last session, but legislative leaders have said they plan to renew their push for the law.[27]

States whose constituents favor stricter gun regulation will no doubt continue enacting gun laws in the wake of *Bruen*. The decision will likely change the way they legislate and will certainly transform the way they justify and defend these laws. One future flashpoint in litigation and advocacy will likely center on the places from which firearms can be excluded—the so-called "sensitive places" to which the Supreme Court said the Second Amendment does not extend. As their restrictive licensing laws fell after *Bruen*, several states turned to more targeted locational restrictions. It would not be surprising for the Court's next intervention to continue refining the contours of where, precisely, the Second Amendment allows government to prohibit gun carrying.

Whether one cheers or condemns these developments depends in large part on one's view of the Second Amendment, *Bruen*'s persuasiveness, and gun rights and regulation generally. After months of legislative wrangling and intense litigation, there can be no doubt that *Bruen* has fundamentally changed the nature of the debate. No longer will the constitutionality of gun laws turn on their effectiveness—on how well they serve the state's interest in reducing gun violence and decreasing threats and intimidation in daily life. Now, almost all that matters is what happened in the olden days. We can only hope our forebears chose their regulations wisely. ■

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[1] The Second Amendment reads: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear

arms, shall not be infringed." U.S. CONST. amend. II.

[2] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). The justices split six to three along ideological lines. Justice Thomas wrote the majority opinion, which was joined in full by Chief Justice Roberts and Justices Alito, Kavanaugh, Gorsuch, and Barrett. Justice Breyer's dissent was joined by Justices Kagan and Sotomayor.

[3] *See* Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581 (2022) (cataloguing gun-rights expansions occurring outside the Second Amendment).

[4] District of Columbia v. Heller, 554 U.S. 570 (2008).

[5] United States v. McCartney, 357 F. App'x 73, 76 (9th Cir. 2009).

[6] Moore v. Madigan, 702 F. 3d 933 (7th Cir. 2012) (invalidating Illinois's public carry ban); Duncan v. Bonta, 19 F. 4th 1087 (9th Cir. 2021) *(en banc), cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F. 4th 1228 (9th Cir. 2022) (upholding California's ban on large-capacity magazines).

[7] Bruen, 142 S. Ct. at 2125 (acknowledging that "the Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny").

[8] *Id.* at 2126 (emphasis in original).

[9] *Id.*at 2133.

[10] *Id.*

[11] *Id.*

[12] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[13] Bruen, 142 S. Ct. at 2133.

[14] United States v Perez-Garcia, No. 22-CR-1581-GPC, 2022 WL 17477918, at *3 (S.D. Cal. Dec. 6, 2022).

[15] United States v. Charles, No. MO:22-CR-00154-DC, 2022 WL 4913900 (W.D. Tex. Oct. 3, 2022).

[16] United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175 (S.D. Miss. Oct. 27, 2022).

[17] *Id.* at *3.

[18] Firearms Pol'y Coal., Inc. v. McCraw, No. 4:21-CV-1245-P, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022).

[19] Antonyuk v. Hochul, No. 122CV0986GTSCFH, 2022 WL 5239895, at *9 (N.D. N.Y. Oct. 6, 2022).

[20] Hardaway v. Nigrelli, No. 22-CV-771 (JLS), 2022 WL 11669872, at *14 n.16 (W.D. N.Y. Oct. 20, 2022).

[21] Antonyuk v. Hochul, No. 122CV0986GTSCFH, 2022 WL 16744700, at *7 n.5 (N.D. N.Y. Nov. 7, 2022).

[22] Charles, 2022 WL 4913900, at *7 (lamenting that "how strict—or loose—an interpretation *Bruen* requires hasn't been clarified, leaving important questions" unanswered).

[23] United States v. Perez-Gallan, No. PE:22-CR-00427-DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

[24] *Id.* at *6.

[25] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132 (2022).

[26] Maxim Elramsisy, *California Legislature Fails to Pass Concealed Firearm Law on a Technicality*, SAN DIEGO VOICE & VIEWPOINT, Sept. 6, 2022, *available at* https://sdvoice.info/california-rejects-senate-bill-918.

[27] *Id.*

BY MICHAEL E. MCCARTHY

Directly designing their own mass claim provisions in arbitration agreements is one among many tools businesses can employ to shift the balance of power

Reversing "Poetic Justice"

IN THE LAST FEW YEARS, plaintiffs' firms have devised a strategy to combat companies' arbitration agreements. That strategy involves filing multiple individual arbitrations at once, triggering massive fee obligations to initiate the claims, and leveraging those obligations to force a settlement before the company can defend the merits. One California judge, commenting on the decades of advocacy for enforcement of arbitration agreements, called the trend "poetic justice."[1] Yet the use of mass claims is nothing new,[2] and the mass arbitration

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model can be susceptible to abuse given that there often may be minimal requirements for initiating a claim, lack of oversight, and mandatory fees companies must pay as soon as a claim is filed, whether the claim is genuine or contrived.[3] The result is a new frontier of aggregated dispute resolution in which mass arbitration to extract payouts is not tied to injuries or wrongdoing but to the possible exposure a company can face to administer cases in the arbitral forum.

Today's growing trend of mass arbitration has its genesis in the 2011 decision *AT&T Mobility LLC v. Concepcion* in which the U.S. Supreme Court upheld the enforceability of an arbitration contract that prohibited individual consumers from bringing or participating in a class action.[4]

In or about 2018, recognizing the massive fee obligations companies could face from thousands of individual claims filed at once, a few plaintiffs' firms began "testing a new weapon in arbitration: sheer volume."

Concepcion involved a dispute by consumers over sales taxes charged for a cell phone that was advertised as free. The sale and servicing agreement for the phone contained an arbitration provision requiring all claims to be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[5] The plaintiffs sued in federal court, and AT&T moved to compel arbitration. The district court denied the motion, finding the class action waiver unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*.[6] The Ninth Circuit affirmed.

The U.S. Supreme Court, however, reversed, finding that the principal purpose of the Federal Arbitration Act (FAA) is to ensure that private arbitration agreements are enforced according to their terms.[7] The Court held that California's so-called "Discover Bank Rule" interfered with the purposes and objectives of the FAA and was therefore preempted. The majority also rejected plaintiffs' argument that "class proceedings are necessary to prosecute small-dollar claims," finding that the plaintiffs actually might have been better off pursuing individual arbitration.[8]

In the wake of *Concepcion*, the Court has repeatedly enforced arbitration provisions precluding class or representative actions. In 2013, the Court reversed the Second Circuit and held that the FAA does not permit invalidation of class action waivers when the cost of individually arbitrating a federal statutory claim could exceed the potential recovery.[9] Later, in 2018, the Court applied *Concepcion* in the employment context, holding that the National Labor Relations Act did not supersede Congress's instruction in the FAA that arbitration agreements requiring individualized proceedings must be enforced.[10]

The Court's rigorous enforcement of arbitration agreements continued in a pair of 2019 opinions: *Henry Schein, Inc. v. Archer & White Sales, Inc.*[11] and *Lamps Plus, Inc. v. Varela*.[12] In the former case, the Court held that when the parties' arbitration agreement delegates arbitrability questions to an arbitrator, "a court possesses no power to decide the arbitrability issue."[13] In the latter, the Court held that ambiguity is an insufficient basis to find that the parties agreed to class-wide arbitration and that any such intent must be expressed clearly rather than in general language that is commonly used in arbitration agreements.[14]

Concepcion and its progeny distilled three principles, which set the stage for the subsequent mass arbitration trend: 1) arbitration provisions that require parties to arbitrate individually, and not in a class or collective action, must be enforced according to their terms under the FAA; 2) courts possess no power to decide arbitrability disputes when the parties have delegated that power to an arbitrator; and 3) class-wide or collective proceedings in arbitration are not available to the parties unless the arbitration agreement clearly and unequivocally expresses otherwise.

While rulings like *Concepcion and Epic Systems* provided the kindling for the mass arbitration phenomenon, the cost provisions that are often included in companies' arbitration agreements provided the spark. Despite the Supreme Court's enforcement of class action waivers under the FAA, courts continued to scrutinize consumer and employment arbitration agreements, regularly invalidating agreements that imposed forum costs on the claimant that could stifle claims.[15] To avoid potential invalidation of their arbitration agreements and accompanying class action waivers, businesses routinely offered (and continue to offer) claimant-friendly terms requiring the business to pay for all administrative and arbitrator fees in any arbitration.[16]

In or about 2018, recognizing the massive fee obligations companies could face from thousands of individual claims filed at once, a few plaintiffs' firms began "testing a new weapon in arbitration: sheer volume."[17] Early publicized examples involved employment misclassification claims against "gig economy" companies like Uber, Postmates, and DoorDash.[18] Mass arbitration claims spread to the consumer context rapidly, with firms utilizing targeted online advertising and claim submission websites to aggregate claimants.[19] Over the last few years, the mass arbitration trend has only gained momentum.

A Model Susceptible to Abuse

The lack of oversight of this newly emergent model has created a system ripe for abuse. To begin with, there are few requirements for initiating an arbitration demand with major providers like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS). A consumer initiating a claim with the AAA, for example, need only "briefly explain the dispute," provide basic contact information, state "what the claimant wants" and the "money in dispute,"and submit a $200 filing fee along with a copy of the arbitration agreement.[20] The filings may consist of thousands of boilerplate demands with nothing more than a short paragraph of legal conclusions and few, if any, individualized details about the claim or claimant. There is often little to no information available to evaluate

the claims, and digging into the details may reveal that many of the claims are invalid on their face.

Yet, absent party agreement, there is often no mechanism to prevent the immediate triggering of arbitration fees following the filing of arbitration demands en masse, regardless of whether the demands have any basis in fact or law.[21] Thus, once the demands are filed, companies may be on the hook for considerable sums before they ever have an opportunity to show an arbitrator whether the claims have merit.

The rules of neutral providers also may require the company to pay fees that exceed the value of any individual damages the claimant supposedly suffered. For example, provider fees and arbitrator deposits can easily amount to over $4,000 per case.[22] Further, many mass arbitration filings involve several thousand boilerplate demands that have been aggregated on the Internet, without proper vetting.[23] The result, then, becomes contrived mass claims not tied to the merits or any actual damages but, instead, the avoidance of arbitration fees.

Initial Responses to Mass Filings

Facing the possibility of thousands of claims and millions in fees to initiate them, companies have employed various approaches to try to combat the mass arbitration trend. Three of these initial approaches have included: 1) refusing to pay arbitration fees, 2) asking a court to halt the arbitrations, and 3) seeking approval of class settlement in parallel litigation. Thus far, these approaches have been unsuccessful for businesses.

First, companies have balked at the astronomical sums invoiced by arbitration providers. This is an ineffective strategy generally,[24] and the State of California has enacted legislation (Senate Bill 707) that provides severe consequences for nonpayment of arbitration fees in the consumer and employment contexts. If the company does not pay, a consumer or employee may "[c]ompel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration."[25] The law also states that "[t]he court shall impose a monetary sanction" against the drafting party.[26] In addition to monetary sanctions, the court may issue evidentiary sanctions, terminating sanctions, and even hold the drafting party in contempt.[27] At least two companies have argued that these California statutes are preempted by the FAA.[28] However, those challenges have been rejected.[29]

Second, some companies have asked courts to step in and rule that the mass claims are in violation of the parties' arbitration agreements, which require claims to proceed individually. For example, in *Adams v. Postmates, Inc.*, Postmates asked a California federal court to require thousands of claimants to "refile their respective arbitration demands in a manner that…includes more details and to proceed before the arbitrator in an 'individual' manner."[30] The court declined, relying on *Schein* and finding that, under the parties' arbitration agreement, "it is within the arbitrator's exclusive authority to determine the sufficiency of Petitioners' arbitration demands and how the arbitration should be conducted."[31] The Ninth Circuit affirmed the district court's decision, holding that whether the claimants' mass claims violated the arbitration agreement's terms was an issue for the arbitrators.[32]

The following year, Postmates received another set of 10,356 arbitration demands filed by the same plaintiffs' firm, each of which alleged worker misclassification and violations of California wage and hour laws, among other things.[33] Postmates took the offensive and sought a restraining order in federal court to enjoin the claimants from participating in a "de facto class arbitration."[34] However, the court also denied that request.[35] Other companies seeking judicial intervention to halt mass arbitrations have run into similar outcomes, with judges unwilling to let the parties out of arbitration and back into court.[36]

Third, businesses facing class action allegations in parallel litigation have sought approval of class settlements to provide releases from class members, including those that filed arbitration demands. Yet, this also has proven ineffective as attempts at court approval have been met with fierce objection from the arbitration claimants' counsel, skepticism from courts reticent to trample on the arbitration proceedings, and the likelihood of opt-outs from a significant portion of individuals who filed arbitration demands (at the direction of counsel).[37]

Shifting the Balance of Power

Although mass arbitration has placed an enormous strain on companies, the following creative defenses and forward-thinking approaches to arbitration provisions may help turn the tables, providing relief to businesses that face these actions.

First, businesses should not ignore claim notice letters, which often are required by statute or the arbitration agreement itself. Companies can evaluate the allegations to determine whether offering relief voluntarily might be a viable cost-saving measure. Regardless, companies may use the notice process to probe for information about the claims. Once claims are filed and the business is assessed arbitration fees, much of the negotiating leverage for the claimants' attorneys is gone. Thus, there may be motivation for the claimants to provide information and agree to postpone filing.

Second, if claims are threatened or filed, companies may wish to scrutinize the arbitration provider's rules, the delegation of powers in the arbitration contract, and the applicable substantive law to determine if procedural defenses are available. As one example, under the AAA's Consumer Rules, "[i]f a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration…[a]fter a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA,…[by] send[ing] a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case."[38]

Although this straightforward rule (and those like it) may dispose of mass arbitration claims in which each claim is individually low-value, in practice, claimants' counsel will vigorously oppose closure of the cases, leading to disputes about whether the arbitration provision's language overrides the arbitral rules, and whether an arbitrator or court has the power to decide the issue.[39] If an arbitrator must decide the issue, the company may still have to pay fees to have cases initiated and arbitrators appointed, eliminating the cost savings.

Companies wishing to preserve the ability to close mass cases in favor of litigating in small claims court (where there

are no comparable fees generally) can ensure that their arbitration agreements expressly reserve the right to elect small claims court.[40] Companies also may wish to evaluate the delegation of oversight powers in their arbitration agreements, including whether they wish to delegate the power to decide all arbitrability disputes to the arbitrator or whether they wish to carve out any discrete oversight powers to the court, for example, allowing the court to decide if the claimants' conduct has violated the collective action waiver in the agreement or to resolve disputes regarding the business's right to elect the small claims forum. By delegating specific threshold issues to the court, companies may be able to seek court review rather than having the threshold dispute referred to an arbitrator, which will require fee payment.

Third, fee-shifting mechanisms are a powerful tool that businesses may wish to evaluate early, especially as these mechanisms may differ according to substantive state law. In California, for example, one type of fee-shifting mechanism includes Code of Civil Procedure Section 128.5 and 128.7 sanctions for bad faith litigation tactics. California law also allows a party to recover its fees and costs directly from opposing party counsel when counsel engages in improper tactics, such as filing frivolous claims or intentionally causing undue and unnecessary expense.[41] California courts have held that these sanctions provisions may apply in arbitration and that arbitrators are empowered to sanction counsel, even if counsel is not a signatory to the arbitration agreement.[42] Thus, advising claimants' counsel at the outset of the company's intent to seek fees and costs for the claimants' improperly vetted and frivolous claims may show that claimants' counsel shares considerable risk.

Fourth, providers generally refuse to consolidate or combine any matters in which the parties' arbitration agreement calls for the individual resolution of claims, unless both parties agree. When the parties reach agreement, however, efficiencies can be achieved. To this end, although claimants' counsel is unlikely to agree to any alternative fee arrangements that would reduce the amount of arbitration fees the business is required to pay, companies often can negotiate the efficient administration of cases and delayed timing of fee assessments. For example, if the parties agree, providers will typically stay the assessment of case management and arbitrator fees pending settlement discussions or while an initial "bellwether" set of arbitrations is litigated.

Businesses also can negotiate with claimants' counsel to allow for other procedural efficiencies, such as allowing a majority ruling in a smaller set of arbitrations to control a common issue across a larger set, joint administrative orders or conferences, assigning a limited panel of arbitrators to decide the cases, and/or coordination for discovery. The bottom line is that arbitrations are party-driven processes and when the parties agree, arbitration providers and arbitrators typically will abide by those agreements, especially when the purpose is to promote efficiency.

Although claimants may be reticent to make the process more efficient initially, claimants who actually seek to arbitrate claims often have little choice but to agree because they may not have the resources to arbitrate hundreds or thousands of cases at once. Agreeing to stay the bulk of the cases for adjudication of a small, initial set may also be appetizing to claimants' counsel, who will want to test their theories before committing to prosecuting hundreds or thousands of claims. If the company believes in the merits of its defenses, winning an initial set of cases may provide strong leverage in resolving the remainder.

Fifth, another way to stave off arbitration fees is through individual settlement resolutions, as often claimants' counsel will agree to stay all claims and expenditures while the parties attempt to negotiate resolution. In fact, as the threat of arbitration fees is often the claimants' greatest leverage, claimants' counsel is incentivized to maintain this leverage while pursuing a potential resolution. Again, companies can use any negotiations as an opportunity to gather information that purportedly supports the claims and to rule out invalid claims, as often the number of individuals claimed to be represented will be cut in half, or more.

Negotiating a large number of individual settlements poses challenges that companies will need to navigate, however, assuming settlement is something the company is willing to consider at all. To confirm that each claimant's claim is real, companies may require that claimants provide certain supporting information to trigger a payment obligation under the settlement. Parties also will need to coordinate how releases will be obtained and payments will be made, and companies may prefer to hire a settlement administrator to process the exchanges on a mass scale. In addition, companies must understand that they are not buying finality of all claims but only releases from individuals who participate in the settlement. Strategies can be employed, though, to help ensure that claims do not continue, including through representations and warranties in the settlements and confidentiality provisions.

Sixth, although a prospective measure, perhaps the strongest way a company can avoid or limit mass arbitration filings in the future is by amending its arbitration agreement to address the claimants' filing strategy preemptively. Terms that companies can consider include, but are not limited to:

- Mutual consent to delineated consolidation procedures in arbitration where the claim is one of many related claims;
- Selecting an arbitral body or rules that provide for more efficient procedures for mass filings—for example, the International Institute for Conflict Prevention & Resolution has adopted an employment-related mass claims protocol, which, among other things, allows for stays of mass claims for test cases;[43]
- Incorporating pre-filing notice procedures that require a period of time before arbitration demands can be filed and that call for reasonable information a claimant must provide in the notice process before filing;
- Allowing for fee reallocation when claims are asserted frivolously or in bad faith;
- Incorporating fee-shifting procedures similar to an offer of judgment if the business makes a settlement offer of a certain amount, and the consumer rejects that offer and fails to obtain a greater award (although enforceability may differ by state law);
- Permitting court oversight of the interpretation of class or collective action waivers or limitations, such that the court is empowered to address disputes regarding manipulation or breach of the parties' arbitration agreement; and/or
- Allowing either party to elect to have a dispute heard in small claims court regardless of whether the claimant files in arbitration first.

When amending the arbitration agreement, striking a

balance between what is needed to ameliorate the risk of mass claims and what is needed to ensure that the contract will still be enforced by a court may go a long way.

As the mass arbitration trend keeps rolling, businesses will be put to a choice. Some businesses may choose to do away with arbitration and class action waivers altogether. Others may opt for lesser known providers that offer mass claims protocols. Still others may implement different strategies, such as designing their own mass claim provisions in their arbitration agreements directly. However, there can be little doubt that claimants' counsel will continue to try to weaponize arbitration expenses to create tremendous exposure in cases with limited substantive value, and businesses would be wise to plan their defenses accordingly. ■

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[1] Abernathy v. Doordash, Inc., No. 3:19-cv-07545-WHA (N.D. Cal. filed Nov. 15, 2019), ECF No. 76 [Transcript], at 27.

[2] *See, e.g.*, Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, ATLANTIC, May 2020, *available at* www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082.

[3] *See, e.g.*, U.S. Chamber Comm. Inst. Legal Reform, *The Mass Arbitration Racket* (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem.

[4] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

[5] *Id.* at 336.

[6] Discover Bank v. Superior Ct., 36 Cal. 4th 148 (2005).

[7] Concepcion, 563 U.S. at 344 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

[8] *Id.* at 351-52 (internal citation omitted).

[9] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237-38 (2013).

[10] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630-1632 (2018).

[11] Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019).

[12] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418-1419 (2019).

[13] Schein, 139 S. Ct. at 529.

[14] Varela, 139 S. Ct. at 1418-1419 (relying on Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp., 559 U. S. 662 (2010), which concluded similarly as to silence in an arbitration agreement).

[15] *See* Italian Colors, 570 U.S. at 236 (explaining that "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable" could still invalidate an arbitration agreement); Chavarria v. Ralphs Grocery Co., 733 F. 3d 916, 927 (9th Cir. 2013) (invalidating arbitration agreement notwithstanding *Concepcion* when the agreement imposed administrative and filing costs that could "effectively foreclose pursuit of the claim"); Capili v. Finish Line, Inc., 699 F. App'x 620, 622 (9th Cir. 2017) ("The district court properly determined that the cost-sharing provision was substantively unconscionable.").

[16] The default rules of popular arbitration providers like the American Arbitration Association also typically require the business to cover arbitration costs in the consumer and employment context. *See, e.g.*, Am. Arbitration Ass'n, Consumer Arbitration Rules, Costs of Arbitration.

[17] Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES, Apr. 6, 2020, *available at* www.nytimes.com/2020/04/06/business/arbitration-overload.html.

[18] *See, e.g.*, Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019); Abernathy v. Doordash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020); Abadilla v. Uber Techs., No. 3:18-cv-07343 (N.D. Cal. filed Dec. 5, 2018).

[19] *See, e.g.*, Alison Frankel, *Mass consumer arbitration is on! Ed tech company hit with 15,000 data breach claims*, REUTERS (May 12,2020), www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22O33E; Alison Frankel, *FanDuel wants N.Y. state court to shut down mass consumer arbitration*, REUTERS (Jan. 14, 2020), www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK.

[20] Am. Arbitration Ass'n, Consumer Arbitration Rules, R-2.

[21] *See* Am. Arbitration Ass'n, Consumer Arbitration Rules, Costs of Arbitration (requiring the business to pay filing fees as soon as the AAA confirms in writing that the individual filing meets the requirements, and requiring the business to pay case management and arbitrator fees prior to arbitrator appointment); JAMS Streamlined Arbitration Rules & Procedures, R. 26 (requiring payment of JAMS fees and expenses "at the time of the commencement of the Arbitration," and requiring deposit of arbitrator fees "prior to the Hearing").

[22] Am. Arbitration Ass'n, Consumer Arbitration Rules, Cost of Arbitration.

[23] *See, e.g.*, Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc., No. 15732, (N.Y. Sup. Ct. Sept. 20, 2021) (challenging fees assessed by AAA in response to "31,000+ nearly identical" arbitration demands).

[24] *See, e.g.*, Abernathy, 438 F. Supp. 3d at 1067-1068 (granting claimants' motion to compel and ordering business to pay arbitration fees); Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc., No. 15732, 2022 WL 1110550 (N.Y. App. Div. Apr. 14, 2022) (denying preliminary injunction request in response to multi-million dollar arbitration bill from AAA).

[25] CODE CIV. PROC. §1281.97.

[26] CODE CIV. PROC. §1281.99(a).

[27] *Id.*

[28] *See* Goobich v. Excelligence Learning Corp., 482 F. Supp. 3d 986, 989 (N.D. Cal. 2020); Postmates Inc. v. 10,356 Individuals, No. CV 20-2783 PSG (JEMx), 2020 WL 1908302, at *7 (C.D. Cal. Apr. 15, 2020).

[29] *See, e.g.*, Postmates Inc. v. 10,356 Individuals, No. CV 20-2783 PSG (JEMx), 2021 WL 540155, at *8 (C.D. Cal. Jan. 19, 2021).

[30] Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019).

[31] *Id.* at 1252-1255.

[32] Adams v. Postmates, Inc., 823 F. App'x 535, 536 (9th Cir. Sept. 29, 2020).

[33] Postmates, 2020 WL 1908302, at *4.

[34] *Id.* at *6.

[35] *Id.* at *6-9.

[36] *See, e.g.*, Intuit Inc. v. 9,933 Individuals, No. 20STCV22761 (Sup. Ct. L.A. Cnty. Oct. 6, 2020) (denying request for preliminary injunction staying approximately 9,933 individual arbitration claims to allow claims to be heard in an alternate forum).

[37] *See, e.g.*, Arena v. Intuit Inc., No. 19-cv-02546-CRB, 2021 WL 834253, at *1 (N.D. Cal. Mar. 5, 2021) (denying preliminary approval of class settlement, including because it would "unduly burden…those who have already begun to pursue claims through arbitration").

[38] Am. Arbitration Ass'n, Consumer Arbitration Rules, R-9(b).

[39] Intuit, No. 20STCV22761 (agreeing with claimants that the parties' arbitration agreement excluded R-9(b) because it preserved the small claims option to claimants only but finding that the court had authority to address the dispute).

[40] Thompson v. Ford of Augusta, Inc., No. 18-2512-JAR-KGG, 2019 WL 652396, at *6 (D. Kan. Feb. 15, 2019) ("The Agreement provides for arbitration if either party elects, but only Plaintiff may elect small claims court….").

[41] *See* CODE CIV. PROC. §128.5(a) ("A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay."); CODE CIV. PROC. §128.5(b)(2) ("'Frivolous' means totally and completely without merit or for the sole purpose of harassing an opposing party."); W. Coast Dev. v. Reed, 2 Cal. App. 4th 693, 702 (1992) ("[T]he prosecution of a frivolous action may in itself be evidence from which a finding of subjective bad faith may be made.").

[42] *See, e.g.*, David v. Abergel, 46 Cal. App. 4th 1281, 1284 (1996) (explaining that Code of Civil Procedure Section 128.5 empowers arbitrators to impose sanctions in arbitration); Bak v. MCL Fin. Group, Inc., 170 Cal. App. 4th 1118, 1124-26 (2009) (finding that Section 128.5 applies to counsel's sanctionable conduct, even if counsel is not a signatory to the arbitration agreement); *see also* In re Marriage of Sahafzadeh-Taeb & Taeb, 39 Cal. App. 5th 124, 135-141 (2019) (explaining that Section 128.5 sanctions are proper where an attorney's tactics are committed with an improper motive and result in an opponent incurring additional costs).

[43] *See* INT'L INST. CONFLICT PREVENTION & RESOL., EMPLOYMENT-RELATED NEW MASS CLAIMS PROTOCOL (VERSION 2.0) (Sept. 29, 2021), *available at* https://static.cpradr.org/docs/ERMCP-2021.pdf; *see also* McGrath v. Doordash, Inc., No. 19-cv-05279-EMC, 2020 WL 6526129, at *10-11 (N.D. Cal. Nov. 5, 2020) (compelling arbitration under CPR rules and rejecting plaintiffs' argument that the CPR forum was biased due to its mass claims protocol). Effective August 2021, the AAA also instituted "Supplementary Rules for Multiple Case Filings," to provide for appointment of a "Process Arbitrator" at the outset of mass filings, among other things. Am. Arbitration Ass'n Supp. Rules for Multiple Case Filings, MC-6.

BY MARY KELLY PERSYN

The Quality *of* Mercy

In a contest between an individual's right to follow medical science's conclusions about compassionate care and society's desire to adhere to traditional mores about parental rights, where does justice lie?

IN 2020 AND 2021, legislators in 22 states considered bills restricting and prohibiting gender-affirming care for transgender youth. In January 2023 alone, state lawmakers dropped over 6 dozen such bills in 23 states. Although only five states have signed bans into law and every court to hear challenges to such statutes has enjoined or otherwise ruled against them, the controversy around minors' rights to gender-affirming care continues to gather steam. Unlike many of her sister states, California not only protects the right to access gender-affirming care but also offers sanctuary to out-of-state families who seek it. However, heated rhetoric and misinformation have consumed the public "debate" on whether gender-affirming care should be available to minors, which in turn, has the potential to skew or undermine effective and candid client advocacy for California lawyers involved in disagreements between parents about access to gender-affirming care, protection of out-of-state families who come to California seeking care, and managing claims by minors seeking care when parents refuse their consent.

The term "gender-affirming care" is a broad concept encompassing a range of medical, mental health, surgical, and nonmedical services.[1] The American Academy of Pediatrics (AAP) has built a gender-affirmative care model (GACM) to advise pediatric health care providers on "developmentally appropriate care" of transgender and gender-diverse (TGD) youth.[2] From a GACM perspective, transgender identities and expressions are not disorders; rather, they are part of normal variations in human diversity that are not always adequately defined by the gender binary. Rather than being absolute, gender identities evolve, reflecting biology, development, socialization, and culture.[3] Mental health issues among TGD people most frequently result from social stigma and negative experiences, sometimes including rejection by the family and community of origin.[4]

"Puberty blockers"—gonadotrophin-releasing hormones—are one medical option for youth who have entered puberty. These medications have been used since the 1980s to treat central precocious puberty.[5] Cross-sex hormones are another option to affirm gender by allowing "adolescents who have initiated puberty to develop secondary sex characteristics of the opposite biological sex."[6] As with all medical interventions and treatments, these medications have risks and benefits to be appropriately evaluated by the health care team, including pediatric patients and their families. Surgical interventions are typically limited to adults.

The goal of the GACM is to treat gender dysphoria by affirming gender identity. According to the AAP, gender

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dysphoria is "a clinical symptom that is characterized by a sense of alienation to some or all of the physical characteristics or social roles of one's assigned gender"; also, gender dysphoria is listed in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), focusing on the "distress that stems from the incongruence between one's expressed or experienced (affirmed) gender and the gender assigned at birth."[7] Expressed or experienced gender, or gender identity, is "one's internal sense of who one is, which results from a multifaceted interaction of biological traits, developmental influences, and environmental conditions."[8] Children who are transgender and gender-diverse "report first having recognized their gender as 'different' at an average age of 8.5 years; however, they did not disclose such feelings until an average of 10 years later."[9] The AAP's GACM recommends individually tailoring interventions and treatments to the particular child. The model relies on relevant research asserting that prepubertal TGD children know their gender identity just as surely as do children who identify as cisgender. The model therefore rejects "watchful waiting" because it withholds critical support for the child and pathologizes transgender and gender-diverse identities.[10] The GACM regards the decision whether to intervene medically as a very personal one that "involves careful consideration of risks, benefits, and other factors unique to each patient and family" in the context of a collaborative, ongoing, multidisciplinary approach within the care team.[11]

Many, including legislators, who reject the GACM argue that youth who receive doctor- and parent or guardian-approved gender-affirming care are victims of medical child abuse. Those who accept the GACM argue that youth who are deprived of the GACM by state legislative or executive action are victims of state-sponsored medical neglect, which is another form of child maltreatment.[12]

State statutes and regulations that characterize gender-affirming care as child abuse rely on prejudice and misinformation as an objective matter.[13] Child abuse has a specific definition in the medical context. A diagnosis of "medical child abuse" (MCA), listed as "Factitious Disorder Imposed on Another" (FDIA) in the DSM-5 and formerly called "Munchausen's syndrome by proxy," identifies a type of child maltreatment that relies fundamentally on deceptive conduct by the parent or guardian.[14] In the case of gender-affirming care, the physician who must evaluate the need for such care renders an independent assessment, raising the question whether parent or guardian deception is possible. The remaining possibility, which appears to be the one intended by legislators attempting to eliminate gender-affirming care, is to claim that the professional medical consensus is malfeasant—that is, pediatricians, pediatric endocrinologists, and other professionals on the health care team either actively wish to cause their patients harm or are reckless in their disregard for patient safety. No evidence supports this view. Indeed, all leading medical professional associations support and promote access to gender-affirming care.[15] Further, the AAP and the American Professional Society on the Abuse of Children, a leading child protection and child abuse professional association, have stated that gender-affirming care is not child abuse; rather, it is necessary care.[16]

State Regulation

The current legal battle over the safety and efficacy of gender-affirming care began in Texas in October 2019 as the result of a custody dispute between a mother who wished to affirm her child and a father who battled to prevent his child from accessing gender-affirming care, in part by accusing his child's mother of "emotional abuse" in the form of gender affirmation.[17] Cultural conservatives, politicians, and legislators in several states jumped on the bandwagon, and the battle was joined.

To date, Alabama, Arizona, Arkansas, Florida, Tennessee, Texas, and Utah have banned gender-affirming care for minors in various forms. Arizona bans only gender-affirming surgeries, which are generally not provided to minors.[18] Tennessee bans gender-affirming puberty blockers and hormone therapy for prepubertal minors; the law has little effect since these medications are not part of the standard of care for prepubescent people.[19] Statutes banning gender-affirming care for minors in Alabama and Arkansas are currently under federal court injunction.[20] Utah's ban was signed into law on January 28, 2023.[21] Florida and Texas, where statutes banning such care failed to make it through state legislatures, banned gender-affirming care for minors by recourse to the Board of Medicine and the governor, respectively, and the Texas directive is under partial injunction.[22]

Nevertheless, the drumbeat of state legislation for the 2023 sessions is unrelenting. Legislatures in more than half of the states have considered bills banning gender-affirming care for minors.[23] The number of anti-transgender bills continues to grow, session by session.

Constitutional Law

Americans do not have a constitutional right to health care, let alone gender-affirming care. Rather, the sources of constitutional law that potentially establish a minor's right to gender-affirming health care, and their guardians' right to consent on their behalf, are equal protection and substantive due process.

The Biden Administration has interpreted the Supreme Court case of *Bostock v. Clayton County* to include transgender people in the protected class "sex."[24] The law cannot make distinctions impacting a protected class of people absent strict scrutiny.[25] Yet, many of the laws and rules that ban gender-affirming care exclude specific therapies for transgender youth only, while permitting treatment for intersex youth, youth experiencing precocious puberty, and any other minor who needs gender-affirming health care for any reason other than treatment of gender dysphoria.[26] When plaintiffs sue the government for discrimination, the government's burden is to show that the law is narrowly tailored to meet a compelling government interest. The injunctions currently in place against Alabama and Arkansas come as little surprise because the statutes unlawfully single out transgender youth as follows: Gender-affirming care and hormone therapy is available to cisgender adolescents with certain health conditions but not transgender youth with gender dysphoria; irreversible surgeries that sometimes affect fertility are performed on intersex infants but refused to transgender youth. Cisgender girls can elect breast reduction or augmentation; transgender youth cannot.

The Supreme Court has recognized parents' fundamental rights to custody and care of their children, which includes decisions about health care.[27] Parental rights to make medical decisions are not absolute, especially when they are not grounded in religious objections. However, courts will generally recognize parental rights to make health care decisions when they rely on recognized standards of care. Given the practically unanimous support among medical associations for World Professional Association for Transgender Healthcare standards supporting gender-affirming care,[28] a parent's decision to consent to such care on behalf of their child likely falls within the ambit of parental fundamental rights.

Transgender minors, parents, and health-

care professionals are challenging the Alabama ban in *Eknes-Tucker v. Marshall*[29] and the Arkansas ban in *Brandt v. Rutledge*.[30] In *Eknes-Tucker*, the court found that the parents had a fundamental right to make medical decisions, including gender-affirming health care, for their child. Because the care in question was "subject to accepted medical standards," prohibiting this care was likely unconstitutional. The question was not whether the care had any risk associated with it; rather, the court questioned the appropriateness of the care in the eyes of medical professionals.[31]

Plaintiffs in *Rutledge* sued Arkansas for violations of Fourteenth Amendment rights to equal protection—discrimination on the basis of sex—and due process—unconstitutional limitation of parental rights to follow medical advice for their children. The district court enjoined the statute and the Eighth Circuit Court of Appeals upheld the ruling. First, the court applied heightened scrutiny to the statute's classification according to sex. It affirmed that the statute was "not substantially related to Arkansas' interests in protecting children from experimental medical treatment and regulative medical ethics" because "there is substantial evidence to support the district court's conclusion that the Act prohibits medical treatment that conforms with the recognized standard of care."[32]

No federal or state judicial precedent to date has enabled or approved prohibitions of gender-affirming care.

Evolution of Federal Law and Policy

There is currently no federal statutory law of gender-affirming care.[33] Under President Joe Biden, the executive branch has issued executive orders and comments clarifying U.S. support for gender-affirming care. On January 20, 2021, the first day of the new administration, President Biden issued an executive order "preventing and combating discrimination on the basis of gender identity or sexual orientation," citing *Bostock*.[34] In June 2021, the Biden Administration Department of Education confirmed its support for the Title IX rights of transgender youth.[35] In August 2021, the Department of Health and Human Services used its power to clarify Section 1557 of the Affordable Care Act protection for the rights of transgender individuals.[36]

The Biden Administration has issued multiple statements in support of transgender youth and in opposition to state legislative attacks on the right to appropriate healthcare. In June 2022, the president signed an executive order protecting transgender children and signaling support for a ban on "conversion therapy" in response to Texas state actions to limit gender-affirming health care by characterizing it as child abuse.[37] The Department of Health and Human Services, with and through its Administration on Children, Youth, and Families and its Office of Civil Rights, has made multiple statements opposing the Texas actions and supporting transgender youth.

In June 2021 and April 2022, the United States participated in the Arkansas and Alabama cases, respectively. The United States makes clear its position on gender-affirming care bans in its Complaint in Intervention in *Eknes-Tucker v. Alabama*, a case challenging the state's ban.[38] Recognizing that Senate Bill 184 "denies necessary medical care to children based solely on who they are," the United States "files this complaint in intervention to enforce the Constitution's guarantee of equal protection." The law criminalizes care for transgender minors that it permits for all others, forcing doctors, guardians, and minors old enough to make medical decisions to "choose between forgoing medically necessary procedures and treatments or facing criminal prosecution."[39]

Texas Governor Abbott's Directive

In the spring of 2021, SB 1646, which would have characterized gender-affirming care for minors as child abuse and therefore criminalized it, passed through the Texas Senate but died in the House.[40] Political opposition to minors' ability to access gender-affirming care was undeterred. Soon after, Representative Matt Krause asked Attorney General Ken Paxton to issue an opinion on whether gender-affirming care is child abuse. On February 18, 2022, Paxton obliged, stating unequivocally that gender-affirming care is child abuse. On February 22, Governor Greg Abbott published a letter to Jaime Masters, Commissioner of the Texas Department of Family and Child Services (DFCS), purporting to confirm their August 2021 conversation characterizing gender-affirming care as child abuse. In his letter, Abbott issues a directive to DFCS agents. Relying on Paxton's opinion, Abbott instructs agents to investigate every incident of gender-affirming care as child abuse, indicating that agents should open investigations on every affirming family.[41] Such investigations carry the possible consequence of child removal.

Paxton's blunt and one-sided letter does not analyze the question of who actually perpetrates the alleged abuse, leaving the reader to conclude that the abusers—the criminals—are doctors and other health care professionals performing the abusive act under the guise of assent by likewise-criminal parents. If true, parents would be guilty of medical child abuse, or factitious disorder imposed on another, a rare and serious form of child abuse.[42] Doctors would be guilty of a serious crime. Abbott makes room for this accusation by characterizing gender-affirming care as not medically necessary (counter to professional standards of care).[43] In effect, Paxton is not arguing that parents are imposing an actual disorder on children to get unnecessary care. He is arguing that the disorder itself is not real—that gender dysphoria is a fiction and transgender youth do not actually exist. Health care focused on gender dysphoria is therefore unnecessary in his view, and all outcomes Paxton perceives as negative constitute child abuse.

The point is important because legislators continue to file bills criminalizing gender-affirming care as child abuse in states across the nation. Where child abuse is not the gravamen of the bill, it remains the underlying accusation.[44] Medical care that aligns with professional standards of care is not child abuse.[45] Treating physicians must take into account risks and benefits of particular care plans for specific patients, meaning that risks are understood and factored into medical decisions. Skipping over the fact that gender-affirming care is part of medical standards of care means that legislators and politicians do not grapple with this necessary risk-benefit analysis; they can simply use scare tactics to amplify risks—ignoring the fact that all medical care involves risk—and ignore or categorically deny known, evidence-based benefits of this care.

The Texas Medical Association (TMA) makes several of these points in its Third Court of Appeals amicus brief filed in support of the plaintiff-appellees in Doe v. Abbott, the Texas state court challenge to Abbott's Directive, in September 2022. The TMA restates its prior opposition to "the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents." The brief also rebuts Paxton's core premise: that gender-affirming care is medically unnecessary.[46] Rather, "[p]roviding gender-affirming care is consistent with accepted clinical standards for the treatment of adolescents with gender dysphoria," and criminalizing or stigmatizing it "worsen[s] existing barriers to care for transgender youth, an already vulnerable population."[47] In its amicus brief in the same case before the

Texas Supreme Court, the American Professional Society on the Abuse of Children and allied organizations state that gender-affirming care is not child abuse but that deprivation of medically necessary care may be medical neglect.[48]

The Texas Third Court of Appeals is currently reviewing the statewide injunction initially issued by the district court in March and partially blocked by the Texas Supreme Court in June 2022.

Lessons for California Lawyers

Legislative and executive attempts to criminalize gender-affirming care in Texas and more than two dozen other states have shifted the ground for California lawyers in ways that are already playing out in our state legislature. What can be learned from the warning of the Texas example?

First, California actively protects in-state transgender youth and their access to health care.[49] An array of California laws and policies prohibit discrimination against LGBTQ+ youth, including the Civil Rights Act of 2007;[50] Nondiscrimination in State Programs and Activities;[51] Juvenile Justice Safety and Protection Act;[52] Omnibus Hate Crimes Act;[53] Providing Safe, Supportive Homes for LGBT Youth;[54] California Foster Care Nondiscrimination Act;[55] School Success and Opportunity Act;[56] and California Student Safety and Violence Prevention Act. California lawyers who represent minors in juvenile dependency proceedings must demonstrate cultural competency and sensitivity in relating to, and discerning best practices for, "providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home placement."[57] The same standard applies in juvenile court, where the requirement of adequate training to represent minors includes "[c]ultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home care."[58]

Second, California has taken significant legislative steps to protect out-of-state transgender youth who come to the state for health care.[59] Senate Bill 107, which goes into effect on January 1, 2023, has three main parts.[60] First, it prohibits health care providers, service plans, and contractors from releasing medical information related to gender-affirming care in response to subpoenas based on state laws authorizing civil actions against people who allow children to receive it. It likewise prohibits California law enforcement from making arrests based on a foreign state's criminalization of gender-affirming care. Second, the law essentially reopens and comments on the Uniform Child Custody Jurisdiction and Enforcement Act, which already provides California with exclusive jurisdiction for making an initial child custody determination when there is a dispute involving a parent in a foreign state.[61] The law prohibits enforcement of an order from a foreign state to remove a child solely due to that state's prohibition of gender-affirming care; in general, it instructs courts to protect the ability of a custodial parent or guardian to provide a child with gender-affirming care in the state, unless the noncustodial parent or guardian can present evidence sufficient to show that such care is not in the best interests of the child.[62]

Third, and relatedly, California attorneys representing parents in in-state custodial disputes based on parental disagreement about gender-affirming care for a child can infer legislative intent from SB 107 and draw on other California laws that protect transgender youth. Attorneys representing an affirming parent in dispute with a parent opposed to gender-affirming care for a youth with gender dysphoria should ensure that the court appoints a minor's counsel to best represent the minor's interests.[63]

Despite the widespread volatility of the current debate over transgender youth rights and gender-affirming care, California law is straightforward on the issue. State law strongly protects transgender youth rights to health care and now protects the rights of out-of-state transgender youth and their families who come to our state to access necessary care. Practitioners of family law in California may encounter disputes between co-parents who disagree over whether gender-affirming care is appropriate for their child. In these cases, lawyers can petition for appointment of minor's counsel to protect transgender youth rights and, in the case of an out-of-state parent, make use of SB 107 to shield gender-affirming care from foreign subpoenas and criminal warrants.

Regardless of specialty or practice, all California lawyers can and should participate in the public discussion of transgender youth rights to necessary medical care. As officers of the California courts, attorneys of the state have an ethical obligation to responsibly describe the laws relevant to accessing gender-affirming care and those that define child maltreatment. That obligation extends to the way in which attorneys discuss the court rulings in multiple states that so far have rejected statutes that outlaw this care. California attorneys, as defenders of the rule of law, have a duty to avoid usurping the role that medical expertise must play when assessing the best interests of the child. ■

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[1] Jill Wagner et al., *Psychosocial Overview of Gender-Affirmative Care*, 32 J. Pediatric Adolescent Gynecology 567-573 (2019) [hereinafter Wagner et al.].

[2] Jason Rafferty, AAP Comm. on Adolescence, AAP Section on Lesbian, Gay, Bisexual, and Transgender Health and Wellness, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents* 142 Pediatrics 1 (2018) [hereinafter Rafferty].

[3] Wagner et al., *supra* note 1, at 568 ("[G]ender identity is one's inner sense of self, which arises from many factors, including biology, socialization, and culture, and is distinct from assigned sex[.]").

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Rafferty, *supra* note 2.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Am. Prof'l Soc'y on the Abuse of Child., APSAC Statement: Gender-Affirming Care is Not Child Abuse (2022) [hereinafter Am. Prof'l Soc'y on the Abuse of Child.].

[13] For example, Texas Attorney General Ken Paxton's opinion letter classifying gender-affirming care as child abuse characterizes such care as "seek[ing] to destroy a fully functioning sex organ in order to cosmetically create the illusion of a sex change," though clinical guidelines exclude genital surgery for minors. Ken Paxton, Op. Ltr. No. KP-0401, 3 (Feb. 18, 2022) [hereinafter Paxton Op. Ltr.]. Without evidence or justification, Paxton finds that gender-affirming care is not medically necessary, a finding counter to the overwhelming majority of American professional health care associations. *Id.* at 2.

[14] Factitious Disorder Imposed on Another is a very serious and sometimes lethal form of child abuse in which "the perpetrator, usually the mother, invents symptoms or causes real ones in order to make her child appear sick." Examples include a child hospitalized nine times, with several invasive procedures, prior to FDIA diagnosis; and a child who was hospitalized several times with headache, abdominal pain, seizures, and other maladies prior to FDIA diagnosis. Noemi Faedda et al., *Don't Judge a Book by Its Cover: Factitious Disorder Imposed on Children-2 Cases*, 6 Frontiers Pediatrics 110 (Apr. 18, 2018). The Cleveland Clinic identifies FDIA as criminal child abuse. *See* Cleveland Clinic, Factitious Disorder Imposed on Another, https://my.clevelandclinic.org/health/diseases/9834-factitious-disorder-imposed-on-another-fdia (last visited Jan. 24, 2023).

[15] The Transgender Legal Defense & Education Fund collects them here: https://transhealthproject.org/resources/medical-organization-statements.

[16] Am. Prof'l Soc'y on the Abuse of Child., *supra* note 12.

[17] Anon., *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2172 (April 2021).

[18] Devan Cole, *Arizona Governor Signs Bill Outlawing Gender-Affirming Care for Transgender Youth and Approves Anti-Trans Sports Ban*, CNN (Mar. 30, 2022), https://www.cnn.com/2022/03/30/politics/arizona-transgender-health-care-ban-sports-ban/index.html.

[19] Allyson Waller, *Tennessee Bans Hormone Treatments for Transgender Children*, N.Y. Times, May

20, 2021, *available at* https://www.nytimes.com/2021/05/20/us/tennessee-transgender-hormone-treatment.html.

[20] Assoc.Press, *A Judge Blocks Part of an Alabama Law That Criminalizes Gender-Affirming Medication*, NPR (May 14, 2022), https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medicat; Associated Press, *First Trial over a State Ban on Gender-Affirming Care Begins in Arkansas*, MONTGOMERY ADVISOR, Oct. 17, 2022, *available at* https://www.montgomeryadvertiser.com/story/news/local/alabama/2022/10/17/gender-affirming-care-arkansas-trial-over-state-ban/69569458007.

[21] S. Res. 16, Gen'l Sess. (Utah 2023).

[22] Amanda D'Ambrosio, *Florida Medical Boards Ban Gender-Affirming Care for Kids*, MEDPAGE TODAY (Nov. 7, 2022), https://www.medpagetoday.com/special-reports/features/101624; María Luisa Paúl & Casey Parks, *Judge Partially Blocks Texas Gov. Greg Abbott's Order to Treat Gender-Affirming Care as Child Abuse*, WASH. POST, Mar. 2, 2022, *available at* https://www.washingtonpost.com/dc-md-va/2022/03/02/texas-transgender-child-abuse-injunction.

[23] Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth Are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports.

[24] Memorandum from Dep't of Just. Civ. Rts. Div. 2 (Mar. 10, 2022) (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020)) ("[B]eing gay or transgender is 'inextricably' bound up with sex.").

[25] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that suspect classes receive strict scrutiny).

[26] *See, e.g.*, Hum. Rts. Watch, Mapping the Intersex Exceptions, https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions (last visited Jan. 27, 2023).

[27] Troxel v. Granville, 530 U.S. 57, 65 (2000) (holding that parents have fundamental rights to care, custody, and control of their children).

[28] *See, e.g.*, Eknes-Tucker v. Marshall, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *1-*2 (M.D. Ala. May 13, 2022) (referencing gender dysphoria diagnosis and citing to WPATH standards).

[29] *Id*.

[30] Brandt v. Rutledge, 47 F. 4th 661 (8th Cir. Aug. 25, 2022).

[31] *See, e.g.*, Eknes-Tucker, 2022 WL 1521889, at *16 ("To be sure, the parental right to autonomy is not limitless; the State may limit the right and intercede on a child's behalf when the child's health or safety is in jeopardy. Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990). But the fact that a pediatric treatment 'involves risks does not automatically transfer the power' to choose that treatment 'from the parents to some agency or officer of the state.' Parham, 442 U.S. 603.").

[32] Rutledge, 47 F. 4th at 671.

[33] Representative Marjorie Taylor Greene (R-GA) has proposed the Protect Children's Innocence Act, which would make gender-affirming care a federal felony. H.R. 8731, 117th Cong. (2022).

[34] Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation.

[35] Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32673 (June 22, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf (subject to preliminary injunction in certain states).

[36] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf.

[37] Exec. Order No. 14075, 87 Fed. Reg. 37189 (June 15, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals.

[38] The enrolled version of Alabama SB 184 can be downloaded at https://legiscan.com/AL/text/SB184/id/2566425.

[39] "S.B. 184 prohibits transgender minors from obtaining care that is well recognized within the medical community as medically appropriate and necessary, while imposing no comparable limitation on medically necessary care by cisgender minors." Compl. at ¶ 49, Eknes-Tucker v. Marshall, 2:22-cv-184-LCB, 2022 WL 1521889 (M.D. Ala. May 13, 2022).

[40] Tex. Senate, S. 1646, 87th Legis., Reg. Sess. (Tex. 2021), https://legiscan.com/TX/bill/SB1646/2021.

[41] Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Commissioner, Texas Dep't of Fam. & Child Servs. (Feb. 22, 2022) (the Opinion of Attorney General Ken Paxton from Feb. 18, 2022, is attached), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.

[42] This syndrome was formerly known as Munchausen Syndrome by Proxy, the name that Abbott uses in his letter. For practice guidelines and more information related to FDIA, *see* AM. PROF'L SOC'Y ON THE ABUSE OF CHILD., MUNCHAUSEN BY PROXY: CLINICAL AND CASE MANAGEMENT GUIDANCE (2017), *available at* https://www.apsac.org/guidelines.

[43] Paxton Op. Ltr., *supra* note 13, at 3 ("In other words, in rare circumstances, some of the procedures you list are borne out of medical necessity. For example, a minor male with testicular cancer may need an orchiectomy. This opinion does not address or apply to medically necessary procedures."). While Paxton does not specify why he finds gender-affirming care medically unnecessary, it may be that, counter to the DSM-V and professional medical standards of care, he either believes that gender dysphoria does not exist or that such a diagnosis does not warrant health care for some unstated reason.

[44] The text of Rep. Greene's bill, which criminalizes all forms of gender-affirming care, does not characterize it as child abuse; it directly names this form of care a felony. Under this bill, persons seeking care for gender dysphoria are victims and physicians providing such care are felons. Protect Children's Innocence Act, H.R.8731, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8731/text. Greene's public commentary frequently states that gender-affirming care is child abuse. *See, e.g.*, Kelly Rissman, "*Disgusting and Appalling": Rep. Marjorie Taylor Greene Introduced a Bill That Criminalizes Performing Transgender Medical Care*, VANITY FAIR, Aug. 20, 2022, *available at* https://www.vanityfair.com/news/2022/08/rep-marjorie-taylor-greene-wants-to-criminalizes-transgender-medical-care.

[45] *See, e.g.*, In re Abbott, 645 S.W. 3d 276, 287 n.3 (Tex. 2022) (Lehrmann, J., concurring) ("By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender dysphoria. In my view, a parent's reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse.").

[46] Brief for Texas Medical Association as Amici Curiae Supporting Appellees, Abbott v. Doe, No. 03-22-00126-CV, at 5 (Tex. 3d Ct. Apps., Sept. 7, 2022). For a statement of facts in the case, *see* 5-11.

[47] *Id*. at 18–19 ("As set forth below, these standards have been recognized and endorsed in the clinical guidance and publications of every American medical association that has addressed this area, as well as the in [sic] guidelines of the American Psychological Association."). Texas Medical Association excludes the position of the American College of Pediatricians, a fringe medical group categorized as a hate group by the Southern Poverty Law Center. *See* Raymond Wolfe, *President of American College of Pediatricians Slams Transgender Drugs as 'Child Abuse,'* RIGHT EDITION (Dec. 18, 2021), https://rightedition.com/2021/12/18/president-of-american-college-of-pediatricians-slams-transgender-drugs-as-child-abuse/; SPLC, American College of Pediatricians, https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians.

[48] Brief for American Professional Society on the Abuse of Children and Nineteen Professional Child Welfare as Amici Curiae Supporting Appellees, Doe v. Abbott, No. 22-0229, at 26 ff (Tex. 3d Ct. Apps., Aug. 25, 2022) ("Withholding or reversing gender-affirming care is harmful to the adolescent patient; either action can be a dangerous and even lethal form of medical neglect. TEX. FAM. CODE §261.001(4)(A)(ii)(b); 40 TEX. ADMIN. CODE §700.46.").

[49] California law defines "gender-affirming care" as "medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient[.]" WELF. & INST. CODE §16010.2(b)(3)(A). The same standard applies to mental and behavioral health care.

[50] California's fundamental civil rights law defines "sex" as inclusive of gender, gender identity, and gender expression. CIV. CODE §51(e)(5).

[51] GOV'T CODE §11135 (defines "sex" to include gender, gender identity, and gender expression).

[52] WELF. & INST. CODE §224.70 (2021) (youth bill of rights; includes gender, gender identity, gender expression).

[53] S. 1234, Reg. Sess. (Cal. 2004) (defines "hate crime" and includes gender).

[54] Assemb. 1856, Reg. Sess. (Cal. 2012) (establishes the right of foster youth to have adult caregivers trained in cultural competency related to LGBT identity).

[55] Assemb. 458, Reg. Sess. (Cal. 2003) (establishes the right of foster children and foster caregivers to fair and equal access to services; includes protections for gender identity).

[56] Assemb. 537, Reg. Sess. (Cal. 1999) (amending the California Education Code by adding actual or perceived sexual orientation and gender identity to existing nondiscrimination policy); Assemb. 1266 [Number of Legislative Body], [Number of Legislative Session] (Cal. 2013) (amending EDUC. CODE §221.5 and establishes the right of transgender youth to participate in sex-segregated programs aligned with their gender identity).

[57] CAL. R CT. 5.660(d)(3)(A)(iii).

[58] WELF. & INST. CODE §317(c)(5)(B).

[59] Minors must obtain parental consent to receive most forms of medical care in California, including gender-affirming care.

[60] Gender-Affirming Health Care, S. 107, Reg. Sess. 2021-2022 (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220SB107.

[61] FAM. CODE, §3400 *et. seq*.

[62] For extensive analysis of SB 107 by the California legislature, *see* the bill analyses available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB107#.

[63] *See* CAL. R CT. 5.240 (appointment of counsel to represent a child in family law proceedings).

by Wayne J. Boehle and Ana M. Sambold

Closing Argument

Implicit Bias—Not a New Concern for Attorneys

Assembly Bill 242 mandating that the State Bar of California enact rules[1] "incorporating the topic of implicit bias and bias-reducing strategies into its MCLE curriculum for all attorneys"[2] took effect January 31, 2023.[3] At least two hours of credit are required for the elimination of bias—one hour at a minimum to focus on implicit bias and the promotion of bias-reducing strategies.

Implicit bias is defined by AB 242 as "positive or negative associations that affect... beliefs, attitudes, and actions towards other people," which it asserts "all people possess." Attorneys, who work with all kinds of people, encounter implicit bias in myriad ways. Subconscious attitudes may manifest as a result of prior subliminal messages regarding physical appearance (skin or hair color, height, weight), gender or perceived gender differentiation, sexuality, perceived notions of ethnic/religious/social variation, and even linguistic cues (foreign accents or regional dialectal speech), among others.

Femi Otitoju, the inspirational champion of LGBTQ+ causes, stated in a 2019 webinar that "If you have a brain, you have a bias." Indeed, implicit biases start in early childhood, continue with family and friends' discussions, work their way into the subconscious by past and present experiences, and develop further because of culture, background, and exposure to a variety of media.

Harvard University has developed the Implicit Association Test (IAT) under the auspices of Project Implicit Health, whose mission is "to educate the public about bias and to provide a 'virtual laboratory' for collecting data on the internet."[4] The American Bar Association adopted the IAT as part of its Implicit Bias Initiative to recognize, understand, and combat implicit bias within the profession.[5] However, the IAT forms only part of the ABA's implicit bias toolkit, which also includes videos and other instructional media to achieve the initiative's mission.

In California, to further greater diversity, equity, and inclusion (DEI) in the legal profession many institutions have developed programs aimed at exposing and eliminating implicit bias. Locally, e.g., Loyola Law School has created a website that provides instruction for reporting a "Bias-Motivated Incident." The site explains that it may not "violate the State Penal Code, but originate[s] in bias against someone's actual or perceived sex, gender, gender identity and expression, race, color, religion, national origin, ancestry, disability, age, sexual orientation, marital status, military status, veteran status, pregnancy, genetic information or any other protected classification."[6] Loyola's parent school, Loyola Marymount University, even has as part of its own implicit bias initiative a webpage that allows users to take the IAT.[7]

The horrible significance of implicit bias is best exemplified by the famous "doll test" Dr. Kenneth Clark conducted as part of his testimony in *Brown v. Board of Education*.[8] Clark demonstrated that a black child's self-esteem was so damaged by subliminal messages of separatist racism in American society that when a black child was confronted with the awareness that he or she viewed a white doll as superior while a black doll was viewed as denigrated, even a very young black child would become so deeply conflicted that he or she would either enter a state similar to shock and/or burst into tears and run away. The *Brown* Court found that the fact of separation alone "because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[9]

Thus, unconscious, or implicit, bias is not only internalized by those who hold such prejudice but also similarly afflicts the object of the bias. For the former, it acts like a poison creating disdain, fear, and hatred; for the latter, it serves to diminish and cripple by generating self-loathing. The new MCLE rule is an explicit indication that our legal system at last is encouraging all palliative measures to rid our society of this scourge. ■

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[1] Bus. & Prof. Code §6070.5.
[2] State Bar Cal., New implicit bias education requirement, https://www.calbar.ca.gov/Attorneys/MCLE-CLE (last accessed Feb. 6, 2023).
[3] *Id.* Only attorneys in MCLE Group 3 are affected currently, but all California attorneys must now complete one hour of implicit bias training as part of the 25 hours required to be completed every 3 years.
[4] Project Implicit, About Us, https://implicit.harvard.edu/implicit/aboutus.html (last accessed Feb. 6, 2023).
[5] Am. Bar Ass'n, Implicit Bias Test, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias /implicit-bias-test/ (last accessed Feb. 6, 2023).
[6] Loyola Law School, Bias Incident Report Committee (BIRC), https://www.lls.edu/thellsdifference/diversityinclusion/birc (last accessed Feb. 6, 2023).
[7] Loyola Marymount University, Test Your Implicit Bias - Implicit Association Test (IAT), https://resources.lmu.edu/dei/initiativesprograms/implicitbiasinitiative/whatisimplicitbias/testyourimplicitbias-implicitassociationtestiat/ (last accessed Feb. 6, 2023).
[8] Brown v. Board of Educ., 347 U.S. 483 (1954).
[9] *Id.* at 494.

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