

Criminal Justice Section Newsletter

Volume 31, No. 1: Fall 2022

The Annual Meeting Highlights

The 2022 Criminal Justice Section's Annual Meeting took place on August 4-6 in Chicago, IL, during the American Bar Association's Annual Meeting, with several CLE programs, committee and Council meetings.

CLE programs offered were:

- Attorneys Advancing Diversity Equity & Inclusion
- Covid-19 Relief Fraud: What is the Future of Enforcement?
- The Sights, Sounds & Statistics of Injustice: Identifying and mitigating Implicit Bias in Civilian and Military Courts
- Annual Review of Supreme Court Decisions

Following committees met during the Annual Meeting: International, CLE Board, Tribal Lands, Women in Criminal Justice, Alternative to Incarceration and Diversion, Prosecution Functions, and Membership.



And the following CJS-sponsored criminal justice related resolutions were passed by the ABA House of Delegates:

- Resolution 501, which sets out the ABA Criminal Justice Standards on Diversion providing guidance on various aspects of diversion programs. The standards are consistent with efforts to reduce collateral consequences; address over-criminalization; reduce incarceration; curtail the burden on and investment in the criminal legal system; and eradicate racial disparities throughout the system.
- Resolution 502, which urges governmental entities to enact legislation permitting courts to hear petitions that allow hearings to take a “second look” at criminal sentences where individuals have been incarcerated for 10 years. The report to support the resolution noted that the U.S. is home to less than 5% of the world's population but houses nearly 25% of the world's prisoners, adding incarceration disproportionately impacts people of color.

Wayne S. McKenzie of New York, NY concluded his year as CJS Chair and **Justin Bingham** (photo below), the City Prosecutor for the City of Spokane based in Spokane, Washington, became the new Chair of the ABA Criminal Justice Section for the 2022-2023 year.



Welcome New Committee Leaders!

As we kickoff the new bar year, we look forward to working with our committees to identify issues involving crime, criminal law, and the administration of criminal and juvenile justice. We also expect to work with them on advancing solutions through programming, policy, books, articles, letters and unique events. We are delighted to keep up the momentum with our continuing chairs and extend a warm welcome to new committee leaders:

Yvette Butler, Academics Committee Vice Chair

Thalia González, Alternative Dispute Resolution & Restorative Justice Committee Co-Chair

Faraz Mohammadi, LGBT Committee Co-Chair

Robert Capers, Probation & Parole Committee Co-Chair

Allison Green, Prosecution Function Committee Co-Chair

Keri Nash, Racial Justice & Diversity Committee Co-Chair

Maryam Ahranjani, Women in Criminal Justice Committee Co-Chair

Daniela Donoso, Colby Moore, Tamara Nash, Young Lawyers Committee Co-Chairs

We invite chairs who need additional support to reach out to staff as well as Division Directors.

Committees are divided into Divisions, each Division is headed up by a Division Director. The Division Directors serve as a resource to committee leaders particularly when committee leaders prepare and submit Committee Work Plans and progress reports. This year's Division Directors are:

Equal Justice Division Directors: Janet Fink, Hon. Denise Langford Morris

Communications, Membership and Services Division Directors: Andrea Alabi, Hon. Sidney Butcher

Corrections and Sentencing Division Directors: Raul Ayala, Steven Zeidman

Professional Development Division Directors: Ann Macy, Nina Marino

Specialized Practice Division Directors: Marissel Descalzo, Anthony Musto

White Collar Crime Division Directors: Michael J. Leotta, Morris "Sandy" Weinberg

For more information on divisions and committees, please refer to the CJS Leadership Directory and committee manual, or visit www.americanbar.org/groups/criminal_justice/com-

Upcoming Events

Nov. 17-20: **CJS Fall Institute/Meeting**
Washington, DC

Dec. 5-7: **ABA/ABA Financial Crime Enforcement Conference**
National Harbor, MD

Feb. 1-4, 2023: **ABA/CJS Midyear Meeting**
New Orleans, LA

March 2-4: **38th Annual National Institute on White Collar Crime**
Miami, FL (scholarship available)

April TBD: **CJS Spring Meeting**
Memphis, TN

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

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Everything You Wanted to Know About School Safety But Were Sued First

By James E. Shaw, Ph.D.

On May 27, 2022, and for days afterwards, the nation paused to pray and remember the unspeakably horrific shooting, a massacre that claimed 21 lives—nineteen children and two teachers—at the Robb Elementary School in Uvalde, Texas. The cruel irony, as legions of the country’s school boards continue to engage in differential diagnoses and soul-searching for answers as to who and what went wrong, is that the Robb Elementary School probably could not have done anything more, different or better, to protect its students—short of constructing a walled-in campus inside of which students would have received provisions and other necessities from the outside.

Many school administrators, aware that (1) their school boards are holding their feet to the fire and withholding long- and even short-term contracts until immediate security and safety improvements are seen on their campuses; and (2) attorneys are “poised overhead like carrion, to strip and de-bone us financially” (one administrator’s angry words to me), are worried about the potential impacts on their careers if they cannot satisfy their school boards’ demands and avoid lawsuits.

In the aftermath of the Robb Elementary School shootings, the nation’s press corps began scouring the country, searching out schools with “perfectly secure” campuses. Media found some hardware-heavy schools with windows fortified by bullet- and shatter-proof glass, and others with high-tech electronically-screened entry ways and auto-locking doors. Still other schools were found to have state-of-the-art cameras, customized wrought-iron fencing and gates, and one-way window panes blocking see-through, two-way viewing.

Some school districts, the press corps noted, had been in earnest talks with firms that provided both security equipment for the banking industry and military-style protection for corporate executives. In light of the fact that in the past five years, certain student-driven fatalities claiming the lives of school principals were found to have been deliberate acts of homicide (shockingly, one school administrator’s death was noted by law enforcement officers as “an assassination”), few in the press corps questioned certain school districts’ decisions to judge their schools as encampments best protected by companies proudly touting that their expertise in security lay in their “field” experience as armed forces special operatives, formerly on active duty.

Dr. James E. Shaw is a member of the Panel of Experts of the Los Angeles Superior Court, Foltz Criminal Justice Center.

- 1) Do the security accoutrements described above impede outsider access? YES.
- 2) Do such security enhancements protect students? SOMEWHAT.
- 3) Does such high-tech security gear guarantee such schools will enjoy permanent safety and security for their students? NO.
- 4) Do such modern and necessary security measures alter student behavior that drives violence? NO.
- 5) Do these sophisticated security devices detect states of mind, anti-social attitudes and their correlative behaviors that might potentially threaten the safety of other students? NO.
- 6) Can school districts and their administrators still be sued in spite of making huge financial investments to improve the safety and security of their campuses and the welfare of their students? YES.
- 7) Are there other variables that exist in school districts and on campuses that are exposed to litigation-minded plaintiffs’ hurt and grieving and wanting “justice”? YES.

Each School Safety Event Turns Up the Heat on School Principals

School violence is a public health problem that must be viewed and addressed in the same way that medical doctors view the etiology of disease and patient care. It is a social curse and it is not going away. Although attempts to deal with deadly threats are often frustrating, the costs of giving up and doing nothing far outweigh efforts to understand the germ, corral the virus, and succeed in sterilizing the bacterium. School shootings forcibly remind school principals to review their safety plans; install formal school safety training calendars for all staff; establish periodic crisis training drills; collaborate regularly with local law enforcement; develop new rules for campus safety management; hire new security resource officers (SROs); and comprehensively evaluate all safety strategies and programs, improving them, and throwing out what does not work. Today’s principals know all too well that, despite the national debate on gun control, shooters’ mental health issues, and home-grown terrorism, it is they who are the public face of school safety to whom grieving parents and their attorneys turn to for any and all answers in the aftermaths of campus tragedies.

School Principals Must Probe the Roots of Acts of Violence

School principals are quickly learning that when two students have a fight on campus, rather than suspend both of them under the popular and archaic “mutual combatants” policy, it is both prudent and vital to find out if something deeper is at work: Bullying? Gang activity? Racial discrimination? Harassment over one’s sexual preference? An attorney asked me

to consult on a case where a certain southern United States school's campus was rife with a rumor that two male students were going to fight because one purportedly bragged he had kissed the other. The vice principal was overheard to tell the eventual victim-student that he had to "Learn to man up," that "Kids, here, will eat you alive." Later, somebody else saw him talking to the eventual combatants and telling them, "Don't you fight here!", tacit approval to proceed with the fight but to take it elsewhere.

Caveat to Principals: Certain Acts of Violence May Violate Federal Laws

The result was that the initial aggressor nearly killed the victim-student on a main boulevard that ran parallel to the campus. The vice principal wrote a specious incident report emphasizing the "off campus" nature of the vicious assault. My own investigation and witness-interviewing revealed facts about a school environment hostile to gays and repeated utterances of hate-speech, by certain staff and students, against gay persons. Two weeks prior to the assault on the victim-student, a gay teacher submitted his resignation—very early in the fall semester—meticulously citing hate-speech and -incidents by students. Further, he annotated with dates and times hate speech remarks the vice principal had been repeatedly overheard uttering in the presence of gay students. The school quietly and quickly tried to sweep the assault incident under the rug; the vice principal's incident report wrote it off as a "mutual combatants" event. That all changed after I disclosed my interview notes in my attorney-requested comprehensive report. I wrote the report and framed it within federal civil rights statutes, showing the school maximally derelict in its duty to care and in breach of its obligations to develop and manage an environment that would have afforded tolerance of and protections to its gay students.

Lawyers Say: "Show Us How Your Site Plan Aligns With the States's Safety Plan"

My school's safety plan aligns with my state's plan. Would we be liable for acts of violence on campus? School administration would be responsible. Liability—how little or how much—could possibly be negotiated pre-trial or become a certain point of argumentation and grist for jurors' deliberations at trial. As for litigation, your school's alignment with your state legislators' statute-driven master plan for school safety would be a huge asset and possibly an advantage (A possible benefit: damage awards could be reduced and made smaller than they otherwise might have been) if you are a defendant school district.

A Grant for Your Proposal Means Keep Your Promise

My school was recently denied a renewal of a previously-received, large school safety grant. Quality, intangible results, and decreasing safety standards were cited. Completely forgotten by the grantors was the fact that the

first grant given to us, a couple of years prior, was based on our proposal for increasing school safety. If we were to be sued for acts of injury-causing violence or worse, wouldn't our having received a prior school safety grant aid our court defense arguments to prove non-dereliction and non-responsibility? Perhaps not, especially if jurors see no evidence of prior tangible, workable and effective safety programs developed from the grant funds. Using your prior grant-recipient status in court might make you a prisoner of your own accomplishments. While NOT getting your grant renewed is no lapse or violation on your school's part, jurors might see you as having been viewed as unfit for grant-renewal.

In a civil court trial resulting from plaintiffs' complaints of injuries resulting from acts of campus violence, your state's grant-denial decision could inspire jurors to view you negatively—they might view your state's decision as an official finding on the substandard quality and content of your school safety program. At the very least, jurors might simply dismiss your defensive arguments and conclude that you failed to keep your promises (a "proposal" is a promise) to enhance and improve your school's safety despite grant monies being appropriated to you by your state. This is known critically as the "empty promises" defense (a potent alert to jurors mindful of your failure to get the grant renewed), due to many juries knowing about the Feds long-standing "Safe and Drug-Free Schools" school safety and improvement grants, as well as various state-level school safety improvement monies.

Beginner-Teacher Training is a Requirement: A Principal's Liability if Overlooked

I am a principal at a school where one of our newer teachers was arrested and hauled into criminal court for repeated (three) acts of sexual battery against a minor. He is now serving time in the state penitentiary. He has a wife and two primary-school aged children. Despite my showing, in court, his excellent work history and character letters from a range of supporters including a priest and an elected official, we lost the case on grounds of negligent hiring and dereliction of duty, among other reasons. As far as I can determine, the plaintiffs won because their lawyers were in possession of our personnel records in which there was absolutely no evidence of district-required beginner-teacher training. This teacher had a Master's Degree in Education. I still cannot figure out how and why our missing just this one item made us liable for his "lack" of beginner-teacher training.

It is a paradox that in the field of Education, "training" is a word that seems to be misinterpreted and extremely unpopular. School districts apparently like to think they are in the "business" of training 24/7. Personnel departments and their Human Resource experts have their hands full in running background checks, waiting for fingerprints to clear with the FBI, reading new applications for hiring, and clearing credentials. In some school personnel departments, there is perhaps a subconscious resentment about the fact that teacher-training programs are buffeted with much theory and, in many states, would-be teachers must spend an additional year of university

coursework, beyond the B.A. or B.S. degree, earning a license to teach in their state. A common view is that when teachers show up at the school district office to apply for work, they are already “over-qualified,” due to the sheer amount of time they have spent in school themselves.

However, many years of taking college and university courses has little or nothing to do with beginner-teacher training. There is no evidence or guarantee that teachers can put theory to practice and then put that practice to the test, or are ready to successfully assume a spate of child-centered duties that have as much with keeping children safe and guarding their welfare as they do with teaching them the “three R’s.” A missing link in the chain tethering an ocean liner to the dock, can cause that multi-tonnage ship to break anchor and dangerously heave and list in the harbor. A missing rung on a painter’s or carpenter’s ladder can result in personal injuries to them as well as damage to the structures on which they are working. It is vital to realize that beginner-teacher training programs are urgently necessary and ought not to be devalued and disregarded.

That your fired and now-incarcerated ex-teacher somehow was skipped over for beginner-teacher training placed the liability for his subsequent acts of sexual battery on you, your school’s top administrator. Beginner-teacher training focuses on sensitive and discreet information that college and university teacher-training courses do not. As I recently told a group of earnest and dedicated principals, “Beginner-teacher training is where the rubber meets the road.” Consider this training an ultra-powerful link in the chain designed to anchor one’s successful teaching career. Without such training, a teacher can possibly remain ignorant or unconcerned—like the teacher in your question—about discreet and highly-sensitive pupil interaction areas. His crossing the boundaries into these areas was a violation that had multiple consequences. These consequences of his sexual-deviant behavior involved his victims, the school district, himself, and his family. The financial damages your school district had to pay is merely one element of that. After he has served his time in the state penitentiary, he will be registered and branded as a sex offender. His predicament ought to serve as a wake-up scream for your school district’s personnel department, and as an alert to vigorously and diligently check every teacher’s beginner-teacher training status.

School Choice: Cop Out for National Gun/School Safety Debate or Improve Campuses

As my school’s principal, for sometime, now, I have periodically ordered re-configurations to our landscaping, cameras, new fencing and higher cinder-block walls around our perimeter. And, depending on rumors and/o information furnished by police, I occasionally close and lock certain access gates. All these campus changes were made in the aftermaths of lots of schools that were shot up since the Columbine High School massacre. I have not stopped but I feel tired and now desperate, as a result of the

Sandy Hook Elementary school shooting. I say this as I hold (be held up a couple of sheets of paper) my new hand-written plans to relocate restrooms away from entryways and shift major mechanical and electrical systems so they could not be shut down or vandalized from the outside. Kids who shoot up school campuses are domestic terrorists and are already way outside the box in their thinking. Am I being paranoid? I don’t think so. Only realistic and not too tired to not want to be fully prepared in a well-protected campus for my students’ total safety.

There must be countless other principals like you. I commend you and praise your persistence. Obviously, you have not given up. From a litigation standpoint, it is urgently important to keep that in mind. Showing, in court, that you have made incessant attempts to improve the safety and security of your campus may not block a lawsuit by an angry or injured plaintiff, but it could possibly blunt the lawsuit’s effects, including negative publicity, and result in a significant reduction of financial damages. Jurors understand safety measures and conscientious, good-faith efforts to upgrade your physical plant incrementally or as necessary. And you have clearly done that.

Jury Fury

In school safety court cases, victory is often neither a slam-dunk nor a unanimous declaration of non-responsibility. Said another way, often victory in court is *relative*—compared to the worse that *might* have happened. Frequently, a proper showing of evidence can result in a reduction of responsibility and damages. Such a jury-driven decision will make your school board, its attorneys, and your school district’s liability and casualty insurance provider smile wide. Conversely, what infuriates juries is “the-sky-fell-on-us-what-could-we-have-done-any-different?” defense attitude. They regard that as a refusal to grow and change, akin to blaming Nature. Traffic lights do not prevent all auto accidents. The blast of train whistles does not stop the occurrence of all calamities at Grand Central Station. And, despite banks’ video cameras and armed guards, robberies inside these institutions occur regularly. However, it is the persistence and commitment—such as you are showing—to design, invest in, and upgrade your campus’ safety measures and equipment, that can positively impress jurors of your professionalism versus dereliction, and of your dedication rather than reckless disregard.

The national debate about school safety will churn on, but parents will continue to turn to their children’s school principals with demands and expectations for better safety and security, no matter what form or format it takes. Peering over their shoulders will be school board members and an army of attorneys.

Betraying the Bench: Could the SCOTUS Leaker Face Criminal Charges?

By T. Markus Funk, Andrew S. Boutros
and Judge Virginia M. Kendall

A federal judge and two former federal prosecutors disagree with widespread claims, made in the context of the leak of the Supreme Court's draft opinion on abortion, that a federal law clerk who leaks court-confidential information cannot face criminal charges. Perkins Coie partner T. Markus Funk, Dechert LLP partner Andrew S. Boutros, and U.S. District Court Judge Virginia M. Kendall discuss federal statutes under which criminal charges are possible.

The possibility that a U.S. Supreme Court law clerk may have leaked a draft opinion to a Politico reporter has shined a rare spotlight on the consequences facing law clerks who betray judicial trust. Chief Justice John Roberts, who characterized the leak as “appalling,” ordered the court's marshal to launch an investigation.

No doubt leaking internal court documents and other sensitive information—whether at the Supreme Court or in a lower court—threatens to end a promising legal career before it has launched, and for good reasons. But does such a bold breach also implicate the criminal law?

Most observers, including some prominent law professors and other members of the legal commentariat sharing their perspectives in outlets such as the New York Times, Washington Post, Reuters, Wired, USA Today, and Politifact, have opined that it likely does not.

As three former federal prosecutors who have been working on criminal cases for some 75 years combined, we offer a different perspective.

Violating the Hallowed Trust

Those lucky enough to have served as judicial law clerks, whether in the federal or state courts, will at some point early on have been warned that the dissemination of court-confidential information is a categorical “no-no.” As Justice Antonin Scalia is reported to have put it with characteristic candor: “If I ever discover that you have betrayed the confidences of what goes on in these chambers, I will do everything in my

Markus Funk is a partner at Perkins Coie. Andrew S. Boutros is a partner at Dechert LLP. Judge Virginia M. Kendall is a U.S. District Court judge in the Northern District of Illinois in Chicago. This article was modified and reprinted with Bloomberg Law's permission.

power to ruin your career.”

But no matter how it is articulated, there is no mistaking the solemn expectation that what happens in chambers stays in chambers.

More than just common practice (not to mention common sense), federal law clerks, and even interns, fall under the same code of conduct covering federal judges. They must, among other things, uphold the integrity of the court, refrain from political activity, and adhere to the highest standards of confidentiality. But can a federal law clerk's ethical breach cross into a violation of criminal law?

The short answer is very likely. A federal prosecutor focused on protecting the integrity of the judicial process, and armed with persuasive evidence of intentional leaking, will almost certainly be able to present charges to a federal grand jury.

Of course, reasonable minds can still disagree on whether prosecutorial discretion should be exercised in favor of lenity, and whether, depending on the circumstances, deferring to state bar ethics authorities is preferable. Those latter issues, however, go to judgment. What we are focused on here, in contrast, is what some might say is the inaccurate claim that federal law somehow precludes prosecution.

Many of the prosecutorial strategies discussed by pundits are, in fact, non-starters. For example, a draft ruling or similar court-sensitive information is not classified, so the Espionage Act (18 U.S.C. § 798) is unavailable.

Further, law clerks almost always have lawful access to the drafts and similar information stored on court computer systems, rendering the hacking statute (18 U.S.C. § 1030), particularly as interpreted in *Van Buren v. United States*, inapplicable.

Finally, the act of leaking itself does not constitute a false statement (18 U.S.C. § 1001). The court's marshal, however, certainly could ask the clerks whether they engaged in leaking conduct. If it turns out that one of them falsely denied involvement, a Section 1001 charge could be brought.



This, however, is far from the end of the conversation.

Corruptly Influencing an Official Proceeding

Enacted with the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1512(c)(2) makes it criminal to, among other things, corruptly influence an “official proceeding.” The issuance of an opinion certainly is part of an official proceeding, and, depending on the evidence, it is foreseeable that a law clerk could seek to corruptly (that is, wrongly, as in *United States v. Nordean*) influence a proceeding by, say, changing the outcome of the justices’ vote or the scope of the court’s holding, through external pressure, threat, intimidation, or otherwise.

Theft of Government Property

The taking of the confidential work product of the justices may also implicate 18 U.S.C. § 641, because, broadly described, it is the theft of government “property.” Perhaps the law clerk “stole” the paper (“thing of value”) on which the ruling was printed. If, as is likely, the value of the thing stolen is under \$1,000, however, we are in misdemeanor territory.

The more substantive question, characterized by a current circuit split, is whether confidential “information” qualifies as a “thing of value.” As the U.S. Court of Appeals for the Second Circuit put it more than 40 years ago, the government has a “property interest in certain of its private records which it may protect by statute as a thing of value.”

It is hard to disagree. After all, federal courts decide issues of enormous economic, social, and legal importance (and value). Advance notice of a court decision creating or removing an asserted right or privilege (or ruling in favor of one litigant or another in a business dispute) would appear to be especially “valuable.” (See also *United States v. Middendorf* —intangible confidential information is “property.”)

Disclosure of Confidential Information

The disclosure of confidential court information might also fit well within the parameters of the oft-overlooked misdemeanor statute, 18 U.S.C. § 1905 (prohibiting the “disclosure of confidential information generally”). Law clerks are federal employees, the information they obtain is “confidential,” it comes to them “in the course of [their] employment,” and the disclosure is not “authorized by law.” (*United States v. Wallington*—U.S. Customs Service employee running unauthorized background checks for a friend; the confidential information need not come from, nor be generated by, a private party.)

Although it is true that the only Section 1905 prosecutions thus far have been brought against executive branch em-

ployees, this bit of legal historiography offers little protection to judicial or legislative branch employees. After all, the text applies to any “officer or employee of the United States,” which includes, but is not limited to, any “department or agency thereof.”

Finally, the fact of a 5-to-4 split ruling, the outcome of a case, or similar information can be said to “concern” or “relate to” the judicial “process,” “operation,” or “style of work,”—at least, the prosecutor will so argue (although there is some room for defense counsel to claim otherwise).

Conspiracy to Defraud the U.S.

In 1919, Ashton Embry, a clerk to Supreme Court Justice Joseph McKenna, sent an opinion to Wall Street financiers ahead of a judgment involving a railroad company. He was indicted for having violated 18 U.S.C. § 371. The prosecution’s theory was that, by releasing the opinion early, the clerk and his “co-conspirators deprived the Court of the right to announce its decisions at the customary time.”

In short, the early release upset the court’s established custom. The district court rejected Embry’s motion to dismiss, but the prosecutor thereafter, for undisclosed reasons, dismissed the case. Although the case was not seen to its conclusion, the unfinished prosecution of Embry is interesting if for no other reason than that it belies recent assertions that law clerk leaking is terra incognita. (*Middendorf* —holding that intent to defraud by sharing intangible information may be “incidental to another primary motivation.)

The widespread claims that the criminal prosecution of a law clerk leaker would require a prosecutor to “cook up creative theories,” that it would be a “stretch” for the Justice Department to “even investigate the matter,” and that there “is no criminal statute” that makes the leaking of draft opinions “illegal” are off-base. When the facts call for it, the existing statutory framework will not stymie a prosecutor dedicated to protecting the integrity of the judicial process.

Member News

On August 13, legal ethics professor and CJS Special Advisor **Ellen Yaroshesky** was awarded the National Association of Criminal Defense Lawyers (NACDL) Champion of Justice Legal Award at the Association’s annual meeting.

CJS Vice Chair **Jaime Hawk** was sworn in as a judge at the King County Superior Court, WA, on August 17. Hawk has served as the Legal Strategy Director for Smart Justice at the ACLU of Washington since 2015, advancing criminal legal system reform.

UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Lawyers Fight Bill Forcing Them to Report Suspicious Client Acts

- **Bill would imperil attorney-client relations, ABA argues**
- **Rise of kleptocrats makes bill timing perfect, backers say**

Lawyers are pushing back against anti-money laundering legislation that would require them to report suspicious transactions by clients, as banks already must do. US House lawmakers led by Tom Malinowski (D-N.J.) and Maxine Waters (D-Calif.) are behind the provision in that body's version of the defense authorization bill. The requirement would also apply to accountants, payment service providers and trust companies.

Opponents worry the plan would disrupt attorney-client privilege and empower the Treasury Department to conduct random audits. "The audit power really is quite broad and unconstrained," Covington & Burling partner Nikhil Gore said in an interview.

The legislation, prompted in part by Pandora Papers disclosures last year, is aimed at shutting down what supporters see as loopholes in the Bank Secrecy Act that let oligarchs such as those allied with Vladimir Putin take advantage of US entities to launder money.

Passage of the language would prevent kleptocrats from being able "to use American law and accounting firms and trust companies to shelter their ill-gotten wealth," Malinowski said in a June statement.

The House in July with broad bipartisan support approved the annual defense bill containing the anti-laundering language. The House Armed Services Committee in the previous month had inserted the provision into the bill.

The House is set for a showdown later this year with the Senate. The Senate Armed Services Committee didn't include the anti-laundering language in its version of the bill the panel approved in June.

The full Senate hasn't yet acted on the defense legislation. Sen. Sheldon Whitehouse (D-R.I.) has said he backs the anti-laundering proposal and plans to introduce it.

Pandora Papers

The Pandora Papers investigation in October by the International Consortium of Investigative Journalists claimed that the Baker McKenzie law firm helped multinational companies and wealthy individuals avoid taxes through shell companies and trusts.

Malinowski and a bipartisan group of five colleagues introduced the Enablers Act, which the language in the defense bill is based on, four days after the allegations against the firm were published.

A firm spokeswoman referred a reporter to a statement that said, "Baker McKenzie performs comprehensive anti-money-laundering and sanctions compliance and background checks on all potential clients" as part of its risk management protocols.

ABA Concerns

The American Bar Association said the legislation would regulate services law firms provide, such as trust formation and company registration, and interfere with attorney-client relationships.

"The attorney-client privilege and the lawyer's ethical duty of confidentiality are bedrock legal principles," then-ABA President Reginald Turner said in July 5 letters to House and Senate leaders.

The ABA has been joined by other affected industries in lobbying against the Enablers Act, according to Senate lobbying registration forms filed in July—including the large cryptocurrency exchange Coinbase. As crypto companies have grown, federal agencies have increasingly targeted them for money laundering activities.

The latest version of the amendment to the House defense bill lists what the sponsors see as instances of lawyers enabling illegal acts. Those include aiding authoritarian and autocratic foreign leaders such as Teodoro Obiang, the vice president of Equatorial Guinea and son of the country's president, who embezzled millions of dollars used to purchase luxury assets in the US.

'Dirty Money'

The timing of the House proposal is perfect, given the Biden administration's emphasis on curtailing money laundering in the US, said Scott Greytak, director of advocacy for Transparency International US. Greytak cites Treasury Secretary Janet Yellen in saying the U.S. may be the number one place in the world to hide dirty money. "That has to change," he said.

Miscarriage, Stillbirth Prosecutions Await Women Post-Roe

- **Advocacy group says 1,300 women prosecuted from 2006-2020**
- **After ruling, enforcement falls to state, local prosecutors**

In Texas, 26-year-old Lizelle Herrera was arrested and charged with murder for self-induced abortion. In California, 29-year-old Adora Perez served four years in prison after giving birth to a stillborn son. And in Mississippi, Latice Fisher was jailed after losing her baby at 36 weeks after police found she'd searched for abortion information online.

Even before the toppling of *Roe v. Wade*, the prosecution of women suspected of purposefully or accidentally ending a pregnancy was on the rise. There has been a movement to use state laws on child endangerment, feticide or murder to arrest women whose pregnancies ended prematurely, reproductive rights lawyers say, and it may be a harbinger of what's to come.

"There's going to be a massive increase in cases like these with *Roe* out of the picture," said Mary McNamara, a San Francisco lawyer representing Perez, whose murder charge was dropped in May.

Already, about 1,300 women have been arrested or charged in the U.S. from 2006 to 2020 for their actions during pregnancy. That's three times the amount during the 33 years prior, according to the National Advocates for Pregnant Women.

The Supreme Court's move overturning *Roe* put into play existing or expected abortion bans in roughly half of US states. Most states don't currently have laws on the books that punish women directly for having abortions. A recent attempt to do so by Louisiana lawmakers (who helped draft legislation with a so-called abortion abolition group) failed after outcry from both pro- and anti-abortion groups.

But prosecutors have been using -- and misusing -- existing laws related to drug use in pregnancy, limits on medication abortions, and protection of fetuses to charge women for miscarriages, stillbirths or actions that lead to pregnancy loss.

Herrera's indictment and April arrest on a murder charge for a "self-induced abortion" that allegedly took place months earlier -- and was, per the district attorney, reported by the hospital that treated her -- outraged women's rights advocates. Her arrest came after Texas banned abortions past six weeks and empowered private citizens to sue medical professionals suspected of violating the ban and to seek bounties of at least \$10,000 per illegal procedure.

Herrera, who could not be reached for comment, was jailed for days with bail set at \$500,000 until the prosecutor dropped the indictment and conceded there was no crime.

Just three states have laws that directly criminalize women for self-induced abortions, all of which exempt life-saving situations. In Oklahoma, a woman who solicits or attempts to commit an abortion can face as much as one year in jail and/or pay a \$1,000 fine. In Nevada, a woman who seeks an abortion after the 24th week of pregnancy can be charged with manslaughter and face up to 10 years in prison. Women in South Carolina who self-manage their abortions outside of a hospital or clinic after their first trimester can face a misdemeanor charge and as much as two years in prison.

But the Herrera debacle raised new concerns that a reversal of *Roe* would put unchecked power in the hands of local prosecutors who could employ an array of other existing laws to prosecute those trying to exercise their reproductive rights.

'Open the Floodgates'

Those include more than 4,450 federal crimes still on the books, as well of tens of thousands of state statutes including conspiracy, attempt and accomplice statutes, according to a report by the National Association of Criminal Defense Lawyers.

Additionally, 39 states have criminal laws giving fertilized eggs, embryos, and fetuses the status of separate crime victim, warning it could "open the floodgates to massive overcriminalization," the report said.

Perez, who admitted to the use of methamphetamines during her pregnancy and declined to be interviewed through her lawyer, originally took a plea agreement to a manslaughter charge. In March, a California judge reversed her conviction and said the law she allegedly broke didn't exist. "There is no crime in California of manslaughter of a fetus," Kings County Superior Court Judge Valerie R. Chrisakis wrote.

McNamara, her lawyer, said that the prosecutor in Perez's case alleged that her methamphetamine use had caused the stillbirth without any scientific evidence to support it. Abortion-rights groups say between 15 to 20% of pregnancies end in miscarriage or stillbirth with medical science unable to conclude the cause. But prosecutors and coroners have brought charges against women for allegations of drug use in pregnancy, the use of abortion-inducing medicines in advanced stages of gestation or outside of an approved medical context, and even for allegations of killing a fetus during a suicide attempt.

Many of the arrests are related to drug use. There are 24 states that consider drug use in pregnancy to be child abuse and 25 that require health-care workers to report suspected prenatal drug use, according to Guttmacher Institute, a nonprofit that tracks reproductive health issues.

Such prosecutions can have devastating effects.

Insufficient Evidence

In California's Central Valley, Chelsea Becker was charged with murder in 2019 for delivering a stillborn fetus allegedly after consuming methamphetamine, according to court records. Becker spent 16 months in jail until a California judge in 2021 dismissed murder charges, ruling that prosecutors failed to present sufficient evidence she'd ingested drugs knowing it could cause a stillbirth, according to one of her lawyers, Samantha Lee, of Advocates for Pregnant Women.

What's more, Lee said that the pathologist later testified they hadn't reviewed Becker's medical records and were unaware she'd suffered three infections that could've resulted in the stillbirth. During Becker's incarceration, she lost custody of a young son.

"Experiencing the loss of my baby alone caused a lot of trauma," she testified to California legislators in June in support of a bill that would ensure no one in the state would be prosecuted for ending a pregnancy. "If the hospital had never involved law enforcement due to this stillbirth happening, I would still have custody of my son." Becker declined to be interviewed through her attorney, Lee.

In both Perez and Becker's cases, the prosecutor misused a California law that is intended to hold accountable those who harm pregnant individuals, according to California Attorney General Rob Bonta, who in January issued an alert to district attorneys warning against "improper and unjust applications of the law."

Pro-choice advocates fear that now that abortion rights are no longer constitutionally protected, more women will find other means to ending unwanted pregnancies if they can't travel out of state for a legal abortion. Should they develop a medical problem, women may find themselves under criminal scrutiny -- even though there isn't a way to distinguish between a self-medicated abortion and a spontaneous miscarriage.

Fisher was charged with second degree murder after she experienced a stillbirth at home and a state medical examiner claimed the baby had been born alive and died of asphyxiation, according to Oktibbeha County court records. Prosecutors said police also went through Fisher's mobile phone data and allegedly found searches for "buy abortion pills," and mifepristone and misoprostol, two medications used for self-managed abortions. She allegedly then purchased misoprostol, a drug that causes the uterus to contract, they said.

The murder charge against Fisher was eventually dismissed after the district attorney admitted doubt about the validity of the tests used to claim the baby had ever been born alive.

"The point of criminalizing is just to instill fear," said Laurie Bertram Roberts, co-founder of the Mississippi Reproductive Freedom Fund and the executive director of Yellow Hammer

Fund, who worked to raise funds and bail Lattice Fisher out of jail in 2018. "Anytime someone Googles her for a job that mugshot with a story of her being indicted for a second-degree murder will always be there no matter what she does in life."

But the case has raised privacy concerns about the types of digital information that could be used by local prosecutors to make these types of criminal cases against women in the future. Apps that help women track their periods and ovulation aren't covered under federal law that protect patient health data. The Federal Trade Commission settled a case last year with fertility app Flo Health Inc. after it allegedly compromised users' sensitive health information.

'Personhood'

Another tactic being used to target women are fetal "personhood" laws under which a fetus has rights akin to a child already born.

"The broadening of protection for the unborn creates risks for pregnant people," according to **Cynthia Soohoo**, a professor at CUNY law school in New York. "It's not surprising that overzealous prosecutors have brought murder and feticide charges for abortions even in cases where the prosecution is not authorized by the statute."

Many of these prosecutions came after the pregnant woman confided in her doctor or health provider about having taken a half a Valium, having a drink or using an illicit drug during their pregnancy, lawyers for these women said.

"These women came in seeking prenatal care, thinking 'I can speak honestly to my doctor so that I can have a healthy life and a healthy pregnancy,'" said Michele Goodwin, a law professor at the University of California, Irvine and author of the book, "Policing the Womb: Invisible Women and the Criminalization of Motherhood."

"These women were doing what they're told to do -- to get prenatal care," Goodwin said. At the same time, "prosecutors were going after these women for laws that were not even on the books."

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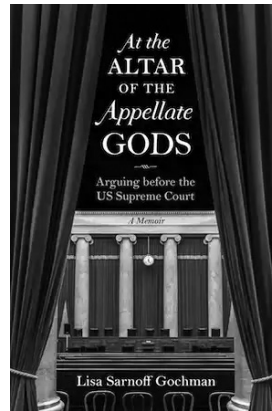
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At the Altar of the Appellate Gods: Arguing Before the US Supreme Court

By Lisa Sarnoff Gochman

(Indiana University Press, 2022)



Reviewed by Elizabeth Kelley

In 2000, the Supreme Court's decision in *Charles C. Apprendi, Jr. v. New Jersey* made a lasting impact on sentencing law in the United States. The book, *At the Altar of the Appellate Gods: Arguing before the US Supreme Court*, tells the story of how the experience of arguing *Apprendi* made a lasting impact on one of the attorneys.

In 1999, Lisa Sarnoff Gochman was contently working in the appellate division of the New Jersey Attorney General's Office when she was assigned to respond to the brief filed by Charles Apprendi. Mr. Apprendi had pled guilty to shooting multiple rounds into the house of a family. At sentencing, the judge imposed an additional two years on Apprendi's statutory maximum sentence of ten years, for a total of twelve years. The additional years reflected the judge's finding that the defendant had acted with racial animus toward the African-American family which lived in the home. After Apprendi the intermediate Court of Appeals affirmed Apprendi's sentence, he appealed to the New Jersey Supreme Court. Here, Sarnoff was assigned to write the State's response. Her life and legal career would be forever changed.

At slightly under 200 pages (including endnotes) *At the Altar of the Appellate Gods* is a fast-paced, behind-the-scenes account of Sarnoff's preparation for oral argument culminating in that monumental day in front of the nine justices. She is by turns reverent and irreverent, sometimes self-deprecating, but always cognizant of her responsibility to the State of New Jersey and ultimately, the family who were victimized by Apprendi. Necessary descriptions of the procedural history of the case and explanations of sentencing factor-versus-element-of-the-crime are leavened by passages such as the following:

The wild roller coaster I was strapped into was swiftly climbing the near-vertical lift hill. I secured my lap bar, raised both hands high in the air, and squeezed my eyes tight as the coaster nosedived into its first cork-screw turn, bound for Washington, DC. (p. 61)

Elizabeth Kelley is a criminal defense lawyer with a nationwide practice focused on representing people with mental disabilities. She is a member of the editorial board of Criminal Justice magazine.

We share in the author's initial disappointment that her boss, the Attorney General John J. Farmer, Jr., wants to argue the case himself before the high court after it was Sarnoff who handled the oral argument before the New Jersey Supreme Court and had filed the brief in response to Apprendi's brief before the US Supreme Court. Similarly, we are relieved when Mr. Farmer, after studying her briefs, realizes that it indeed should be Sarnoff who argues before the high court.

We can identify with the last-minute stress of packing for her trip to DC and worrying that she might have forgotten something. We groan over the fact that the valet at her hotel crashed her car, but get a kick out of the fact that hotel management granted her use of the hotel's limo and its driver.

The author brings us with her as she faces the onslaught of moot courts in DC in preparation for her argument. We share her amusement and appreciation that Justice Clarence Thomas asked a question during her argument. And we cheer as she withstands the barrage of questions by Justice Scalia. Sarnoff gleefully quotes Supreme Court reporter Dahlia Lithwick:

I wouldn't be surprised to hear that Gochman had to be carted out of court today. Had she been Scalia's daughter, brought home in a squad car with a hickey at 3 a.m., she would not have had a tougher twenty minutes. (p. 142)

No need for a spoiler alert. Gochman lost her case in a 5-4 decision. But she is philosophical about this apparent loss:

Winning my case would have been nice, but I'm over that. 'Tis better to have argued in the United States Supreme Court and lost than never to have argued at all. ... Writing this memoir has been the optimal way to relive the *Apprendi* argument without the angst of the real thing. There was no time to savor all the little details while caught up in the maelstrom or to envision how it would all pay out. Arguing in the United States Supreme Court was this appellate lawyer's dream, come true, and I got to relive my dream through writing this memoir. My next book is tentatively titled *Milking It for All Its Worth*. (p. 176)

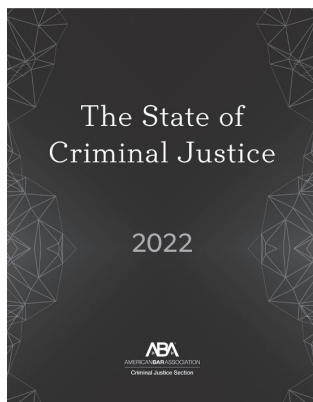
We should be glad that Sarnoff took the time to write this book and allowed us to relive this experience with her.

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Edited by Mark Wojcik



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