RIVERSIDE LAWYER

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In This Issue

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RIVERSIDE LAWYER MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:

To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities, Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

The Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

Submission of articles and photographs to Riverside Lawyer *will be deemed to be authorization and license by the author to publish the material in the* Riverside Lawyer.

The material printed in the Riverside Lawyer *does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

Calendar

November

11 **Veterans' Day Holiday**
RCBA Offices Closed

12 **Civil Litigation Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Chris Heikaus Weaver
Topic: "Developments in Employment Law"
MCLE – 1 hour General

Juvenile Law Section
Noon – 1:30 p.m.
Juvenile Courthouse, Dept. J5
9991 County Farm Road, Riverside
Speaker: Tiffany Ross, LCSW
Topic: Children with Mental Illness & Crisis Intervention"
MCLE – 1 hour General

Joint RCBA & SBCBA Landlord/Tenant Section
6:00 p.m. to 8:00 p.m.
Le Rendezvous Café, 201 E. Valley Blvd., Colton
Topic Discussion about the new law AB 1482
MCLE – 1 hour General

15 **General Membership Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Topic: "Historic Civil Liberties Matters in Riverside County History"
Speakers: Robin Peterson ("*The People of the State of California v. Jukichi Harada*"); Andy Roth ("*Elizabeth Bouvia v. County of Riverside*"); Dan Woods ("*Log Cabin Republicans v. United States*"); Jack Clarke, Jr. ("No Easy Way – Integrating Riverside Schools).
MCLE – 0.75 hour General

19 **Family Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: David Notowitz, President & Founder, NCAVF
Topic: "13 Tips to Make You a Hero with Video, Audio & Digital Evidence"
MCLE – 1 hour General

20 **Estate Planning, Probate & Elder Law Section**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Michael Gouveia
Topic: "The Dirty, Rotten Scoundrel Heir Filed Bankruptcy — What Your Estate Planning Client Needs to Know!"
MCLE – 1 hour General

28 & 29 **Thanksgiving Holiday**
RCBA Offices Closed

EVENTS SUBJECT TO CHANGE.
For the latest calendar information please visit the RCBA's website at riversidecountybar.com.

CORRECTION:
Due to an editing error on page 23 of the October 2019 *Riverside Lawyer*, the article entitled *Judicial Profile: Honorable Michael J. Raphael* incorrectly stated that he was confirmed by "the California Senate" instead of "unanimously confirmed." The online version of the article has been corrected and can be found at the following link:

riversidecountybar.com/Documents/Magazine-2019/Riverside-Lawyer-Magazine-volume-69-9-October-2019.pdf

President's Message

by Jack Clarke, Jr.

A Thought About That Sweet Thing We Call Privacy

Before I make a short comment on this month's subject of the *Riveride Lawyer*, Privacy, I want to highlight another aspect of the RCBA – the section chair persons. As I hope you all know, the bar has regular meetings of specialty sections of the association. These sections provide high quality, focused programs and information to make sure that there is some topic available for almost all of us. Participation in the sections is a great way to increase your professional network (without the all seeing eye of social media), increase subject matter competence, and gain MCLE units. This year's section chairs are:

- Appellate Law — Susan Beck
- Business Law — John Boyd, Craig Marshall
- Civil Litigation — Stefanie Field, Megan Demshki
- Criminal Law — Paul Grech, Lori Myers
- Environmental & Land Use Law — Melissa Cushman
- Estate Planning, Probate & Elder Law — Herb Chavers
- Family Law — NaKesha Ruegg, Kristen Holstrom
- Human/Civil Rights — D.W. Duke
- Immigration Law — Kelly O'Reilly, Aggie Dolinska
- Juvenile Law — Alexandra Fong, Maura Rogers
- Landlord/Tenant Law (joint with SBCBA) — Barry O'Connor, Paul Goodwin
- Solo & Small Firm — Drew Gilliland, Taylor Bristol Warner

If you want to contact one of the chair persons, just contact Executive Director Charlene Nelson and she will connect you to the right person. I am going to endeavor to attend a good number of the section meetings this year and I hope you will attend the meetings you find relevant and/or interesting.

Now, in order to make my small observation on the issue of privacy, I need to put two quotes in juxtaposition to each other.

The first quote is from Justice Brandeis, in *Olmstead v. United States* (1928) 277 U.S. 438, 478. Justice Brandeis wrote:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significances of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

The next quote was written by Justice William O. Douglas in *Lener v. Casey* (1958) 357 U.S. 468,

> "There are areas where government may not probe. Private citizens, private clubs, private groups may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose his beliefs, his philosophy, his associates. But government has no business penalizing a citizen merely for his beliefs or associations."

This "right to be left alone," I agree is the right most valued by civilized folk. If that right, I believe, was also broadly embraced as a value by which a large majority of us lived, that could improve our society on many fronts. It would reduce pettiness and envy. It would also decrease racial tension and homophobic tendencies. Don't get upset just because someone is over there doing some small thing you just can't stand. Just let them be. Of course, the right of privacy can go too far. That is why Justice Douglas' quote if read too broadly and out of context of the case makes me wince just a touch. I come from a lineage that was excluded for no other reason than the most superficial of traits. Traits which bore no relation to ability, intelligence, competence, or internal value system. I remember my parents telling me that they could not join certain private clubs just because of their ancestry. I mean, the club members had their own right of privacy, correct? Thank God, we have advanced a good way; I can't say a long way. But the dynamic concept that we can have a "right of privacy" and its implications in the current political environment in the age of social media is of as great importance as it has ever been. I hope you enjoy reading this month's *Riverside Lawyer*.

Jack Clarke, Jr. is a partner with the law firm of Best, Best & Krieger LLP.

Barristers President's Message

by Paul Leonidas Lin

RCBA Barristers Event Privacy Notice

The RCBA Barristers (hereinafter "Barristers") will be taking pictures and recording video footage at our events. Given that our events are public areas with controlled access, and that we do not intend to photograph you directly but rather groups, we do this based on our legitimate interest to document our events and market their success.

In other words, if you're planning to tell your supervisor that you need to leave early or tell your significant other you're coming home late because of a networking event, don't let them read this column or follow us on our various social media platforms, because there will be photos of you eating, drinking, and being merry.[1]

That said, thank you to everyone for joining us for our first two events of the year. There were many new faces (most of which from the New Attorney Academy), some familiar friends, and the usual suspects—namely the ragtag bunch of misfits that make it to every event. For those that missed it, we started the year off with a happy hour at Lake Alice where we disappointedly watched the Packers take the first and—as of the writing of this article—only loss for the season. Go Pack Go!

However, the real treat so far was our beer tasting and MCLE event hosted with JAMS at the Riverside Law Library. This is the third year that JAMS has graciously agreed to co-host this event with us. This year we were lucky to have Lexi Myer, a JAMS Neutral, present on the elimination of bias. Of course, as is tradition for a Barristers event, we had a beer tasting and appetizers before and after the MCLE training. Thank you again to Stacee and Karla from JAMS for all the hard work you did throwing this event and letting us put our name on it. We hope to continue the tradition next year.

Unlike a certain social club where the first two rules are to not talk about the club, the Barristers' first two rules are 1) talk early about our events and 2) talk often about our events. Invite everyone you know to come to our events! You don't have to be a Barrister (37 years or

1 Exception: If and when the whiskey shots come out, cameras are put away because what happens in Barristers Happy Hours, stay in Barristers Happy Hours.

younger, or within your first 7 years of practice) to come to our events—I'm looking at you Cathy Holmes who did a wonderful job as the MC at the RCBA installation dinner this year. We welcome everyone and hope to see everyone at our next events.

Upcoming Events:

- **Saturday, November 2** – Hike with the RCBA Furristers! Meet at 8:30 a.m. Hike starts at 9:00 a.m. Outdoor Brunch at Heroes immediately after.
- **Friday, November 15** – Happy Hour at ProAbition Whiskey Lounge, starting at 5:00 p.m.
- **Thursday, December 12** – Elves Wrapping starting at 5:00 p.m. at the RCBA Building with Happy Hour at Wolfskill to follow.

Follow Us!

Stay up to date with our upcoming events!

Website: RiversideBarristers.org

Facebook: Facebook.com/RCBABarristers/

Instagram: @RCBABarristers

Paul Leonidas Lin is an attorney at The Lin Law Office Inc. located in Downtown Riverside where he practices exclusively in the area of criminal defense. He is the immediate past president of the Asian Pacific American Lawyers of the Inland Empire (APALIE). Paul can be reached at PLL@TheLinLawOffice.com or (951) 888-1398.

Employee Privacy Rights Just Got Trickier for California Employers

by Jamie Wrage

The California Consumer Privacy Act of 2018 ("CCPA") provides that, beginning January 1, 2020, consumers have various rights with regard to personal information held by certain businesses. The new law provides the right for employees or job applicants (who qualify as "consumers" under the law) to request disclosure of specific personal information collected and to require that the information be deleted. The bright side for some smaller businesses is that the CCPA applies only to for-profit businesses that have annual gross revenue over $25 million; or buy, sell, share or receive personal information of 50,000 or more consumers; or derive 50% or more of their annual revenue selling personal information.

While it applies to employers too, the CCPA casts a much wider net in its attempt to protect California consumers from the misuse of their personal information. Beginning January 1, 2020, on the request of any "consumer," a covered business must deliver the information it has collected on a consumer to the consumer free of charge within 45 days of receiving a verifiable request. The information must also be destroyed upon request. A consumer cannot be required to create an account to make such a request to disclose or destroy personal information.

The CCPA further expands all consumer privacy rights by providing that when collecting personal information, a covered business must, at the time of collection, inform the consumer about the categories of information being collected and inform the consumer of the purposes for which that information will be used. Finally, a civil class action is authorized against any business that violates its duty to keep personal information collected from consumers safe from unauthorized access and exfiltration, theft or disclosure. Businesses that allow unauthorized disclosure or use are subject to statutory damages ranging from $100-$750 and consumers have the right to file a PAGA-like representative action to collect those.

In conjunction with these rules, the CCPA places new burdens on California employers in the collection and handling of personal information of employees. An employee or job applicant is considered a "consumer" under the CCPA. Thus, all of the new requirements discussed above apply to employers that otherwise meet the threshold requirements to be subject to the statute. The one bright light for such employers is that an amendment was recently signed into law (October 11, 2019) providing them temporary relief from the new requirements—a one-year delay.

This amendment (AB 25) exempts from the CCPA, until January 1, 2021, information collected "by a business in the course of the natural person acting as a job applicant to, an employee of, director of, officer of, medical staff member of, or contractor for that business."[1] Thus, so long as information is collected only for the purposes of employment, covered employers generally do not have to comply with the CCPA until January 1, 2021.

A diminished expectation of privacy in the workplace is common. Employees are often notified through policies and handbooks that their workplaces may be searched. Technology policies inform employees that their computer use, emails, and voicemails may be monitored. So long as the policies are clear, such policies have been regularly upheld by the courts. Beginning January 1, 2021, in additional to other privacy disclosures, employers must also inform employees regarding the categories of personal information the employer has collected and the purposes for which the information will be used. The definition of the term "personal information" is very broad and includes, but is not limited to, a person's name, alias, IP address, email address, signature, social security number, physical characteristics or description, telephone number, passport number, driver's license or state identification card number, insurance policy number, education information, employment history, bank account number, credit card number, financial information, medical information, health insurance information, internet activity, biometric information, geolocation data, and "[i]nferences drawn" from any other confidential information used "to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes."[2] Thus, covered employers should start thinking now about how they will modify their policies and practices to comply with the new law.

While there is no private right of action to enforce the requirements of the CCPA (yet), if there is unauthorized

1 Civ. Code § 1798.145(g)(1)(A).
2 Civ. Code § 1798.140(o)(1)

disclosure of protected data, the CCPA provides for statutory damages in a PAGA-like action that allows any consumer to bring a claim on behalf of all similarly-situated consumers (employees/applicants). And it must be noted that this enforcement provision is not delayed in its application under AB 25. So internal procedures to protect employee information from authorized use or disclosure must be immediately reviewed.

In summary, any for-profit business that meets the threshold requirements of the CCPA should:

1. Immediately review internal procedures in place to protect employee data from unauthorized use or disclosure that could result in very expensive statutory penalties; and
2. By January 1, 2021:
   a. Prepare and deliver notices to employees informing them what personal information the company has collected about them and how it may be used;
   b. Update employment privacy disclosures and policies to comply with the new law going forward;
   c. Set up procedures to handle requests for information under CCPA and to deliver the information to the employees or job applicants in the proper timeframe; and
   d. Set up procedures for destroying employee/job applicant information upon proper request.

Jamie E. Wrage is a shareholder at Stream Kim Hicks Wrage & Alfaro, PC, who practices employment law and complex business litigation.

Dog Sniffs and Traffic Stops

by Victor Lee

The Fourth Amendment protects personal privacy against governmental intrusion, and more specifically guarantees the right to be free from "unreasonable searches and seizures."[1] It is well established, however, that using a trained dog to sniff for the presence of hidden contraband is not the sort of search that implicates privacy interests protected by the Fourth Amendment.[2] The United States Supreme Court has reasoned that a dog sniff "does not expose noncontraband items that otherwise would remain hidden from public view."[3] The dog sniff has been distinguished on this basis from, for example, the use of a thermal imaging device to peer inside a residence, which might reveal "'intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'"[4]

Thus, perhaps counter-intuitively for those unfamiliar with the case law, when a police officer has a dog sniff the exterior of a car for the odor of contraband during a traffic stop, the officer is not conducting a search within the meaning of the Fourth Amendment. But the officer has conducted a seizure, since a traffic stop is a form of temporary detention.[5] The constitutional question, then, is whether or not that seizure was reasonable under the circumstances.

A traffic stop is reasonable, and therefore permitted under the Fourth Amendment, so long as the officer has reasonable suspicion that the driver has committed a traffic violation.[6] The officer need not have any additional suspicion that the detained vehicle contains contraband to justify conducting a dog sniff of the exterior of the car during the traffic stop.[7] All that matters is that the initial stop was justified by reasonable suspicion of a traffic violation.

The United States Supreme Court recently emphasized, however, that a traffic stop may not be extended in length to allow for a dog sniff to be completed. In *Rodriguez v. United States*, the driver's detention was extended seven or eight minutes after the officer had completed the "mission" of the traffic stop and issued a written warning so that a back-up officer could arrive and assist with conducting a dog sniff of the exterior of the car.[8] The Supreme Court found that the driver's Fourth Amendment rights had been violated, reasoning that police authority to detain a driver on a traffic stop "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."[9] The police officer "may conduct certain unrelated checks during an otherwise lawful traffic stop," including conducting a dog sniff of the exterior of the car.[10] These checks unrelated to the "mission" of the traffic stop may not, however, be done in a way that prolongs the stop even a de minimis amount.[11] Furthermore, the "critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop' . . . ."[12]

Applying *Rodriguez*, a recent published appellate opinion, *People v. Vera*, affirmed a San Bernardino County narcotics conviction arising from a dog sniff conducted during a traffic stop for a window tint violation.[13] The Court of Appeal found no evidence that conducting the dog sniff prolonged the traffic stop in any way. The officer who pulled Vera over, after completing his initial investigation, retrieved both his citation book and his dog from his patrol car at the same time.[14] He then handed the citation book to a second officer already on the scene, asking him to write up a warning for the window tint violation, before running his dog around the car.[15] The dog alerted for the presence of narcotics while the second officer was still writing the warning, and Vera made no attempt to show that the second officer took an unusual or unreasonable amount of time to write it.[16] The Court of Appeal found the record provided "no reason to conclude that Vera's traffic stop was unconstitu-

1 U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 9.
2 *Illinois v. Caballes* (2005) 543 U.S. 405, 409 (*Caballes*).
3 *United States v. Place* (1983) 462 U.S. 696, 707.
4 *Caballes, supra,* 543 U.S. at pp. 409-410, quoting *Kyllo v. United States* (2001) 533 U.S. 27, 38.
5 *Arizona v. Johnson* (2009) 555 U.S. 323, 330.
6 *Id.* at p. 333.
7 *Caballes, supra*, 543 U.S. at p. 408.
8 *Rodriguez v. United States* (2015) ___ U.S. ___, 135 S.Ct. 1609, 1613 (*Rodriguez).* The "mission" of a traffic stop includes not only issuing a ticket or warning, but also "'ordinary inquiries incident to [the traffic] stop.'" (*Id*. at p. 1615.) Such inquiries typically "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (*Ibid*.)
9 *Id.* at p. 1614. Note that reasonableness here does not mean the reasonable duration of traffic stops in similar circumstances, but the amount of time actually necessary to perform the stop: a police officer does not earn "bonus time to pursue an unrelated criminal investigation" by completing traffic-based inquiries quickly. (*Id.* at p. 1616.)
10 *Id.* at p. 1615.
11 *Id.* at pp. 1615-1616.
12 *Id.* at p. 1616.
13 *People v. Vera* (2018) 28 Cal.App.5th 1081, 1083-1085 (*Vera*).
14 *Id.* at pp. 1084.
15 *Id.* at pp. 1084-1085. As it turns out, the officer who initiated the traffic stop and whose dog sniffed Vera's car had the last name "Maltese." (*Id.* at p. 1084.) The opinion does not reveal the name or breed of Officer Maltese's dog.
16 *Id*. at pp. 1084-1085, 1089.

tionally prolonged by the use of a dog to sniff his vehicle."[17]

Other jurisdictions, too, "have uniformly interpreted *Rodriguez* as requiring a particularized review of the individual stop to determine, sometimes on a minute-by minute basis, whether time has been added to the stop through a dog sniff."[18] Indeed, even a second-by-second analysis may be necessary. In a Utah case, for example, the defendant argued that the traffic stop had been unconstitutionally prolonged because the officer who pulled him over took a few seconds to radio for a K-9 officer to come to the scene, thus adding "'more time than necessary' to complete the mission of the stop."[19] The Utah Court of Appeal affirmed the denial of the defendant's motion to suppress, finding that there was no evidence that the officer's radio call had delayed completing the stop at all, since he "may have been waiting for police dispatch to relay to him the results of the records check when he made the request for the dog sniff."[20] The court seemed skeptical that "a few-second distraction from an officer's focus on resolving the traffic offense would violate the Fourth Amendment even if it could be shown to have caused a corresponding few-second delay in the overall duration of the traffic stop."[21] It is hard to avoid that conclusion, however, if the Supreme Court's rejection of even "de minimis" prolongation of a traffic stop is to be taken literally.[22]

17 *Id.* at p. 1089.
18 *Underhill v. State* (Fla.Ct.App. 2016) 197 So.3d 90, 92.)
19 *State v. Sosa* (Utah.Ct.App. 2018) 427 P.3d 448, 451.
20 *Ibid.*
21 *Ibid.*
22 *Rodriguez, supra,* 135 S.Ct. at pp. 1615-1616.

Similarly, a North Dakota appellate court was asked to determine whether a few seconds taken for one deputy to "hand off" the task of writing a traffic ticket to a second officer, so that the first officer would be free to conduct the dog sniff, unconstitutionally prolonged the traffic stop.[23] The court concluded that "time taken by one officer to hand off traffic stop duties such as completing the ticket to another officer is within the mission of the stop."[24] In *Rodriguez*, however, the Supreme Court emphasized that "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission."[25] The North Dakota officer could have written the ticket himself in a slightly shorter time than it took for the second officer to be brought up to speed and then write the ticket, and the first officer only handed off ticket-writing responsibilities to facilitate the dog sniff. There is at least a tension between the North Dakota court's reasoning and the Supreme Court's analysis in *Rodriguez*.

The opportunities for hair splitting opened up by so intensely factual an inquiry as that required by *Rodriguez* are probably not actually infinite. They may seem so, however, to the attorneys who will get to litigate them and the courts that get to rule on them in the years to come.

Victor Lee is an appellate court attorney at the Court of Appeal, 4th District, Division 2. The views expressed in this article are solely his own.

23 *State v. Vetter* (N.D. 2019) 927 N.W.2d 435, 442.
24 *Ibid.*
25 *Rodriguez, supra,* 135 S.Ct. at p. 1616.

* ATTENTION RCBA MEMBERS *

How would you like to receive (or read) the *Riverside Lawyer* magazine?

Some members have told us they prefer reading the online version of the *Riverside Lawyer* (available on our website at www.riversidecountybar.com) and no longer wish to receive a hard copy in the mail.

OPT-OUT: If you would prefer not to receive hard copies of future magazines, please let our office know by telephone (951-682-1015) or email (rcba@riversidecountybar.com).

Thank you.

Abortion and the Right to Privacy

by Charles S. Doskow

Privacy made its debut in the progressive jurisprudence of the United States Supreme Court in 1965 in *Griswold v Connecticut* (381 U.S. 479 (1965)), in which the Court held unconstitutional a state law which criminalized the private use of birth control by married persons. Justice Douglas found that earlier cases suggest that some provisions of the Bill of Rights have penumbras, formed by "emanations from those guarantees that give them life and substance."

"Various guarantees," he wrote "create zones of privacy."

The rights referred to involved the education of children, but Douglas added the First, Third, Fourth and Fifth Amendments to those guarantees.

In striking down the Connecticut law, he ruled, "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."

(In fairness it should be noted that Justice John Marshall Harlan had expressed similar views four years earlier dissenting in *Poe v Ullman* (367 U.S. 497 (1961)) a case attacking the same statute. That case was dismissed for lack of standing.)

Flash forward eight years to 1973.

Justice Harry Blackmun wrote for a seven judge majority in *Roe v Wade* (410 U.S. 113 (1973).); "The Constitution does not explicitly mention any right of privacy. In a line of decisions, [the] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of personal privacy, does exist under the Constitution."

And the right of privacy, regardless of from what freedom one deems it derived, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

There has been a lot of law argued and decided since *Roe v Wade*, but Justice Blackmun made the essential statement of the right clearly and forcefully.

Roe has been litigated constantly since 1973. Many state and federal laws have been passed to restrict the contours of the rights Justice Blackmun laid out. His trimester analysis was replaced in *Planned Parenthood of Southeastern Penn. v Casey* 505 U.S. 833 (1992)), in which *Roe*'s essential holding was affirmed by a 5-4 vote, and the trimester replaced by a "substantial burden" test.

Roe has divided the country since its decision. Both federal and state legislation have sought to limit the right, or eliminate it altogether, and court decisions and legislation have narrowed it. Republican administrations have on several occasions expressly asked the court to overrule it.

The conservative mantra has long been that the Court should overrule *Roe v Wade*, and its survival has often hung by a thread. It still hangs by a thread.

The two most recent appointments to the Supreme Court have created a five-vote majority which it is widely assumed will, when it gets the chance, overrule *Roe*. Those appointments filled two vacancies: one was created by the death of Antonin Scalia, which the Democrats strongly believe was stolen by a Republican Senate's refusal to even hold hearings on President Obama's appointment of Merrick Garland as a successor. The other was created by Justice Anthony Kennedy's retirement. They join Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas as a conservative (read Republican) bloc.

The question of the moment is whether that new majority will take advantage of the opportunity that has now presented itself.

Two cases provide the opportunity. Texas (in 2013) and Louisiana (shortly thereafter) were among the states passing laws intended to make abortion virtually or totally impossible in each state. These laws were designed to force a Supreme Court decision which they hoped would eliminate the constitutional right guaranteed by *Roe*.

On October 4, 2019, the Supreme Court granted certiorari in *June Medical Services v. Gee* (905 F.3d 787 (2018), stay granted 139 S.Ct. 663 (2019), cert. granted — S.Ct. —, 2019 WL 4889929) a case from Louisiana, in which a state law expressly intended to be a vehicle to overrule *Roe* was approved by the Fifth Circuit Court of Appeals.

To understand the question presented in *June Medical* it is necessary to return to a case from Texas. In *Whole Women's Health v Hellerstadt* 136 S.Ct. 2292 (2016), the Supreme Court in 2016 found that a Texas law violated a woman's right to abortion by imposing an undue burden on that right. The 5-4 majority included Justice Anthony Kennedy.

The Texas law had two questionable provisions. One required any physician performing an abortion to have admitting privileges in a hospital within 30 miles of the facility where the procedure is performed. Another provision required that any facility in which abortions occurred must meet certain standards specified in the law.

The District Judge who tried the constitutional challenge to the law found that the first requirement would

reduce the number of facilities performing abortions from 40 to 20, would double the number of women living 50 miles or more from a clinic, and that the available venues would drop to 7 or 8 if the surgical-center standards took effect.

Based on those findings, the court granted an injunction against the law's taking effect, finding that the surgical-center requirement and the admitting privileges requirement each and together constituted an undue burden. Together the two provisions were an "impermissible obstacle as applied to all women seeking a previability abortion."

After the Court of Appeals reversed, the Supreme Court granted certiorari, accepted the holdings of the district court, and held the law unconstitutional. Its opinion included a holding that the two requirements provided "few, if any health benefits to women" while posing a substantial obstacle. Justice Anthony Kennedy, now retired, provided the swing vote of a 5-3 decision.

We move on to Louisiana, where a law was passed virtually identical to the statute invalidated in *Whole Women's Health*. Stare decisis, the requirement that a court follow precedent, should have decided the case in the Fifth Circuit. Not so.

When the Louisiana law was challenged in *June Medical Services*, the district court enjoined it on the basis of the *Whole Women's Health* precedent. Despite the governing law in the case having been decided by the Supreme Court, the Fifth Circuit Court of Appeals reversed, and ultimately upheld the law.

When the case reached the Supreme Court earlier this year the plaintiffs asked the Court to stay the ruling from going into effect, pending Supreme Court argument and decision. Five votes are required to grant a stay. Chief Justice Roberts voted with the four vote liberal (read Democratic) justices to grant the stay, giving no reasons. The other four (Republican) judges voted to deny the stay.

Although granting a stay requires no opinion by any Justice, and the affirmative voters gave none, Justice Kavanaugh gave his reasons for voting to deny it at some length. He discusses exactly how many doctors could in fact obtain admitting privileges, and tied the outcome of the case to that number. (The evidence at trial showed that there was little chance of the three doctors in question obtaining the necessary privileges.) And the evidence in the *Whole Women's Health* trial showed that such a requirement had little or no relevance to the health aspects of abortion.

That is the posture of the case, which awaits a date for oral argument. The briefing schedule established by the Supreme Court extends through February, which makes it unlikely that a decision will come down during the current Court term, which ends in June.

Once briefed and argued, the Court has several alternative courses of action available to it.

It could decide the case for the state and overrule *Roe v Wade*; it could decide the case for the state and not overrule *Roe*, finding that on the facts of the case there was not an undue burden, while allowing that to remain the test under *Roe*.

Or it could reverse the Fifth Circuit and rely on the law of *Whole Women's Health* as binding precedent.

The Chief Justice, although he dissented in *Whole Women's Health*, provided the fifth vote to stay the Court of Appeals decision in *June Medical*. (That stay prevents the Louisiana law from going into effect until the Supreme Court decides the case.) There is speculation that Roberts' main concern is for the Court as an institution, its reputation, and his legacy. These considerations might, some have opined, cause him not to want to be remembered as the Chief Justice of the Court that overruled a woman's right to choose.

The Chief Justice in 2012 voted against his four conservative colleagues and found a way to uphold Obamacare.[1] It was speculated at the time that considerations of the institutional role of the Supreme Court motivated his position. Whether his decisive vote granting the stay reflects any considerations other than the merits of the case is one great unknown, and, again, of much speculation and comment.

Plaintiffs have clearly sought to focus attention on stare decisis and the principles upheld in *Women's Whole Health*. Their application for certiorari to the Supreme Court stated the Question Presented as "Whether the Fifth Circuit's decision upholding Louisiana law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's holding in *Women's Whole Health*."

Although these abortion cases no longer use the language of privacy, there is no doubt that they owe their origin to the vision of past Courts that the Constitution's explicit rights are to be read broadly and taken to their logical destination. Whether that vision continues to move forward with respect to woman's rights is a subject which this Court will shortly decide.

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1 *National Federation of Independent Business v. Sibelius* 507 U.S. 519 (2012).

Privacy Matters: Revisiting Brandeis' Right to Be Let Alone

by Abram S. Feuerstein

We may not recall John Tyner's name, but we remember what he said. Well, sort of. The Oceanside, California computer programmer in 2010 refused to pass through a TSA full-body scan machine at San Diego International Airport, and instead opted for a pat-down by TSA agents. But, he issued this warning to them: "If you touch my junk, I'm going to have you arrested."[1]

In short order, Tyner's statement went viral (mostly because he posted a cell-phone video of the encounter), and became transformed into the punchier "Don't touch my junk." Columnist Charles Krauthammer labeled that catchphrase as the "anthem of modern man" even as he noted that it did not have "the 18th-century elegance of 'Don't Tread on Me.'"[2]

Louis Brandeis

The irony surrounding junk-man Tyner's resistance to a private, intimate search of his body by TSA agents, of course, was its highly public nature. In posting a video about a desire to be let alone and free from government intrusion as he boarded a plane, Tyner achieved celebrity status and fame – even if for only 15 minutes. And, ten years later, if we have forgotten who Tyner is, we can locate information about Tyner in a matter of seconds by inputting his immortal words into a search engine and pressing a button. Oddly, by coining "Don't touch my junk," surely Tyner will be unable to achieve his goal of being let alone.

In 1890, in one of the most frequently cited law review articles of all time, the "The Right to Privacy,"[3] Louis D. Brandeis and his law firm partner Samuel D. Warren, attempted to create a new legal structure that protected privacy interests — or what they termed the right "to be let alone." With the newly developed Kodak camera and tabloid presses in mind, they observed that "(i)nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[4]

Certainly, Brandeis and Warren understood that invasions of privacy could subject an individual to mental pain and distress "far greater than could be inflicted by mere bodily injury."[5] More significantly, they embraced the idea that the nation's founding concept of a right to life really meant the "right to enjoy life," an intellectual and emotional one filled with thoughts and sensations, and pain and pleasure.[6] To them, as the "intensity and complexity of life" increased with "advancing civilization," man's spiritual nature required an ability to "retreat" from the world.[7] So they tried to identify existing, common law legal principles that could be extended to protect people from an "overstepping" press and an increased public appetite for gossip.

Brandeis and Warren Team Up

The Brandeis/Warren collaboration had several motivations. One was personal. In 1879, Brandeis and Warren opened a law firm together.[8] They had been classmates and friends at Harvard Law School, with Brandeis finishing first in the class and Warren second.[9] They were an unlikely pair. Brandeis, born in 1856 and raised in Kentucky, was the son of Jewish Czech/German immigrants.[10] Warren belonged to a Boston Brahmin, upper class family. In 1883, Warren married the well-heeled daughter of a U.S. Senator from Delaware,[11] and the couple frequently found themselves the subject of gossip in Boston's tabloids. The Warrens resented the unwanted attention and sought Brandeis' help in finding a remedy for the intrusions into their privacy.[12] The article followed.

1 A CNN video news story of the incident may be retrieved at: *https://www.bing.com/videos/search?q=john+tyner+don%27t+touch+my+junk&view=detail&mid=0792B49438DA12FFB2DF0792B49438DA12FFB2DF&FORM=VIRE*.

2 Charles Krauthammer, "Don't touch my junk," *Washington Post*, November 19, 2010, retrieved at: *http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111804494.html*.

3 Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193-220 (1890) (hereafter, "RTP"). Brandeis biographer Melvin I. Urofsky states that through 1947, it was the "most cited article in American legal scholarship." Urofsky, *Louis D. Brandeis: A Life*, p. 101 (First Paperback Edition, Schocken 2009) ("Urofsky").

4 RTP, p. 195.

5 RTP, p. 196.

6 RTP, pp. 193-95.

7 RTP, p. 196.

8 Urofsky, p. 49. The law firm, Warren & Brandeis, continued until 1897 even though Warren had left the firm a decade earlier to run a family paper business. *Id.*

9 Urofsky, p. 42. *See also* Jeffrey Rosen, *Louis D. Brandeis: American Prophet*, p. 40 (Yale University Press 2016) ("Rosen").

10 Rosen, pp. 30-31.

11 Urofsky, p. 97.

12 Urofsky, p. 98; Rosen, p. 40.

Several high profile privacy cases involving celebrities, too, influenced Brandeis and Warren to write their article, including what they called the "notorious case" of actress Marion Manola.[13] Featured in a comic opera, *Castles in the Air,* Manola's costume required her to wear tights.[14] Confronted by declining audiences, the theatre manager hit upon a scheme to increase attendance by photographing the cast in costume and advertising the play.[15] Manola refused. She stated that she was not "prudish," but did not want her 10-year-old daughter to see pictures of her in tights "in shop windows."[16] Undaunted, the theatre manager had a photographer surreptitiously snap a photo of the tights-wearing Manola during a June 1890 performance.[17] The flash interrupted the performance and Manola, realizing what had happened, left the stage.[18] She then sued the manager and the photographer and obtained an injunction against the use of the photos.[19]

Mostly, however, Brandeis and Warren's privacy article was part of a growing effort by legal scholars and the courts to grapple with the emergence of a new problem caused by new technologies. In the past, a person typically had to commit an act of physical trespass in order to violate another's privacy. But that changed with the emergence of inexpensive printing techniques and the Kodak camera — which the company called a "detective" camera that enabled the average person to take photographs of average people without their consent or knowledge.[20]

The privacy intrusions that thus concerned Brandeis and Warren did not involve physical trespasses, but were about "transgressing the respect that one member of a community owes to another."[21] To be sure, images of public figures like George Washington, Benjamin Franklin, or Queen Victoria had been used in merchandizing and adorned flour containers and other products.[22] That was the price of fame. However, new technology threatened a person's ability to remain anonymous in public. At any time both the famous and ordinary person might find their pictures used to peddle boxes of flour.[23]

Against this backdrop, Brandeis and Warren proposed their right of privacy. Without a constitutional reference point, they pointed to existing common law principles to support their new right and mainly those that protected property rights – i.e., the right to control the circulation of one's own portrait.[24] As summarized by Constitutional Law expert Jeffrey Rosen, the tort they created consisted of three elements: "It allowed celebrities to sue the press for emotional injury, it allowed citizens to remove true but embarrassing information from public debate, and it required courts to distinguish between what was and wasn't fit for the public to know."[25]

The Fourth Amendment

More than a decade after his appointment to the Supreme Court, in 1928, Brandeis refined his ideas about privacy in *Olmstead v. United States*,[26] where the Supreme Court first considered the constitutionality of electronic wire-tapping. An ex-policeman turned bootlegger, Roy Olmstead, availed himself of the latest in telephone technology so purchasers could call in their orders and arrange deliveries.[27] Without obtaining a warrant federal agents had tapped the underground phone wires outside Olmstead's office for a period lasting five months.[28] Olmstead appealed his conviction and claimed that the government violated his Fourth Amendment rights, which protects the security of people "in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Chief Justice William Howard Taft wrote the majority opinion (5-4) affirming the conviction. In mechanical fashion, Taft dismissed Olmstead's arguments because federal agents had never actually entered Olmstead's premises.[29] They had not committed an act of physical trespass in tapping telephone wires under public streets. Also, for Taft, conversations could not be considered "effects" within the meaning of the Fourth Amendment.[30] No trespass, no effects, thus no violation of the Fourth Amendment.

In dissent, Brandeis reached back to the Brandeis/Warren 1890 article on the right to privacy. He again took note of "man's spiritual nature," and the need for the Constitution

13 RTP, p. 195.
14 *See* Jennifer E. Rothman, "The Right of Publicity: Privacy Reimagined for a Public World," p. 20 (Harvard University Press 2018) ("Rothman").
15 *Id.*
16 *Id.*
17 RTP, p. 195; Rothman, p. 20.
18 Rothman, p. 20.
19 *Id.*; Manola enjoyed wide public support in her effort to control the use of her image. And, apparently the publicity from the lawsuit boosted her career and increased the play's ticket sales. Rothman, p. 21.
20 Rothman, p. 12.
21 Urofsky, p. 100.
22 Rothman, pp. 16-17.
23 In her book, Rothman describes the case of a surprised and humiliated Abigail Roberson whose picture appeared on 25,000 lithographic ads for the Franklin Mills Flour company under the words, "Flour of the Family." Rothman, pp. 22-24; *see also, Roberson v. Rochester Folding Box Co*., 65 N.Y.S. 1109 (Sup. Ct. 1900).
24 Urofsky, pp. 98-99.
25 Rosen, p. 41. *See also* Jeffrey Rosen, "What would privacy expert Louis Brandeis make of the digital age? *The Washington Post*, March 20, 2015, retrieved at *https://www.washingtonpost.com/opinions/clash-between-free-speech-and-privacy-in-the-digital-world/2015/03/20/bee390e6-c0f8-11e4-ad5c-3b8ce89f1b89_story.html*. Rosen is the President of the non-partisan National Constitution Center and is a law professor at George Washington University. A self-confessed Brandeis aficionado, Rosen is the creator of The Great Courses 12-hour lecture series, *Privacy, Property and Free Speech: Law and the Constitution in the 21st Century* (the "Rosen Great Courses"). The lectures provided significant background information for this article.
26 277 U.S. 438 (1928) (Brandeis, J. dissenting).
27 Urofksy, p. 628.
28 Rosen, p. 139.
29 Urofsky, p. 629.
30 Rosen, p. 139.

"to protect Americans in their beliefs, their thoughts, their emotions and their sensations." The makers of the Constitutions had "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." Accordingly, "(t)o protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Just as he had raised concerns associated with the Kodak camera four decades earlier, Brandeis understood that technological changes meant that "(s)ubtle and more far-reaching means of invading privacy (had) become available to the Government." In fact, one particular new technology caught Brandeis' attention – something called a television.[31] Although Brandeis deleted a reference to it in the dissent when he learned that it was not a two-way technology allowing one person to see into another's home, Brandeis noted that "(d)iscovery and invention (had) made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." He referred to the "progress of science in furnishing government with means of espionage . . . not likely to stop with wire tapping." "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury intimate occurrences of the home," Brandeis wrote.[32]

The Fourth Amendment, a reaction to criminal evidence fishing expeditions ordered at the behest of King George III, had been intended to protect people from government searches and seizures at a time when people maintained their intimate letters, papers and diaries in desk drawers at their homes. The Founders had not envisioned electronic communications, much less a world with smart phones or cloud storage. And, forget about heat scanners that could detect from a car parked across the street marijuana growing inside a house.[33] By embracing a Fourth Amendment that protected persons, not places or material things, Brandeis had re-imagined the Amendment for a 20th Century Supreme Court.[34]

The Free Speech Problem

Brandeis' analysis of the Fourth Amendment applied only to protecting citizens from government action; it had no application to private actors. So, what became of the Brandeis/Warren 1890 invasion of the "Right of Privacy" tort? Well, as Jeffrey Rosen has noted, there was just one problem with their formulation of the right of privacy – "it clashed directly with the First Amendment's protections for free speech and public debate."[35]

One year prior to the *Olmstead* decision, in 1927, Brandeis wrote at length about his views on free speech in a concurring opinion in *Whitney v. California*.[36] He observed that no speech presented a "clear and present danger" unless there was an emergency and the speech threatened to produce serious and imminent harm. His free speech vision recognized that citizens should have the fullest access to information in order to educate themselves, develop their thoughts and ideas, and enable them to meet their obligations as participants in a democracy. According to Brandeis, the best way to counter false ideas and opinions was with more speech, not censorship. The over-riding importance of free speech for Brandeis meant that transparency and publicity trumped privacy concerns.[37]

Other democracies without a First Amendment tradition today believe that they can regulate the dissemination of information to protect privacy. The European Union has adopted strict data protection directives and regulations, and the French have embraced what they call a "right to oblivion" enabling, among other things, the take-down of internet information otherwise forever associated with a person's identity. Brandeis' free speech approach took him in another direction, away from the earlier right of privacy he crafted with Warren.

Brandeis retired from the Court in 1939 and died in 1941. While he had given thought to the emergence of new technologies and their impact on privacy, as a man who came of age in the 19th Century, Brandeis could not envision powerful private actors like Google or Facebook in control of speech and access to information. Although Rosen's analysis suggests that Brandeis would have advocated for as few restrictions as possible for these speech platforms, would Brandeis have abandoned, entirely, the common law remedies he "discovered" in 1890 in "The Right to Privacy?"

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31 Rosen, p. 140; Urofsky, p. 630.

32 In visionary fashion, Brandeis even seemed to anticipate the use of brain scans and other similar evidence, fearing that "(a)dvances in the psychic and related sciences may bring means (of the government) exploring unexpressed beliefs, thoughts, and emotions." To all of this, Brandeis asked: "Can it be that the Constitution affords no protection against such invasions of individual security?" Olmstead, 277 U.S. at 473-74.

33 *See Kyllo v. United States,* 533 U.S. 27 (2001) (holding that the use of a thermal imaging device to monitor heat from a person's home was a Fourth Amendment search requiring a warrant).

34 Rosen, p. 139.

35 Rosen, p. 41.

36 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

37 Rosen, pp. 128-133; *see also*, Jeffrey Rosen, "What would privacy expert Louis Brandeis make of the digital age? *The Washington Post*, March 20, 2015.

Can't Touch This — Use of Section 1826 Court Investigator Reports in Subsequent Proceedings

by Andrew Gilliland

Privacy rights play a significant and crucial role in conservatorship proceedings. In making its evaluation on the need for a conservator, a Probate Court must carry out a delicate balance between the privacy rights of the proposed conservatee (as well as the proposed conservator) and the need for the Probate Court to obtain sufficient and personal information to make a determination whether a conservatorship is appropriate and whether the proposed conservator should be appointed. Handling private information and protecting it during the conservatorship process is a primary concern of a Probate Court.

One valuable tool a Probate Court has at its disposal is the ability to appoint a court investigator to gather and review the private and sensitive information of the proposed conservatee and the proposed conservator. A court investigator conducts a thorough investigation and memorializes their findings in a report to the Probate Court. A court investigator may also make a direct recommendation to the court on the need for a conservatorship and appointment of the proposed conservator. During this intrusive process, a court investigator has access to the proposed conservatee's and the proposed conservator's private and sensitive information.

Once appointed, a court investigator in a conservatorship proceeding must follow and satisfy the requirements of Section 1826 of the California Probate Code with respect to their investigation. Section 1826 provides specific guidelines for the method and the type of information a court investigator is required to report on to the Probate Court. Specifically, a court investigator conducts interviews, reviews the pleadings on file, and reviews the private files and medical records of the proposed conservatee. As needed, a Probate Court can direct a court investigator to research and provide their recommendations on a specific issue that is pertinent to the Probate Court's determination.

After completing its investigation, a court investigator delivers a written report to the Probate Court at least five days prior to the hearing. The Probate Court marks the court investigator report as confidential and places it in a confidential envelope. The report must also be delivered to the attorney for the petitioner, the attorney for the proposed conservatee, the proposed conservatee, the spouse or registered domestic partner of the proposed conservatee, the relatives to the first degree of the proposed conservatee, and anyone else the court determines is necessary.[1] The confidential investigator's report provides all the above parties with the opportunity to review the confidential report in anticipation of examining and providing argument for or against the court investigator's recommendations at the conservatorship hearing. This process preserves the due process rights of the involved parties and protects the privacy rights of the proposed conservatee and the proposed conservator.

So how does the court investigator's report or the court investigator's testimony come up in a subsequent proceeding? Sometimes immediately prior to the conservatorship petition being filed or even during the conservatorship proceedings, a proposed conservatee executes a will and/or trust that comes under question in a subsequent proceeding once the proposed conservatee passes. As should be obvious, the timing of the execution of the will and/or trust may be suspect, which is more so the case when the need for a conservatorship is based on declining mental capacity rather than a catastrophic event such as a stroke or aneurism. The concern of lack of capacity increases when the subsequent will or trust has a disproportionate result favoring one child or individual over others. Based on the circumstances, a challenge may be made that the proposed conservatee lacked the mental capacity at the time of the execution of the will and/or trust. Proving a lack of legal capacity to execute a will can be difficult if not impossible in a will challenge litigation. The same is true for proving lack of legal capacity to execute a trust. The simple fact is that finding admissible facts that on a specific day at a specific time the proposed conservatee lacked capacity to execute a will and/or trust is problematic. Medical records can be helpful, but may not resolve the issue because of their often limited purpose to the immediate reason for the medical visit. To try and fill this evidentiary void, the court investigator and the court investigator's report seems like a welcoming opportunity for the petitioner in the subsequent proceeding to prove the lack of capacity.

1 Section 1826(a)(12) of the California Probate Code.

Unfortunately, trying to fill this evidentiary void by using the court investigator's report is problematic if not impossible because the court investigator's report is confidential. Section 1826(c) of the California Probate Code specifically states that the report is confidential and can only be disclosed to the attorney for the petitioner, the attorney for the proposed conservatee, the proposed conservatee, the spouse or registered domestic partner of the proposed conservatee, the relatives to the first degree of the proposed conservatee, and to any person specifically authorized by the Probate Court. To use the court investigator's report in a subsequent proceeding an order must be obtained from the Probate Court with jurisdiction over the prior conservatorship and then only upon a finding by such Probate Court that the release is in the proposed convervatee's best interest.

Likewise, subpoenaing the court investigator to testify will likely result in a pleading being filed to quash the subpoena and block the court investigator from testifying. Such pleading may cite to California Evidence Code Section 1040(b)(1), which provides a shield preventing a public employee (such as a court investigator) from disclosing official information where disclosure is forbidden by statute. The restriction in Section 1826(c) of the California Probate Code would seem to qualify for this shield as it prevents the court investigator's report from being disclosed absent a court order. "Official Information" is defined in Section 1040(a) of the California Evidence Code as information acquired by a public employee acting in their official duties. In essence, we end up at the same place that absent a court order authorizing disclosure of the court investigator's report, the court investigator will not be able to testify.

For the petitioner challenging a will or a trust in a subsequent proceeding, seeking to prove the lack of capacity through the testimony of the court investigator or using the court investigator's report in a subsequent proceeding is problematic. One thing is clear, however, that the process starts with petitioning the Probate Court with jurisdiction over the prior conservatorship proceedings for an order authorizing the release of the court investigator's report in the subsequent proceeding.

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The Promise and Problems of Law Enforcement's Use of Facial Recognition Technology

by Souley P. Diallo

Throughout history, consumer driven technological innovations have resulted in an unintended beneficiary - law enforcement professionals. The development of technologies never intended for use in the detection and prevention of crime are now foundational elements of police investigations. The intersection of advanced camera technology and sophisticated computer algorithms has given way to a new breakthrough – the development of facial recognition technology. Facial recognition, currently the darling of boardrooms in Silicon Valley and Seattle, promises the latest revolution to change the face of criminal investigations around the world. However, as with every groundbreaking technology adopted by law enforcement, the promise of facial recognition also comes with latent dangers to privacy, due process and civil rights.

Broadly, the term "facial recognition" encompasses a range of technologies that seek to identify individuals in digital photographic and video images via a computer algorithm. The algorithm analyzes digital images of a person's face to ascertain unique identifying markers, such as pupil size, eye distance, and facial structure. The combination of these unique identifying markers are compiled into a data set known as a "face-print"; a term borrowed from the fingerprint technology upon which the concept was based. The "face-print" is then compared to a database of digital images in order to attempt to identify an individual. The algorithms used to make the comparison typically do not identify individuals on a binary "yes" or "no" basis. Rather, the algorithms most commonly in use make comparisons based upon a range indicating the strength of the match between the face-print and an individual photograph in the database.

The benefits of facial recognition for use in law enforcement are readily apparent. Imagine the proverbial bank robber caught on a security camera video. Facial recognition could allow investigators to compare that security camera footage to a photographic database, for example mugshot photographs, to attempt to make an identification. Such uses are beyond theoretical; law enforcement agencies in more than 26 states currently utilize facial recognition technology in some form or fashion.[1] For more than a decade, the FBI has developed sophisticated facial recognition technology, employing DMV, and other photographic databases in 16 states. This network of databases gives the FBI access to more than 411 million images, a number exceeding the entire population of the United States.[2] Facial recognition has been used to investigate terror suspects and locating missing persons.[3] Further, facial recognition technology has been increasingly used by security professions in identifying threats to high profile public venues such as airports[4] and sporting events.[5] The successful use of facial recognition could serve as a substantial innovation in public safety and criminal investigations.

The initial dangers of the use of facial recognition by law enforcement start with the limitations of the technology itself. The algorithm is developed from an initial dataset of images from which the algorithm "learns" to recognize unique identifying markers of human faces. To the extent that dataset of images is limited in diversity and scope, biases may be built in to the algorithm. In fact, research has indicated that error rates in facial recognition comparisons are higher for identifying images of people of color, young people, and women.[6] Further, the accuracy of the identification is limited by the database used to compare against a given face-print. A broad based, diverse database assists in the accuracy of identification, while a limited, skewed database could result in more errors. This problem is further compounded by the fact that, the ultimate conclusion of whether an individual is "identified," relies upon a human being to interpret the data.

The fear of the widespread use of this nascent technology in criminal investigations is that it may result

1 *See* Clare Garvie et. al. *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, Georgetown Law Center on Privacy and Technology (2016).

2 *Id.*

3 S*ee* Tom Simonite, "How Facial Recognition Tech Could Help Trace Terrorism Suspects," *MIT Technology Review*, April 18, 2013.

4 Adam Vaccaro, "At Logan, Your Face Could Be Your Next Boarding Pass," *Boston Globe*, May 31, 2017.

5 *See* John D. Woodward, Jr., *Super Bowl Surveillance: Facing Up to Biometrics*, RAND Corporation, 2001.

6 Brendan Klare et. al., "Face Recognition Performance: Role of Demographic Information," 7 IEEE Transactions on Info. Forensics and Sec. 1789 (Dec. 2012).

in accusation and arrest of innocent people. To illustrate this danger, the ACLU conducted a study in which images of 28 members of Congress were erroneously "matched" with criminal mugshots using facial recognition technology.[7] Concerns over the accuracy of facial recognition technology await the refinement of technology for use in criminal investigations.

Moreover, the use of facial recognition technology has substantial implications to privacy and due process considerations. The ubiquitous capturing of images has been facilitated by the integration of camera and video capability into every smartphone in America. The ability to instantly upload pictures and video into social media networks provides a nearly unlimited catalogue of images that could be subject to investigation by law enforcement. Furthermore, the widespread use of cameras in public, by both government and private businesses, provides the opportunity for 24/7 real time surveillance utilizing facial recognition. The most ominous forecasting of Orwellian "Big Brother" conspiracies could have never foreshadowed the potential of such vast monitoring of human behavior by the government.

It is unclear whether the traditional protections afforded by the U.S. Constitution will abate concerns about the potential abuses of facial recognition technology. Since its watershed opinion in *United States v. Katz*, the Supreme Court has consistently held that public activity is not subject to the Fourth Amendment proscriptions against warrantless searches and seizures.[8] Further, the Supreme Court has held that law enforcement's use of technology to enhance its ability to monitor and capture public activity are similarly not subject to the warrant requirement.[9] Notwithstanding, these precedents have been tested by technological innovations in law enforcement: The Court has recently held that, residential thermal imaging scans,[10] GPS vehicle data,[11] and historical cell phone tower location data[12] are subject to Fourth Amendment's warrant requirement. It remains to be seen whether courts will similarly apply the Fourth Amendment to facial recognition.

Finally, predictions into uncharted legal territory anticipate the eventual use of facial recognition technology as evidence in court. Thus far, the use of facial recognition technology in criminal justice has been limited as an investigatory tool by law enforcement agencies. One could anticipate, with the refinement of the technology, and its increased use by agencies nationwide, a time where facial recognition could be used as evidence to buttress suspect identifications in criminal trials. The first issue that courts would have to address is whether facial recognition meets the threshold of admissibility of scientific evidence as articulated by *Daubert*[13] and *Kelly*.[14] The issue presented – whether or not facial recognition technology assists the trier of fact, or reasonably recognized in the scientific community; collides against limitations of the current technology as discussed above. In addition, the admission of evidence of an "identification" resulting from a facial recognition algorithm immediately implicates a defendant's Sixth Amendment right to Confrontation. As a computer algorithm is not a witness that can be subject to cross examination, it remains to be seen whether or not courts will routinely approve its admission in criminal trials, especially in circumstances where there is no other evidence of eyewitness identification.The problems and the promises of facial recognition technology have been met with a mixed response. Law enforcement continue to tout the potential positive impacts of the technology to public safety. Civil liberties advocates continue to warn against the technology's dangers and abuses.[15] Recently, in response to potential dangers of the technology, San Francisco[16] and Oakland[17] have passed ordinances banning the use of facial recognition by police. Notwithstanding, proprietors of facial recognition technology have continued to advocate for its increased use by law enforcement, including the integration of the technology in police body worn cameras.[18] As such, the complexity of issues presented by the use of facial recognition by law enforcement will continue to be the subject of litigation, legislation, and discussion.

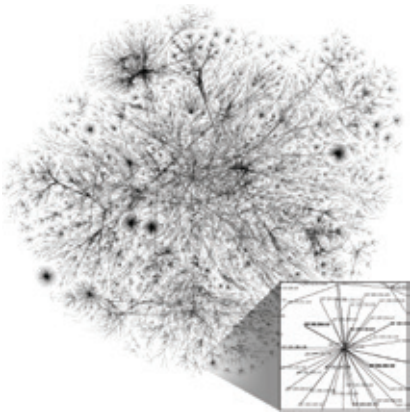
Souley Diallo is a deputy public defender with the County of Riverside, where he practices in the Complex Litigation Unit.

7 Jacob Snow, "Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots," ACLU (July 26, 2018).
8 *United States v. Katz,* (1967) 389 U.S. 347.
9 *United States v. Knotts,* (1983) 460 U.S. 276, 282.
10 *Kyllo v. United States*, (2001) 533 U.S. 27.
11 *United States v. Jones,* (2012) 565 U.S. 400.
12 *Carpenter v. United States,* (2018) 138 S.Ct. 2206.
13 *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.
14 *People v. Kelly,* (1976) 17 Cal. 3d 24, 30.
15 Statement of Neema Singh Guliani, Senior Legislative Counsel, ACLU, Hearing on Facial Recognition Technology, House Oversight and Reform Committee, May 22, 2019.
16 Trisha Thandani, "San Francisco Bans City Use of Facial Recognition Surveillance Technology," *San Francisco Chronicle*, May 14, 2019.
17 Sarah Ravani, "Oakland bans use of facial recognition technology, citing bias concerns," *San Francisco Chronicle,* July 17, 2019.
18 Matt Cagle and Nicole Ozer, "Amazon Teams Up With Government to Deploy Dangerous New Facial Recognition Technology," ACLU, May 22, 2018.

BioMetrics, Privacy & the California Consumer Protection Act[1]

by Boyd Jensen

"You will not find it difficult to prove that battles, campaigns, and even wars have been won or lost primarily because of logistics"[2]… and so be it for the effort to protect our privacy. In the air, on the ground, both seen and unseen and literally in the mind, privacy has been substantially eroded within the last post cellular/internet years.



Logistically, before that time, much law existed to protect the property owner, their home, "their castle;" activities, obviously and circumstantially" intended to be private; minors or protected classes; and special activities where privacy was necessary for pubic security. Logistically since that time there is not an area of our lives, which is not accessible through analogue, digital and infrared technology. Former zones of privacy are bombarded with unsolicited input. As described in the June 2019 issue of the *Riverside Lawyer*,[3] there are civil remedies in California and nationally, but the purpose of this article is to analyze beyond narrow civil remedies for privacy intrusion by unsolicited emails, and analyze the formable *California Consumer Protection Act of 2018* (CCPA), which goes into effect on January 1, 2020.

There is a bevy of important federal legislation. Important federal privacy laws affecting digital communication include: *The Federal Trade Commission Act* (FTC) – (unfair and deceptive commercial practices); *Electronic Communications Privacy Act* (ECPA) – (wire and electronic communications from unauthorized access); *Computer Fraud & Abuse Act* (CFAA) – (unauthorized computer access e.g. passwords); *Family Educational Rights and Privacy Act* – (student education records); and *Children's Online Privacy Protection Act* (COPPA) – (posted security information and parental consent for information disclosure of or about minors 13 and older). For financial records and privacy dealing concerns about customer credit and identity distribution: *Financial Services Modernization Act* (GLBA) and the *Fair and Accurate Credit Transactions Act* (FACTA).

However, in spite of all the legislative protections, in early 2018 it was widely published that an international company, Cambridge Analytica, had exposed tens of millions and perhaps billions of Facebook users' private information. "Facebook on Wednesday said that the data of up to 87 million users may have been improperly shared with a political consulting firm . . . Facebook had not previously disclosed how many accounts had been harvested . . . Among Facebook's acknowledgments . . . was the disclosure of a vulnerability (that) could have exposed 'most' of its 2 billion users . . ."[4]

California responded by drafting and passing the *California Consumer Protection Act of 2018*.[5] This Act would grant a consumer the right to obtain from businesses "personal information" that it collects and/or sells; the sources "from which that information is collected;" the collectors "business purposes;" the "3rd parties" with whom the information is shared; and grant a consumer the right to request deletion of their "personal information." The Act authorizes consumers the right to "opt out of the sale of personal information" and prohibit "discriminating against the consumer for exercising this right." The Act authorizes businesses to offer financial incentives for the collection of personal information; except in certain cases from consumers "under 16 years of age." Besides penalties and damages through private enforcement, the Act provides for public enforcement by the Attorney General. And damages are steep. …(A)ny person, business, or service provider that intentionally violates this title may be liable for a civil penalty of up to seven thousand five hundred dollars ($7,500) **for each violation!**

The categories of protected consumer "personal information"[6] include "*Identifiers*" name, alias, postal address, unique personal identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other

1 The image in this article was obtained from a Google search for an "internet image," which upon disclosure was attributed to Wikipedia.

2 President/General Dwight D. Eisenhower.

3 California CAN-SPAM" - $1,000 for Each Spam Email" by Boyd Jensen, *Riverside Lawyer* June 2019.

4 *New York Times*, April 4th 2018, "Facebook Says Cambridge Analytica Harvested Data of Up to 87 Million Users" by Cecilia Kang and Sheera Frenkel

5 Emphasis by **emboldening added**. CCPA Assembly Bill No. 375 An act to add Title 1.81.5 (commencing with Section 1798.100) to Part 4 of Division 3 of the Civil Code, relating to privacy. (Specifically section 1798.155 (b).) [Approved by Governor Jerry Brown June 28, 2018. Filed with Secretary of State June 28, 2018.]

6 CCPA *supra* at section 1798.140(o).

similar identifiers; "*Commercial information*," i.e. records of personal property, products, services obtained, or considered, including histories and tendencies; "*Biometric information*;" Internet or other electronic network activity information; "*Geolocation data*;" "*Audio, electronic, visual, thermal, olfactory, or similar information*;" "*employment-related information*;" "*Education information*;" defined as information that is not publicly available; and "inferences" which can be drawn from the aforementioned information categories! These could include consumer preferences, psychological trends, predispositions, attitudes, and aptitudes. Literally everything imaginable is intended to be protected, except for information already publicly available.

The California Attorney General has also proposed text for new regulations,[7] which this article has limited space to describe. The effort seeks to manage this Act's extraordinary tasks – against overwhelming nefarious and legitimate free market competition – while respecting the constitutional rights of all concerned. Thus, procedures for collection notices; opt-out notices; consumer requests and their deletion; managing the categories of minors (under 13, and 13 to 16;) financial incentives for those consumers who choose to offer personal information for their commercial benefit; and the verification process for all of the above.

7 Title 11.Law; Division 1. Attorney General; Chapter 20. California Consumer Privacy Act regulations proposed text of regulations.

Without legislative efforts like California's CCPA, "(P)rivacy is indeed dead," which is already our world, according to one expert questioned in the Pew Research Institute's study 1. Concerns about human agency, evolution and survival (December 10, 2018; D. J. Krieger p. 8.)[8] Pew as a self-proclaimed, nonpartisan American "fact tank" in Washington, D.C., has provided significant information and demographic trends using empirical social science research, to assess the impact of our digital world's inherently eroding privacy. In other research since the Cambridge Analytica experts e.g. *A Majority of Teens Have Experienced Some Form of Cyberbullying,*[9] **not only did they find the privacy of teenagers was eroded, but approximately 60% of U.S. teens have been cyberbullied, for example, assaulted online.**

Logistics, logistics, logistics are clearly not only the secret to military success, but to the preservation of our personal privacy. We just need to acknowledge it and manage it responsibly.

Boyd Jensen, a member of the RCBA Bar Publications Committee, is with the firm of Jensen & Garrett in Riverside.

8 See also *Stories From Experts About the Impact of Digital Life* by Janna Anderson and Lee Rainie (July 3, 2018.)

9 Pew Research Center [PewSearch.org] Q&A: How and why we studied teens and cyberbullying by A.W. Geiger (September 27th 2018.)

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The EU's General Data Protection Regulation: What is it and How Can I Comply?

by Christina Morgan

Due to rising concerns about privacy in the digital world, in April 2016, the European Union adopted the General Data Protection Regulation (GDPR). The GDPR took effect 2 years later on May 25, 2018. The GDPR was designed to harmonize data privacy laws across Europe, to protect the "personal data" of EU citizens, and to give EU citizens greater control over how their data is used. Given the regulation's breadth and strict penalties, it is important for entities in the United States to know whether the regulation applies to them and, if so, how to comply. This article is intended to provide a brief overview of the GDPR with those goals in mind.

Who Is Bound by the GDPR?

For purposes of the GDPR, **personal data** is defined as any information relating to an identified or identifiable living individual. The GDPR applies even if the information has been de-identified or encrypted, but could be used to re-identify a person. Examples of personal data include an EU's resident's name, address, email address, identification card number, location, data and IP address. The GDPR does not apply to personal data processing of deceased persons or of legal entities.

Any individual, company or organization that controls or processes the personal data of EU residents is subject to the GDPR's mandates. An individual, company or organization qualifies as a **data controller** for GDPR purposes if it meets any of the following criteria:

- has a physical presence in the EU,
- has employees or contractors in the EU,
- sells products designed to meet EU market requirements (e.g., 220 volt products),
- purposefully directs its sales and marketing activities at the EU market, or
- monitors the behavior of consumers in the EU.

Many entities in the U.S. qualify as data controllers because they purposefully direct sales and marketing activities at the EU market. The phrase "data controllers" is broadly construed to include individuals, companies, and organizations that: have distributors or resellers in the EU, accept Euros or other member state currency or have translated their website or other marketing materials into member-state languages.

Behavior monitoring is also being broadly interpreted. It includes the use of technologies to track EU website users, using predictive analysis to anticipate buying patterns, and operating affinity or loyalty programs in the EU.

An individual, company or organization can also be subject to the GDPR as a **data processor**. Data processors do not collect personal data directly from EU residents. Rather, data processors receive personal data of employees, consumers, or others in the EU that was collected by their customers. Once received, the data processor, as its name implies, processes the personal data on behalf of its customer. Processing includes recording, organizing, structuring, storing, transmitting, and adapting.

Is Consent Required to Process Data?

Absent specific legal authority, personal data processing is generally prohibited without consumers' consent. If a data controller processes the personal data of individuals under age 16, parental consent is required.

When data processing is based on consent, the data controller must be able to demonstrate that consent was obtained from each consumer. The request for consent must be presented in an intelligible and easily accessible form – no legalese allowed! Once consent is given, it must be as easy for the consumer to withdraw consent as it is to give consent.

What Rights Do Consumers Have?

Consumers have a right to access information about whether or not their personal data is being processed, where and for what purpose. If requested, a data controller or data processor must provide the consumer a copy of his or her personal data in electronic format free of charge.

Consumers also have a right to be forgotten. Consumers can ask data controllers to erase their personal data, cease further dissemination of data and, potentially, have third parties halt processing of the data. However, data controllers can weigh consumers' privacy rights against the public interest in availability of data when considering such requests.

What If There's a Data Breach?

A data breach occurs when there is a security incident resulting in a breach of confidentiality, availability or integrity. If the breach is likely to pose a risk to an individual's rights and freedoms, data controllers must notify the Data Protection Authority without undue delay and no later than 72 hours after becoming aware of the breach. Data processors must notify their data controller customers of any breach.

If a data breach poses a high risk to the affected individuals, then the individuals should also be informed.

What Are the Penalties for Violating the GDPR?

The penalties for violating the GDPR are steep. Processors or controllers who fail to comply with the GDPR can be fined up to 4 percent of their total global revenue or €20 million, whichever is greater.

If a consumer believes their rights have been violated, they may lodge a complaint with their national DPA, who will then investigate the complaint and advise of the progress or outcome of the investigation within 3 months. If the DPA fails to do so, consumers can bring an action in court against the DPA. Consumers can also skip the DPA process and file an action in court directly against the controller or processor who allegedly violated their rights.

Christina Morgan is an attorney at Best Best & Krieger LLP in the Business Services practice group. Aside from an active real estate and commercial litigation practice, Christina consults with businesses, universities, and municipalities on privacy and data security issues.

Opposing Counsel: Mario Alfaro

by Juanita Mantz

Mario Alfaro, the president and one of the founding members of the Hispanic Bar Association of the Inland Empire (HBAIE), is a force to be reckoned with. Mario is a partner at a law firm and a political dynamo who also serves as the parliamentarian for the San Bernardino County Democratic Central Committee and is president elect for the Inland Empire Chapter of the Federal Bar Association. Mario's story is an inspiring one as is his commitment to a work life balance at his law firm.

Mario Alfaro

A California native, Mario was born in Los Angeles to parents who had immigrated from El Salvador. His father died when he was a mere eight years of age and his mother raised him alone until she remarried when he was twelve. Mario attended Cal State Fullerton (CSUF) for his undergraduate degree in political science. In 2002, he graduated from CSUF and married his college sweetheart and dedicated schoolteacher, Kary. They have a true love story and five beautiful children together. Mario's youngest child is in second grade and his oldest is in college.

Mario has a strong commitment to fatherhood and somehow manages to juggle it all stating, "I have not missed a soccer practice yet." In fact, the day we did our interview, Mario had accompanied his youngest child on a school field trip, illustrating that he is very involved.

Mario graduated from USC Law in 2006 and was a partner at Gresham Savage Nolan & Tilden, PC ("Gresham") until 2018. In 2018, Mario left to start his own firm with other Gresham litigation partners and the firm Stream Kim Hicks Wrage & Alfaro was born. The firm has offices in California and Washington. Mario's specialty is business civil litigation and practices primarily in federal court. Mario has had much success in federal court defending corporations in all aspects of business litigation including RICO claims and real estate litigation. One of his favorite cases was out of Houston, Texas where he represented the owner on the issue of whether the damage to a building was "reasonable" wear and tear. Mario was successful in the trial court and the decision was affirmed on appeal.

But, most of all, Mario is a dedicated father and when you hear him speak about fatherhood, that is when you truly understand who he is. Mario stated, "I can appreciate how lucky and fortunate I am to be able to grow my practice and try and become a master in the law, but what I am most proud of is being a good dad." He went on to add that, "You cannot always be sprinting and I sprinted a lot the first few years, but now that I have the opportunity to work with my amazing partners at our own firm, we can try and offer more of a balance for ourselves and our associates."

You can read more about him at https://www.streamkimlaw.com/attorneys/mario-h-alfaro/.

Juanita E. Mantz is a deputy public defender in Riverside, specializing in incompetency. She is a member of the Macondo Writers Workshop and just completed her memoir. You can read more of her stories on her blog at https://wwlifeofjemcom-jemmantz.blogspot.com.

Judicial Profile: Justice Frank J. Menetrez

by Kimberly Encinas and Alicia Pell

Justice Frank Menetrez is the most recent addition to the Court of Appeal, Fourth District, Division Two. Although a new face in the Inland Empire legal community, he is no newcomer to the Court of Appeal. Justice Menetrez has dedicated most of his legal career to working for the judicial branch in one capacity or another. His colleague, Justice Marsha Slough, predicts that as the local legal community gets to know him better, community members will become forever grateful for his presence. We—his two research attorneys—wholeheartedly agree with that sentiment. This profile is our small contribution to that effort.

Justice Frank J. Menetrez

Justice Menetrez grew up in Bethesda, Maryland. His father was a psychotherapist, and his mother was a full-time mom who taught piano before raising her kids. He and his sisters have all dedicated themselves to public service in different ways. His older sister was a physician in the United States Army and retired as a full colonel, and his younger sister is a social worker in the Baltimore school system.

Justice Menetrez's interests as a youth ran the gamut. He played piano, violin, cello, and guitar. He also swam competitively from age eight through high school, and while he was "decent" at a variety of strokes, he was never the team star. But he excelled at mathematics. So when it came time for college, he decided to double major in mathematics and philosophy—the latter because he thought he would enjoy it after taking an introductory philosophy course early on in his education. He earned his undergraduate degree from Johns Hopkins University in three years. In hindsight, he describes his undergraduate education as "unfortunately narrow," because with two majors in three years, he had little time to study anything other than the mandated coursework.

Justice Menetrez's path to law school was not direct. After earning his undergraduate degree in 1987, he wanted to continue to study philosophy. He ultimately decided between the doctoral programs at the University of California, Los Angeles (UCLA) and Harvard University, and he chose UCLA. That decision was fortuitous. He met his future spouse at UCLA, where she was also pursuing a Ph.D. in philosophy.

After earning his Ph.D. in 1996, Justice Menetrez went on the academic job market. It was an exceptionally bad year to be a newly minted Ph.D. The country had just suffered a wave of state budget crises, and state universities had largely stopped hiring. As a result, academic jobs were in short supply and there was a surplus of qualified candidates. While he did not get the academic position that he was hoping for, UCLA offered him a one-year lectureship, which he accepted.

Justice Menetrez braved the academic job market again the next year and had some partial success—he was one of a handful of people whom Harvard interviewed for a tenure-track position. At the same time, he applied to law schools in the areas where his future spouse had job interviews. She accepted a tenure-track position at Claremont McKenna College, where she remains today as a full professor with an endowed chair. He decided to attend law school at UCLA.

Graduate school taught Justice Menetrez to rigorously assess and develop arguments and to pay careful attention to linguistic detail. The justice suspected that those skills would translate well to law school, and he was right. He graduated as a member of the Order of the Coif, received UCLA's Outstanding Graduate Student Award, and was editor-in-chief of the UCLA *Law Review*. His summer associate positions in law school included stints at the American Civil Liberties Union, Sidley Austin LLP, and Munger, Tolles & Olson LLP. And after earning his J.D. in 2000, Justice Menetrez clerked for the Honorable A. Wallace Tashima on the Ninth Circuit Court of Appeals in Pasadena.

Justice Menetrez landed next at Sidley Austin, where he was a litigation associate for a little over two years. Much of the work was standard for a junior associate at a large international law firm, but he was lucky enough to get more brief-writing work than was typical for junior associates. His most memorable case there was a pro bono matter representing a defendant convicted of conspiracy to violate the arms embargo against apartheid-era South Africa. A district judge granted the habeas petition filed by Sidley Austin and denied the government's 70-plus page motion for reconsideration of that decision.

From Sidley Austin, Justice Menetrez moved to Horvitz & Levy LLP, where he practiced as an appellate specialist for a little over one year. But he was not satisfied with advocating for one side—he enjoyed "figuring out the right answer" much more than advocacy. He loved clerking and thought a position at the Court of Appeal would be a good fit. As it happened, the governor had just appointed the Honorable Frances Rothschild to the Court of Appeal, Second District, Division One, and she was seeking research attorneys. Justice

Menetrez was offered the position and was with her for 10 years, including after her elevation to Presiding Justice of Division One.

It was during his time with Presiding Justice Rothschild that Justice Menetrez began toying with the idea of becoming a judge. Presiding Justice Rothschild and Judge Tashima were extraordinary role models and gave him the best possible education in judicial decisionmaking. But eventually, Justice Menetrez concluded that he could add more value by making the decisions himself rather than merely advising.

Justice Menetrez submitted his application for the bench and in March 2015, Governor Jerry Brown appointed him to the Los Angeles County Superior Court. He was assigned to the dependency court for almost four years. The case load was crushing, the subject matter was emotionally taxing, and the complicated, technical body of law was intellectually challenging. But he loved it. The work was "unbelievably rewarding and transformative" for him. He remains a self-described "champion" of the dependency court assignment.

In 2017, Justice Menetrez took a four-month break from the superior court to sit as a pro tem justice in Division Seven of the Second District Court of Appeal. The following year, Governor Brown appointed him to his current position, and the Commission on Judicial Appointments unanimously confirmed him in November 2018. According to Justice Slough, he's an ideal colleague—thoughtful, analytical, and confident in his opinions, but not unyielding. She describes a jurist who is willing to listen to opposing views and is capable of changing his opinion. However, he is equally adept at articulating a divergent, well-reasoned opinion and forging consensus based on that viewpoint. And Justice Slough advises people not to be fooled by his reserved personality; he's approachable, kindhearted, and quick to laugh.

One surefire way to draw out Justice Menetrez? Soccer. He's an admitted "soccer junkie," though that wasn't always the case. He knew nothing about soccer until he started coaching his oldest son's team ten years ago. Now he, his wife, and their two school-age sons play fantasy soccer together, and they all follow the English Premier League. Only the family's two dogs are left out of the soccer madness.

Justice Menetrez approaches the law with the same zeal and admiration. He is a conscientious jurist whose attention to detail is well-known in the courthouse. For attorneys arguing before him, he advises that they approach the argument with the same rigor, paying particular mind to the analysis in the tentative opinion. Expect to be met with kindness, respect, and thoughtfulness. That is what Justice Menetrez brings with him whatever the endeavor.

Kimberly Encinas and Alicia Pell are research attorneys at the Court of Appeal, Fourth District, Division Two, and are assigned to the chambers of Justice Frank J. Menetrez.

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