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Let's Talk About 'Sex': SCOTUS Delivers Title VII Landmark Ruling: A Case Synopsis of *Bostock v. Clayton County, Georgia*

BY AZAR ALEXANDER & JOY ANDERSON

On June 15, 2020 the United State Supreme Court directly and unequivocally answered the question of whether an employer can terminate an employee for their sexual orientation and/or gender identity – the Court held employers cannot. More than more than five decades after the passage of Title VII of the Civil Rights Act, protections for the LQTBQ+ community remained uncertain, and half of state governments did not provide

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Supreme Court Releases Statement on Racial Justice, Next Steps for Judicial Branch

June 22, 2020

The events of recent days and weeks have exposed frailties in our public institutions and brought to the forefront the disproportionate impact the application of certain laws, rules, policies and practices have had on the African American population, the Latinx community, and other people of color in Illinois and nationally.

Racism exists, whether it be actualized

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Let's Talk About 'Sex': SCOTUS Delivers Title VII Landmark Ruling: A Case Synopsis of *Bostock v. Clayton County, Georgia*

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blanket employment protections for employees on the basis of their sexual orientation and/or gender identity. And while many states still do not provide hate crime and other protections for the LGBTQ+ community, the *Bostock*[1] decision marks a significant victory in the battle for equal rights. Leaving no room for ambiguity, the Court declared the rule that is derived from the statutory language. **"[A]n employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."**[2]

Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[3] The *Bostock* decision presented the United States Supreme Court with the question of whether Title VII encompass discrimination based on an individual's sexual orientation and/or gender identity.

The Court's decision in this consolidated action of appeals from the second, sixth, and eleventh circuits had support of six Justices and dissents from three. Justice Neal Gorsuch delivered the opinion with Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan joining. Justice Alito authored a dissent that Justice Thomas joined, and Justice Kavanaugh authored a separate dissent.

The Court did not dwell over the all-too-familiar factual scenarios of the underlying three cases. In each case, *Zarda v. Altitude Express, Inc.*,[4] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*[5] and *Bostock v. Clayton County Board of Commissioners*,[6] a gay or transgender employee was terminated for because the employee was either gay or transgender. These cases ultimately led to a circuit split between the Eleventh and the Second and Sixth Circuits for which the Court granted *certiorari*. After consolidating the appeals, the Court was tasked with resolving the issue of whether discrimination against an employee because of sexual orientation or gender identity (or "transgender status") constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964.

The Court resolved this legal question relatively quickly, holding that discrimination on the basis of homosexuality or transgender status necessarily requires that the employer do exactly what Title VII prohibits—intentionally treat employees differently because of their sex. The majority went on to address opposing viewpoints, nuances, and arguments proffered by the dissenting Justices. It noted that in order to resolve these issues, it must (1) keep in mind its limited role in interpreting statutes, as to be careful not to usurp Congress's power,[7] and (2) analyze the statute through a 1964 lens.[8]

The majority recognized that the terms "sex," "because of," and "discrimination" are integral to the resolution of the parties' claims. The Court utilized 1964-era definitions and societal context to solidify its understanding of these terms it must analyze. Recognizing that some may have appreciated a broader definition, the Court proceeded on the assumption that "sex" in 1964 referred only to biological distinctions between male and female anatomy.[9] The ordinary meaning of "because of" at the time was "by reason of" or "on account of."[10] Here, the Court made clear that Congress intended the but-for test be the proper causation standard.[11] Importantly, it also recognized that there may be more than one but-for cause for an adverse employment action under the statute. And to "discriminate against" a person, the Court found, means treating that individual worse than others who are similarly

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situated.[12]

To further support the statute's plain language, the court embarked on an illustration-filled discussion on why it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[13] Notably, the Court provided the example of two groups of otherwise similarly situated male and female pairs of individuals: (1) who both like men and (2) who both identify as female. If the employer fires only the male who likes men because of that reason, or the formerly male-identifying female for that reason, and not their female counterparts for the same reason, it is "unmistakable" that the individual's sex played a role in that employment decision.[14]

The Court ultimately held that "homosexuality and transgender status are inextricably bound up with sex … because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[15] It also unequivocally stated that if an employer discriminates against homosexual and/or transgender employees, that employer satisfies the statute's intent requirement because it "inescapably intends to rely on sex in its decisionmaking."[16] Because the employers did not dispute terminating the plaintiffs employment for their sexual orientation or transgender (gender identity) status, the Court did not have to resolve any issues regarding pretextual reasons for terminating the employees.

Citing past precedent, the Court declared that its holding should come as no surprise, reasoning that it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.[17] (i.e. clever naming or framing of discriminatory policies do not insulate an employer from liability). Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action.[18] Last, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups.[19]

With its ruling firmly in place, the Court then addressed the dissents and opposing viewpoints in the third and longest section of the opinion, beginning with "[w]hat do the employers have to say in reply?"[20] Justices Alito and Kavanaugh separate dissents relied on the commonly used textual argument that "if Congress had wanted to address sexual orientation and gender identity in Title VII, it would have referenced them specifically."[21]

Justice Alito focused on unsuccessful LGBTQ+ employment-related bills previously considered by Congress to provide support for the argument that the majority's decision equates to "legislation."[22] Justice Alito made a "slippery slope" argument to show the potential unintended effects of the majority's decision, including that there could be implications in many contexts, such as bathrooms, locker rooms, women's sports, housing, faith-based employment practices, healthcare, freedom of speech, and constitutional claims.[23]

Striking a completely different tone than Justice Alito's dissent, Justice Kavanaugh acknowledged the "important victory achieved" by the LGBTQ+ community, recognizing the community's "extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives." Justice Kavanaugh's dissent argued that the Court rewrote the law based on its own policy views, and not the language of the statute.[24] As evidence, Kavanaugh cited the history of appellate and district court decisions to claim that the majority of prior courts to consider the issue did not come to the same conclusion as the majority.[25] The Kavanaugh dissent also spent a considerable amount of time discussing the difference between the ordinary and literal meaning of "sex" to bolster the argument that in order to come to its decision, the majority relied on the literal meaning of "sex" instead of relying on the ordinary meaning, which the court should follow in order to maintain "rule of law and democratic accountability."[26]

The majority had no shortage of counterpoints to the dissents in this regard. The majority held that its interpretation was in line with the statute's language because "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."[27] The Court also pointed out that in at least three prior instances (sexual harassment, motherhood discrimination, sex-segregated job advertising) it included concepts not explicitly provided for in Title VII.[28] It reasoned that sexual orientation and transgender status are no different. Last, the majority responded to the textual arguments by citing the late Justice Scalia for the notion that "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote." Touché.

Justices Alito and Kavanaugh also suggested that there are in fact ways to discriminate solely based on sexual orientation and transgender status that would not qualify as sex discrimination.[29] Justice Alito provided the example of an employer enacting a policy that explicitly forbids the hiring of homosexual and transgender persons, despite their biological sex, just like the United States military has done.[30] The majority pushed back by highlighting that sexual orientation and gender identity are unable to be separated from Alito's understanding of the term "sex." The majority challenged the dissenting justices and employer defendants to devise instructions or explanations for a discriminatory rule (sexual orientation and gender identity) that does not utilize sex-based terminology. It posited this cannot be done because these concepts are all inextricably bound.

The employers and dissenting Justices finally asserted that in 1964, few "would have expected Title VII to apply to discrimination against homosexual and transgender persons."[31] The majority responded twofold. First, it saw no need to dive into legislative history here, because legislative history "is meant to clear up ambiguity, not create it."[32] "[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead it simply "demonstrates the breadth of a legislative command."[33] Second, the majority insisted that the Court interprets statutes regularly. Peculiarly, it noted, the Court receives push back when the focus of the statutory interpretation benefits unpopular groups in society.[34] The majority uses the example of the Americans with Disability Act ("ADA") and how its application to post offices (not provided for in the ADA) was not controversial, but its application to prisons (also not provided for in the ADA) was very controversial.[35] The Court put this argument to bed by stating

"[t]o refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[36]

In the face of compelling and creative arguments from the parties, a crystal-clear rule emerged from the majority opinion: Title VII now protects individuals based on their sexual orientation and transgender status (gender identity). Just as the late Judge Damon J. Keith would famously say, "[t]here's not a day in my life in some way large or small, I'm not reminded of the fact that I'm Black,"[37] there is no doubt that the LGBTQ+ community also face daily reminders that they are "different." At least as of June 15, 2020, the reminder of one's LGBTQ+ status can no longer be legally acceptable grounds for termination. As recognized by Justice Kavanaugh, this is something of which our nation can be proud.■

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1. *Bostock v. Clayton County, Georgia*, --- U.S. ----, Nos. 17-1618, 17-1623, 18-107, 2020 WL 3146686 (U.S. June 15, 2020).
2. *Id.* at *7.
3. *Id.* at *4 (citing *New Prime Inc. v. Oliveira*, 586 U.S. ---- (2019)); 42 U.S.C. 2000e-2(a)(1).
4. 883 F.3d 100 (2nd Cir. 2018).
5. 884 F.3d 560 (6th Cir. 2018).
6. 894 F.3d 1335 (11th Cir. 2018).
7. *Bostock*, --- U.S. ----, 2020 WL 3146686 at *4.
8. *Id.*
9. *Id.*
10. *Id.* (citing *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013)).
11. *Id.* at *5.
12. *Id.*
13. *Id.* at *7.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at *8 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971) (*per curiam*)).
18. *Id.* (citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)).
19. *Id.* at *9 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)).
20. *Id.*
21. *Id.* at *11.
22. *Id.* at *18.
23. *Id.* at *40–42.
24. *Id.* at *56.
25. *Id.* at *57.
26. *Id.* at *60.
27. *Id.* at *11.
28. *Id.* at *11, 16.
29. *Id.* at *11.
30. *Id.* at *21.
31. *Id.* at *14–15, 30–35, 60–61.
32. *Id.* at *14.
33. *Id.*
34. *Id.* at *15.
35. *Id.*
36. *Id.*
37. Virginia Gordan, *Judge Damon J. Keith, Judicial Giant and Civil Rights Icon, Dies at 96, National Public Radio*, April 28, 2019, available at https://www.npr.org/2019/04/28/718077751/judge-damon-j-keith-judicial-giant-and-civil-rights-icon-dies-at-96 (last accessed July 6, 2020).

Supreme Court Releases Statement on Racial Justice, Next Steps for Judicial Branch

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as individual racism, institutional racism or structural racism, and it undermines our democracy, the fair and equitable administration of justice, and severely diminishes individual constitutional protections and safeguards of full citizenship with the attendant rights and benefits sacred to all. People of color have no less expectation of fairness, equity and freedom from racial discrimination than others, yet they are continually confronted with racial injustices that the Courts have the ability to nullify and set right.

The Preamble to the Illinois Constitution opens with **We, the People of the State of Illinois** and in this context the Illinois Supreme Court, a co-equal branch of government in the State of Illinois, affirms to all of the people of the great State of Illinois its commitment to the protections and benefits extended to every citizen and court user through fair and equitable constitutional and procedural governance.

The administration of justice must be accessible, it must be fair, and it must be equitable. Where frailties in the disposition of justice exist, we will recognize and acknowledge them and seek to rectify any injustice.

Here are a few steps the Court has taken to begin to address these issues within the Judicial Branch:-

- In 2012, the Illinois Supreme Court created the Commission on Access to Justice to promote, facilitate and enhance greater access of underserved populations and communities to civil courts.
- In 2015, the Supreme Court Committee on Equality was formed to advance the Court's commitment to a judicial system free of bias in which every user and employee of the court could feel fairly treated, safe, and respected, and to promote equality and fairness in the administration of justice and facilitate a high level of trust and public confidence in the courts and its judicial officers.
- In 2017, the Supreme Court Committee on Equality partnered with the American Bar Foundation to participate in a judicial decision-making study that revealed judges are just like everyone else in their susceptibility to implicit bias – formed from influences which unconsciously affect decision making. These findings created an opportunity for engaging the judiciary and justice partners about implicit bias and prompted the creation of an Illinois Pattern Jury Instruction on implicit bias.
- In 2019, the Illinois Supreme Court unveiled its first Strategic Agenda and Operational Plan for implementing changes within

the Judicial Branch. This Agenda adopted core values for the Judicial Branch: fairness, accountability, integrity, and respect.

- In 2020, the Supreme Court Committee on Juvenile Courts recently formed a working group on disproportionate minority representation and disparate outcomes for children and youth involved in the child welfare and juvenile justice systems.

But there is still much work to be done.

To further these efforts, the Court is announcing the recruitment of a Chief Diversity and Inclusion Officer (CDIO) for the Judicial Branch. The CDIO will serve as a leader in proposing practices, procedures and rules for Illinois' courts to protect the constitutional rights of the public we serve. This executive-level hire will work with the Supreme Court, the Administrative Director and Court leaders throughout the Judicial Branch to achieve the Supreme Court's strategic goals related to diversity, equity and inclusion.

We recognize that these steps are only part of a long process that requires continuous research on the role of racism in our society and actions necessary for its eradication. The Court will continue to advance initiatives to achieve its mission to protect the rights and liberties of all by providing equal justice for all under law.

(FOR MORE INFORMATION, CONTACT: Chris Bonjean, Communications Director to the Illinois Supreme Court at 312.793.2323 or cbonjean@illinoiscourts.gov.)■

Illinois ARDC Statement on Racism

Chicago

June 29, 2020

The Attorney Registration and Disciplinary Commission has a unique and significant responsibility for assuring that the legal system achieves its goal of equal justice for all citizens. Given the ARDC's role and responsibility in the legal system, it is important for us to reinforce our commitment to addressing injustice by actively combatting the evils of racism and social inequity. These times of racial and civil unrest have have caused us to think deeply and differently about how we may more effectively meet our obligation to combat racism and support justice for all, which we publicly share with hope and commitment.

Illinois ARDC Statement on Racism

The killing of George Floyd by a Minneapolis police officer, along with recent killings of Ahmaud Arbery, Tony McDade, Breonna Taylor, Rayshard Brooks and other Black Americans by both law enforcement officers and others, brings into sharp focus the fears and injustices that continue to devastate people of color in our country. The ARDC, the regulator of the Illinois legal profession, joins with those seeking justice in denouncing the institutional racism that plagues our communities of color. These tragic deaths have compelled us to consider how the ARDC can play a meaningful role in addressing racism and promoting social equity.

The ARDC's first step must be to continue to examine its regulatory processes to identify and change any practices that allow bias to permeate our agency. In 2015, the ARDC appointed a Diversity and Inclusion leader, and since that time, we have addressed the equity of our internal processes and procedures. Through our D & I initiative, we have also provided continuing D & I education to our staff and volunteer board members, delivered D & I education to the profession, cultivated relationships with affinity bar associations, and increased representation of attorneys of color in upper levels of the organization. We will leverage our ongoing D & I initiatives in further identifying and addressing bias within our agency, and in all aspects of this agency's undertakings.

The ARDC also commits to use its regulatory authority to engage and educate members of the legal profession on addressing and eschewing racism, including implicit bias. Further, the ARDC commits to holding all in the legal profession accountable for protecting the rule of law and making the justice system available to and equitable for all members of our communities.

The special responsibilities of a largely self-governing profession require that lawyers aid other lawyers in observing the rules of professional conduct and assist others responsible for the administration of the justice system in fulfilling their duties. In the preamble to those rules, the Supreme Court instructs that lawyers are public citizens who should seek to improve the administration of the system of justice and should further the public's understanding of and confidence in the rule of law and the justice system. Conduct rules provide specific requirements, including prohibiting lawyers from engaging in discriminatory conduct.

Simply put, there is no place in our profession for those who cannot practice without discrimination based upon a person's color. We recommit ourselves to creating and maintaining a disciplinary system that identifies and holds attorneys responsible for conduct that includes racial bias, inequity or intolerance.

Finally, the ARDC commits to an ongoing focus and action on this issue and to transparency on that commitment. We will provide regular reports of our efforts, focusing on our D & I, regulatory

and educational initiatives and analysis of public data from our disciplinary caseload. Our annual reports will contain a comprehensive discussion of our yearly efforts. In these ways, we will provide information to the Supreme Court, the profession and the public to fairly gauge and hold the ARDC accountable for the success of our efforts.

The ARDC is hopeful about the possibility of change. History shows us that significant change is possible. In the past, lawyers have taken bold actions that have championed the rights of historically marginalized communities, led to the eradication of corrupt practices in the justice system and brought improvements in the fairness of that system. Currently, called to action by the brutal killings of Black Americans, the public is sending a clear message that racism must end. We join in that call and accept the responsibility of responding to that call in the work of our own agency.

Released on behalf of the ARDC Commission, Jerome E. Larkin, ARDC Administrator, and Lea S. Gutierrez, ARDC Director of Diversity and Inclusion■

Litigants Unsuccessful in Invoking European Union's Data Protection Regulation to Prohibit U.S. Discovery

BY BRITTNEY L. DENLEY

The General Data Protection Regulation (GDPR) provides broad privacy restrictions applicable to the data of EU citizens wherever they may reside. When it became effective in 2018 litigators queried whether the GDPR would complicate discovery in cross-border disputes, or in any disputes involving the personal data of EU citizens. Several recent U.S. cases have affirmed that the GDPR will not provide a safe harbor in which parties may seek refuge from U.S. litigation discovery obligations.

History of the GDPR

The GDPR[1] changed the European Union's data privacy landscape for entities in possession of citizens' personal information. Lauded as the world's strongest set of data protection rules, the regulation imposes limits on how organizations that control or process personal data may use and provide access to such data. Key provisions authorize EU nations to enact their own data privacy legislation consistent with the regulation, guiding how the GDPR will be implemented in respective EU-member countries. The UK[2], for example, has since passed the Data Protection Act of 2018.

The wide applicability of the GDPR impacts industries and jurisdictions across the globe. Companies, including those in the U.S. that operate or service EU citizens have had to adapt to comply with GDPR mandates or face fines up 20 million euros per violation.[3]

Invocation of the GDPR to Avoid U.S. Discovery

Litigants in U.S. courts have attempted to use the GDPR to limit or avoid discovery obligations with little success. Courts have declined to protect deposition testimony based on the assertion that the GDPR creates greater confidentiality for such testimony, see, *e.g., Ironburg Inventions, Ltd. v. Valve Corp.*,[4] declined to limit data retention and production based on an assertion that the GDPR increased the data anonymization burden, *see, e.g., Corel Software, LLC v. Microsoft,*[5] and declined to prohibit a video deposition on the basis that doing so over a party's objection violated the GDPR, see, *e.g., d'Amico Dry D.A.C. v. Nikka Financial.*[6] As discussed in detail below, when faced with a challenge that the GDPR prohibits the discovery sought entirely U.S. Courts have thus far generally maintained that they will not weigh foreign nations' privacy interests over the interests of domestic parties seeking discovery.

The conflict between the GDPR and the right to discovery in U.S. litigation has been confronted by courts across the United States. In a California patent infringement suit, *Finjan, Inc. v. Zscaler, Inc.*, the defendant contended that the production of its former sales director's emails would violate the GDPR unless costly redactions and anonymization were applied.[7] In South Carolina, the plaintiffs in *Rollins Ranches, LLC, v. Watson* raised claims of defamation, tortious interference, and civil conspiracy against a U.K. citizen based on her social media communications. The defendant opposed the plaintiffs' initial and renewed motions to compel discovery responses and the production of records, asserting that the UK Data Protection Act blocks access to these communications.[8] In Pennsylvania, in *Giorgi Global Holdings, Inc. v. Smulski*, an action for civil RICO and breach of contract, among other claims, Defendants argued that Polish privacy law and the GDPR prohibited them from producing

otherwise discoverable documents. In New Jersey, in *In re Mercedes-Benz Emissions Litigation,* the defendants sought to overturn an appointed special master's finding that sought after discovery could not be withheld under GDPR protections, but rather could be produced and designated as "Highly Confidential."[9]

Where a party has met its burden to prove that a foreign law bars production of discovery, courts will engage in a case-by-case comity analysis to determine its application.[10] In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for Southern District of Iowa,* the Supreme Court followed the "particularized analysis," set forth in the Restatement (Third) of Foreign Relations Law § 442(1)(c), to weigh the privacy interests of the foreign nation against the disclosure interests of the U.S. based on the following factors:

1. The Importance to the Litigation of the Documents or Other Information Requested

The importance of the documents weighs in favor of disclosure when the evidence is "directly relevant" to the claims[11] and there is a "substantial likelihood" that the documents will be important to prove the claims.[12]

2. The Degree of Specificity of the Request

Where a party makes a specific request directly related to relevant information from relevant documents this factor weighs in favor of production. This factor weighs against production where a party seeks irrelevant, sensitive, personal information and unduly burdens the opposing party with "generalized searches for information."[13]

3. Whether the Information Originated in the United States

This factor weighs against production where it is found that the majority of the sought-after documents and their custodians are located in a foreign nation.

4. The Availability of Alternative Means of Securing the Information

Where there is no alternative means for a plaintiff to obtain the sought-after information, this factor weighs in favor of production.[14]

5. The Extent to Which Noncompliance Would Undermine Important Interests of the United States, or Compliance Would Undermine Important Interests of the Foreign State

Arguably the most important factor, the Courts recognize that the U.S. "has a substantial interest in fully and fairly adjudicating matters before its courts – an interest only realized if parties have access to relevant discovery – and in vindicating the rights of American plaintiffs."[15] Where this goal can be accomplished while respecting foreign privacy interests (i.e., through protective orders and confidentiality agreements), this factor weighs in favor of production.[16] Likewise, this factor weighs in favor of production where respecting foreign privacy interests would impede the pursuit of serious claims with significant impact (i.e., impacting American consumers *en masse*).[17]

The *Finjan, Rollins Ranches, In re Mercedes-Benz Emissions Litig.,* and *Giorgi* courts rejected the invocation of the GDPR and implementing regulations. Those courts found that the parties resisting discovery failed to meet their burden, to demonstrate that the regulations should apply and, upon evaluation of the aforementioned factors, found that the interests of the U.S. and the party seeking discovery outweighed the interest of the foreign nation privacy interests.[18] Accordingly, the GDPR and implementing legislation did not result in a prohibition against the requested discovery.

Chapter 6 GDPR provides that a "legal requirement" may be a basis for which a company can make a compliant disclosure of personal information.[19] Article 49 of the GDPR further provides that personal data can be transferred to a third country where it is "necessary for the establishment, exercise or defence of legal claims."[20] However the European Data Protection Board ("EDPB"), which was created by the GDPR to create guidance on its application, has advised that a legal requirement is not established merely by an order of a U.S. Court, and the Article 49 derogation is not granted for every foreign legal proceeding—only those in which pass a strict "necessity test." While balancing the interests of domestic parties seeking discovery U.S. courts must also be aware of the reality that action may be taken against litigants for their disclosures in discovery.

Implications of U.S. GDPR Rulings and Beyond

U.S. courts' rulings in favor of disclosure over litigants' invocation of the GDPR and other foreign data protection laws are likely to make waves for companies with an EU presence. Where courts determine that litigants must comply with discovery requests, the companies involved in maintaining relevant personal data run the risk of violating the GDPR. While not the focus of regulators thus far, document production in litigation may soon garner their attention, as enforcement efforts have been aggressive, and the imposition of fines has been significant.

Furthermore, as domestic data privacy legislation expands in the U.S.—California's enactment of the California Consumer Privacy Act (CCPA)[21] is expected to be followed by additional states enacting similarly restrictive data privacy laws—similar discovery objections and claims are likely to be raised, based instead on state law.■

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1.General Data Protection Regulation, EUR-Lex (May 25, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1552662547490&uri=CELEX%3A32016R0679.
2. The UK will continue to be subject to the GDPR through its Brexit transition period, until December 2020. Brexit and data protection in the UK, IT Governance (Feb. 5, 2020), https://www.itgovernance.co.uk/eu-gdpr-uk-dpa-2018-uk-gdpr.
3. Ryan Browne, Europe's privacy overhaul has led to $126 million in fines — but regulators are just getting started, CNBC (Jan. 19, 2020) https://www.cnbc.com/2020/01/19/eu-gdpr-privacy-law-led-to-over-100-million-in-fines.html; Ivana Kottasová, These companies are getting killed by GDPR, CNN Business (May 11, 2018), https://money.cnn.com/2018/05/11/technology/gdpr-tech-companies-losers/index.html.
4. *Ironburg Inventions v. Valve Corp.*, Case No. C17-1182-TSZ (W.D. Wash. Aug. 22, 2018).
5. *Corel Software, LLC v. Microsoft*, Case No. 2:15-cv-00528-JNP-PMW (D. Utah Oct. 5, 2018).
6. *d'Amico Dry D.A.C. v. Nikka Financial*, CA 18-0284-KD-MU, Dkt. No. 140 (Adm. S.D. Ala. Oct. 19, 2018).
7. *Finjan, Inc. v. Zscaler, Inc.*, No. 17CV06946JSTKAW, 2019 WL 618554, 1 (N.D. Cal. Feb. 14, 2019).
8. *Rollins Ranches, LLC v. Watson*, 2020 BL 192422, 4 (D.S.C. May 22, 2020).
9. *In re Mercedes-Benz Emissions Litig.*, No. 16-CV-881, 2020 WL 487288, 3 (D.N.J. Jan. 30, 2020).
10. *Id.* at *6 ; *Royal Park Investments SA/NV v. HSBC Bank USA, N.A.*, No. 14 CIV. 8175 (LGS), 2018 WL 745994, *11 (S.D.N.Y. Feb. 6, 2018)); *In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. 374, 377 (C.D. Cal. 2002).

11. *In re Mercedes-Benz Emissions Litig*., No. 16-CV-881, 2020 WL 487288, 6 (D.N.J. Jan. 30, 2020; *AstraZeneca LP v. Breath Ltd*., No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800, 13 (citing *In re Air Crash at Taipei*, 211 F.R.D. at 377).
12. *Giorgi Glob. Holdings, Inc. v. Smulski*, No. CV 17-4416, 2020 WL 2571177, 1 (E.D. Pa. May 21, 2020); quoting *Laydon v. Mizuho Bank, Ltd*., 183 F.Supp.3d 409, 420 (S.D.N.Y. 2016).
13. *In re Mercedes-Benz Emissions Litig*., 7.
14. "Where 'the information sought in discovery can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.'" *AstraZeneca LP v. Breath Ltd*., No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800, *14 (D.N.J. Mar. 31, 2011); *In re Air Crash at Taipei*, 211 F.R.D. at 378 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir.1992)).
15. *Giorgi Glob. Holdings, Inc. v. Smulski*, No. CV 17-4416, 2020 WL 2571177, *2 (E.D. Pa. May 21, 2020); quoting *Fenerjian v. Nong Shim Co*., Ltd., 2016 WL 245263, *5 (N.D. Cal. Jan. 21, 2016).
16. *In re Mercedes-Benz Emissions Litig*., 3.
17. *See, e.g., In re Mercedes-Benz Emissions Litig*., No. 16-CV-881 (KM) (ESK), 2020 WL 487288, at *8 (D.N.J. Jan. 30, 2020) (noting the unlawful misleading of American consumers).
18. *Rollins Ranches, LLC v. Watson, at *4* (holding that the defendant offered no support for her assertion that the UK Data Protection Act applied to limit her discovery responses, in reliance upon *Societe Nationale Industrielle Aerospatiale's* holding that that "[foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute;" *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987); *Giorgi Glob. Holdings, Inc. v. Smulski,* at *2 (holding that defendants failed to meet their burden to prove that GDPR protections should apply to their documents even where the defendants' documents originated or were located outside of the U.S., as an analysis of all the Restatement factors weighed in in favor of disclosure); *In re Mercedes-Benz Emissions Litig.*, at *8 (holding that the Special Master did an appropriate comity analysis and did not abuse his discretion in finding that the GDPR did not preclude disclosure of evidence where the information could be protected under a Discovery Confidentiality Order); *Finjan, Inc*., at *3 (holding that the defendant did not meet its burden to prove that the GDPR barred production or that disclosure would result in a GDPR enforcement action, even where sales director from whom the discovery was sought was physically located in the U.K.).
19. EDPB Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, adopted on 25 May 2018, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.
20. *Id*.
21. California enacted its own data privacy legislation at the top 2020—the first legislation of its kind in the U.S. The California Consumer Privacy Act (CCPA) applies to companies operating in California that either a) earn at least $25 million in annual revenue, b) gather, buy, or sell data on more than 50,000 of its users, or c) generate more than half of their revenue from the sale of user data. Similar to the GDPR, the CCPA aims to protect consumers' personal information. Key provisions detail consumers' legal rights to know what personal information covered entities possess and disclose about them, to request the deletion of personal information, to request to opt in or out of the sale of personal information, to name a few.

Time to Allow Possession of Cell Phones in Courthouses and Courtrooms

BY EVAN BRUNO

As part of its 2020-2023 Strategic Plan, the Illinois Supreme Court Commission on Access to Justice plans to draft a uniform policy, to be presented to the Illinois Supreme Court, allowing greater use of cell phones in courthouses and encouraging adoption of a uniform policy statewide.

I believe it's high time to permit cell phones in courthouses and courtrooms, not just for lawyers, but for *pro se* litigants and members of the public as well. In January 2020, the Michigan Supreme Court adopted a new statewide policy allowing just that. Under Michigan's new policy, cell phones must be silenced, they cannot be used for photography, recording, or communication with witnesses or jurors, and the judge retains ultimate discretion to determine what cell phone activity is disruptive or likely to compromise courthouse security. Michigan's policy is eminently reasonable and loaded with appropriate safeguards. Illinois should follow suit.

The Michigan Supreme Court's order came with a dissenting opinion by Justice Stephen Markman, who characterized the use of cell phones as "a mere individual convenience" and laid out his arguments against the new statewide policy. First, he criticized the new policy's one-size-fits-all approach, opining that policing the new rules will be more difficult in large, busy courtrooms than in small courtrooms. Second, he expressed his worry that cell phones will threaten the "solemn proceedings" and "compromise the necessarily formal and focused atmosphere of the courtroom." Third, he warned that cell phones could be used to capture photos or recordings "to gain information about witnesses and jurors in order to intimidate, compromise, or embarrass these persons." Justice Markman's parade of horribles could be better described as a parade of *dagnabbits*.

His argument against the one-size-fits-all approach—an argument that could be made against *any* rule of general applicability—is a mischaracterization of the new Michigan policy, which gives courtroom judges discretion to "terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice."

Justice Markman's second fear, that the introduction of cell phones will destroy the solemnity of the courtroom, rests on the faulty assumptions that (1) cell phones are not already ubiquitous in courtrooms (they are, in the hands of lawyers) and (2) cell phone possession cannot coexist with solemnity (it can, as is obvious to anyone who has attended a church service, wedding, or funeral during the age of cell phones). Similar curmudgeonly arguments were made against allowing extended media coverage, closed-circuit video arraignments, and doing away with the powdered wig. And although Justice Markman is correct that occasional "beeps, buzzes, and personalized ringtones" could invade the serenity of the courtroom from time to time, the justice system is not so fragile as to collapse under such trivial disturbances, if they occur.

Finally, the claim that cell phones will be used to somehow tamper with

witnesses or jurors is more of an imagined boogeyman than a practical reason to maintain cell phone bans. Illinois already allows extended media coverage of trials, including audio and video recordings that are televised and posted online. Journalists often publish witness names and verbatim reports of their testimonies. Those who arrive in courtrooms to testify or serve as jurors are already subject to the gazing eyes of audience members whose right it is to attend public proceedings. Anyone with a cell phone may stand outside a courthouse's front doors and document all who enter. And any fear that outside information might reach a juror during trial can be remedied by embargoing the jurors' cell phones during proceedings. Witness and juror tampering is bad when it happens, but given the already public and open nature of our court systems, it's hard to believe cell phone bans are the floodgates that, if broken, would unleash a meaningful increase in such misconduct.

The downside of cell phones in the courtroom is mild, but what about the upside? Take the following made-up case of Jane Doe as an illustration.

Jane, a single working mother, wakes up one morning to find a threatening voicemail from her abusive ex-boyfriend. She texts a babysitter to come look after the kids while she goes to the courthouse to obtain an emergency order of protection. Arriving at the courthouse via Uber, Jane is turned away at the metal detectors and told she can't bring her cell phone inside. She walks around the block and, making sure the coast is clear, slips her cell phone into a bush, hoping the rain holds off. (This is an actual practice—I've seen it done.)

Inside the courthouse, Jane starts on her petition. The form asks for the date of birth, addresses, and other biographical information for her ex. She doesn't have this information memorized, but she could have figured it out using various apps and information stored on her cell phone. She leaves those lines blank. Doing her best to remember the contents of the threatening voicemail she received, she jots down a paraphrased version and goes to the courtroom for the emergency hearing.

She waits almost an hour for the judge to call her case, regretting having told the babysitter she wouldn't be gone for long. Finally her case is called. The judge, reading her petition, is hesitant to grant an emergency order of protection based on a single voicemail. He asks Jane if she's received other threatening messages in the past. She has, but cannot recall the exact dates or details. "That's all on my phone, Your Honor." The judge denies the emergency order of protection, but tells Jane to come back in exactly two weeks at 3:00 p.m. with printouts of the other threatening messages. (She'll need to find someone who owns a printer.) "Does that date work for you?" the judge asks. Jane, not able to consult her electronic calendar, says "sure," forgetting her son, Johnny, has an appointment with his asthma specialist that same date and time.

Finally, exiting the courthouse, Jane retrieves her phone from the bush and sees a series of text messages from the babysitter:

"Johnny says he's having trouble breathing. What do I do?"

"Where do you keep Johnny's inhaler!??"

"I don't know what to do. He's not getting better."

"Just called 911. Ambulance on its way."

Jane's story is fictional, but the troubles she faces are not. People come to courthouses to conduct important business, but cell phones bans often deprive those people of the tools necessary to accomplish their tasks. Cell phone bans also trivialize the important role, for better or worse, that cell phones play in important daily life affairs of most adults.

Illinois must seriously rethink the pros and cons of cell phone bans. The cons have changed little over the past 10 to 20 years. Phones still make occasional beeps and buzzes, and they can be used to make recordings. The pros, on the other hand, have ballooned proportionate to the technology. The modern cell phone is an extension of its owner's brain and the primary mechanism through which he organizes and manages his daily life. They are so much more than "a mere individual convenience," as Justice Markman opines. Courthouses and courtrooms are the last public places where the greatest technological innovations of our lifetimes remain contraband. It's time to change that.

The 2020-2023 Strategic Plan of the Illinois Supreme Court Commission on Access to Justice can be found here: https://courts.illinois.gov/SupremeCourt/Committees/ATJ_Commn/01-Strategic_Plan_2020.pdf

The Michigan Supreme Court's Order and Justice Markman's dissenting opinion can be found here: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-30_2020-01-08_FormattedOrder_AmendtOfMCR8.115.pdf ■

Obscure New Jersey 'Treatment' Facility Has a Higher COVID-19 Death Rate Than Any Prison in the Country

BY JORDAN MICHAEL SMITH

Note: The following article discusses the effects of COVID-19 on the residents of a New Jersey facility housing individuals who have been indefinitely committed under that state's Sexually Violent Predator statute. New Jersey and Illinois are two of 20 states that have civil commitment laws that apply to sex offenders who have completed their criminal sentences. The Illinois Sexually Violent Persons Commitment Act is found at 725 ILCS 207/1 et seq. While the New Jersey statute differs somewhat from the Illinois statute, the Temporary Detention Facility in Rushville houses some 500 residents in a former prison now run by the Illinois Department of Human Services. The residents have been committed indefinitely or have pending commitment petitions. As in New Jersey, the Illinois program delivers cognitive behavioral therapy by mental health experts in a "congregate living facility". Also as in New Jersey, many of the residents of the Illinois program live at Rushville for decades. As of July 7, 2020, the Illinois Department of Public Health reports that 619 residents of Schuyler County, where Rushville is located, had been tested for COVID-19. There were 13 confirmed cases with no deaths reported.

The following article was written by Jordan Michael Smith, The Appeal. It was published June 4, 2020 at https://theappeal.org/obscure-new-jersey-treatment-facility-has-a-higher-covid-19-death-rate-than-any-prison-in-the-country/, and is republished here with permission.

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This story was produced in collaboration with Type Investigations.

With its innocuous name, the Special Treatment Unit (STU) sounds like a hospital. It's a building in Avenel, New Jersey, housing 441 "residents," as it calls them. It has what state officials have described as a "comprehensive treatment program" with cognitive behavioral therapy delivered by mental health experts.

But the STU is actually a prison in all but name—it's run by the state's Department of Corrections and located on the grounds of the East Jersey State Prison. So-called residents live there involuntarily, often for decades on end, their lives controlled and regimented. That's because the detainees in the STU were all convicted of sex offenses and deemed too dangerous to release, despite research showing that such assessments are often flawed.

Inside this small, harmless-sounding complex, at least eight individuals died of COVID-19 by the end of May. Two others have died since mid-March, but the causes haven't been released. As of May 28, state officials confirmed 55 STU prisoners had tested positive, but prisoner Roy Marcum said on June 2 that he believes the number is about 70.

With at least eight deaths per 441 prisoners, the STU has a higher death rate—by far—than any prison in America. Its death count is equal to that of all the prison complexes combined in California. Or all those in Arizona, Pennsylvania, or more than 14 other states, according to Bureau of Prison data. New Jersey ranks fourth in prison deaths due to the coronavirus (43 as of Wednesday).

Unlike in jails and prisons around the country, every individual in the STU has completed his criminal sentence. Some completed their sentences long ago and have been held in the STU since it opened in 1999. At least one of the eight people who died committed his crime more than 30 years ago, in the 1980s. Experts say America's way of dealing with individuals convicted of sex crimes has long been cruel, unjust, and counterproductive. In the pandemic era, it's become fatal.

Some prisoners have resigned themselves to their fate. Joshua Denisiuk, 26, was convicted for sex crimes he committed when he was just 15 and has been in the STU since 2013. He knows there is little he can do to avoid the coronavirus besides wash his hands frequently. "If I get it, I get it," he said.

For centuries, the ideas behind a process called "civil commitment" have allowed authorities to involuntarily institutionalize individuals whom psychiatric experts believe to be incapable of caring for themselves. Beginning in the 1960s, civil commitment became used primarily to hospitalize people who were considered an imminent danger to themselves or others, for short periods.

But in 1999, New Jersey followed other states in enacting a Sexually Violent Predator Act. The law effectively permits state officials to indefinitely lock up people convicted of sex offenses who "are likely to engage in repeat acts of predatory sexual offenses." When people around New Jersey convicted of sex offenses approach the end of their criminal sentences, the state's attorney general can petition to hold them under the law. Once they're in, they sometimes remain held there for the rest of their lives.

The American Psychiatric Association and many other health experts oppose civil commitment for individuals who have committed sex crimes, saying it lacks a scientific basis and violates core civil liberties. "Contemporary civil commitment measures grew out of interwoven panics concerning 'stranger danger,' satanic ritual abuse, and violent crime," said the historian Paul Renfro, author of "Stranger Danger: Family Values,

Childhood and the American Carceral State." Renfro points to research showing that civil commitment does little to address sexual violence and that recidivism for sex crimes is actually lower than for other crimes.

But the Supreme Court has upheld the practice, and 20 states now have civil commitment laws for people classified by the state as sexually violent predators (SVPs), as does the federal government and the Bureau of Prisons. Approximately 5,400 individuals around the country—almost all men—are held under these laws.

As its name suggests, civil commitment is a civil procedure, not a criminal one. People held under these laws do not have the same legal rights as others in the justice system. They are held indefinitely, without potential release dates, living in limbo for years—sometimes for their entire lives. "Once you're there, nobody wants to take a chance and release someone who's been civilly committed," said Russell, who requested that his last name not be used to avoid being harassed by his neighbors. He spent nine years at the STU before being released nearly a decade ago.

The underlying basis for civil commitment is the assumption that an individual who commits a sexual offense at some point in his life is an eternal risk to his community. Experts disagree.

"Nobody is a risk all the time," said Maia Christopher, executive director of the Association for the Treatment of Sexual Abusers. Determining the risk level of individuals is critical, she added, but SVP laws are broad and severe. Once individuals are caught in the system, it's difficult for them to get out. "There are very few ways for people to get acknowledged for positive behavior," Christopher said.

In New Jersey, as elsewhere, so-called SVPs are kept in separate facilities from prison detainees. "They don't consider you prisoners, but they treat you like prisoners," said William Moore, who was in the STU for 15 years before being released in 2014 at age 65. The state does not have to prove beyond a reasonable doubt that an individual will commit a sex crime in the future—authorities just need to present "clear and convincing evidence" to a judge.

Some of the detainees, like Denisiuk, were convicted of crimes as children. He doesn't participate in the treatment that is offered. He said his lawyer advised him against it, warning him that anything an individual said to a therapist or staff member in the facility can be used against him in a hearing. Rather than incriminate himself by saying the wrong thing, he hopes his case is resolved in court, and that he is eventually freed, since he already completed the sentence for the sexual assault he committed as a teenager more than 10 years ago.

People in civil commitment are at heightened risk of contracting the coronavirus because of age and poor health conditions. "We know that the death rate from COVID is higher among older individuals, and civil commitment disproportionately affects older individuals," said Mike Mangels, a public defender who represents the STU residents. Since people in civil commitment have already served their sentences—sometimes lengthy—they are older on average than other incarcerated people. Since the pandemic started, they are afraid for their lives. "They have to watch as some of the people they have known for 10 years or more, in some cases, are carted out, never to be seen again," he said.

Marcum, a 56-year-old who has been in the STU since 2000, told The Appeal and Type Investigations that as of last Saturday, 29 detainees were in isolation because they had tested positive for COVID-19. Detainees are now locked in their cells for more than 23 hours per day, he said, but for weeks state officials prohibited them from even wearing masks. Hand sanitizer was considered contraband until recently, according to detainees and news reports, and testing was slow and haphazard. "For a week I was getting a call just about every day that another person had died," said Mangels, the public defender.

Liz Velez, a spokesperson at New Jersey's Department of Corrections, said residents are not locked down and leave their cells for showers, phone calls and "passive recreation" such as playing board games and reading. "The STU [is] located in the northern region of the state—the region hardest hit by the pandemic." Velez said. "Across all our facilities we've implemented various virus mitigation strategies from enhancing sanitization, ensuring access to sanitation products like soap and hand sanitizer, along with CDC education on proper hygiene and we also distributed masks to all inmates, residents and employees."

The STU follows social distancing guidelines and anyone testing positive for the virus is placed in medical isolation with a well-trained team, she said, noting that the department was also providing on-site testing to residents and state DOC employees.

But concerns about the STU long predate the coronavirus. In 2016, detainees there filed a class-action lawsuit against authorities, alleging that conditions at the facility were "punitive." Detainees "are entitled to considerate treatment" but were instead treated like "criminals whose conditions of confinement are designed to punish," the suit noted, citing examples such as infrequent family visits and little or no educational, vocational or recreational activities." Detainees, it added, "are being denied meaningful mental health care treatment that gives them a realistic opportunity for their conditions materially to improve."

In response to COVID-19, group treatment programs in the STU, and around the country, have been canceled or scaled back. New Jersey's Department of Human Services, which runs the mental health treatment at the STU, did not respond to a request for comment by publication time. But according to detainees, the most common form of treatment in the facility, group therapy, has been canceled since mid-March, which means individuals in civil commitment cannot even work to be among the few deemed worthy of release.

As of 2016, only 15 percent of prisoners at the STU were ever released. The rest exist in purgatory, made worse by the threat of coronavirus. "People are scared," Marcum said. He is still hopeful that one day he'll be released. "Less so as the years go by."

Residents of the STU are eligible for furloughs in the community, but Velez said "no such trips have been scheduled during the pandemic to minimize exposure in the

community."

"It would be one thing to lose the few freedoms we have if what they did was effective—but what they did was clearly pretty ineffective," Marcum said.

Unlike those incarcerated in prison or jail, the identities of people in civil commitment are unavailable to the public. The names of the eight people at the STU whose deaths were confirmed to be related to COVID-19 have not been released. They existed there anonymously, some for decades, and they died just as anonymously.

"We called it the 'Pine Box Release Program'—because the only way you were leaving it was in a box, dead," said Russell, the former prisoner released in 2011. He still has friends there, men who have been there for decades. He's hoping they'll one day be released, alive. But in the age of the coronavirus, he isn't counting on it.■

The Appeal is a non-profit media organization that produces original journalism about criminal justice that is focused on the most significant drivers of mass incarceration, which occur at the state and local level. For more information, contact The Appeal at https://theappeal.org/.

https://theappeal.org/obscure-new-jersey-treatment-facility-has-a-higher-covid-19-death-rate-than-any-prison-in-the-country/.

Recent Appointments and Retirements

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1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Benjamin W. Dyer. 6th Circuit, June 1, 2020
- Mathew J. Hartrich, 2nd Circuit, June 8, 2020

2. The following judge has retired:

- Hon. Kathleen M. McGury, Cook County Circuit, June 1, 2020 ■