

Queens

BAR BULLETIN

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December 2022 | Volume 90, No. 3

November 2022

NYS Bar Association House of Delegates

On November 4th and 5th, 2022, the Executive Committee and House of Delegates of the New York State Bar Association met at the Bar Center in Albany, New York. As Vice President for the Eleventh Judicial District, I attended both meetings. The House of Delegates is the policy-making body of the Bar Association.

The House of Delegates received a report from President Sherry Levin Wallach on what has occurred so far during her term and what she anticipates for the future. We heard from Treasurer Dominick Napaletano and head of the Finance Committee, Michael McNamara on the financial position of the Association and to pass a budget for 2023. We discovered that, like most institutions, the Association has been damaged by the financial conditions of the past few years but, overall, is relatively strong at this time.

Reports and recommendations were passed by the House of Delegates to update bylaws and modify the rules of the House itself. A moving memorial

was presented for Hon. Richard D. Simons by Hon. Howard A. Levine, both past judges of the New York State Court of Appeals. The Root/Stimson award was presented to Samantha I.V. White by President Wallach. This award is presented to an attorney to honor their commitment to volunteer community services work. The Association nominating committee presented the nominations for offices and House of Delegate Members for the 2023-2024 year. Treasurer Dominick Napaletano was nominated to be the next President Elect of the Association.

The House and Executive Committee received several informational reports which currently did not require action but which point toward upcoming issues to be considered. They include:

- A) A report from the task force on Emerging Digital Finance and Currency.
- B) A report from the task force on Modernization of Criminal Practice.
- C) A report from the Committee on Legal Education.

- D) A report from the Committee on membership.
- E) A report on Affirmative Legislative Proposal.

Substantively, the House of Delegates passed several proposals which become the policy of the Association and, therefore, upon which the Association can now act. One of these resulted in the Association supporting a federal right to an abortion and for passage of adding an Equal Rights Amendment to the New York State Constitution.

The abortion issue has been front and center for some time but especially since the recent Supreme Court decision in DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION, which held that no Federal Right to abortion exists, overturning the 1973 ROE V. WADE ruling. Since the Dobbs decision, as least seventeen

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The Docket

Being the official notice of the meetings and programs listed below. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

DECEMBER 2022

Wednesday, December 7 CLE: Criminal Court Seminar 1:00 pm
 Thursday, December 8 CLE: No Fault Updates 2022 1:00 pm
 Thursday, December 15 Holiday Party at Jericho Terrace, Mineola, NY 5:30 pm
 Monday, December 26 to Friday, December 30 OFFICE CLOSED

JANUARY 2023

Monday, January 2 *New Year's Day Observed – OFFICE CLOSED*
 Wednesday, January 11 Academy of Law Committee Mtg 1:00 pm
 Thursday, January 12 CLE: Buying & Selling Real Property 5:30 pm
 Thursday, January 26 Our Family Wizard Lunch & Learn Program 1:00 pm
 Thursday, January 26 Nominating Committee Mtg 5:00 pm
 Monday, January 16 *Martin Luther King, Jr. Day – OFFICE CLOSED*

FEBRUARY 2023

Monday, February 13 *Lincoln's Birthday Observed – OFFICE CLOSED*
 Monday, February 20 *Presidents' Day – OFFICE CLOSED*

MARCH 2023

Tuesday, March 14 Judiciary, Past Presidents & Golden Jubilarian Night

APRIL 2023

Friday, April 7 *Good Friday – OFFICE CLOSED*
 Tuesday, April 18 CLE: Equitable Distribution Update – Pt 1 5:30 pm
 Tuesday, April 25 CLE: Equitable Distribution Update – Pt 2 5:30 pm

MAY 2023

Thursday, May 4 Annual Dinner & Installation of Officers at Terrace on the Park
 Wednesday, May 17 Family Law Committee Dinner 5:30 pm
 Monday, May 29 *Memorial Day – OFFICE CLOSED*

JUNE 2023

Monday, June 19 *Juneteenth – OFFICE CLOSED*

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Editor's Note

January 6, 2021 and October 16, 1859 – A Reckoning

By Paul E. Kerson

What are the similarities and differences between January 6, 2021 and October 16, 1859, the two most significant days in the internal history of the United States Government?

John Brown's Raid on the United States Government's Arsenal in Harper's Ferry, West Virginia (then Virginia) on October 16, 1859 was one of the seminal events in American History. Much has been written about this event over the past 163 years including several entire volumes.

In order to understand it, we must first consider John Brown's background. He was born in Torrington, Connecticut in 1800 but raised in Hudson, Ohio from the age of five. Hudson, Ohio was part of Connecticut's Western Reserve before Ohio became a State of the United States. Many former Connecticut residents of the Western Reserve were Calvinists with a deep condemnation of the slavery of African-American people practiced in the Southern United States. Slavery was forbidden in Ohio, Indiana, Illinois, Wisconsin and Michigan by the Northwest Ordinance of 1787.

In Hudson, the Calvinists from Connecticut set up a rudimentary institution of higher learning, Western Reserve College, which survives today as one of the nation's leading universities, Case Western Reserve University (CWRU) now located in Cleveland, some 30 miles from Hudson. Cleveland was also part of Connecticut's Western Reserve. Western Reserve College and much of Hudson were stops on the Underground Railroad, used to house liberated African-American slaves as they journeyed from the Southern United States to Canada and freedom during the early 19th century. The Underground Railroad was not actually a Railroad. It was a road map to safe houses for runaway slaves. See Google, *Hudson, Ohio Underground Railroad*.

Western Reserve College also had a Union Regiment in the Civil War to fight the soldiers of the Confederacy.

It was in this environment of strict anti-slavery sentiment that John Brown grew up from the age of five.

Thus, it is completely unsurprising that as the 19th century progressed, John Brown would become a leading Abolitionist. He did not think that just writing and speaking about it was enough. He wanted to actually "go to Africa" and liberate the slaves himself. By "Africa" he meant the Southern United States where so many African-Americans resided in horrific living conditions.

John Brown went to Missouri and peacefully liberated several African-American slaves. He then went to Osawatimie, Kansas where he engaged in pitched battle with pro-slavery forces seeking to introduce slavery into the then Kansas territory. Several people were killed.

John Brown then studied the matter further and decided to plan a Raid on the United States Government's Arsenal in Harper's Ferry, Virginia. West Virginia had not yet been created. When Virginia seceded from the United States in 1861 to join the Confederacy, people in the Northern Counties of Virginia were opposed and formed their own State, the new State of West Virginia which was admitted to the Union in 1863 during the Civil War.

But we are getting ahead of ourselves. John Brown hoped that by liberating the United States Government's arsenal, the slaves of Virginia would come flocking to him, take up arms, and liberate the rest of the slaves of the South.

John Brown was a white man. The leading Abolitionist of the time was Frederick Douglass, a black man who had previously been a slave himself. John Brown met with Frederick Douglass to discuss his plan. They met in an old stone quarry near Chambersburg, Pennsylvania. Although Douglass was very sympathetic to Brown's views, he thought the Harpers Ferry plan was incredibly dangerous. Frederick Douglass told John Brown that his plan was "a perfect steel-trap" and he would never get out alive. See Brian McGinty, *John Brown's Trial*, Harvard University Press, Cambridge, Massachusetts, 2009, Page 45, 235.

Nevertheless, John Brown believed that the violence and degradation of slavery in the Southern States was so egregious that he moved forward with this plan on October 16, 1859. The slaves of Virginia did not rise up despite the fact that guns were available.

In order to understand why, we must understand that the conditions of slavery were so brutal and so oppressive and so fearful, that the risk of failure meant certain torture and death for anyone who joined John Brown's plan.

Thus, it would appear that the plan failed. But that was not the case. John Brown was militarily defeated and arrested. He was charged with the unusual crime of treason against the State of Virginia, rather than against the United States. This was a specific agreement between then United States President James Buchanan and Virginia Governor Henry Alexander Wise. One of Brown's legal defenses was

that one could not commit treason against a State of the United States only against the United States itself. See McGinty at page 13.

Brown was nevertheless convicted and sentenced to death by hanging.

However, before his sentence, the Virginia State Trial Court gave him the opportunity to address the Court. Brown's Trial in 1859 was "the trial of the century" that is the 19th century, similar to the leading Trials of the 20th century, the 1925 "monkey trial" of John T. Scopes, the 1935 "Lindberg baby kidnapping Trial", the 1954 murder trial of Dr. Sam Sheppard and the 1995 murder trial of O.J. Simpson. See McGinty, page 16.

Although television, radio and the internet had not been invented in 1859, newspapers and telegraphs had been so invented. Telegraphs were the original E-mail. Newspaper reporters from all over the country came to Charlestown, Virginia (now known as Charles Town, West Virginia). They transcribed the proceedings word for word and sent them by telegraph to their newspaper offices in Boston, New York, Philadelphia, Atlanta, Chicago, Cleveland, Baltimore and Washington, the leading American cities at the time. See McGinty at pages 223-224.

In his book, *John Brown's Trial*, Brian McGinty sets forth John Brown's entire speech to the Court. Parts of it are worth re-printing here. Before his death sentence, John Brown had this to say:

"In the first place I deny everything but what I have all along admitted, of a design on my part to free slaves. I intend in certainly to have made a clean thing of that matter, as I did last winter when I went to Missouri, and there took slaves without the snapping of a gun on either side, moving them through the Country, and finally leaving them in Canada. I designed to have the same thing again on a larger scale. That was all I intended. I never did intend to murder or treason, or the destruction of property, or to excite or incite the slaves to rebellion, or to make insurrection.

I have another objection and that is that it is unjust that I should suffer such a penalty. Had I interfered in a manner in which I admit, in which I admit has been fairly proved – for I admire the truthfulness and candor of the greater portion of the witnesses who had testified in this case – had I so interfered in behalf of the rich, the powerful, the intelligent, the so-called great, or in behalf

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Editor's Note

January 6, 2021 and October 16, 1859 –
A Reckoning

CONTINUED FROM PAGE 4

of any of their friends, either father, mother, brother, sister, wife or children, or any of that class, and suffered and sacrificed what I have in this interference it would have been all right; every man in this Court would have deemed it an act worthy of reward rather than punishment..."

I believe that to have interfere as I have done, as I have always freely admitted I have done, in behalf of His despised poor, it is no wrong, but right. Now if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in the slave country, whose rights are disregarded by wicked, cruel and unjust enactments, I say let it be done" See McGinty at pages 224-225.

This plan is carefully explained by Tulane University History Prof. R. Blakeslee Gilpin in his noted work, *John Brown Still Lives!*, the University of North Carolina Press, Chapel Hill, N.C. 2011, page 37. A contemporary observer, the Reverend Vanderlip Leech, a revivalist Virginia preacher and a witness to Brown's raid called Brown's plan "a more idiotic and senseless theory never entered an American mind... in the superlative degree it was unreasonable and ridiculous". See Gilpin at pages 37-38.

Unreasonable? Ridiculous? Idiotic?

Prof. Gilpin is at his most interesting when he compares John Brown with his civil rights descendants one century later Dr. Martin Luther King, Jr. and Malcolm X.

Malcolm X famously said "so when you want to know good white folks in history where black people are concerned, go read the history of John Brown". Dr. King on the other hand was of the completely opposite view to both John Brown and Malcolm X stating "urging Negroes to arm themselves and prepare to engage in violence, as he has done, can reap nothing but grief". This was Dr. King commenting on Malcolm X's embrace of John Brown. See Gilpin at page 185.

We cannot, we must not, judge 19th and 20th century people by 21st century standards. But we must understand what they thought, what motivated them, and why they did what they did if are to understand ourselves and build a better world.

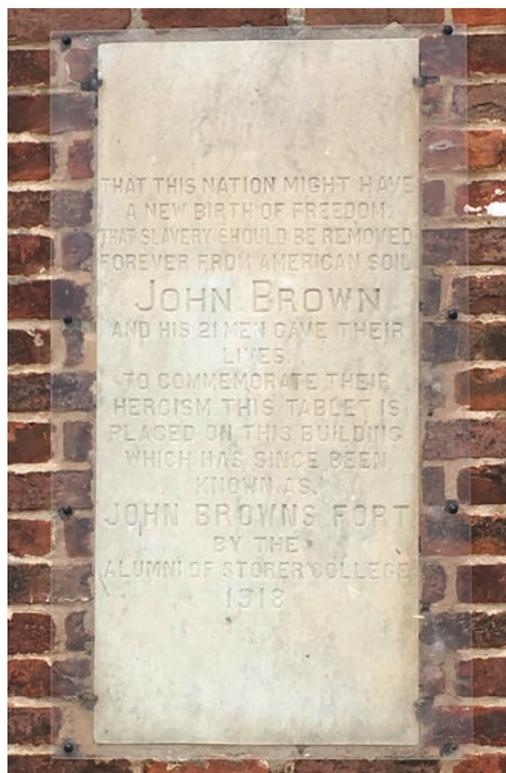
John Brown was in fact executed. But the impact of his allocution in 1859 in the Virginia State Court was read all over the country.

McGinty describes the impact of Brown's Trial as follows:

"It was printed in newspapers all over the country and re-printed countless times – sometimes even as a separate publication. In his statement, Brown showed himself to be a man of conviction and principle. He enunciated words that inspired the enemies of slavery. He indicted slavery as an offense against the 'law of G-d' and expressed the firm belief that by seeking to interfere with slavery, he himself had done 'no wrong, but right'. See McGinty at page 11.

City University of New York (CUNY) Prof. David S. Reynolds in his biography *John Brown Abolitionist*,

at page ix describes the impact of John Brown's raid and Allocution to the Virginia State Trial Court: "... Brown did not *cause* the Civil War which resulted from a host of social, political and cultural forces. But he *sparked* the war to a degree that no other American did. 'Begin' is the word Frederick Douglass chose: 'if John Brown did not end the war that ended slavery, he did at least, begin the war that ended slavery'" See David S. Reynolds *John Brown Abolitionist*, Vintage Books, New York, 2005 page ix.



John Brown's Fort Monument is the place where the U. S. Government's Arsenal was located in Harper's Ferry, West Virginia (then Virginia) in 1859. It is also the place where John Brown and his 21 man armed force tried to end slavery by themselves by distributing these guns to Virginia slaves who never showed up.

Brown and his men were arrested, tried and convicted of treason against Virginia and other crimes. Brown was executed. He lost militarily, but actually won. His anti-slavery speech to a Virginia State Trial Court Sentencing Hearing was distributed via telegraph and newspaper to the entire nation. He caused such fear in the South that the Confederacy was formed and the US Government attacked for not doing enough to protect slavery, which was still legal in 1859. This caused the US Government to change its collective mind and use its Union Army to end slavery.

More than one million Americans died in this effort. John Brown sparked the whole thing, say today's university historians.

Senator Crittenden of Kentucky tried to "stip it out" in our collective Sutphin Blvd. philosophy by introducing a bill in Congress for the U.S. Government to financially compensate slave owners whose slaves were liberated by Northern efforts such as Brown's and the related Underground Railroad. Senator Crittenden failed, and a million people died.

We who negotiate and write stips every day should take special note.

Yours, Paul

Brian McGinty, in his book, *John Brown's Trial*, states the impact that John Brown's allocution to the Virginia State Trial Court had upon our country:

"He had of course, broken Virginia laws when he invaded Harpers Ferry – notoriously and fragrantly – and he was now going to pay his penalty to the Commonwealth. But Virginia perhaps, would one day pay its penalty to him, and to all the slaves who had suffered under its domination for hundreds of years". See McGinty page 227.

Reynolds is of the view that Brown's raid changed the course of history and made the ultimate ending of slavery possible. See Reynolds at ix.

We now live in similar turbulent times. The country appears to be very divided. There is talk of civil war. It all seems so foolish. And that is where John Brown's story and his raid on Harper's Ferry is very much worth discussing and thinking about today. The country was so torn apart in 1860 that it went to war with itself and 600,000 soldiers died. 476,000 soldiers were wounded. 400,000 soldiers were declared missing. See Google, Study.com, *Casualties of the Civil War*.

There was an effort at compromise by Senator John J. Crittenden of Kentucky pending in the United States Congress in 1860 before the Civil War started in 1861. Senator Crittenden proposed that where Northerners had liberated Southern slaves, the United States Government would compensate the slave owner with money. See University of Illinois Prof J. G. Randall and John Hopkins University Prof. David Donald, *The Civil War and Reconstruction*, D.C. Heath and Company Boston, Massachusetts, 2d Edition 1961, page 150.

Wouldn't this have been a much better way to solve the nation's problems in 1860 without the loss of 600,000 soldiers' lives, 476,000 soldiers wounded and 400,000 soldiers declared missing?

On January 6, 2021, the United States Capitol Building was stormed by several hundred rioters on the same day that the Congress was scheduled to certify the November 2020 election of the new President.

The Members of Congress were prevented from so doing for many hours late into the night and early into the next morning of January 7, 2021 before they could certify the results of the 2020 election.

It was only through the valiant efforts of the Washington, D.C. Police Department, the Capitol Police and the National Guard that the Capitol was finally cleared of rioters so that the members of Congress could do their sworn duty.

Following John Brown's raid on October 16, 1859, the Southern States of the United States formed a new government called the Confederate States of America.

They also tried to attack the United States Capitol and overthrow the Federal Government. They came very close. The vast majority of the battles of the Civil War were fought in what are today Washington, D.C., suburbs and exurbs: The first battle of Bull Run, Virginia on July 21, 1861, the second battle of Bull Run, Virginia on August 29 to 30, 1862 the battle of Chancellorsville, Virginia on May 1 to 6, 1863, the

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President's Message

An Attitude of Gratitude

By Adam Moses Orlow

With nothing particularly new to report to you about our upcoming transition, and as I write this on the eve of Thanksgiving, I thought it would be appropriate to deliver a message about what has long been my favorite holiday and more particularly, the sentiment behind that holiday. While I have no doubt that many of you would love to read my words of wisdom I prefer to provide you with the far more articulate and poignant words of Rabbi Lord Jonathan Sacks, the former Chief Rabbi of Great Britain, from his book, *Covenant & Conversation, Deuteronomy*, OU Press, 2019, whose words, paraphrased below, have played a large role in shaping my views. I hope you enjoy:

In the early 1990s, one of the great medical research exercises of modern times took place. It became known as the Nun Study. Some seven hundred American nuns, all members of the School Sisters of Notre Dame in the United States, agreed to allow their records to be accessed by a research team investigating the process of ageing and Alzheimer's Disease. At the start of the study the participants were aged between 75 and 102. What gave this study its unusual longitudinal scope is that sixty years early the very same nuns had been asked by their Mother Superior to write a brief autobiographical account of their life and their reasons for entering the convent. These documents were now analyzed by the researchers using a specially devised coding system to register, among other things, positive and negative emotions. By annually assessing the nuns' current state of health, the researchers were able to test whether their emotional state in 1930 had affected their health some sixty years later. Because they had all lived a very similar lifestyle during these six decades, they formed an ideal group for testing hypotheses about the relationship between emotional attitudes and health. The results, published in 2001, were startling. The more positive emotions - such as contentment, gratitude, happiness, love and hope - the nuns expressed in their autobiographical notes, the more likely they were to be alive and well sixty years later. The difference was as much as seven years in life expectancy. So remarkable was this finding that it has led, since then, to a new field of gratitude research, as well as a deepening understanding of the impact of emotions on physical health.

Since the publication of the Nun Study and the flurry of further research it inspired, we now know of the multiple effects of developing an attitude of gratitude. It improves physical health and immunity against disease. Grateful people are more likely to take regular exercise and go for regular medical check-ups. Thankfulness reduces toxic emotions such as resentment, frustration, and regret, and makes depression less likely. It helps people avoid over-reacting to negative experiences by seeking revenge. It even tends to make people sleep better. It enhances self-respect, making it less likely that you will envy others for their achievements or success. Grateful people tend to have better relationships. Saying "thank you" enhances friendships and elicits better performance from employees. It is also a major factor in strengthening resilience. One study of Vietnam War Veterans found that those with higher levels of gratitude suffered lower incidence of Post-Traumatic Stress Disorder. Remembering the many things we have to be thankful for helps us survive painful experiences, from losing a job to bereavement.

Part of the essence of gratitude is that it recognizes that we are not the sole authors of what is good in our lives. The egoist, says Andre Comte-Sponville, "is ungrateful because he doesn't like to acknowledge his debt to others and gratitude is this acknowledgment." La Rochefoucauld put it more bluntly: "Pride refuses to owe, self-love to pay." Thankfulness has an inner connection with humility. It recognizes that what we are and what we have is due to others, and above all to God. Comte Sponville adds: "Those who are incapable of gratitude live in vain; they can never be satisfied, fulfilled or happy: they do not live, they get ready to live, as Seneca puts it."

Though you don't have to be religious to be grateful, there is something about belief in God as creator of the universe, shaper of history, and author of the laws of life that directs and facilitates our gratitude. It is hard to feel grateful to a universe that came into existence for no reason and is blind to us and our fate. It is precisely our faith in a personal God that gives force and focus to our thanks.

It is no coincidence that the United States, founded by Puritans - Calvinists steeped in the Hebrew Bible - should have a day known as Thanksgiving, recognizing the presence of God in American

history. On 3rd October 1863, at the height of the Civil War, Abraham Lincoln issued a Thanksgiving proclamation, thanking God that though the nation was at war with itself, there were still blessings for which both sides could express gratitude: a fruitful harvest, no foreign invasion, and so on. He continued:

No human counsel hath devised nor hath any mortal hand worked out these great things. They are the gracious gifts of the Most High God, who, while dealing with us in anger for our sins, hath nevertheless remembered mercy...I do therefore invite my fellow citizens in every part of the United States...to set apart and observe the last Thursday of November next, as a day of Thanksgiving and Praise to our beneficent Father who dwelleth in the Heavens. And I recommend to them that while offering up the ascriptions justly due to Him for such singular deliverances and blessings, they do also, with humble penitence for our national perverseness and disobedience, commend to His tender care all those who have become widows, orphans, mourners or sufferers in the lamentable civil strife in which we are unavoidably engaged, and fervently implore the interposition of the Almighty Hand to heal the wounds of the nation and to restore it as soon as may be consistent with the Divine purposes to the full enjoyment of peace, harmony, tranquility and Union.

What might such a declaration made today do to heal the wounds that so divide nations today? Thanksgiving is as important to societies as it is to individuals. It protects us from resentments and the arrogance of power. It reminds us of how dependent we are on others and on a Force greater than ourselves. As with individuals so with nations: thanksgiving is essential to happiness and health.

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Financial Issues in Shared Custody Arrangements

BY JOSHUA KATZ

There exists a rebuttable presumption in our laws that parents have equal rights to their children. No longer is there a “tender years” doctrine, or a gender bias in custody. This is good! However, the legal standard in determining custody disputes continues to be the “best interests of the children,” and not the rights of the parents.

Regardless, the trend and preference of our Courts is to resolve custody disputes as closely as possible to a 50/50 parenting schedule – absent evidence of imminent risk to the children (wrong legal standard), this is the reality we face as custody litigators.

With this reality in mind, practitioners must figure out how to resolve maintenance and child support (and counsel fees) in shared (50/50) custody arrangements, with little guidance from appellate case law.

Let’s meet the Johnson family. Mrs. Johnson is a teacher earning \$110,000 per year, with an adjusted gross income of \$100,000. Mr. Johnson is a nurse earning \$52,000 per year, with an adjusted gross income of \$45,000. The Johnsons have two young children, and are getting divorced. They have agreed to share physical custody of the children equally.

Bast v Rosoff (239 A.D.2d 106, 1st Dept 1997) instructs us that in 50/50 custody situations, the less-monied spouse is deemed to be the custodial parent for child support purposes. This means that the parent with the higher income must pay child support to the parent with lower income. A straight reading of DRL 240(1-b) means that the more monied spouse should pay full CSSA support, with no deviation, despite having the same burden as the other spouse to provide food, clothing and shelter for the children. Clearly, this generates an “unfair and unjust” result, which allows the Court to deviate, pursuant to the “catch-all” factor (f)(10). But, how much of a break should be given?

Maintenance Calculation:

First, let’s address maintenance, which our Legislature codified in 2016, in an attempt to provide guidelines to prevent wild deviations from county to county, judge to judge. We are provided a mathematical formula based upon the incomes of the parties and duration of the marriage, to calculate guideline maintenance, which the court can then deviate upward or downward based upon 17 statutory factors. However, at the time the Legislature put together this formula, maintenance payments were deductible to the payor, and taxable to the payee – which has since changed. In other words, the guideline maintenance is now, due to changes to the IRS Code, substantially more of a financial burden to the payor, and a far larger boon to the payee from what was intended by the legislation. For this reason, most judges will “tax impact” the guideline calculation, and give a reduction to the payor.

When deciding maintenance motions, Justice William Viscovich will only tax impact if the attorney specifically requests and argues for this deviation within the motion papers. Most judges will not “estimate” the amount of a deviation after a trial unless the obligor brings a tax expert to testify at trial.

Justice Jodi Orlow encourages parties to settle, and suggests a median 20% deduction for tax impacting maintenance. Justice Anna Culley generally does not tax impact maintenance.

According to statutory guidelines, utilizing Joy Rosenthal’s software, our hypothetical Mrs. Johnson should pay \$729 per month maintenance to the father.

Child Support Calculation:

After deciding whether or not to tax impact or deviate from guideline maintenance, the maintenance obligation must be deducted from the payor’s adjusted income and added to the payee’s adjusted income before calculating child support.

According to CSSA guidelines, Mrs. Johnson’s child support obligation is \$1,901 per month.

Next, we arrive at the question of whether or not to deviate from the CSSA calculation based upon our 50/50 custody situation.

I have appeared before a Support Magistrate in Queens Family Court who calculated the mother’s CSSA obligation to the father, and the father’s obligation to the mother, and ordered child support as the net difference between the two. This “formula” would result in a discounted child support award of \$781 per month. This calculation would likely be upheld on appeal.

Other jurists have simply cut the CSSA obligation in half under a theory that the children are only with the “custodial” parent 50% of the time. This would result in a discounted child support award of \$950 per month. This calculation would likely be upheld on appeal.

Other jurists have recommended discounts of 10% or 25%, while some jurists do not believe there should be any discount below the cap based on a strict reading of the statute. Any of these results would likely be upheld on appeal. Keep in mind that if Mr. & Mrs. Johnson had the same incomes, there would be no child support obligation, but the instant Mrs. Johnson earns \$1.00 more per year, child support kicks in, and the question as to how much support should be paid must be answered.

Justice Culley told me she generally would not deviate unless the parents’ incomes were close, but not when Mrs. Johnson earns double what Mr. Johnson earns.

Justice Orlow told me she would look at the particulars of the Johnson family such as which parent traditionally pays for the children’s expenses or how much rent Mr. and Mrs. Johnson will be paying at their respective post-separation homes. Hon. Orlow encourages the parties to settle on a “fair” deviation, noting that, in her opinion, the monied spouse is entitled to “some” discount.

While there is extreme inconsistency from jurist to jurist, the practitioner is provided little guidance by appellate law, as any one of the above approaches is likely to be upheld on appeal. Moreover, families with income below the cap can rarely afford appeals.

As a practitioner, I have been on both sides of this argument. I’ve represented the “monied” and “less-monied” spouse in 50/50 custody arrangements. It

always makes sense to try to settle, which can only be done via compromise. Personally, I believe a reasonable compromise, for our hypothetical Johnson family, would be a 20% discount on maintenance, and a 25% discount on child support absent any other data. This results in maintenance of \$583 per month, and child support of \$1,452, for a total of \$2,035 per month.

Counsel Fees:

Further complicating the issue, let’s look at mom’s counsel fee obligation. DRL 237 states that the Court “shall” award counsel fees to the non-monied spouse. Assuming the ultimate settlement (or Court Order) obligates my suggested compromise of \$2,035 per month:

Mother’s gross income: \$110,000 less Federal and NYS income taxes (estimated with standard deductions) = \$84,000 net

Father’s gross income: \$52,000 less Federal and NYS income taxes (estimated with standard deductions) = \$41,000 net.

Mother’s net take home after income taxes, payment of maintenance and child support: \$59,580

Father’s net take home after taxes plus maintenance and child support: \$65,420.

Both parents must provide for the children equally, but now the father has more net disposable funds than the mother. Which parent is the “monied spouse”? Should this mother be ordered to pay the father’s counsel fees? Of course, had we not tax impacted maintenance and/or discounted child support, then the resulting net funds for Mr. Johnson would be *substantially* higher versus Mrs. Johnson.

Justice Jeffrey S. Sunshine, the chief administrative judge for matrimonial cases in New York State, who presides in Kings County, issued a lengthy opinion in 2013 (*Scott M. v Ilona M.*, 38 Misc 3d 1216), which addresses this situation. Hon. Sunshine reasoned that Mrs. Johnson is no longer the monied spouse and should have no counsel fee obligation to Mr. Johnson under these circumstances. Hon. Orlow, agrees with this outcome in our Johnson family hypothetical.

Unless/until our appellate courts provide more guidance, or until the Legislature re-writes the statutes, we, as practitioners need to learn how to negotiate and compromise. We need to properly advise our clients of the discretion and vast potential outcomes, and work to avoid costly and risky litigation on these issues. It’s fine to zealously represent our clients. Just remember, our matrimonial bar is relatively small and collegial. You may have Mr. Johnson as your client today, but next time you face the same adversary you could be representing Mrs. Johnson!

November 2022 NYS Bar Association House of Delegates

CONTINUED FROM PAGE 1

(17) states have acted to in some way restrict the right to an abortion. The right to abortion, and every candidates position on it, is a critical issue in every election whether Federal, State or local.

Although the issue is clearly political in nature, it is also legal in that laws are passed and Courts must review those laws. The House of Delegates overwhelmingly decided that this was an issue for the Bar Association to be involved in. The Association will now act to support its policy through lobbying and educational efforts.

The Equal Rights Amendment passed in the legislature in the last term. It must now pass to become part of the State Constitution.

Other reports and recommendations submitted and passed by the House of Delegates were from the Committee on Legal Aid and Access to Justice and the report and recommendations of the Task Force on U.S. Territories. The report and recommendations of the Committee on Judicial Discipline, after long debate, was withdrawn for further consideration.

All of the reports and recommendations are available on the New York State Bar Association's website. This overview does not do justice to the hard work of many dedicated attorneys and staff that have worked and continue to work, on these important issues. I highly suggest that your review the reports.

My thanks go out to Hon. Adam Seiden, Vice President of the 9th Judicial District who prepared this article and graciously allowed me to share it with you.

Once again, it was an honor to attend and be involved in these meetings on behalf of the QCBA and the Eleventh Judicial District.

Respectfully submitted,
DAVID LOUIS COHEN

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I cannot recommend Etan highly enough. From the very beginning, we charted a sale plan and it worked flawlessly. Etan is extremely knowledgeable in navigating the complexities of selling a home and guided me every step of the way, I had a special situation where timing of the sale was critical. Etan worked exceptionally hard to ensure that we hit our targets. Aside from being an awesome professional. He's just a really nice guy and a pleasure to work with. A truly fantastic experience.

– Richard A.

I became the Executor of my Aunt's estate which included a condo she owned in Queens. Etan was recommended by our estate attorney to be our realtor. He was great from the very beginning! He was always very professional and extremely knowledgeable about the real estate market. I live in New Jersey and he made the difficult task of selling my Aunt's condo in Ridgewood NY an absolute pleasure. He helped me with every aspect of the entire process. With Covid entering the picture, it became a long process and he was wonderful every step of the way. He spent a lot of time answering numerous questions, always returning calls promptly and keeping me updated on different strategies to sell the condo. I would recommend him and his team very highly!

– Joan T.

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The Practice Page

Burden of Proof for Municipal Liability on Summary Judgment

BY HON. MARK C. DILLON

Serves on the Appellate Division, Second Department

There is no shortage of cases where plaintiffs seek damages for injuries sustained as a result of alleged municipal negligence. As the bar is aware, municipal defendants are not liable for injuries arising out of certain dangerous conditions, such as those involving defective highways and sidewalks, absent prior written notice to the municipality and a failure to then correct the condition within a reasonable time (GML 50-g). Prior written notice statutes represent a waiver of sovereign immunity, but on condition that written notification of an alleged defective condition be received, and not timely acted upon, for liability to potentially attach.

Two exceptions exist where municipalities lose their statutory prior notice protections. One is when a municipal actor creates a dangerous condition through an affirmative act of negligence (*Amabile v City of Buffalo*, 93 NY2d 471) which has immediate effect (*Oboler v City of New York*, 8 NY3d 888) and which, in effect, is tantamount to “self-notice.” That affirmative negligence exception was expanded somewhat in *San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, where a municipality may be held liable for affirmative conduct that creates a known and foreseeable risk --- in that case, piling snow as to create a snowmelt and refreeze at a parking lot. The second exception to prior written notice is when the condition’s location is subject to the municipality’s “special use” (*Amabile v City of New York*, *supra*; *Yarborough v City of New York*, 10 NY3d 726). Oftentimes, a plaintiff’s complaint and/or bill of particulars will identify the theory of municipal liability as defect creation or special use, particularly in instances where prior written notice to the municipality is lacking.

When a municipal defendant moves for summary judgment on the ground of the absence of prior written notice, and has the burden on the motion of proving its *prima facie* entitlement to the requested relief, is it sufficient for the municipality to merely evidence that prior written notice was never received? Or, to meet its burden of proof, must the municipality go a step further and establish the inapplicability of the two exceptions — that it did not affirmatively create the dangerous condition and did not make any special use of the subject location — when either of those exceptions are specifically alleged in a complaint or bill of particulars?

The answer to these questions were recently provided in an erudite opinion of Justice Robert Miller of the Second Department, in *Smith v City of New York*, 210 AD3d 53 [Sept. 21, 2022]). The plaintiff in *Smith* slipped on ice on a municipal access road and alleged that the City had affirmatively created the injury-producing condition. The City moved for summary judgment on the ground that it did not receive prior written notice of the dangerous condition as required by NYC Administrative Code 7-201. The City stated in its moving papers that the burden shifted to the plaintiff opposing summary judgment to establish that one of the exceptions applies. Ultimately, the Appellate Division, in resolving a split of appellate authorities on this interesting burden-shifting issue, agreed with the City that notwithstanding what is specifically alleged by the plaintiff, the City need only address for summary judgment purposes the absence of prior written notice; and that thereafter, the plaintiff bears the burden of raising a question of fact regarding an exception. The reasoning, says the court in *Smith*, is the language of the Court of

Appeals in *Yarborough v City of New York*, *supra* and *Groninger v Village of Mamaroneck*, 17 NY3d 125 which, by inference, define the evidentiary burden in prior notice cases in that particular sequence. Municipalities need only establish the lack prior written notice, without needing to initially address any of the plaintiffs’ specific allegations regarding the affirmative creation of the defect or special use, because municipalities waive their sovereign immunity upon certain conditions, one of being their entitlement to prior written notice. The prior written notice statutes must therefore be strictly construed in favor of the municipality, shifting the burden to the plaintiffs to establish, in opposition to summary judgment, either of the recognized exceptions. This is distinguishable from other actions that do not involve municipalities, where private defendants do not enjoy sovereign immunity or its waiver upon stated conditions, and where those defendants moving for summary judgment must initially address all of the plaintiff’s specific allegations in order to meet their *prima facie* burden of proof for summary judgment. That said, the *Smith* opinion now firmly aligns the Second Department with the approach of the other three Departments of the state (*Dunn v City of New York*, 206 AD3d 403[1st Dep’t.]; *Vnuk v City of Albany*, 191 AD3d 1056 [3rd Dep’t.]; *Franklin v Learn*, 191 AD3d 982)).

Mark C. Dillon is a Justice of the Appellate Division, 2nd Dep’t., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney’s.



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Allen E. Kaye

Immigration Questions

USCIS Updates – October 2022



Joseph DeFelice

The Good News:

- USCIS has agreed to meet with AILA quarterly!!! These meetings will be in addition to the April and June conferences so, in essence, they will be meeting with AILA every other month. The format will be quite different than the pre-Trump years. Each meeting will be focused on a topic (rather than rotate between SCOPS, HQ, Field Ops, etc.), and almost any topic will include more than one of the USCIS Committees (including CAC, HQ/Benefits and Field Ops). The first meeting is scheduled for December 8th and will focus on customer service improvements, including the permanent extension of COVID-19 flexibilities, improving Ask Emma, InfoPass appointments, and other critical and timely issues related to this overall topic of Customer Service.
- The stakeholder email mailbox is now a reality! AILA is able to utilize this email mailbox to send systemic issues and trends. It is not intended to be for individual stakeholders, who should continue to use the Public Engagement email address.
- It is too early to tell but so far we have received quick “thank you” responses and are still awaiting further substantive responses. Among the issues we escalated recently include:
 - o PIMS Delays (we submitted at least 11 examples) that appear to be due to USCIS, not DOS (at least DOS says it’s USCIS, not them)
 - o Clarification whether the KCC copy is actually needed since USCIS stated in a recent O and P stakeholder meeting that it is no longer needed
 - o Relief for RFE/Receipt Delays – how can attorneys quickly and effectively get the RFE resent to them,

and a denial reversed when it was due to a delay on USCIS’ part in issuing the RFE? USCIS has acknowledged delays on their end (primarily at the TSC), but it remains unclear how an attorney can get their client’s denial reopened if they never received the RFE or received it too late.

- o Working on escalating the long delayed I-601/I-601A issue with case examples after AILA received over 300 examples. USCIS is already well aware of this issue.
- USCIS recently announced that I-90 applicants will now receive an automatic two-year permanent resident card extension based on the timely filing. USCIS is hoping this step will help clear up the InfoPass backlog, specifically how impossible it is right now to secure an InfoPass appointment through the InfoMod system.
- USCIS emphasized that they are actively working on improving Customer Service and we’re hoping these improvements will be announced and then implemented soon. They did specifically mention that AILA’s policy brief dated February 16, 2021 was very helpful and the agency is working on an initiative to implement those specific recommendations.

The Bad News

- Processing times remain horrible (see I-601/I-601A example above, but also really bad for many types of petitions and applications)
- Customer Service is still USELESS
- Ask Emma is abominable and USCIS seems clueless about it – hence why we will bring it up in our liaison meeting

- Likely training issues due to all the new officers, but mistakes are just rampant right now, such as erroneous rejections, dumb RFEs, etc. And, yes, likely there are still some (maybe many) Trump era hires who just want to deny as many cases as possible.

- Case Assistance Committee is rather overwhelmed (Michelle can attest to this as one of the committee members) and the AILA Government Relations team is spread so thin among many committees. It is increasingly difficult to get committee members to stay engaged since they are understandably too busy with their own practices to devote the time that is needed to address the countless issues reported to our committee

- We think we mentioned/reported on this before, but AILA no longer assists with individual case liaison assistance and members must first either seek help through the Ombudsman or Congressional Liaison. Some on the CAC think this is a positive, but others are not happy with the more limited assistance AILA now provides to dues-paying members. Given the staff issue we noted above, we really don’t think AILA had much choice here, and we are hoping we can help on a bigger picture level by raising the problematic trends and issues (this will, of course, rely on members to actually send us case examples and not just whine about it on social media!).

BY ALLEN E. KAYE AND JOSEPH DEFELICE

Allen E. Kaye and Joseph DeFelice are the Co-Chairs of the Immigration and Naturalization Committee of the Queens County Bar Association.

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A Baseball Legend – Two Thugs – And A Friend - how a national scandal was quashed a human interest story

BY LEONARD L. FINZ

What follows is an amazing human-interest story borrowed from my published memoir, “The Greatest Day of My Life.” And in order to present a relevant and chronological buildup to the narrative that follows, I have called upon early biographical material setting the stage that leads ultimately to a most surprising ending. So here goes...

It was during The Great Depression when my family moved from a 4th floor walk-up tenement building in the Lower East Side of Manhattan (where I was born), to a small apartment in Brooklyn. Times were very tough and with each passing day, another economic crisis confronted my parents who provided for their four young children. But despite the painful money strain, my father and mother sacrificed and bought me a saxophone when I was 7 years old. (To my parents I seemed to have exhibited some musical talent). The instrument cost \$50 dollars, paid for with a \$5 dollar down payment, and \$4 a month. They also arranged for lessons at 25 cents per session. Fast forward to my 8th grade...

About to complete elementary school, I was ready to enroll into Lafayette High School, no more than fifteen minutes from where I lived. Changes came however, when my music teacher insisted I apply to the High School of Music and Art (commonly called M & A) in upper Manhattan.

In existence for only one year, it was the special pride of Mayor Fiorello H. La Guardia. He wanted a specialized high school for children gifted in either music or art. But acceptance into the school as a music student required the passing of a very rigid audition.

I remember carrying my alto sax in its case and making a two-hour trip through the subway system to the school. It was a long journey, particularly for my mother who accompanied me. When we arrived at what resembled an old Gothic castle on a steep hill, we found our way into a large auditorium and checked in. Within a half hour my name was called. Directed to the large stage, I suddenly faced the music director and other music teachers on the faculty seated in the first row of the auditorium.

My sax was already out of its case and held by a leather strap around my neck. Being 13 years old, and extremely nervous, I thought I would throw up. With great relief however, I didn't.

“Sit in the chair in front of the music stand,” I was ordered by one of the faculty members. “Play any piece you want.” With that, I played “Nola”, a popular selection I had practiced many times, it being an assignment from my sax instructor. When finished, someone placed a sheet of music on the stand and said, “Play it.” This was a test of my ability to sight-read music. The armpits of my shirt were already drenched with perspiration. In almost a state of panic, I played the sheet as best I could, hoping I didn't screw it up.

To make matters even more difficult, another sheet of music was placed on the stand and told to sight-read it, not with sax this time, but with voice. Reading music to be played on my sax was one thing. After all, I had been taking formal lessons since I was seven years old. Sight-

reading by singing was quite another. I fumbled through having no clue whether I was on target or having missed by a country mile. “You'll hear from us one way or the other,” a cold voice rang out. I couldn't get out of there fast enough, upset that my elementary school music teacher caused me to suffer such torture.

A week later, I received the news. “The High School of Music and Art has accepted you.” Shock was followed by relief, followed by exhilaration. I couldn't believe I made it. (We are getting closer to the above titled story, “A Baseball Legend – Two Thugs – And a Friend”)

The Big Band Era And My M & A Swing Band

Being accepted into M & A in upper Manhattan was quite an honor for me. The High School of Music and Art has since relocated to Lincoln Center in Manhattan, having merged with the School for the Performing Arts. Both are under the same umbrella and called The Fiorello H. LaGuardia High School of Music & Art and Performing Arts.

While I spent almost four hours a day traveling from Brooklyn to M & A on an incomplete subway system, it did however, have its unpredictable rewards. For example, to get to upper Manhattan, I had to take three local trains to 42nd street. With no connecting lines to the IRT or Independent Subway at the time, I would have to walk up two flights of stairs to the level above where I would then exit onto the street. As a result, I would have to walk to the subway that would take me to upper Manhattan each morning and of necessity pass by the New York Paramount Theatre located in the Times Square area (the Paramount was probably considered the most popular movie theatre in the country at the time).

In those days (referring to the late 1930's), the theatre featured a first run movie that would start at 8 am followed by a big live band, and then a vaudeville show. The ticket price at that hour was all of twenty-five cents. That's when I would cut class to see and hear my idols of the swing band era: Glen Miller, Benny Goodman, Tommy Dorsey, Jimmy Dorsey, Stan Kenton, Les Brown, Woody Herman, Artie Shaw, and a host of others who were the greats in the big band business during that very special period (those names are probably foreign to many readers, but they were the most prominent swing band names in the nation at the time). Although I would sit in an almost empty theatre, I am grateful to this day that I did. Seeing and hearing the music legends of that era was an experience I have cherished for more than eighty-two years.

I cannot describe my M & A life without including the following: Aside from being taught the clarinet by one of the finest classical clarinetists in the city, and later sitting in the first clarinetist's chair of M & A's outstanding symphony orchestra, I also became the leader of M & A's prize-winning swing band. This came about since the leader had graduated and a replacement had to be found. The selection of a new leader of M & A's big band was then put to a vote and somehow I was elected unanimously. I felt extremely humbled by the action taken.

(As an aside, many gifted music notables were students of M & A. To name a few: Bess Meyerson, the former Miss America; my classmate, Bernie Garfield who later became the first bassoonist with The New York Philharmonic, and The Philadelphia Symphony Orchestra; Hal Linden, actor and Tony Award winner, and the star of the TV show in which he played Barney Miller; Steven Botchco, producer and writer of “L.A. Law”, “Hill Street Blues”, and “NYPD Blue”; Marilyn Bergman, a top-ranked lyricist of such standards as, “What are you doing the rest of your life”, and other Michel Legrand hits; Peter Hyams, famed Hollywood producer; Shorty Rogers, the epic jazz trumpet artist-who was in my high school class and my trumpet player in the M & A jazz band; and dozens more who made it big in Hollywood, recordings, Broadway musicals, and show business in general).

Fronting the orchestra that had five saxes, three trumpets, three trombones, piano, drums, guitar, and string bass, was a blast. We had the stock music arrangements of the big bands (commercially available), and my standing in front with clarinet in hand (a la Benny Goodman and Artie Shaw, my two idols, and the era's greatest jazz clarinet artists), are memories I carry to this day. (We are getting closer to the story above titled, “A Baseball Legend – Two Thugs – And a Friend”).

My Steady Weekend Gig In A Smokey Joint

I was turning almost 16 years of age when as part of a trio (with a piano player and drummer), I had a weekend job playing sax in a gin mill. The joint was located in the section of upper Manhattan that was known as North Harlem at the time. It had a small stage and dance floor to match. The pungent smell of cigarette smoke and beer was enough to knock you over.

I also remember the jukebox that would be played without stop during our breaks. The Tommy Dorsey record of Frank Sinatra singing his blowout hit, “I'll Never Smile Again”, would be played over and over again (at a nickel a pop). The bar and grill customers couldn't get enough of what would later become an iconic recording for all time. In fact, it is as much in my memory today as if it were played for the first time just yesterday. And whenever I hear Sinatra singing this classic on Sirius satellite radio, I can almost still smell stale cigarette smoke and beer that was such a rancid part of the room's dimly lit atmosphere.

As for the job, it was a steady music gig on Friday, Saturday, and Sunday from 9pm to 3am, for which I earned \$3 a night. My non-musician friends were earning less than that working for nickel tips delivering pharmacy prescriptions. My mother, as caring as she always was, would be waiting up for me in the kitchen until she saw that I arrived home safely (the piano player had a car and would pick me up and deliver me home). I would be upset that it was four o'clock in the morning and she shouldn't be up so late. But being my wonderful mother, she would smile in her loving way, kiss me goodnight, and only then would she go to bed.

CONTINUED ON PAGE 18



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Opinion

“HAPPY”, DON’T PACK YOUR TRUNK! Court of Appeals Rejects Bid for Nonhuman Elephant’s Writ of Habeas Corpus

BY HON. GEORGE M. HEYMANN

In my recent article, “The Humanization of Animals and the Custody of Companion Pets When Couples Separate or Divorce” (NYLJ, 3/23/23), I discussed the numerous attempts by animal rights organizations to obtain writs of habeas corpus for animals (chimpanzees) that they believe have innate traits and qualities akin to human beings. In each instance, the efforts failed and never went beyond the four Appellate Divisions, each of which concluded that no such writ can lie for nonhuman animals.

On June 14, 2022, in *Matter of Nonhuman Rights Project, Inc. v. Breheny*, (__ NY3d __, 2022 NY Slip Op 03927) the Court of Appeals, in a 5-2 decision, resolved the issue with a definitive “no”, that animals (in this case, “Happy”, an elephant) are not human beings and, therefore, are not entitled to obtain a writ of habeas corpus for their release from custody.

Writing for the majority in this landmark case, Chief Judge DiFiore observed that “despite the relative simplicity of the legal issue presented, this case has garnered extraordinary interest from amici curiae and the public – a testament to the complicated and ever-evolving relationship between human beings and other animals”. Indeed, articles began to appear in the media immediately after the opinion was rendered (See, e.g.: N.Y. Today, 6/15/22 [Elephant isn’t a person, court rules]; N.Y. Post, 6/15/22 [Court: Elephant stays at Bronx Zoo] and, yes, even celebrity columnist Cindy Adams, N.Y. Post, 6/15/22 [Forgotten elephants]).

The sum and substance of this entire matter is set forth in the straightforward language of the opening paragraph of the decision:

“For centuries, the common law writ of habeas corpus has safeguarded the liberty rights of human beings by providing a means to secure release from illegal custody. The question before us on this appeal is whether petitioner Nonhuman Rights Project may seek habeas corpus relief on behalf of Happy, an elephant residing at the Bronx Zoo, in order to secure her transfer to an elephant sanctuary. Because the writ of habeas corpus is intended to protect the liberty of human beings to be free of unlawful confinement, it has no applicability to Happy, a nonhuman animal who is not a ‘person’ subjected to illegal detention. Thus, while no one disputes that elephants are intelligent beings deserving of proper care and compassion, the courts below properly granted the motion to dismiss the petition for writ of habeas corpus, and we therefore affirm.”

Happy has resided in the Bronx Zoo for the past 45 years. She has been in captivity since she was approximately one year old and has not known of any other kind of existence. During this time, she had two successive male companions both of whom have since been euthanized. The only remaining elephant in the zoo is another female, Patty. The two are housed separately due to their “hostile” relationship.

Distinction Between Appellate Division And Court Of Appeals Decisions

The Appellate Division cases focused on the issue of whether the chimpanzees could fulfill the *rights and responsibilities* of humans were they to be released from custody. The courts clearly determined that such “imposition of societal obligations and duties” would not be possible. (See, *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 124 AD3d 148, 150, 151 [3rd Dept 2014], lv denied, 26 NY3d 902 [2015]; *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 AD3d 1334 [4th Dept 2015], lv denied, 26 NY3d 901 [2015]; *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 2014 NY Slip Op 68434 [2nd Dept 2014])

“Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government”. (*Matter of Nonhuman Rights Project, Inc. v. Lavery*, 124 AD3d at 151) The court further emphasized that “although the dispositive inquiry is whether chimpanzees are entitled to the right to be free from restraint such that they may be deemed ‘persons’ subject to the benefits of habeas corpus, legal personhood has consistently been defined in terms of both rights and duties”. (*Id.* at 151) *** So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties... Persons are the substances of which *rights and duties* are the attributes. It is only in this respect that persons possess judicial significance. And this is the exclusive point from which personality receives legal recognition”. (*Id.*) (emphasis added)

Accordingly, the differentiation between chimpanzees, elephants and/or any other species of animal, from humans is their “incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees [or any other animal] the legal rights ... that have been afforded to human beings”. (*Id.* at 152)

Although the net result is the same, that nonhuman animals are not people and not entitled to the relief sought by the petitioners, the Court of Appeals approached the issue from a different perspective. In *Matter of Nonhuman Rights Project, Inc. v. Breheny*, supra, the high court focused on the legality of a person’s detention. “The ancient writ of habeas corpus ‘is a summary proceeding to secure personal liberty’ that ‘strikes at unlawful imprisonment or restraint of the person by state or citizen’ (citations omitted). The right of persons to invoke the writ of habeas corpus – ‘the historic writ of liberty’ which we have recognized as ‘the greatest of all writs’ – ‘is primary and fundamental’ (citations omitted).”

The key is the legality of a person’s confinement. Here, it cannot be said that Happy’s confinement is illegal. Moreover, merely transferring her to a different setting that may be less constrictive than that at the Bronx Zoo, is nothing more than going from one confinement to another. As such, the whole purpose of obtaining a writ that would allow for “immediate release” from confinement is inapplicable under the circumstances sought by the petitioner. Nor did petitioner prove that

Happy was treated in any way that was not in full compliance with the state and federal statutory laws and regulations. To grant such relief, “would have an enormous destabilizing impact on modern society. It is not this Court’s role to make such a determination”.

The Court emphasizes that the “selective capacity for autonomy, intelligence, and emotion of a particular nonhuman animal species is not a determinative factor in whether the writ is available as such factors are not what makes a person detained qualified to seek the writ”.

Moreover, “[g]ranteeing legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life...”. It would become “a morass of confusing case-by-case inquiries apparently to be determined by some subjective, amorphous, and evolving ‘normative’ value system regarding the treatment of nonhuman animals to which our own legislature has not subscribed”. The Court noted that “[s]uch arbitrary distinctions stand in clear contrast to our recognition that habeas is, and always has been, the bulwark of *human* liberty rights.”

Addressing the two dissents as “long on historical discourse (Wilson, J., 70 pages; Rivera, J., 21 pages) but woefully short of any legal analysis” which would entitle an autonomous nonhuman animal the same rights as humans, the Court opined that it would become a never-ending task for courts to objectively make such determinations. Were the Court to allow opening this Pandora’s Box, there would be an “inevitable flood of petitions” and neither dissenter can “identify any intelligible standard upon which to resolve these labyrinthine issues”. In effect, this would become a bridge too far, with no standardized way to determine which species of animal would qualify for the relief sought herein. The Court cites numerous examples that could impact “on owners of numerous nonhuman animal species - farmers, pet owners, military and police forces, researchers, and zoos, to name just a few”. The opinion further takes exception to Judge Wilson’s test of “functional intelligence” as an “undeniably slippery slope” to determine what animals qualify, such as elephants but not ants; dolphin or dogs; cows or pigs or chickens “species routinely confined in conditions far more restrictive than the elephant enclosure at the Bronx Zoo[.]”. It thus becomes obvious that following the reasoning in the dissents would result in situations that will spiral out of control.

Finally, as did the Appellate Division in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 124 AD3d 148, 152 [3rd Dept 2014], lv denied, 26 NY3d 902 [2015], the Court made clear that “[a]lthough nonhuman animals are not ‘persons’ to whom the writ of habeas corpus applies, the law already recognizes that they are not the equivalent of ‘things’ or ‘objects’” and proceeds to identify areas where they are protected under the various statutes and regulations such as their humane treatment under the Agriculture and Markets Law, (see, Heymann, *Animal Abuse and Medical Treatment*, Queens Bar Bulletin, December 2016) as well as the recent amendment to the Domestic Relations Law §236

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A Baseball Legend – Two Thugs – And A Friend

BY LEONARD L. FINZ

CONTINUED FROM PAGE 14

As for my weekend music jobs in that smoke-filled bar and grill, they added to my overall band experience. In addition, a portion of the \$9 earned wound up in a small savings account.

At last, we have arrived. What follows, is the strange story of, **“A Baseball Legend – Two Thugs – And a Friend.”**

My Great Jazz Pianist Johnny Smith

The M & A big swing band had a number of outstanding and talented musicians. Some of them made big names for themselves in the music industry. What follows is a written account of one of them...

Johnny Smith (fictitious name) was my remarkable jazz pianist. Shortly after graduating from M & A, his enormous talent was discovered by the world-renowned Duke Ellington. The Duke took great pride in stating that Johnny's fingers on the keyboard were so fast that he ranked him right up there with Art Tatum, the number one piano jazz artist in the world at the time.

Putting his piano artistry on hold, Johnny moved to Los Angeles and became a vocal coach to a number of Hollywood stars. These are some of the big-time celebrities he coached: Judy Garland, Barbra Streisand, Mitzi Gaynor, Robert Wagner, Jane Russell, Marilyn Monroe, and the list goes on. In fact, Marilyn's singing voice in, “Gentlemen Prefer Blondes”, the Hollywood mega hit, was singularly tutored by Johnny as her personal vocal coach.

Since Johnny had been my M & A band pianist for more than three years, in my High School class, and

close friend, we kept in active touch when he was riding high with all the biggies in Hollywood.

Now fast forward to the human interest and sensational side, of this story. What follows made gigantic national news...

Marilyn and Johnny had a love affair shortly after her divorce from baseball legend Joe DiMaggio - a marriage that lasted only nine months. DiMaggio was convinced that the Marilyn and Johnny relationship was the root of the breakup. And having a strong jealous nature, he even hired private detectives after the divorce to spy on Marilyn and Johnny.

On one stand-out incident that was widely covered by the national press, DiMaggio was tipped off that Marilyn and Johnny were spooning together in a certain house in Los Angeles. Sneaking onto the property, DiMaggio, several hired thugs, and a friend, then broke down the back door of the house expecting to find Marilyn and Johnny in a love tryst. As it was, they smashed the door of the wrong house. The occupant, a 30-year-old woman who was in bed at the time, screamed out hysterically, believing that she was being assaulted by break-in burglars who had made their way into her bedroom.

Hearing the loud shrieking noises, and suspecting that they were being secretly spied upon, Marilyn and Johnny quickly fled from the house they were in (which happened to be next door), and out of the grasp of DiMaggio, the two thugs, and the friend.

Shortly after the incident, Johnny telephoned and told me that if they had crashed the door of the right house which at the time was occupied by Marilyn and Johnny, he, Johnny, “probably would have wound up as dog meat.” After that close encounter with disaster, and

having received many death threats with warnings to stay away from her, Johnny left California and never saw or spoke to Marilyn Monroe again.

The frightened 30-year-old woman, however brought suit against DiMaggio, other individuals and the friend.

The national media was all over the juicy story. But shortly after the legal action that was brought, DiMaggio and the friend quickly settled the “assault incident” with a sufficient cash payment that was given to the 30-year-old victim. That deal consummated, the spectacular notoriety and scandal created by the media, was ultimately quashed.

Now let's take a step back. I did write that DiMaggio at the time of the “wrong house break-in caper” had two thugs and a friend with him. Curiously, one might ask, “Okay, tell me already, who was the friend?” Answer? **The friend turned out to be none other than Mr. Blue Eyes himself...FRANK SINATRA!**

END OF STORY

Leonard L. Finz, age 98, is a former New York State Supreme Court Justice, (Queens County); a decorated WWII Veteran (1st. Lt., Field Artillery, Pacific War Zone, Philippines); inducted into the prestigious U.S. Army OCS Artillery “Hall of Fame”; and on July 23, 2022 inducted into the elite Army OCS “Hall of Fame” by order of the United States Department of Defense; the author of four published thriller novels; Peer-Reviewed as “One of America’s preeminent lawyers”; an active member of the QCBA for 68 years; and the founder of Finz & Finz, P.C.



Opinion

“HAPPY”, DON’T PACK YOUR TRUNK!

BY HON. GEORGE M. HEYMANN

CONTINUED FROM PAGE 17

B (5)(d)(15) regarding the best interests of companion animals in determining the appropriate placement of said animal(s) in divorce proceedings. (see, Heymann, “The Humanization of Animals and the Custody of Companion Pets When Couples Separate or Divorce” [NYLJ, 3/23/23], supra.

CONCLUSION

In recent years, many steps have been taken to become more aware of the treatment of animals. For example,

circuses such as Ringling Brothers have eliminated the use of animals in their performances and, unfortunately for Happy, the Bronx Zoo has made it clear that it will no longer be bringing any new elephants into its care. Strides to protect animals are being made, but as the Court of Appeals posits, “granting legal personhood and attendant liberty rights to Happy, an elephant, would not be an incremental step in ‘the slow process of decisional accretion’ regarding the scope and flexibility of the writ of habeas (citation omitted) but a ‘sweeping pronouncement[]’ of nonhuman animal personhood lacking in legal foundation that would displace the

carefully devised state and federal statutory frameworks governing animal welfare (citation omitted)”.

George Heymann is a retired judge of the NYC Housing Court; former adjunct professor of law, Maurice A. Deane School of Law at Hofstra University; certified Supreme Court mediator; of counsel, Finz & Finz, PC and a member of the Committee on Character and Fitness, Appellate Division, Second Department, 2nd, 10th, 11th & 13th Judicial Districts.

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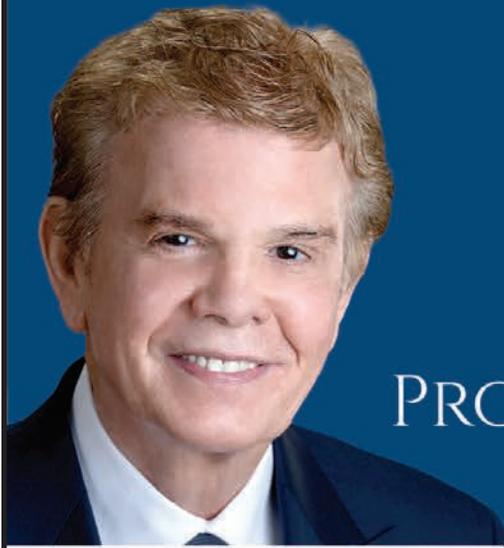
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You Can Quote Me On That

BY FRANK BRUNO, JR.

“Quotes help us understand, inspire, motivate, clarify and show our approach to things around, this is why people and I love quotes.” – Takyou Allah Cheikh Malaynine

A quote lives past its beginning. A great phrase can be said today and live forever. It can start an article, punch up the middle or close with a bang. It serves as motivation, inspiration, or life advice. Words have impact. The better the words, the greater the impact.

Quotes drive home a point or set the stage for better understanding. I will quote my grandmother in a consultation for dramatic effect or a great leader to prompt action to be taken. Often, I will place a quote at the beginning of my article to draw a comparison between what I am about to write, and the wisdom said by someone special. I used to write a legal blog and started nearly every post with a quote. Some were quotes that I saved for such use, and some were captured from the internet after I wrote the article and googled the topic. That is the case for the quote that started this article. I googled quotes about quotes. I never heard of Cheikh Melaynine but his quote captured my intention and since his quote is in quotation marks, it makes him seem erudite and the quote profound and with borrowed credibility it does the same for me!

My weekly newsletter starts and ends with a quote from a luminary in the field of history, poetry, music, law or science. As we can see from the beginning of this article, I sometimes use a regular guy. Mostly quotes are from Einstein to Churchill from Marcus Aurelius to the Collared One. *“Fight for the things that you care about but do it in a way that will lead others to join you”* RBG. The turn of phrase or pithy wisdom transcends time and space.

In a consultation where messy family disputes are the norm, with dissension, tension and acrimony high, my grandmother’s quote always seems appropriate, *“as my grandmother would say...money makes the blind see.”*

Stoic philosopher Seneca had a year’s long correspondence with Lucilius and in each letter would offer a quote. He maintained learning quotes is the path to wisdom: to find one quote or idea each day that improves you. *“The wisdom of the wise, and the experience of ages, may be preserved by quotation.”* Issac D’Israeli. I have books of quotes, read quotes, try unsuccessfully to memorize them, and mostly try to live by them.

A game I used to play with my mother was going quote for quote of adages, proverbs, idioms or other short pithy sayings. Like the scene in the movie, *A Few Good Men* between Kaffee and Luther.

Kaffee : [at Luther’s magazine stand] How’s it going, Luther?

Luther : Another day, another dollar, captain.

Kaffee : You gotta play them as they lay.

Luther : What goes around comes around.

Kaffee : Can’t beat ‘em, join ‘em.

Luther : At least I got my health.

Kaffee : [hands him money before leaving] Well, then you got everything... See you tomorrow, Luther.

Luther : Not if I see you first.

We would go phrase for phrase for a few rounds every few days. Sometimes at the dinner table and sometimes driving in the car. Strike while the iron is hot; many hands make light work, honesty is the best policy, the grass is always greener on the other side of the fence; don’t judge a book by its cover, an apple a day keeps the doctor away, better late than never were some of our favorites. It was Hauser the nutritionist, who said *“you are what you eat, but if you happen to be an intellectual, you are what you quote.”* Joseph Epstein

Oftentimes a quote will be shortened, misquoted, or fallen out of favor. A quote that I live by is the full phrasing and meaning of the following: “A jack of all trades is a master of none, but oftentimes better than a master of one.” This phrase was originally intended as a compliment, the phrase means that a person is a generalist rather than a specialist, versatile and adept at many things.” Without the second half it is a knock, but the entire quote is a prescription for a life well lived. And I take that into my life as a husband, parent, trial attorney, counselor, transactional attorney, and dispenser of wisdom.

An idiom is a figurative phrase that reveals more than the individual words themselves would appear to convey and helps express ideas in a simpler way, like “comparing apples to oranges.” That phrase alerts the listener that two things are impossible to compare to one another because they possess different traits.

Proverbs are simple yet powerful phrases that are commonly used and widely understood. They impart wisdom, are part of natural conversation, can be a phrase or a sentence, take the shape and form of metaphor and simplify sophisticated ideas. Don’t put all your eggs in one basket or the early bird catches the worm or don’t cry over spilt milk. The meaning is don’t concentrate all of your efforts in one area; encouraging the reader not to be lazy, or the listener not to be upset over something that has already happened and cannot be changed respectively.

An adage is a condensed and memorable expression, an ancient saying or maxim, brief and sometimes mysterious, that has become accepted as conventional wisdom. Adages look like proverbs and are often defined as a type of proverb. A good one for the law is an ounce of prevention is worth a pound of cure. From literature we

have *“It’s better to have loved and lost than never to have loved at all”* Alfred Lord Tennyson or *“Life is like a box of chocolates. You never know what you’re going to get.”* Forrest Gump, Winston Groom.

To further clarify and not confuse, an idiom is a common saying with a meaning different from that of its individual words and adages and proverbs are well-known sayings that have been used for a long time stating a general truth or piece of advice. Usually about ways to behave and live.

“There is no real ending. It’s just the place where you stop the story.” – Frank Herbert

The opposite of the happy ending is not actually the sad ending—the sad ending is sometimes the happy ending. The opposite of the happy ending is actually the unsatisfying ending.” – Orson Scott Card

“Everything has to come to an end, sometime.” – L. Frank Baum, *The Marvelous Land of Oz*

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QUEENS COUNTY BAR ASSOCIATION

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The Nominating Committee is accepting applications to serve on the Queens County Bar Association Board of Managers

Please take notice that those members who wish to be considered for nomination as Members of the Board of Managers of the Queens County Bar Association should submit written requests and resumes highlighting your activities in the Association prior to January 11, 2023.

A virtual meeting of the Committee will take place on January 26, 2023, beginning at 5:00 P.M. All candidates must attend at their designated interview time.

You may present the names of the persons whom you desire to have considered by the Nominating Committee for nomination to offices to be filled at the Annual Meeting. A hearing will be held as indicated above for that purpose pursuant to the by-laws.

Kristen J. Dubowski Barba
Secretary

Please submit your requests in writing to the attention of the:

Nominating Committee
Queens County Bar Association
90-35 148 Street
Jamaica, N.Y. 11435

The Annual Election of Officers and Managers will be held on March 3, 2023. The newly elected Officers and Managers will assume their duties on June 1, 2023.

Dated: December 1, 2022
Jamaica, NY

Get involved! Can't commit to the Board as yet...join a committee! Call for more info.



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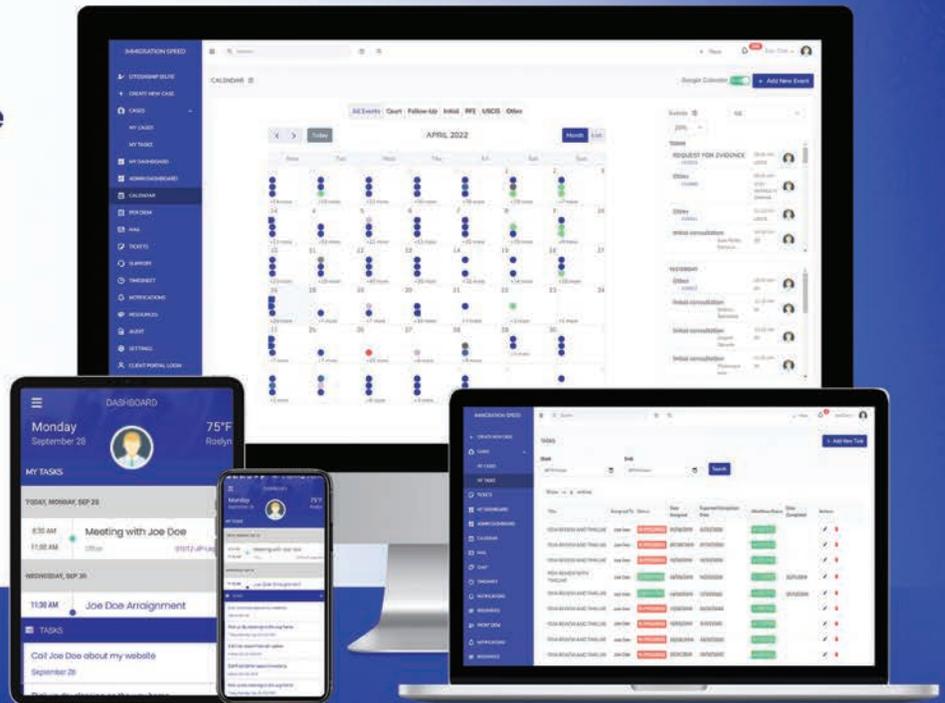


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Editor's Note | January 6, 2021 and October 16, 1859 – A Reckoning

CONTINUED FROM PAGE 5

battle of Wilderness, Virginia on May 5 to 7, 1864, the battle of Fredericksburg, Virginia on December 13, 1862, the battle of Spotsylvania, Virginia on May 8 to 20, 1862, the siege of Petersburg, Virginia on June 15, 1864 to April 16, 1865, the battle of Antietam-Sharpsburg, Maryland on September 17, 1862 and the battle of Gettysburg, Pennsylvania on July 1 to 3, 1863. See Randall and Donald, page 198.

In preparing this article, your Editor drove to Harper's Ferry, West Virginia and stood in the United States Government's arsenal that John Brown tried to take over on October 16, 1859. Your Editor did this in order to gain an understanding of the effect of physical violence on the internal workings of the United States Government.

Harper's Ferry, West Virginia has not changed very much since October 16, 1859. It is at the border of three states, Virginia, West Virginia and Maryland. It is at the intersection of the Potomac River and the Shenandoah River. An inspection of Harper's Ferry reveals why it has not grown. The Potomac River and Shenandoah River both appear not to be navigable in November. Various rocks appear in both rivers making passage by boat very difficult.

Because Harper's Ferry is the exact meeting point of what we are often refer to as the North (including

Maryland) and the South (including Virginia) and the State that was formed because of this conflict (West Virginia). Standing in this spot yields a much better understanding of our country and the forces that nearly tore it apart in 1859 through 1865.

The Confederacy tried, at the cost of more than 600,000 lives, to do what several hundred rioters managed to do on January 6, 2021: to take over the United States Capitol, and thus the United States Government. We did not let it happen in 1861-1865. We did not let it happen in 2021.

The entire story of John Brown, Frederick Douglass, President Buchanan, Governor Wise and Senator Crittenden is worth understanding so that we can resolve our disputes now and in the future in a way that causes no bloodshed whatsoever. Certainly that's what Dr. King would have wanted.

In 1954 to 1968, Dr. King led a continuous massive non-violent protest against the notion of second-class citizenship for the descendants of African-American slaves freed by President Lincoln in 1865, one hundred years earlier.

The protesters who took over the United States Capitol on January 6, 2021 did not have an articulate platform. However, a daily study of the media for the past two years yields the following conclusion: the underlying

issues that sparked John Brown's violent protest of October 16, 1859 and the violent takeover of the United States Capitol building on January 6, 2021 appear to be have the same roots: it is a fear of "the other".

We must learn to understand that there is no "the other". While it cannot accurately be said that all people are brothers and sisters, it can definitely accurately be said that all people are cousins. One anthropologist's estimate is that we are all related as cousins within 50 links, every one of the eight billion of us. That teaching must be foremost in the national and international imagination.

Once we think of the world as populated by our cousins, we can understand that bloodshed is never the right way to solve anything. See A.J. Jacobs "We Are All Family", CBC Radio, The Current, November 23, 2017 and Scott Hershberger, "Humans Are All More Closely Related Than We Commonly Think", *Scientific American*, October 5, 2020.

The hero of 1859-1860 was Senator John J. Crittenden of Kentucky, who unsuccessfully tried to broker a compromise which would have saved the lives of 600,000 deceased American soldiers, 476,000 wounded soldiers and 400,000 missing soldiers.

We do not read much about Senator Crittenden in history. Perhaps we should.



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Donna received her law degree from St. John's University of Law. She is currently the Chairperson of the Board of Directors of the Catholic Lawyers Guild of Queens and was past President of the Queens County Women's Bar Association, the Astoria Kiwanis Club, East River Kiwanis Club, and the Catholic Lawyers Guild of Queens. Co-Chair of the Elder Law Section of Queens County Bar Assn. 2012-2019



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