



Advisory

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LAWSUIT AGAINST FERGUSON OFFICER DISMISSED

On June 17, 2019, the U. S. Court of Appeals for the Eighth Circuit, en banc, reversed an order of the District Court and ordered Dorian Johnson's suit against Officer Darren Wilson, the City of Ferguson, and the former Chief of Police dismissed. Johnson was the companion of Michael Brown in the notorious 2014 incident when Officer Wilson shot and killed Brown in self-defense. Johnson was with Brown, following an earlier convenience store robbery on August 9, when he and Brown were ordered out of the middle of the street by Officer Wilson. Johnson later claimed that Brown had his hands up at the time of the shooting. Riots ensued. A subsequent investigation by the U. S. Department of Justice found that Johnson's story was false and that Brown had

attacked Officer Wilson. In spite of this, Johnson sued.

In **Johnson v. City of Ferguson**, Johnson claimed that when Officer Wilson stopped him and Brown in the middle of the street and ordered them to the sidewalk, he had unlawfully seized him in violation of the Fourth Amendment. Both Officer Wilson and the City of Ferguson asked the Federal District Court to dismiss the suit, but the court denied their motions. They appealed to the Eighth Circuit Court of Appeals where a divided panel also refused to dismiss the case.

The Eighth Circuit later agreed to reconsider the panel's denial en banc, meaning the entire court would review the case. The National Police Association asked CJLF to submit an *amicus*

curiae (friend of the court) brief on their behalf, encouraging the Eighth Circuit to dismiss Johnson's lawsuit.

In the brief, Foundation Legal Director Kent Scheidegger argued that, even assuming Johnson's allegations of the facts, he was not seized by Officer Wilson when he and Brown were told to leave the street and go to the sidewalk. Officer Wilson was acting in the scope of his duties in ordering Johnson and Brown to stop walking down the middle of the street, which is against the law. Officer Wilson's order did not prevent either man from continuing on the sidewalk. By Johnson's own admission, he was not ordered to stop and was not prevented from leaving, which he did when he ran. The Foundation cited its 1991

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RIVERSIDE COUNTY DISTRICT ATTORNEY ADDRESSES CJLF ANNUAL MEETING

The Criminal Justice Legal Foundation held its 37th Annual Meeting in Los Angeles on June 12. The meeting featured an address by Riverside County District Attorney Mike Hestrin. In his remarks, Hestrin discussed the impact of California's criminal justice reform laws on law enforcement's ability to protect the public from crime. He also commented on the Governor's recent blanket reprieve of murderers on California's death row, saying that the Governor's action will not prevent his office from seeking the death penalty in appropriate cases. He cited the recent death sentence his office secured for habitual felon John Hernandez Felix, for the October 8, 2016 murders of Palm Springs police officers Lesley Zerebny, 27, and Jose Gilbert Vega, 63, as they responded to a domestic violence call. Among the guests to the luncheon meeting were Ventura County District Attorney Greg Totten and senior prosecutor and President of the Los Angeles Association of Deputy District Attorneys Michele Hanisee.



Riverside County District Attorney Michael Hestrin

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ACADEMIC JOURNALS TO PUBLISH CJLF ARTICLES

“Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism”—
An examination of Supreme Court decisions imposing new rules
on trial and sentencing in capital cases.

“Two Views on Criminal Justice Reform: The Author and a Critic on Locked In”—
A two-part article presenting contrasting views. Part one is an interview with John Pfaff,
author of *Locked In*. Part two is a review of *Locked In* by Kent Scheidegger

The Ohio State Journal of Criminal Law and the Federalist Society Review have accepted articles by CJLF Legal Director Kent Scheidegger for publication.

The Ohio State Journal will publish Scheidegger’s “Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism” this fall. The article examines Supreme Court decisions going back to the late 1960s which imposed new rules on trials and sentencing in capital cases. Prefacing this examination, Scheidegger notes, “Shifting majorities have imposed rules, each of which seemed to be an improvement in policy to a majority or plurality of justices at the time, but none of which had any sound basis in the ‘text and tradition of the Constitution.’ The combined weight of these ‘improvements’ is what makes the system dysfunctional.”

The article in the Federalist Society Review, “Two Views on Criminal Justice Reform: The Author and a Critic on *Locked In*,” includes an interview of Fordham Law Professor John Pfaff, author of the book *Locked In*, and Scheidegger’s critical review of the book. Pfaff effectively debunks the “Standard Story” of popular claims that America’s so-called mass incarceration has been caused by overly long sentences imposed by the War on Drugs and lobbying by private prisons. He suggests, instead that over incarceration is the result of over-zealous District Attorneys elected by uninformed voters and unnecessarily harsh sentences enacted by politicians who fear being labeled “soft on crime” by voters. Pfaff argues that District Attorneys should be appointed by state governors and be required to consider the economic cost when making sentencing decisions; that sentencing commissions



rather than; legislatures should determine sentences; and that more criminals, including violent criminals, should be sentenced to rehabilitation rather than incarceration.

While applauding the professor’s debunking of the “Standard Story,” Scheidegger argues that much of Pfaff’s data refutes the claim of overly harsh sentences. In addressing Pfaff’s reform proposals, which he calls a “dog’s breakfast,” Scheidegger points out that local voters are quite aware of local crime and in the best position to choose a District Attorney who is effectively addressing it. Unelected sentencing commissions insulate legislators from responsibility to represent the public on crime and punishment, which is often a key political issue during elections. Finally, he notes that Pfaff’s focus on the economic costs and diminishing returns to incarceration completely ignore a fundamental component . . . justice.

SANCTUARY FOR CRIMINALS

Citizens of foreign countries who enter the United States illegally are by definition criminals. Granted, the crime is not considered serious under U. S. law, roughly comparable to trespassing, but it is a crime; and 50 years ago, in both Democrat and Republican administrations, illegal immigrants who were caught were usually deported. But, beginning in 1971, progressive cities, including San Francisco, Los Angeles, and Berkeley and the state of Oregon, enacted laws making them sanctuaries for illegal aliens. In October 1986, Congress passed the Immigration Reform and Control Act, which authorized legalization of immigrants without proper documentation who could prove they had resided in the U. S. continually since January 1, 1982, hence the term “undocumented” immigrant. Since adoption of that act, the odds of deportation for those whose only crime was crossing the U. S. border illegally dropped to near zero. During the Bush Jr. and Obama administrations almost all deportations were for illegals who committed additional crimes in the United States with most of the emphasis on violent crimes.

The 9/11 terrorist attack focused public and government attention on both illegal and legal immigration, leading to the 2002 passage of the Homeland Security Act by Congress and the creation of the Bureau of Immigration and Customs Enforcement (ICE). The mission of ICE is to protect America from cross-border crime and illegal immigration that threatens national security and public safety. This is distinct from the U. S. Border Patrol which is tasked with securing the nation’s borders.

Until 2016, the leaders of both political parties had repeatedly expressed support for border security and the deportation of criminal aliens, but politicians were never able to agree on the specific policies to accomplish this. During the eight years of the Obama administration, while the president talked tough on illegal immigration and the mainstream media falsely reported increased deporta-

tions, they had actually declined. In the last year of his presidency, Bush Jr. had deported 1,171,000 illegal aliens. Under the Obama administration, ICE reported that deportations began to decrease every year, ending in 2016 with 240,000 illegals deported. In 2012, Obama also initiated the Deferred Action for Childhood Arrivals (DACA), which gave temporary legal status to 1.8 million illegals under the age of 31. In 2014, Obama expanded DACA to waive the age limit and include illegals who entered the U. S. prior to 2010. All of this was done without the approval of Congress.

In early 2017, newly elected President Trump, keeping a promise he made during his campaign, stepped up illegal immigration enforcement at the border and repeatedly announced his plans to substantially increase border security and more aggressively identify and remove illegals who had committed crimes. In response, eight states, including California, Colorado, Illinois, Massachusetts, Vermont, and Washington state, and scores of cities, including New York, Cincinnati, and Philadelphia enacted sanctuary laws prohibiting local law enforcement cooperation with ICE, even in cases involving criminal aliens.

As ICE began carrying out sweeps to capture criminal aliens for deportation, progressive politicians took action to undermine the effort. Oakland Mayor Libby Schaaf, when notified that ICE would be looking for criminal aliens in her city in January 2018, publicly announced the pending sweep to warn illegals, making her an instant celebrity among progressives.

For several years, ICE has been compiling data on its requests to local police departments to detain criminal illegal aliens eligible for release from jail so that immigration enforcement officers can take them into federal custody for deportation. A recently released Declined Detainer Report, for the first quarter of 2018, indicates how laws which prohibit local police from cooperating with ICE have turned law-abiding citizens into

victims at the hands of criminal aliens. Some examples:

- On January 7, 2018, Los Angeles Police arrested a 30-year-old alien from Mexico on drug charges. ICE issued a detainer on the offender, but it was not honored and the alien was released from jail. On February 26, 2018, the same illegal alien was arrested for murder.
- In December 2017, a 29-year-old criminal alien was arrested in San Luis Obispo for a probation violation. ICE issued a detainer but it was not honored and the defendant was released. A month later the same criminal alien was arrested for rape, and ICE issued another detainer, which was not honored and the criminal was again released.
- On January 17, 2018, a 38-year-old illegal alien was arrested in Los Angeles for domestic violence. An ICE detainer was issued but not honored and the criminal was released. In April the same man was arrested for drunk driving. An ICE detainer was not honored and the criminal alien was released from jail and remains at large.
- On January 31, 2018, a 41-year-old illegal alien from Honduras was arrested in San Francisco for burglary and fighting with the arresting officer. An ICE detainer was not honored and the alien was released. In April the same illegal alien was arrested by San Francisco Police for drug trafficking and auto theft. After an ICE detainer was not honored, the criminal was released and remains at large.
- On February 13, 2018, a 26-year-old illegal alien from Mexico was arrested in Beverly Hills for auto theft. After an ICE detainer was ignored, the alien was released. On April 13, 2018, the same criminal alien was arrested for attempted murder. ICE issued a detainer that was ignored and the alien was released and remains at large.
- On February 18, 2018, a 23-year-old illegal alien from Honduras was first

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SUPREME COURT TO REVISIT BORDER SHOOTING CASE

The U. S. Supreme Court will reconsider a lawsuit brought by the Mexican parents of a 15-year-old boy who was shot and killed by a border patrol agent as he and several other youths were throwing rocks at the agent from the Mexican side of the border.

At issue in **Hernández v. Mesa** is whether parents who are Mexican citizens have the right to sue a U. S. law enforcement officer for an incident on the Mexican side of the U. S.-Mexico border, which resulted in the death of their 15-year-old son who was also a Mexican citizen living in Mexico.

CJLF joined the case in 2017 to encourage a decision denying the lawsuit, arguing that under the circumstances of the shooting, the parents cannot seek to hold a border patrol agent personally liable for an alleged offense which occurred in another country.

In a June 2017 ruling, the Supreme Court sent the case back to the Fifth Circuit Court of Appeals to determine if the lawsuit was affected by the Court's 2017 decision in another case (**Ziglar v. Abbasi**), which held that alleged terrorists from a foreign country could not sue U. S. officials for implementing anti-terrorist policies. In March 2018, the Fifth Circuit held that, after considering **Abbasi**, the unique circumstances of the case precluded the Mexican parents from suing the border patrol agent in a U. S. court. This year the Supreme Court announced that it would hear the appeal of the Fifth Circuit's decision this fall.

Court records present the facts surrounding the death of 15-year-old Sergio Adrian Hernández Guereca (Hernández) on June 7, 2010. On that day, Hernández and several others were hanging around a cement culvert that separates El Paso, Texas, from Mexico. The border runs along the center of the culvert with a fence along the embankment on the U. S. side. The plaintiffs claim that Hernández and his friends were playing a game where they would run up the side of the culvert, touch the fence, and run back. When Border Patrol Agent Jesus Mesa, Jr. arrived at the scene, he caught one of Hernández's friends on the U. S. side of the culvert. Then, while standing on the U. S.

side, Mesa shot and killed Hernández as he was watching from the Mexican side.

A subsequent U. S. Department of Justice investigation found that Hernández was known by law enforcement for illegally smuggling people across the border. On the day of the shooting, Agent Mesa caught a suspect attempting to cross the border at the El Paso culvert. Seeing this, Hernández and his friends began pelting Mesa with rocks at close range and, in response, Agent Mesa fired his weapon, killing Hernández.

In their lawsuit, Hernández's parents argue that their sons's constitutional rights were violated, and thus they are entitled to sue and hold Agent Mesa personally liable for excessive force resulting in the death of their son. They cite a 1971 Supreme Court ruling in **Bivens v. Six Unknown Federal Narcotics Agents** for support. The Bivens ruling allowed a U. S. citizen whose home was searched without a warrant, before he was arrested, strip searched, and interrogated on an unsubstantiated narcotics violation, to sue federal authorities for damages.

In a scholarly *amicus curiae* (friend of the court) brief, Foundation Associate Attorney Kymberlee Stapleton argues that in light of the Supreme Court's **Abbasi** decision and the unique circumstances of this case, **Bivens** does not extend constitutional protections to foreign citizens with no ties to the U. S.

Among the other organizations which filed briefs supporting the plaintiffs (Hernández) in this case are the American Civil Liberties Union, Amnesty International, the Constitutional Accountability Center, and the American Immigration Council.

"Congress, not the judiciary, is the proper branch to decide if noncitizens can recover money damages for government conduct occurring in a foreign country," said Stapleton. "A decision to allow this lawsuit would permit the family of a noncitizen with no ties to the U. S., who was likely engaging in criminal activity, to force a border patrol agent into litigation over an incident that has been investigated by the Department of Justice and would chill the enforcement of America's border security," she added.



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CRIME & CONSEQUENCES



"SANCTUARY"

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arrested in San Francisco on auto theft and receiving stolen property. Between that date and January 21, 2019, the same criminal alien was rearrested 12 more times for multiple crimes, including burglary, drug charges, and stealing five cars. Upon each arrest, ICE issued detainers which were not honored and the criminal was released and remains at large.

Dozens of other criminal aliens are identified in the report after multiple arrests and releases for drunk driving, domestic violence, drug trafficking, car thefts, burglaries, and numerous other offenses.

The suggestion that preventing ICE from removing criminal aliens puts people living in sanctuary communities at risk has been rejected by most liberal political leaders, immigration activists, and the media, even when the illegal aliens are convicted of murder. Those committed to making our cities and states sanctuaries for criminal aliens are clearly willing to sacrifice the lives and safety of innocent Americans for a political agenda. This has to stop.

Michael Rushford
President



A concerted effort to end enforcement of common-sense laws has turned large parts of America into filthy, vagrant-infested breeding grounds for unprecedented levels of crime. Sanctuary state and city laws are adding to this crisis by protecting criminal aliens at the expense of law-abiding citizens. CJLF is fighting for enforcement of the laws necessary to make our streets and communities safe. But, because we refuse government support, we struggle every year to raise the funds needed to stay in this fight. Help us to continue our work during these chaotic times by making your annual tax-deductible contribution today. Please return the card on the right with your check or go to www.cjlf.org or call us at (916) 446-0345 to contribute with your credit card. **Thank you so much.**

SCANNING THE NEWS

CA Sentencing Reforms Enabling Violent Criminals

A man charged with murdering four and wounding two others with a machete on August 7 had a criminal record that police say would have kept him behind bars prior to enactment of California's sentencing reforms. Brian Day of KTLA reported that on August 8, gang member Zachary Castaneda was arrested for the fatal machete stabbing of two men at an Orange County apartment complex, the stabbing of a woman during the robbery of an insurance office, the random attack of a man at a gas station, the fatal stabbing of a customer during a sandwich shop robbery, and the fatal stabbing of a security guard at a convenience store. Castaneda had multiple prior felony convictions going back to 2009, which, according to Garden Grove Police Chief Tom DeRe qualified him as a "violent individual who should have never been considered for early release based upon Assembly Bill 109." That measure, called "Public Safety Realignment," prohibits prison sentences for repeat offenders designated by the state as "non-violent, non-serious, non-sex offenders," requiring instead that they serve short sentences in county jails and be released on probation. In addition to committing numerous crimes, Castaneda had violated his probation seven times between 2016 and 2018. He is just another example of the "low risk" criminals California's leaders have decided should be left on the streets.

"FERGUSON"

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U. S. Supreme Court victory in **California v. Hodari D.** as support.

The appeals court agreed, deciding that Johnson was never seized within the meaning of the Fourth Amendment, citing the holding in **Hodari D.** Johnson was simply ordered to stop walking down the middle of the street, which is illegal, and move to the sidewalk where pedestrians are supposed to walk.

"A ruling upholding Johnson's lawsuit would have invited similar suits against police officers across the country for doing nothing more than basic law enforcement," said Scheidegger.

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CJLF URGING HIGH COURT TO REVIEW NINTH CIRCUIT HOMELESS RULING

America's last homeless crisis, which began during the Carter Administration and extended into the early 1990s, sparked a movement among city and county government to restrict camping in public spaces such as parks and sidewalks. These restrictions, usually in the form of local ordinances, allowed police to clear out vagrants who had taken over San Francisco's Golden Gate Park and Central Park in New York and were utilized in dozens of communities to protect public health and make downtown districts more welcoming to shoppers and tourists. During that period, CJLF helped win some of the court battles to uphold anti-camping ordinances.

Over the past two decades, some big cities, such as Los Angeles, San Francisco, and New York, have abandoned such laws, sometimes due to lawsuits challenging their enforcement and

punishment in violation of the Eighth Amendment. The ruling came in a lawsuit filed by a group of homeless people in Boise, Idaho, who claimed that the city's anti-camping law punished them for being homeless. The ruling sparked multiple lawsuits by homeless advocates in other cities trying to restrict vagrants from pitching tent cities in parks and along sidewalks.

Circuit Judge Milan Smith notes, "the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination."

Last April, the Ninth Circuit rejected the City of Boise's request for an en banc panel to reconsider the earlier ruling. Circuit Judge Milan Smith led five other Ninth Circuit judges in a dissent, which noted that both the Eleventh Circuit and Fourth Circuit have held that restrictions on camping do not violate the Constitution. "[T]he panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination," wrote Smith.

The City of Boise has decided to appeal the Ninth Circuit ruling to the U. S. Supreme Court. CJLF has joined the case to file argument encouraging the high court to grant the city's petition for review.

Coordinating with the attorneys representing Boise (Gibson, Dunn & Crutcher) in **City of Boise v. Martin**, CJLF will submit argument stressing that the Ninth Circuit was wrong in its determination that preventing vagrants from camping on public property is cruel and unusual punishment, and that it is not unconstitutional for a local government to enforce its health and safety laws. Until this decision is overturned, there is no way cities and counties are going to be able to effectively mitigate their homeless problems.



sometimes because enforcing them became politically incorrect. But other cities have continued to enforce anti-camping laws. In September 2018, a three-judge panel of the Ninth Circuit Court of Appeals ruled in **Martin v. City of Boise** that enforcing anti-camping laws in cities which did not have enough shelter beds to house all of their homeless constituted cruel and unusual

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