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Over the Top: Judges, Lawyers, and COVID-19 Rhetoric

Jonathan L. Entin

OVER THE TOP: JUDGES, LAWYERS, AND COVID-19 RHETORIC

Jonathan L. Entin†

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INTRODUCTION

The United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[1] Sometimes this principle means that we afford constitutional protection to false or hyperbolic speech.[2] It should not be surprising that, especially in a time of high political and cultural polarization, the debate surrounding COVID-19 has become heated.[3] We might hope that courts and lawyers addressing legal issues arising from the pandemic would refrain from overheated rhetoric that could undermine the legitimacy of public health programs that seek to combat the pandemic, even if that rhetoric enjoys First Amendment protection. Alas, in several notable incidents, that hope has been frustrated.

† David L. Brennan Professor Emeritus of Law and Adjunct Professor of Political Science, Case Western Reserve University. This essay was written before the assault on the U.S. Capitol on January 6, 2021. Sharona Hoffman, Peter Poulos, and Raymond Vasvari provided helpful comments on earlier versions. The author takes sole responsibility for errors, omissions, and other inadequacies.

1. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

2. This was true in the very case that articulated this principle. Several of the statements in the advertisement that gave rise to Commissioner L.B. Sullivan's libel suit against the New York Times were inaccurate, and some of the inaccuracies were not trivial. *See id.* at 258–59; Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 199–200.

3. *See, e.g.,* Lisa Rosenbaum, *Tribal Truce—How Can We Bridge the Partisan Divide and Conquer Covid?*, 383 NEW ENG. J. MED. 1682 (2020).

I. JUDICIAL RHETORIC

Three opinions illustrate my concern with judges' language in pandemic-related cases. Let's begin with *On Fire Christian Center, Inc. v. Fischer*,[4] in which the United States District Court for the Western District of Kentucky entered an ex parte temporary restraining order preventing the City of Louisville from taking any action to interfere with a church's drive-in Easter Sunday worship service. The court issued the order at 2 p.m. on the day before Easter, which Judge Justin Walker explained made it impractical to conduct a hearing.[5] The case had been filed late the day before, on Good Friday afternoon.[6] The church went to court after the mayor prohibited drive-in religious services; he also announced that police officers would hand out information about the health risks of drive-in religious services, record the license plate numbers of cars that were present, and share this information with the health department, which would contact those who attended the services to explain the medical risks of such activities.[7]

Judge Walker emphasized that the city's position discriminated against religious gatherings because it did not cover nonreligious drive-in and drive-through activities such as liquor stores or parking lots.[8] Some courts have emphasized this aspect of the *On Fire* decision in rejecting challenges to other health restrictions on religious activities.[9] Perhaps another judge would have assessed the evidence of discrimination against religion differently.[10] Or maybe the same judge

4. 453 F. Supp. 3d 901 (W.D. Ky. 2020).

5. *See id.* at 904.

6. *Id.* at 909.

7. *Id.* at 908–09.

8. *Id.* at 910.

9. *See, e.g.,* Calvary Baptist Church of Bangor v. Mills, 459 F. Supp. 3d 273, 283 n.13 (D. Me. 2020), *appeal dismissed*, 984 F.3d 21 (1st Cir. 2020); Cassell v. Snyders, 458 F. Supp. 3d 981, 998 n.6 (N.D. Ill. 2020); Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100, 1152 (D.N.M. 2020).

10. *Compare* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) (finding that pandemic-related restrictions on worship services discriminated against religion), *with id.* at 80 (Sotomayor, J., dissenting) (concluding that the restrictions at issue treated religious activities "far more favorably than" secular activities); *compare* South Bay Unified Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (finding no impermissible discrimination against religious activities), *with id.* at 1614–15 (Kavanaugh, J., joined by Thomas & Gorsuch, JJ., dissenting from denial of application for injunctive relief) (finding that restrictions on attendance at places of worship did constitute impermissible discrimination).

would have come out the other way if time had permitted an adversary hearing at which the city could have presented its side of the story. But put such conjecture to the side.

Consider instead the tone of the opinion. Judge Walker began by declaring: "On Holy Thursday, an American mayor criminalized the communal celebration of Easter."[11] Thereafter he devoted eight paragraphs to chronicling the persecution of Christians, notably invoking the Pilgrims' flight from England and the Thirty Years' War as well as the harsh treatment of enslaved people who attended prayer meetings, the violence that led members of the Church of Jesus Christ of Latter Day Saints to migrate to Utah, and various forms of anti-Catholic and anti-Semitic bigotry in the United States.[12]

The hyperbolic opening was completely gratuitous. The analogy between a mayor's effort to prevent drive-in religious services during a pandemic, however misguided or even legally problematic, bears no resemblance to the religious persecution described in those eight paragraphs. Worshipers at On Fire Christian Center did not face threats to their lives or the prospect of assault, forced conversion, exile, or anything remotely like what the Pilgrims and other disfavored religious groups mentioned in the opinion faced. Indeed, other courts have found that some health orders impermissibly discriminated against religious activities without the rhetorical overkill that Judge Walker employed.[13]

Another example of judicial hyperbole comes from a concurring opinion in *Wisconsin Legislature v. Palm*,[14] in which the Wisconsin Supreme Court invalidated a pandemic emergency order promulgated by the state health director because the director did not follow required rulemaking procedures and the order exceeded her authority under state law.[15] In her concurrence, Justice Rebecca Grassl Bradley repeatedly invoked *Korematsu v. United States*[16] to explain why she believed that

11. *On Fire Christian Center,* 453 F. Supp. 3d at 905.

12. *Id.* at 905–07. The opinion's only mention of the "racist, anti-Semitic, and anti-Catholic" Ku Klux Klan described the late Justice Hugo Black and the late Senate Majority Leader Robert Byrd as former Klan members without explaining why they were relevant to the discussion. *See id.* at 906–07.

13. *See, e.g.,* Roberts v. Neace, 958 F.3d 409, 413–14 (6th Cir. 2020); Marysville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614–15 (6th Cir. 2020); Soos v. Cuomo, 470 F. Supp. 3d 268, 282–83 (N.D.N.Y. 2020).

14. 942 N.W.2d 900 (Wis. 2020).

15. *Id.* at 918.

16. 323 U.S. 214 (1944).

the emergency order could not stand.[17] She emphasized that using *Korematsu* enabled courts "to test the limits of government authority, to remind the state that urging courts to approve the exercise of extraordinary power during times of emergency may lead to extraordinary abuses of its citizens."[18] With all respect, this argument is even more problematic than the one in *On Fire Christian Center*. The emergency order at issue in the Wisconsin case directed all residents to stay at home and all businesses to remain closed, subject to agency-approved exceptions, and also forbade most private gatherings.[19] Whatever the wisdom or legality of the emergency order, it applied to everyone in the state. Unlike the situation in *Korematsu*, no one was targeted based on race, religion, national origin, or any other invidious characteristic.[20] The invocation of *Korematsu* therefore was not only gratuitous but also demeaning to those who were interned (with judicial approval) during World War II. Perhaps the only consolation is that the reference to *Korematsu* appeared in a separate opinion; the court majority managed to reach its conclusion without reference to one of the most widely condemned rulings that the Supreme Court has ever made.[21]

Finally, there is Justice Gorsuch's concurring opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*,[22] where a divided Supreme Court enjoined the enforcement of restrictions on religious services because the restrictions were not neutral toward religion and could not

17. *Wis. Legislature*, 942 N.W.2d at 923 n.6 (R. Bradley, J., concurring). Justice Rebecca Grassl Bradley should not be confused with Justice Ann Walsh Bradley, who wrote her own dissenting opinion and joined all or most of two other dissents. *See id.* at 941–42 (A. Bradley, J., dissenting); *id.* at 951 (Dallet, J., dissenting); *id.* at 974 (Hagedorn, J. dissenting).

18. *Id.* at 923 (R. Bradley, J., concurring) (footnote omitted).

19. *Id.* at 906–07.

20. Some commentators have invoked *Korematsu* in discussing the coronavirus pandemic, but they have done so only to argue against completely insulating pandemic-related health orders from judicial review rather than to imply that those orders raise the same concerns as did the Japanese internments during World War II. *See* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 183 (2020).

21. One justice joined Justice Bradley's concurrence. *See Wis. Legislature*, 942 N.W.2d (R. Bradley, J., concurring) (stating that Justice Daniel Kelly joined her opinion). Neither the majority opinion, the concurring opinion of Chief Justice Patience Roggensack (who also wrote the majority opinion), nor Justice Kelly's separate concurring opinion mentioned Korematsu. None of the dissenting opinions in this 4–3 ruling mentioned *Korematsu*, either.

22. 141 S. Ct. 63 (2020) (per curiam).

survive strict scrutiny.[23] Justice Gorsuch went even further. At one point he warned that upholding the state's restrictions amounted to "cutting the Constitution loose during a pandemic."[24] He went on to maintain that "we may not shelter in place when the Constitution is under attack."[25] In essence, he wrote: "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[26]

Justice Gorsuch seriously distorted the issue.[27] Nobody claimed that the Constitution should be ignored in assessing the validity of pandemic restrictions. Chief Justice Roberts, who dissented on prudential grounds despite his reservations about the restrictions, had it exactly right: some members of the Court "simply view[ed] the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution."[28] It certainly was possible to regard the strict limits on attendance at religious services as facially discriminatory when other indoor activities that the state treated as essential were not subject to the same restrictions. That is how the majority opinion and a separate concurrence by Justice Kavanaugh approached the case.[29] But dissenting Justices Breyer, Sotomayor, and Kagan disagreed. In doing so, they concluded that the restrictions, viewed in light of medical and epidemiological evidence on which the

23. *Id.* at 67, 69.

24. *Id.* at 70 (Gorsuch, J., concurring).

25. *Id.* at 71 (Gorsuch, J., concurring).

26. *Id.* at 70 (Gorsuch, J., concurring). Nor are these the only pungent comments in the concurrence. For example, Gorsuch described the state's position as "it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians," alluding to secular exceptions for liquor stores, bicycle shops, and acupuncture centers. *Id.* at 69 (Gorsuch, J. concurring). *See also infra* note 43.

27. The Court's per curiam opinion also contains a problematic statement that is analogous to Justice Gorsuch's statements: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020). It is problematic for the same reasons that Justice Gorsuch's statements are troublesome, *see infra* notes 28–31 and accompanying text, but it is the only such statement in that opinion. This statement should not be ignored, even if the overall tenor of the per curiam opinion noticeably contrasts with Justice Gorsuch's acerbic tone. *See supra* notes 24–26 and accompanying text; *infra* note 43 and accompanying text.

28. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. at 75 (Roberts, C.J., dissenting).

29. *See id.* at 66 (footnote omitted) (observing that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment"); *id.* at 73 (Kavanaugh, J., concurring) (concluding that "once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class").

district court had relied in upholding them, did not discriminate against religious activities.[30] They never suggested that the Constitution was irrelevant to the case, only that the restrictions had a sufficiently strong legal basis that they should not be enjoined before the district court's judgment could be promptly reviewed by the court of appeals.[31]

The Walker, Bradley, and Gorsuch opinions exaggerate the problems that these judges identified. It is one thing to conclude that the Louisville ban on drive-in religious services violates the Free Exercise Clause, that the Wisconsin stay-at-home order was not properly promulgated, or that New York should not have treated religious activities as riskier than other indoor activities that attract numerous participants in close quarters. It is quite another to suggest that the mayor sought to persecute religious believers, that the state health director was arbitrarily or irrationally mistreating state residents, or that a governor high-handedly ignored the Constitution during a pandemic. The rhetorical excesses could be read to imply that government should not have authority to act against COVID-19 in a way that might cause social or economic inconvenience.[32] That is, to

30. *Id.* at 76-77 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting); *id.* at 79 (Sotomayor, J., joined by Kagan, J., dissenting).

31. *Id.* at 78 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting). Resolving the debate over whether the New York regulations actually discriminated against religion is beyond the scope of this essay, but it bears emphasis that this debate turns on whether the religious activities at issue were sufficiently similar to secular activities that were not subject to the restrictions and how much, if any, weight medical and epidemiological evidence should have in making that assessment. In any event, New York seems not to have based its restrictions on the risk of coronavirus transmission in different settings. *See* Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 632 (2d Cir. 2020).

32. Justice Alito's remarks about the pandemic late last year do not go that far but are nonetheless noteworthy. Alito emphasized the emergence of "lawmaking by executive fiat rather than legislation" that empowered "an elite group of appointed experts." Aaron Blake, *Samuel Alito's Provocative, Unusually Political Speech*, WASH. POST (Nov. 13, 2020), https://www.washingtonpost.com/politics/2020/11/13/samuel-alitos-provocative-unusually-political-speech/ [https://perma.cc/V86C-H34U]. But COVID-19 restrictions for the most part have been imposed by elected governors and mayors, albeit typically based on recommendations from health experts, rather than by administrators acting on their own. The major exception was in Wisconsin, which involved restrictions imposed by the director of the state health department, but in that case the court went out of its way to say that the ruling had nothing to do with the governor's authority. Wis. Legislature v. Palm, 942 N.W.2d 900, 905 (Wis. 2020). And Alito developed his argument about potential governmental overreach with reference to a Nevada statute that authorizes the governor rather than an expert administrator to act in an emergency. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (denying an injunction pending appeal, over Alito's dissent, in

put it mildly, an unusual position for public officials to take in the midst of a health emergency.

II. LAWYERS' RHETORIC

While some courts have fallen into rhetorical excess, lawyers also have framed their challenges to pandemic-related health orders in troublesome ways. Two Ohio cases illustrate the problem.

In one pending action, eight individual plaintiffs have filed suit in federal court challenging the constitutionality of Governor Mike DeWine's emergency declaration and all COVID-19 health orders issued pursuant to that order. The complaint in *Renz v. Ohio*[33] asserts a variety of claims. Among them are due process,[34] privacy,[35] the Ninth Amendment,[36] takings,[37] and the freedoms of assembly and religion.[38] This document relies on conspiracy theories as the basis for its claims. It attacks "intentionally misleading information" disseminated by the state and federal governments, asserts that "COVID-19 is roughly as dangerous as the seasonal flu," and adds that the coronavirus is "less dangerous than many other infectious diseases that we have not taken such drastic steps to stop."[39] These allegations are amplified over about 20 pages.[40] In essence, the plaintiffs seek to litigate the underlying science of COVID-19 before a jury.[41]

But the lawyers should have recognized the unwisdom of trying to persuade a court to resolve a scientific dispute. They did not need to immerse themselves in the debate about the proper role of the judiciary

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a case involving restrictions on attendance at religious services); Blake, *supra*. In fact, Alito emphasized that the emergency statutes "confer enormous *executive* discretion" and that "[t]he pandemic has resulted in previously unimaginable restrictions on individual liberty." *Id.* (emphasis added).

33. No. 3:20–cv–1948 (N.D. Ohio filed Sept. 1, 2020). The plaintiffs filed an amended complaint on October 13, 2020, that includes all the quotations and other substantive points discussed here. Subsequent references will cite both the original and the amended complaint.

34. Compl., ¶¶ 96–103; Am. Compl., ¶¶ 82–89.

35. Compl., ¶¶ 104–07; Am. Compl., ¶¶ 90–95.

36. Compl., ¶¶ 108–10; Am. Compl., ¶¶ 96–98.

37. Compl., ¶¶ 111–12; Am. Compl., ¶¶ 99–101.

38. Compl., ¶¶ 113–14; Am. Compl., ¶¶ 102–03.

39. Compl., ¶ 13; Am. Compl., ¶ 13.

40. *See* Compl., ¶¶ 15-64; Am. Compl., ¶¶ 15–64.

41. The complaint demands a jury trial in a courtroom that does not use any special pandemic-related safety arrangements, such as masks or physical distancing. Compl., ¶¶ 8–9; Am. Compl., ¶¶ 8–9.

in such matters.[42] Instead, they might have taken heed of Chief Justice Roberts's warning in a COVID-19 case that the judiciary generally should avoid second-guessing medical and scientific decisions.[43] The full Court, in a subsequent pandemic case that rejected restrictions on religious services, similarly emphasized that jurists "are not public health experts, and [they] should respect the judgment of those with special expertise and responsibility in this area."[44] Indeed, more conventional legal arguments have some potential for success. Evidence for this point comes from a federal district court ruling that struck down Pennsylvania's pandemic-related emergency orders under some of the same constitutional theories on which the *Renz* plaintiffs rely without invoking conspiracy theories and fringe scientific claims.[45]

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42. Probably the most famous chapter in that debate occurred in the U.S. Court of Appeals for the District of Columbia Circuit nearly half a century ago. *Compare* Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring) (advocating that courts focus on agency procedures rather than scientific substance in reviewing administrative actions relating to technical issues), *with id.* at 68–69 (Leventhal, J., concurring) (advocating that courts engage with the substance but not substitute their judgment for that of agency experts on technical matters). *See also* Wendy E. Wagner, *Ethyl: Bridging the Science-Law Divide*, 74 TEX. L. REV. 1291, 1293–95 (1996) (explaining the approach taken in the majority opinion in Ethyl, which asked: (1) whether the regulatory question could be answered based on existing science; (2) whether the agency has properly distinguished between disputed and undisputed scientific facts; and (3) whether the agency decision is based on undisputed scientific facts and the decision fell within the bounds of agency discretion afforded by the relevant statute).

43. South Bay Unified Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). Rather than following this alternative, the lawyers took a not-so-subtle swipe at the Chief Judge's warning without citing this case. Compl., ¶ 3; Am. Compl., ¶ 3.

    Justice Gorsuch later dismissed the Chief Justice's opinion as "nonbinding and expired." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 70 (2020) (per curiam) (Gorsuch, J., concurring). But the Court's order granting temporary injunctive relief against New York's restrictions on religious services emphasized that those restrictions discriminated against religion. *Id.* at 66. The majority opinion did not question the validity of the medical judgments that the state had used to justify its restrictions. *See infra* note 44 and accompanying text.

44. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. at 68.

45. Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883 (W.D. Pa. 2020), *stay pending appeal granted*, No. 20–2936, 2020 WL 5868393 (3d Cir. Oct. 1, 2020).

    As this essay was going to press, the *Renz* plaintiffs voluntarily dismissed their case after the district judge ordered them to submit a coherent complaint that presented a "short and plain statement of the claim." FED. R. CIV. P. 8(a)(2). *See* Jo Ingles, *Federal Lawsuit over COVID Closures*

In the other Ohio case, nine dance studios challenged state closure orders. The complaint in *State ex rel. Your Next Move LLC v. Graham*[46] included two quotations supposedly from *Ex parte Milligan*.[47] That landmark case held that the federal government could not prosecute Northern critics of the Civil War in military tribunals when the civilian courts remained open.[48] A party challenging governmental restrictions on private actors understandably might find this a helpful precedent. But neither statement appears anywhere in *Milligan*, which covers 141 pages in Volume 71 of the United States Reports.[49]

The first nonexistent quotation, which is repeated three times, says: "Neither the legislature nor any executive or judicial officer may disregard the provisions of the constitution in case of emergency."[50]

These rhetorically powerful words cannot be found in *Milligan*. Similar language does appear in *People ex rel. Lyle v. City of Chicago*,[51] a 1935 Illinois case that struck down a measure that reduced the salaries of municipal judges during the Great Depression. That language has been quoted in approximately half a dozen other state cases over the years, although never in a federal case and certainly not in a Supreme Court opinion.[52] But the complaint does not refer to *Lyle* or any of those other state cases.

Dropped as Backers Change Legal Strategy, WKSU, Mar. 18, 2021, https://www.wksu.org/government-politics/2021-03-18/federal-lawsuit-over-covid-closures-dropped-as-backers-change-legal-strategy [https://perma.cc/X3RQ-RMZ5]; Jake Zuckerman, *Judge Blasts COVID-19 Lawsuit Against Health Department as "Incomprehensible,"* OHIO CAP. J., Feb. 10, 2021, https://ohiocapitaljournal.com/2021/02/10/judge-blasts-covid-19-lawsuit-against-health-department-as-incomprehensible/ [https://perma.cc/8UP9-G867].

46. No. 20CV000785 (Lake County, Ohio Ct. Com. Pl. filed June 22, 2020) [hereinafter *Your Next Move*].

47. 71 U.S. (4 Wall.) 2 (1866).

48. *Id.* at 122–27; *see also id.* at 135–36 (Chase, C.J., joined by Wayne, Swayne & Miller, JJ., concurring).

49. *See id.* at 2–142.

50. *Your Next Move*, Compl., ¶¶ 38, 43, 58.

51. 195 N.E. 451, 453 (Ill. 1935) ("Neither the Legislature nor any executive or judicial officer may disregard the provisions of the Constitution even in case of a great emergency.").

52. People *ex rel.* John V. Farwell Co. v. Kelly, 196 N.E. 795, 797 (Ill. 1935) (quoting *Lyle*) (ordering payment of compensation to owner of property damaged by change in road grade); Nierstheimer v. State, 9 Ill. Ct. Cl. 365, 367 (1937) (quoting *Farwell*, which quoted *Lyle*) (dismissing on statute-of-limitations grounds a claim for damage to property resulting from change in highway grade); People *ex rel.* Northrup v. City Council, 31 N.E.337, 339 (Ill. App. Ct. 1941) (not citing *Lyle* but repeating the language) (striking down salary reductions for members of the Chicago

The second nonexistent quotation says:

> ANYONE who declares the suspension of constitutionally guaranteed rights (to freely travel, peacefully assemble, earning a living, freely worship, etc) and or attempts to enforce such suspension with the 50 independent, sovereign, continental United States of America is making war against our constitution(s) and therefore, we the people. They violate their constitutional oath and thus, immediately forfeit their office and authority and their proclamations may be disregarded with impunity and that means ANYONE; even the governor and President.[53]

This one contains two obvious clues to its falsity. First, there were only 36 states in 1866.[54] Second, there are not 50 "continental" states even today, unless Hawaii suddenly got relocated. The idiosyncratic prose style, capitalization, and punctuation might also raise questions about the quotation's authenticity.[55]

The dance studio case was voluntarily dismissed only a few weeks after the complaint was filed,[56] so we do not know whether the defendants or the court caught the made-up quotations. But the lawyers who represented the studios should have known better than to attribute quotations to a landmark case like *Milligan* without confirming that those quotations actually appeared there.[57] It would be

Board of Aldermen); Jorgensen v. Blagojevich, 811 N.E.2d 652, 663 (Ill. 2004) (quoting *Lyle*) (striking down an effort to withhold cost-of-living adjustments from state judges**);** Sherman v. Twp. High Sch. Dist. 214, 937 N.E.2d 286, 292 (Ill. App. Ct. 2010) (quoting *Lyle*) (rejecting challenge to a student fee); *In re* Pension Reform Litig., 32 N.E.3d 1, 19 (Ill. 2015) (quoting *Lyle*) (rejecting cutbacks in retirement benefits); Hall v. Elected Officials Retirement Plan, 383 P.3d 1107, 1117 (Ariz. 2016) (rejecting cutbacks in retirement benefits). For more about *Jorgensen,* see Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation and Judicial Independence*, 2011 UTAH L. REV. 25, 30–31.

53. *Your Next Move*, Compl., ¶ 80. The idiosyncratic punctuation reproduces the complaint; I have not altered anything.

54. *See Admission of States to Union*, https://u-s-history.com/pages/h928.html [https://perma.cc/6DBM-8PGH].

55. Another detail suggests that something is amiss with both quotations. The complaint does not indicate the specific pages where the quotes can be found, although it does provide pinpoint citations for other quotations. *Compare Your Next Move*, Compl., ¶¶ 38, 43, 58, 80 (containing no pinpoints for alleged *Milligan* quotations), *with id.*, ¶¶ 82, 83, 88–89, 93, 97, 100–07, 110, 115–19, 123–25 (providing pinpoints for other quotations).

56. *Your Next Move*, Notice of Voluntary Dismissal (filed July 29, 2020).

57. Apart from that major problem, the complaint was replete with spelling and grammatical errors. To give just one of many possible examples, the

devastating to any advocate's credibility with the court if either the other side or the court itself discovered the problem. In addition, relying on bogus quotes breaches rules providing that an attorney's signature attests to the accuracy of statements in submissions to the court.[58]

As the Wisconsin case and a decision by the Michigan Supreme Court[59] make clear, there are plausible grounds to challenge the validity of pandemic orders without invoking rhetorical overkill or dubious quotations. Whether those arguments should succeed is beyond the scope of this essay. I am concerned only with the appropriate kind of argumentation.[60]

III. ANOTHER EXAMPLE

Before concluding, let me add a few words about some troublesome comments by Attorney General William Barr.[61] In answer to a question about pandemic restrictions after a speech last fall, Barr condemned business closures and stay-at-home orders as analogous to slavery. Here are his exact words: "[P]utting a national lockdown, stay at home orders, is like house arrest. Other than slavery, which was a different

name of defendant Lance Himes, the interim director of the Ohio Department of Health, is misspelled every time it appears, including in the case caption. But the failure to proofread is the least of the problems with the complaint. *See supra* notes 46–55 and accompanying text.

58. In Ohio, a lawyer's signature on a pleading "constitutes a certificate by the attorney [. . .] that to the best of the attorney's knowledge [. . .] knowledge, information, and belief there is good ground to support it." OHIO. R. CIV. P. 11. *Cf.* FED. R. CIV. P. 11(b)(3) (providing that an attorney's signature on a pleading certifies that "the factual contentions have evidentiary support").

59. *In re* Certified Questions, No. 161492, 2020 WL 5877599 (Mich. 2020); *see also* House of Representatives v. Governor, 949 N.W.2d 276 (Mich. 2020).

60. Lawyers have asserted fringe theories and made false factual statements in other proceedings, of course. For example, this has occurred in many cases challenging the results of the 2020 presidential election. *See, e.g.,* John Kruzel, *Trump Attorneys Risk Disciplinary Action Over Wave of Election Suits*, HILL (Dec. 24, 2020), https://thehill.com/regulation/court-battles/531537-trump-attorneys-risk-disciplinary-action-over-wave-of-election-suits [https://perma.cc/F6AA-848S]; Steven Lubet, *That Louie Gohmert Lawsuit*, HILL (Jan. 1, 2021), https://thehill.com/opinion/campaign/532289-that-louie-gohmert-lawsuit?rnd=1609463513 [https://perma.cc/B3LV-2C54].

61. There is no shortage of inflammatory rhetoric from other public officials, but my focus here is on members of the bar who are subject to professional norms that apply only to lawyers.

kind of restraint, this is the greatest intrusion on civil liberties in American history."[62]

These comments, like Justice Bradley's ill-considered references to *Korematsu*, miss the point.[63] They demean the millions of enslaved persons who were treated as property because they were regarded as less than human. Perhaps some pandemic orders have been unwise or legally problematic, but the comparison to slavery is unseemly. Those orders are designed to protect public health, not to degrade persons or groups as unworthy of membership in civil society. Perhaps the comments are not as disturbing as the other examples discussed in this essay because they came in response to a question rather than as part of a written document. Even if we accept that assumption, the comments reflect poorly on Barr's judgment. Distinguishing slavery as merely "a different kind of restraint" suggests a profound lack of understanding of the peculiar institution. We should expect the nation's leading law enforcement official to offer a more thoughtful critique of governmental responses to COVID-19 than Barr provided.

CONCLUSION

The legal system seeks to offer constructive alternatives to reliance on self-help for resolving disputes. In participating in a system that serves this vital function, lawyers and judges have important civic responsibilities. Among them, those actors should try to structure the legal process in a way that reduces the level of anger and aggression in society, especially when tensions are running high. We are talking here about norms, not rules that can or should be formally enforced. These norms apply with particular force to disputes about governmental responses to COVID-19, the most serious public health crisis since the global influenza pandemic a century ago.[64]

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62. Anna Salvatore, *Transcript of Attorney General's Remarks as Delivered and Q&A at Hillsdale College*, LAWFARE (Sept. 17, 2020), https://www.lawfareblog.com/transcript-attorney-generals-remarks-delivered-and-qa-hillsdale-college [https://perma.cc/A23R-DAGP]; *see also* Katie Benner, *Barr Defends Right to Intrude in Cases as He Sees Fit*, N.Y. TIMES (Sept. 17, 2020), https://nyti.ms/2ZKdrtK [https://perma.cc/6LYN-KESJ]; Quint Forgey & Josh Gerstein, *Barr Creates Firestorm with Comments that Appear to Boost Trump's Reelection Campaign*, POLITICO (Sept. 17, 2020), https://www.politico.com/news/2020/09/17/william-barr-coronavirus-lockdowns-slavery-416776 [https://perma.cc/6VK3-YPWC].

    Of course, there has not been a "national" lockdown. The restrictions imposed during the COVID-19 pandemic have been adopted at the state or local level. But the problems with Barr's statements apply regardless of what level of government adopted the restrictions.

63. *See supra* notes 14–21 and accompanying text.

64. *See generally* JOHN M. BARRY, THE GREAT INFLUENZA (2004).

Public officials are facing threats to their lives over their efforts to combat the coronavirus. Well-respected health experts have been driven from their positions,[65] while governors and mayors have been targeted for kidnapping and murder.[66] Some of those efforts might be ineffective

65. *See* Anna Maria Barry-Jester et al., *Pandemic Backlash Jeopardizes Public Health Powers, Leaders*, KAISER HEALTH NEWS (Dec. 15, 2020), https://khn.org/news/article/pandemic-backlash-jeopardizes-public-health-powers-leaders/ [https://perma.cc/JHL6-5HNN]; Julie Bosman, *Health Officials Had to Face a Pandemic. Then Came the Death Threats*, N.Y. TIMES (June 22, 2020), https://nyti.ms/3152Cnk [https://perma.cc/Z3YS-QGSU]; Rachel Weiner & Ariana Eunjung Cha, *Amid Threats and Political Pushback, Public Health Officials Are Leaving Their Posts*, WASH. POST (June 22, 2020, 4:30 PM), https://www.washingtonpost.com/health/amid-threats-and-political-pushback-public-health-officials-leaving-posts/2020/06/22/6075f7a2-b0cf-11ea-856d-5054296735e5_story.html [https://perma.cc/2M7B-ESAW].

66. The FBI arrested a group of conspirators who were planning to kidnap the governor of Michigan. *See* Nicholas Bogel-Burroughs et al., *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Oct. 8, 2020), https://nyti.ms/3jILDhg [https://perma.cc/VF2N-H2TB]; Matt Zapotosky et al., *FBI Charges Six Who It Says Plotted to Kidnap Michigan Gov. Gretchen Whitmer, as Seven More Who Wanted to Ignite Civil War Face State Charges*, WASH. POST (Oct. 9, 2020, 2:07 AM), https://www.washingtonpost.com/national-security/michigan-governor-kidnap-plot/2020/10/08/0032e206-0980-11eb-9be6-cf25fb429f1a_story.html [https://perma.cc/Z657-VC5E]. The governor of Virginia might also have been a target. *See* Giulia McDonnell Nieto del Rio & Neil MacFarquhar, *Virginia Governor Was Also a Possible Target of Anti-Government Plot, F.B.I. Says*, N.Y. TIMES (Oct. 13, 2020), https://nyti.ms/2IttKW0 [https://perma.cc/T4YJ-54MM]; Kayla Ruble et al., *Whitmer Plotters Also Discussed Kidnapping Virginia Gov. Ralph Northam, FBI Agent Testifies*, WASH. POST (Oct. 13, 2020), https://www.washingtonpost.com/national-security/ralph-northam-gretchen-witmer-kidnapping-plot/2020/10/13/26b4e31a-0d5f-11eb-b1e8-16b59b92b36d_story.html [https://perma.cc/BPT6-96JX].

    In addition, police arrested a Wichita, Kansas, man who threatened to kidnap and kill the mayor over his pandemic policies. *See* Timothy Bella, *Wichita Man Arrested for Threatening to Kidnap and Kill Mayor Over City's Mask Mandate, Police Say*, WASH. POST (Oct. 19, 2020), https://www.washingtonpost.com/nation/2020/10/19/wichita-mayor-kidnapping-threat-masks-coronavirus/ [https://perma.cc/5YJX-RFWQ]; Christina Morales & Michael Levenson, *Man Arrested After Threatening Wichita Mayor Over Face Masks, Police Say*, N.Y. TIMES (Oct. 18, 2020), https://nyti.ms/358ZnM9 [https://perma.cc/Z2ZZ-39AZ].

    Another Kansas mayor resigned after receiving numerous death threats over her city's adoption of a mask order. *See* Teo Armus, *Kansas Mayor Resigns Over Violent Threats for Backing Mask Mandate: "I Do Not Feel Safe Anymore,"* WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/nation/2020/12/16/kansas-mayor-mask-covid-resignation/ [https://perma.cc/F9W3-WPN3]; John Eligon,

or even unlawful, but judges and lawyers have civic responsibilities to maintain an appropriate level of public discourse. The inflammatory rhetoric discussed in this essay certainly is protected by the First Amendment, because it is not "directed to inciting or producing imminent lawless action [nor] is [it] likely to incite or produce such action."[67] But surely members of the legal profession should aspire to a higher standard than that, and the public should expect them to behave in a way that does not undercut efforts to combat the coronavirus. It should not need to be said, but judges ought to refrain from gratuitous or inflammatory statements from the bench and in their written opinions, and lawyers ought to frame their arguments without resorting to conspiracy theories and nonexistent sources. Unfortunately, some lawyers and judges apparently do need to be told these seemingly obvious things.

After Personal Threats Over a Local Mask Mandate, the Dodge City, Kansas, Mayor Resigns, N.Y. TIMES (Dec. 16, 2020), https://nyti.ms/2Kdot5Z [https://perma.cc/9WBY-ZCGK].

And the governor of New Hampshire cancelled plans for an outdoor inauguration because of credible threats of violence resulting from his mask order. Brendan Cole, *Republican Governor Cancels Inauguration After Receiving Armed Threats Over Mask Order*, NEWSWEEK (Dec. 31, 2020), https://www.newsweek.com/republican-governor-cancels-inauguration-after-receiving-armed-threats-over-mask-order-1558252 [https://perma.cc/V8RB-HV87].

This is not an exhaustive list of harassment of public officials in connection with pandemic policies. *See, e.g.*, Lily Altavena,*Paradise Valley Unified Superintendent Resigns Amid Calls for Civility in COVID-19 Debates*, AZCENTRAL.COM (Dec. 7, 2020), https://www.azcentral.com/story/news/local/phoenix-education/2020/12/07/paradise-valley-superintendent-jesse-welsh-resigns-amid-online-vitriol/3861022001/ [https://perma.cc/Q3DS-J5XX]; Eligon, *supra*.

67. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (footnote omitted).