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# MAGA Law: How the Trump Judges Twist U.S. Justice

They're overwhelmingly young, white, male, and extreme. And they'll be in power for a generation

By **JAY MICHAELSON**



Photo Illustration by Sarah Rogers for Rolling Stone

The hard right's takeover of the **Supreme Court** is real, and is having real consequences. But despite that leaked decision that would overturn *Roe*, this takeover isn't just about abortion, and it's not just about the Supreme Court. In fact, Trump-appointed judges at all levels of the judiciary are remaking nearly every aspect of American law, from voting rights to environmental regulations, police accountability to LGBTQ and women's equality.

record 220 the tenure federal judges on the bench. And while these judges don't make the headlines like the Supreme Court does, they are already transforming our country, a little bit at a time.

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Perhaps most important, they will be there for many, many years. Because Trump's minions chose the youngest cohort of judges in recorded history, some of these people are in their thirties and forties. That means they could still be on the bench in 40, even 50 years — if climate change hasn't flooded their courtrooms by then.

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## SO, WHO ARE THESE PEOPLE?

Well, for a start, they're 84 percent white and 76 percent male, well out of proportion to the population, which is 58 percent non-Hispanic white, and 50 percent male. (At the appellate-court level, the slant is even greater: 43 of Trump's 54 appointees are men.) Keep that in mind the next time a court decides something about women's rights to control their bodies.

And they were, statistically speaking, remarkably less qualified than usual. In four years of Trump, the nonpartisan, nonpolitical American Bar Association rated 10 of his nominees as "not qualified," something they'd done only 12 times in the previous 27 years. (True to form, Republicans have **attacking** the American Bar Association itself.)

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conservative resumes, but with solid reputations as well. But many others are not.

“The plan was to put on as many folks who have an extreme ideology as possible,” says Lena Zwarenstejn, senior director of the Fair Courts Program of the Leadership Conference on Civil and Human Rights. “This is a very long-term project that a very narrow extreme group has had, largely in response to the civil rights movement integrating communities and schools. It is a systemic plan to roll back progress we have made on civil and human rights.”

And this is all according to plan. Trump’s judges were vetted, and in some cases selected, by **the Federalist Society** and other hard-right groups dominated by religious extremists with the overt intention of turning the clock back on civil rights of all kinds. (Many of those extremists are now **judges themselves**.) The goal? “I would love to see the courts unrecognizable,” said the Federalist Society’s co-chairman, **Leonard Leo**, in May 2017.

That has now happened. As Sen. Sheldon Whitehouse described (visual aids and all) at Justice Amy Coney Barrett’s confirmation hearing, Leo’s network found and supported conservative law students, educated them in hard-right ideology, and helped them find jobs in think tanks, government, and the courts.

The thing to understand here is that while big cases like *Dobbs* and *Roe* come along once every few years, every day there are incremental cases that either bolster or erode our civil rights. Just as progress is gained one small step at a time, it is lost the same way. The advance of Christian nationalism is a steady drip-drip-drip, eroding rights a little bit at a time, by judges we don’t hear much about until it is too late.

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A look at the worst MAGA judges and their rulings reveals a record of extreme ideology and irrational jurisprudence that has very little to do with the rule of law.

Judge Kathryn Kimball Mizelle is now famous for her truly incompetent opinion overturning the CDC's masking rule for airplanes in April. Whatever you think of that rule, Mizelle's opinion was flagrantly wrong, while dabbling in ignorant anti-mask/anti-vax rhetoric of the type you'd hear on Fox News.

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How wrong? Amazingly, it all came down to one word: "sanitation." When that word was used in the 1944 law that authorized the Centers for Disease Control to, you know, control disease, it had a broad meaning that encompassed any public-health measures needed to curb the spread of a disease.

But Judge Mizelle, whose understanding of historical dictionaries is extremely limited, said it only means cleaning something up. Which masks don't do. And so, one judge wiped out the entire country's pandemic rules.

In an interview with **NPR**, Erin Fuse Brown, a law professor at Georgia State University, said, "If one of my students turned in this opinion as their final exam, I don't know if I would agree that they had gotten the analysis correct. . . . It reads like someone who had decided the case and then tried to dress it up as legal reasoning without actually doing the legal reasoning."

Given that performance, it's no surprise that when Judge Mizelle was nominated, **she was rated "not qualified" by the ABA**. But Mizelle's opinion isn't simply wrong; it's wrong in a particular, ideologically driven way. Which is exactly why she was put in her current position.

#### Judge Matthew Kacsmaryk

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District Judge Matthew Kacsmaryk is like the immigration version of Judge Mizelle: With the stroke of a misguided pen, he changed federal policy to align with his ideological preferences.

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was presented to the Senate. For example, **a 2015 article mocking same-sex marriage** and arguing that the sexual revolution “sought public affirmation of the lie that the human person is an autonomous blob of Silly Putty unconstrained by nature or biology, and that marriage, sexuality, gender identity, and even the unborn child must yield to the erotic desires of liberated adults.”

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Which is funny, since I totally don't remember reading that in my law-school class on women's and LGBTQ rights, which are actually grounded in the equality and dignity of all human beings and the limits on governmental power to make their most profound intimate decisions for them. I guess I slept in that day.

But it's in the area of immigration where Kacsmaryk has made his greatest impact.

Last year, Kacsmaryk ordered the Biden administration to return to the Trump-era policy known as “Remain in Mexico,” where migrants applying for asylum must stay in Mexico while their case is pending. It's now well-known how cruel this policy is: It's caused families to be torn apart and victims of violence to be left vulnerable and defenseless.

But Kacsmaryk didn't just ignore these humanitarian concerns. As even the conservative justices of the Supreme Court noted in April during their review of the case, he also completely twisted federal immigration law in such a way that even Trump's policies were too lenient. Which is impressive, really.

Where the law actually gives government officials four options for dealing with people seeking asylum — mandatory detention, return to a contiguous territory, parole for humanitarian reasons, and release on a cash bond — Kacsmaryk simply ignored the last

impractical. But which, again, is in line with why Kacsmaryk was put on the bench to begin with: to transform not just immigration law but also the rule of law itself.

## Judge Stuart Kyle Duncan

Like Kacsmaryk, Fifth Circuit appellate judge Stuart Kyle Duncan had a prolific anti-LGBTQ résumé, having worked as a **professional activist** for several years. He defended Louisiana's ban on same-sex marriage, defended Alabama's right to take away a woman's parental rights because she was a lesbian, defended Louisiana refusing to issue a birth certificate to same-sex parents, and worked on a number of anti-trans cases, arguing in court that trans people are merely delusional and that teenage boys might simply want to "[opt] onto female [sports] teams."

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Now he's a judge for life.

Two years ago, Duncan authored one of the most bizarre and cruel federal-court opinions in recent memory. After dismissing a trans woman's request to change her name on her judgment of confinement to accord with her legally changed name, Kathrine Nicole Jett, he spent five pages referring to Jett by her no-longer-valid "dead name" and explaining why he would not even use female pronouns to refer to her in court. Amazingly, he said that to use female pronouns "could raise delicate questions about judicial impartiality" (as if using male pronouns does not), and while doing so might be a "courtesy," there's no law that requires it, so why be courteous? Or respectful? Or kind?

## Judge John Bush



pseudonym "G. MORRIS" **wrote** that the two greatest tragedies in our country — slavery and abortion — relied on similar reasoning and activist justices at the U.S. Supreme Court, first in the *Dred Scott* decision, and later in *Roe*.” (He also **repeated** “birther” claims about President Obama.)

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Believe it or not, Christian-right folks make this analogy all the time: Ronald Reagan said in 1984 that *Roe* “is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. The *Dred Scott* decision of 1857 [which upheld slavery] was not overturned in a day, or a year, or even a decade.”

That’s right: Embryos and fetuses are just like enslaved human beings.

So it should come as no surprise that, when the issue of abortion came before him in 2019, Judge Bush **wrote an opinion** repeatedly referring to a fetus as “unborn life” (so much for certain words raising questions of impartiality), and upholding a law that required transvaginal probes even for pregnancies under nine weeks and forced doctors to describe the fetus’ organs, even in cases of rape, incest, and when the fetus or the mother would not survive.

**Judge Patrick Bumatay**

Often, some of the worst erosions of civil rights take place under the cover of obscure doctrines that only lawyers know about. For example, police misconduct is often enabled by the doctrine of “**qualified immunity**,” which shields bad cops from accountability by requiring that their conduct violate “clearly established law” to be prosecuted. So, when a white cop kneels on the neck of a Black man, the question is not “How in the world could this possibly be OK?” but rather “Was there a clearly established law that this officer knowingly violated?”

**Department of Justice**

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Usually, the answer to that question is no, since laws and court cases can't anticipate every possible situation in advance, and so the cops get off.

Last November, for example, two judges, including Trump appointee Judge Patrick Bumatay, applied that doctrine to let off a cop who failed to get a young Black woman medical help while she was in his custody. After arresting Aleah Jenkins at a traffic stop outside San Diego, the officer began driving her to police headquarters, an hour away. Along the way, according to bodycam footage, Jenkins vomited repeatedly, groaned, and screamed for help, before falling silent for 10 minutes, her body twitching and shaking. When they finally made it to the police station, the officer didn't ask for medical help or use the Narcan he had in his trunk, but instead fingerprinted her while she lay on the ground, and then put her back into the car. When he checked on her 11 minutes later, she was unconscious, having fallen into a coma. Nine days later, she was dead.

But because there was no previous case that "clearly established" that the officer's behavior was unreasonable, the case was dismissed.

This case didn't make any national headlines. But it, and others like it, have empowered irresponsible police officers, who know they can do anything they want as long as there's no "clearly established" rule governing the exact circumstances of their case.

"It's often invisible as to why something cruel is happening to people," Zwarenstejn tells me. "Yet courts impact people's lives day in and day out."

## **SO, WHAT CAN WE DO?**

Now, there is a way this story can still turn out well: if overturning *Roe v. Wade* wakes up enough people to, as the saying goes, "vote the Republican bastards out."

Remember, the conservative takeover of the judiciary has happened away from the limelight: the extremist judges, the drip-drip-drip erosion of civil rights, all of it. But *Roe v. Wade* is a lot of limelight. Will it motivate people to turn out in the record numbers needed to defend our rights and our democracy? After all, if Democrats had



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action against climate change in American history.

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There are two things needed for that to happen, though.

First, remember that the rules are tilted in Republicans' favor, starting with the institutions of the Senate and Electoral College, which were set up to preserve white supremacy and are doing so spectacularly today.

Moreover, the same judges taking away women's and LGBTQ rights are also making it much harder to vote — especially if you're Black or brown. At the Supreme Court level, the court's six conservatives devastated Section 2 of the Voting Rights Act in last year's case of ***Brnovich vs. Democratic National Committee***. Not only did the court allow Arizona's new voting restrictions — which it admitted disproportionately impacted Black voters — but it also said that such restrictions were totally fine unless individual voters could prove that they, personally, faced a heavy burden in meeting the new requirement. This will make it almost impossible to challenge any state's voting restrictions, and not surprisingly, red-state lawmakers have rushed to put them in place since.

**A protest rally for abortion rights at the Supreme Court.****Mark Peterson/Redux**

A similar case was decided last July, when an appeals court with four Trump judges sitting on it affirmed an Alabama voter-ID law, even though everyone agreed that Black voters were twice as likely as white voters to lack a voter ID that the state considered acceptable. Just pause to reflect on that: A Jim Crow law is passed, everyone agrees that it will affect Black voters more than white voters, yet courts allow it to stand.

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vote. Progressives have to help other people vote, especially marginalized people. We have to give our time, money, and attention.

And that requires the second thing that has to happen: Not letting the bastards drag you down.

“You can despair for a moment, but not for a long time,” says Zwarenstejn. “Remember, how we got here was based on decades of work. Our opportunity to change course and to pursue equal justice for all is not a short-term project.”

That means building momentum, getting involved in grassroots organizations and campaigns, and remembering what’s at stake. Despair is easy; resilience is power.

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It also means getting over the many disappointments of the past two years and remembering that progress can and has been made, especially when it comes to these lifetime federal judges. “This administration has prioritized judges with a demonstrated conviction to civil rights and who look like all our communities,” Zwarenstejn says. “They’ve appointed 60 lifetime judges, a remarkable rate.”

The Democrats are far from perfect, but there’s no comparison between them and Republicans, especially when it comes to judges and the courts. “Right now,” Zwarenstejn continues, “we have numerous incredible nominees pending. Talk to your senators so those judges get confirmed. People felt a sense of victory when Justice Ketanji Brown Jackson was confirmed, and she is the embodiment of many nominees and judges we are seeing. We need to make sure they are on the bench ASAP.”

Ultimately, says Zwarenstejn, “it’s been a long campaign from the other side, but they are counting on us losing hope. We need to be standing up for one another and not backing down.”

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