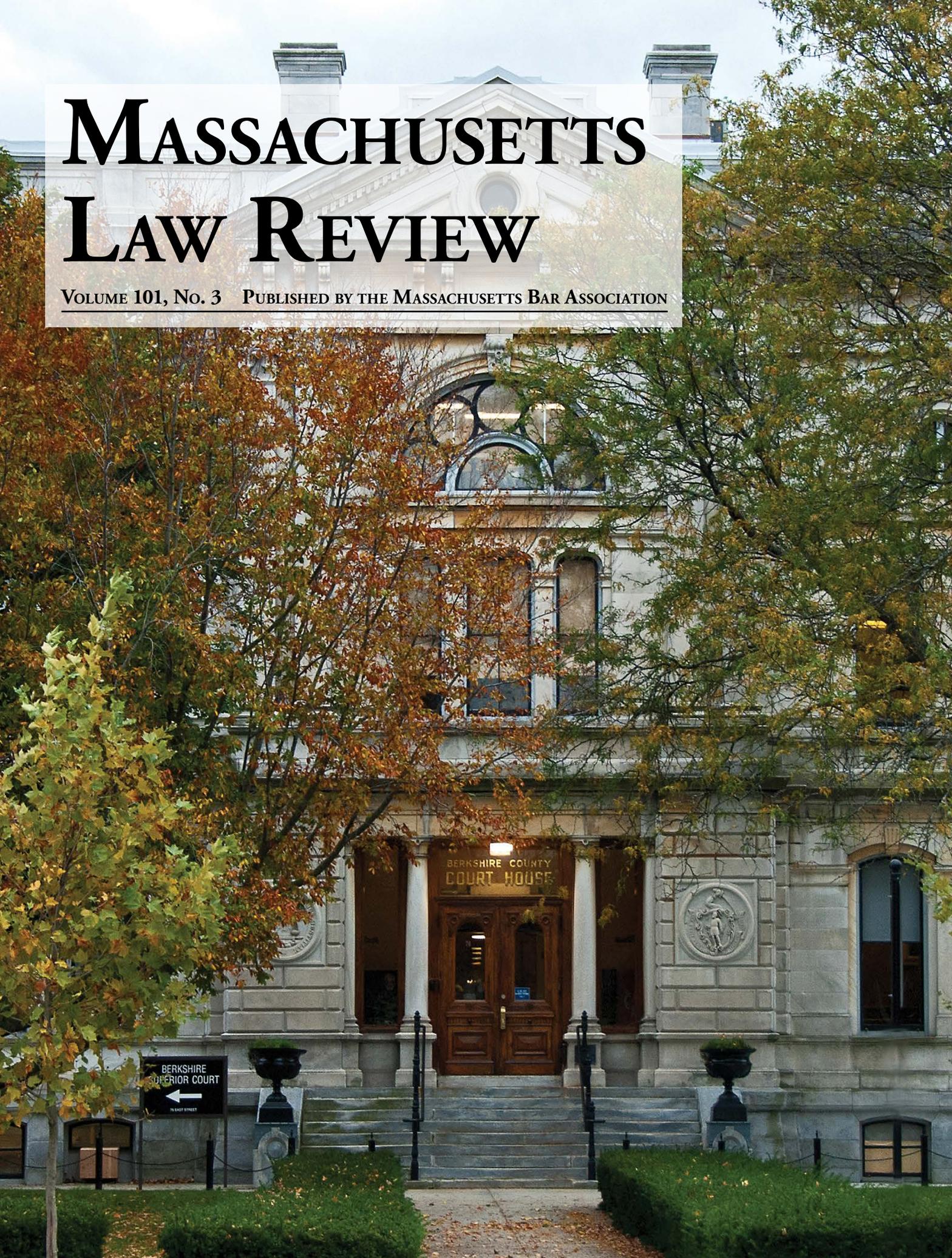


# MASSACHUSETTS LAW REVIEW

VOLUME 101, No. 3 PUBLISHED BY THE MASSACHUSETTS BAR ASSOCIATION





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# MASSACHUSETTS LAW REVIEW

VOLUME 101

NUMBER 3

June 2020

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Cover: *Berkshire Superior Court*. Photo by Hon. David S. Ross.

MASSACHUSETTS BAR ASSOCIATION  
20 WEST STREET, BOSTON, MA 02111-1204

*Massachusetts Law Review* (ISSN 0163-1411) is published quarterly by the Massachusetts Bar Association, 20 West Street, Boston, MA 02111-1204. Periodicals postage paid at Boston, MA 02205. Postmaster: Send address changes to Massachusetts Bar Association Member Services Center, 20 West Street, Boston, MA 02111-1204.

Subscriptions are free for members and are available to libraries at \$50 and those not eligible for membership in the Massachusetts Bar Association at \$75 per calendar year. Single copies are \$25.

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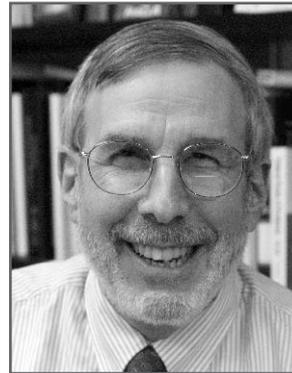
# THE BOSTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW: THE FIRST FIFTY YEARS

By Mark S. Brodin

## INTRODUCTION

Oliver Wendell Holmes Jr. thought that a person “should share the passion and action of his time at peril of being judged not to have lived.”<sup>1</sup> As a thrice-wounded veteran of the Civil War, influential legal philosopher, chief justice of the Supreme Judicial Court, and later an associate justice of the Supreme Court of the United States, Holmes certainly practiced what he preached.<sup>2</sup> He was not alone. Massachusetts lawyers have a long tradition of pro bono public service and commitment to the greater good of our society. John Adams set an early example, risking his reputation and his future while answering one of the highest calls of the lawyer’s duty, defending the unpopular client, when he defended British soldiers in the Boston Massacre trials.<sup>3</sup> Adams’ primary authorship of the Massachusetts Constitution of 1780 was influential in formulating the Constitution of the United States, and creating an independent judiciary.<sup>4</sup> Rufus Choate famously used his own eloquence to help preserve our independent judiciary.<sup>5</sup> John Quincy Adams and others actively worked against slavery and racial injustice.<sup>6</sup> Louis Brandeis brought his immense talents to bear in fighting for economic justice for our citizens and against large corporate monopolies.<sup>7</sup> Felix Frankfurter, then a Harvard Law School professor, was a leader of the international outcry against the injustice of Massachusetts’ execution of Italian immigrants in the *Sacco-Vanzetti* case.<sup>8</sup>

So, it is no surprise that John F. Kennedy, a president steeped in Massachusetts history, reached out to the practicing bar to involve it in what he saw as a moral and legal crisis “as old as the scriptures and as clear as the American constitution.”<sup>9</sup> In 1963, only months before his assassination, President Kennedy convened a meeting of 244 of the nation’s leading lawyers at the White House, seeking their active participation in the protection of civil rights under the law.<sup>10</sup> At the



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and co-author of *Handbook of Massachusetts Evidence* (with Michael Avery), *Criminal Procedure: The Constitution and the Police* (with Robert M. Bloom), and *Civil Procedure: Doctrine, Practice and Context* (with Stephen Subrin, Martha Minow, Thom Main and Alexandra Lahav). Brodin is a consultant to the six-volume Weinstein’s Federal Evidence treatise. His *William P. Homans Jr.: A Life in Court* traces the life and times of the iconic criminal defense and civil liberties lawyer.

time, defiant southern governors were blocking the entry of black students to state universities, sheriffs were brutally putting down nonviolent protests with howling police dogs and firehoses, black churches were being bombed, and Freedom Riders were suffering pitiless beatings. In response to President Kennedy’s call to action, the national Lawyers’ Committee for Civil Rights was formed later that same year with the aim of activating the pro bono resources of the private bar in the struggle for racial equality and justice.<sup>11</sup>

1. Oliver Wendell Holmes Jr., Memorial Day Speech (May 30, 1884) (transcript available at <https://speakola.com/ideas/oliver-wendell-holmes-memorial-day-speech-1884>).

2. See generally LIVA BAKER, *THE JUSTICE FROM BEACON HILL* (Harper Collins, 1991).

3. HILLER B. ZOBEL, *THE BOSTON MASSACRE* (Norton, 1970); DAVID McCULLOUGH, *JOHN ADAMS* 65-68, 77, 123, 630 (Simon & Schuster, 2001).

4. See CHIEF JUSTICE EDWARD HENNESSEY, *John Adams and the Massachusetts Constitution*, in *THE HENNESSEY PAPERS* 94-97 (MCLE Inc. 2002).

5. See 2 MASS. L. Q. 220 (1917) (reprinting Choate’s speech to the 1853 Constitutional Convention on the occasion of the dedication of the statue in his honor in what is now the John Adams Courthouse).

6. See, e.g., *United States v. Libellant and Claimants of The Schooner Amistad*, 40 U.S. 518 (1841) (Adams successfully argued cause of slaves who had mutinied on Spanish ship bound for Cuba).

7. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (Pantheon, 2009).

8. Felix Frankfurter, *The Case of Sacco and Vanzetti*, *THE ATLANTIC* (March 1927).

9. President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963).

10. Mark S. Brodin, *A History of the Lawyers’ Committee for Civil Rights under Law of the Boston Bar Association*, 32 *BOSTON BAR JOURNAL* 9 (1988).

11. *Id.*

## THE FOUNDING OF THE BOSTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

A distinguished group of Boston lawyers<sup>12</sup> answered the call when they created the first local affiliate of the national Lawyers' Committee for Civil Rights in 1968, with funding from the Ford Foundation and the city's major law firms. In 1973, the Boston affiliate secured the sponsorship of the Boston Bar Association (BBA), and became the Lawyers' Committee for Civil Rights of the Boston Bar Association (LCCR, Lawyers' Committee or Committee). BBA leaders Carl Sapers and John Perkins declared:

If the poor and the underrepresented are to have equal justice, it is not enough that we leave their advocacy to young and inexperienced counsel, however dedicated such counsel may be. It is not enough that the organized bar contribute from time to time to funding such advocacy programs. The Boston Bar Association has accepted full responsibility for the development of a public interest law office which will be an integrated part of the Bar itself and will be supported professionally and, to a large extent, financially by the lawyers of this city. We know of no better way to make clear our commitment to the administration of justice for all the citizens of this community.<sup>13</sup>

The founding year of the Boston LCCR was one of the most tumultuous and consequential in the history of the American Republic. In February 1968, the Kerner Commission (the National Advisory Commission on Civil Disorders) issued its report concluding famously that the nation was fast becoming two Americas — “one black, one white — separate and unequal.”<sup>14</sup> The struggle for civil rights and equal justice was, the report documented, in no way limited to the South.<sup>15</sup> President Kennedy's vision of enlisting a mobilized private bar to join the fight for equal justice had come home to Massachusetts, and there was plenty of work to be done here, as even a brief review of the Boston Committee's activities over the past 50 years amply demonstrates.

## RACIAL AND ECONOMIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

The Boston LCCR initially focused on glaring racial and economic disparities in the criminal justice system. These were documented in the Committee's publication of *The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston* (the “Orange Book”),<sup>16</sup> a groundbreaking empirical study from extensive court-watching and data compilation prepared under the leadership of Stephen Bing and S. Stephen Rosenfeld. Its recommendations became the blueprint for legal reform in Massachusetts in the decades that followed, including: elimination of the outdated and problematic trial de novo system, which invested unreviewable discretion in local district court judges; elimination of private bail bondsmen; adoption of uniform procedural rules; and expansion of the public defender system.

## SCHOOL DESEGREGATION

The Boston LCCR also addressed segregation in the Boston Public Schools (BPS). The BPS' system for school assignment was first challenged (unsuccessfully) in 1849 in *Roberts v. City of Boston*,<sup>17</sup> a case brought on behalf of a black girl forced to walk a great distance to an under-resourced, all-black common school while passing white schools in her own neighborhood. Pressure to desegregate Boston's schools rose to a fever pitch in the 1960s, but after efforts at reform were met with resistance, aggrieved parties turned to the courts.

In 1972, the Lawyers' Committee sued the Boston School Committee in the United States District Court for the District of Massachusetts.<sup>18</sup> The case exposed the School Committee's policies of deliberately and systematically assigning students and teachers on the basis of race, and locating new schools with the obvious purpose of maintaining segregation. In a courageous ruling later affirmed by the First Circuit, Judge W. Arthur Garrity determined that Boston was running a dual system, one for white children and another, far inferior, for black children.<sup>19</sup> The *Morgan v. Hennigan* decision was a defining moment in the movement to make the mandate of *Brown v. Board of Education*<sup>20</sup> a reality in the North as well as the South.

12. The original steering committee included Richard L. Banks, G. d'Andelot Belin, Frederick L. Brown, Theodore Chase, Livingston Hall, Samuel Hoar, Paul J. Liacos, Hans F. Loeser, William F. Looney Jr., Frank I. Michelman, David Nelson and James St. Clair.

13. Mark S. Brodin, *A History of the Lawyers' Committee for Civil Rights under Law of the Boston Bar Association*, 32 BOSTON BAR JOURNAL 9, 10 (1988). BBA presidents, including Jack Curtin, Gene Dahmen, Rudolph Pierce, Sandra Lynch, Margaret Marshall and Joan Lukey, provided vital economic and moral support during these early years.

14. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

15. *Id.*

16. Stephen Bing and S. Stephen Rosenfeld, *THE QUALITY OF JUSTICE: IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW* (1970).

17. *Roberts v. City of Boston*, 59 Mass. 198 (1849).

18. *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.*, *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, *Kerrigan v. Morgan*, 421 U.S. 963 (1975) and *White v. Morgan*, 421 U.S. 963 (1975). Nathaniel Jones, Thomas M. Simmons, J. Harold Flannery, Eric E. Van Loon and Robert Pressman of Foley, Hoag & Eliot and Roger I. Abrams and John Leubsdorf of the Harvard Center for Law and Education served as counsel for the plaintiff.

19. *Id.* at 480-82.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Over the years, the Committee has carried on its tradition of defending equal access to education. This has included successful litigation in Holyoke, Lowell, Cambridge, Northampton, Amherst and other districts to enforce bilingual teaching and desegregation requirements.<sup>21</sup> The LCCR also has tackled the difficult issue of resource disparities. For example, in *McDuffy v. Secretary of Executive Office of Education*,<sup>22</sup> the Supreme Judicial Court (SJC) struck down Massachusetts' system of school financing that relied on local property taxes, and thus resulted in gross differences between poor and wealthy districts. Committee lawyers filed amicus briefs in the United States Supreme Court in *Grutter v. Bollinger*<sup>23</sup> in support of affirmative action, and the Court of Appeals for the First Circuit in defense of Lynn's voluntary school desegregation plan.<sup>24</sup> The LCCR also has successfully sued to require districts to fund residential placements for students with special needs. All of these cases have achieved favorable results for equal educational opportunities.

### BATTLING RACIAL VIOLENCE

When Judge Garrity issued his remedial order requiring the busing of school children to achieve racial balance, violent resistance exploded. Threats against Judge Garrity led to the United States Marshals Service providing him with around-the-clock protection, and black school children in Boston had to be escorted to school by tactical police officers in riot gear. The ugly vitriol was poignantly captured in Stanley Forman's Pulitzer Prize-winning photograph of Ted Landsmark, a young black professional, speared in the face with an American flag wielded by anti-busing protestors in front of City Hall.<sup>25</sup> Similar racial confrontations erupted at schools and elsewhere.

In response to such widespread violence, the Lawyers' Committee joined with other organizations in requesting that the Boston Police Department create a Community Disorders Unit (CDU). Despite hundreds of racially motivated crimes in the mid-to-late 1970s, including multiple fatal attacks, the department had often been reluctant to investigate these incidents. The CDU, under commander (later police commissioner) Francis "Mickey" Roache, was credited with ushering in a long-overdue change in police response

to such cases. The protocols became a national model for what is now known as community policing.

To further buttress these enforcement efforts, the LCCR and other groups encouraged Attorney General Francis Bellotti, and his Civil Rights Division head L. Scott Harshbarger, to propose the Massachusetts Civil Rights Act (MCRA).<sup>26</sup> Ultimately enacted in 1979, the law significantly expanded the protections available under the parallel federal anti-discrimination law. Thereafter, in 1982, the LCCR established its Project to Combat Racial Violence designed to advance the MCRA's commitment to provide legal representation and support in both civil and criminal matters to targets of racial violence.

The LCCR also tackled the difficult issue, much at the center of public debate in the past few years, of disparate police violence against minorities. Since its inception, the Committee has represented victims of police abuse. For example, in 2018, the Committee filed a federal complaint on behalf of the mother of a black man with no criminal record or history of violence who was shot and killed by a Boston police officer in the doorway of the family apartment.<sup>27</sup>

### HOUSING DISCRIMINATION

The LCCR's reach has extended beyond the most direct consequences of racial discrimination to its root causes. In many respects, residential segregation is the foundational ill from which much of the inequality in American society flows.<sup>28</sup> Accordingly, Boston's LCCR, from its inception, has provided leadership in combating discrimination in housing. For example, it offered representation to minority families seeking to integrate longtime white enclaves, litigating individual and class actions on their behalf against the Boston, East Boston, Somerville and Fall River housing authorities, as well as private landlords and realtors.<sup>29</sup> In 1996, the Committee filed suit on behalf of tenants of color charging the Boston Housing Authority with a failure to address racial violence over a period of decades.<sup>30</sup> The case resulted in a \$1.5 million settlement, and the adoption of meaningful policies to protect minorities, including a "zero-tolerance policy" for racial harassment.

21. See, e.g., *Hispanic Parents Advisory Council v. City of Holyoke*, Civ. Action No. 80-0172 (D. Mass. 1980); *Hispanic Parents Advisory Council v. Kouloheras*, Civ. Action No. 87-1968 (D. Mass. 1987) (school desegregation and bilingual education case that resulted in a favorable settlement).

22. *McDuffy v. Sec'y of Exec. Office of Educ.*, 415 Mass. 545 (1993).

23. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

24. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

25. Jeff Robbins, *Trump's rhetoric soiling 'Old Glory' anew*, BOSTON HERALD (July 23, 2019, 12:43 AM), <https://www.bostonherald.com/2019/07/23/trumps-rhetoric-soiling-old-glory-anew/>.

26. MASS. GEN. LAWS c. 12, § 11I (2020).

27. *Coleman v. City of Boston*, Civ. Action No. 18-10646 (D. Mass. 2018). The plaintiff had called 911 to seek medical assistance for her mentally disabled son, but a police officer dispatched with the emergency medical technicians (EMT) shot him twice in the abdomen, claiming he was threatened by

the victim with a knife (a matter hotly disputed by his mother). The lawsuit challenges the practice of requiring police to accompany EMTs on mental distress calls, as well as the lack of adequate training of officers in this regard. A *Boston Globe* investigation revealed that of the 65 persons fatally shot by police in Massachusetts in recent years, nearly half were suicidal or showed clear signs of mental illness. Yet only one in five police officers has received training to deal with such situations — a tragic but not atypical story across the country.

28. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

29. *NAACP v. Bos. Housing Authority*, 723 F. Supp. 1554 (D. Mass. 1989); *Mak v. Fall River Housing Authority*, Civ. Action No. 95-11796 (D. Mass. 1995); see, e.g., *Barrett and Graham v. Realty World/Danca Realty*, 17 MASS. DISCRIM. LAW RPTR. 1665 (1995) (successful housing discrimination case awarding \$60,000 in emotional distress damages); *Windjammer Properties v. MCAD*, Civ. Action No. 02-00099 (Mass. Super. Ct. 2002).

30. *Doe v. City of Boston*, Civ. Action No. 96-12540 (D. Mass. 1996).

Similarly, in 1978, the LCCR challenged the persistent failure to expend federal housing funds in a non-discriminatory manner.<sup>31</sup> The case was settled a decade later (under the threat of the cutoff of at least \$75 million in federal aid) with a historic decree desegregating Boston's housing projects after many years of explicitly race-based assignment policies. Now placements would be made randomly from a citywide list, and minority families that were victims of discriminatory past practices were given first preference. Extending beyond Boston proper, the LCCR oversaw the establishment of a fair housing panel in the mid-1970s to provide individual representation to families experiencing housing discrimination in surrounding cities and towns. Several successful federal suits were brought, including two against large real estate brokerage companies in Belmont and Everett.<sup>32</sup>

### EMPLOYMENT DISCRIMINATION

The Committee also has provided leadership in challenging discrimination in the workplace. For example, *DeGrace v. Rumsfeld* exposed the dark underbelly of racial hostility at the United States Naval Air Station in South Weymouth (NASSW).<sup>33</sup> A mere 12 miles from Boston, and with a civilian workforce in the hundreds, NASSW employed only a tiny handful of minority workers, including the named plaintiff, Bobby DeGrace, the lone black firefighter in a 50-person unit.<sup>34</sup> DeGrace was subjected to persistent harassment, including death threats, from his fellow firefighters.<sup>35</sup> Boston's LCCR brought suit in 1976, charging naval authorities with ignoring and condoning discriminatory and abusive misconduct, and ultimately secured a federal court decision that the NASSW was "infected with pervasive racism" that was "obvious to the supervisory personnel on the base"; and the court ordered appropriate remedies.<sup>36</sup> The case has become a cornerstone in the development of federal anti-harassment law in the workplace.

In *Sarni Original Dry Cleaners v. Cooke*, the LCCR sued on behalf of a black truck driver whose daily route took him to South Boston in the mid-1970s.<sup>37</sup> The LCCR argued that his race, and the animus it occasioned in the white enclave, was the reason for his termination from the largest dry-cleaning company in Boston.<sup>38</sup> The final decision by the SJC was a widely cited civil rights victory that rejected the argument that risk of racial violence by third parties could justify adverse action against an employee or provide

a bona fide occupational qualification for racially discriminatory hiring. The SJC cited another court's observation that it would be "totally anomalous" to allow the very prejudices anti-discrimination laws are directed against to excuse discriminatory practices by an employer.<sup>39</sup>

### AFFIRMATIVE ACTION

The LCCR has consistently challenged discriminatory police hiring and promotional practices that deprive qualified minorities of employment opportunities, and their communities of diverse representation among the police that patrol their streets. Litigation over the years has targeted the Boston, Cambridge, Salem and Barnstable police departments on behalf of black and Latino entry-level applicants, as well as officers seeking promotion, resulting in the first nonwhite sergeants in each of these departments.<sup>40</sup> The Lawyers' Committee also took over monitoring the consent decrees in the pioneering *Castro v. Beecher* class action that successfully challenged the discriminatory state civil service exam.<sup>41</sup> The consent decrees mandate minority hiring preferences until each police (and, as a result of later litigation, each fire) department reaches demographic parity with its community.<sup>42</sup> In 1983, the Lawyers' Committee successfully defended these gains against a reverse discrimination challenge to the protection of incumbent minorities vulnerable to last-hired-first-fired layoffs.<sup>43</sup>

The LCCR also participated in a 2006 case against the city of Lynn challenging discriminatory police and firefighter civil service exams that led to a settlement of back pay and jobs to 66 minority candidates.<sup>44</sup> In 2014, the LCCR won a significant victory in the First Circuit Court of Appeals when the court ruled that the plaintiffs who challenged the Boston Police Department's use of a drug test had established a prima facie case of a racially disparate impact under Title VII of the Civil Rights Act.<sup>45</sup> A 2016 action compelled the Boston Police Department to release records concerning the racial impact of its employment practices.<sup>46</sup> LCCR's actions are not limited to court filings; along with other civil rights groups, it sponsored a 2017 community forum on police and fire diversity at the Dorchester headquarters of the Massachusetts Association of Minority Law Enforcement Officers Inc., which spurred further efforts toward equal employment opportunity.

31. NAACP v. Cisneros, Civ. Action No. 78-00850 (D. Mass. 1978).

32. These often resulted in unpublished dispositions by preliminary injunction or settlement.

33. *De Grace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980).

34. *Id.* at 799-800.

35. *Id.*

36. *Id.*

37. *Sarni Original Dry Cleaners, Inc. v. Cooke*, 388 Mass. 611 (1983).

38. *Id.* at 612.

39. *Id.* at 617.

40. *See, e.g.,* Mass. Ass'n. of Afro-American Police, Inc. v. Bos. Police Department, Civ. Action No. 78-529 (D. Mass. 1978) (resulted in consent decree); *Brown v. City of Salem*, 1986 WL 11750 (D. Mass. 1986).

41. *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

42. *Id.* at 729.

43. *Mass. Ass'n. of Afro-American Police Inc. v. Bos. Police Department*, 780 F.2d 5 (1st Cir. 1985).

44. *Bradley v. City of Lynn*, 443 F. Supp. 2d 145 (D. Mass. 2006).

45. *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014).

46. *Jones v. City of Boston*, 845 F.3d 28 (1st Cir. 2016).

## CIVIL RIGHTS ACT ENFORCEMENT

Since 1968, the Lawyers' Committee has been a relentless enforcer of Title VI of the Civil Rights Act of 1964, which forbids the disbursement of federal funds to any program or activity engaging in illegal discrimination. Funds flowing through the Department of Housing and Urban Development, Revenue Sharing, Law Enforcement Assistance Administration, Department of Commerce, and Community Development Block Grants have all been subjects of LCCR litigation.<sup>47</sup> A preliminary injunction stalled the construction of a new police station in Barnstable until the resolution of an LCCR case challenging promotion practices. A victory in a class action against the Boston Redevelopment Authority implemented the citizen participation requirements connected to the massive Fenway Urban Renewal Project, giving community groups an important voice in its direction. Other litigation has redirected Seaport Development linkage payments from South Boston to more diverse neighborhoods.<sup>48</sup> The Lawyers' Committee also submitted an amicus brief defending a public housing tenants' union sued by a major Boston landlord claiming that such concerted action constituted an illegal conspiracy to deprive him of his property.<sup>49</sup>

## VOTING RIGHTS

Recognizing the vital importance of protecting voting rights, the Lawyers' Committee filed an amicus brief in an early challenge to Boston's at-large scheme for selecting city councilors, which effectively disenfranchised minority communities.<sup>50</sup> Though unsuccessful, the case prompted legislative changes, and in 1983 the Committee prevailed in an action challenging the resulting redistricting plan.<sup>51</sup> This decision enforced the rule of "one-person, one vote" and led to increased racial diversity on the Boston City Council. In another voting rights case, a federal district court invalidated the 1985 redistricting plan for the state House of Representatives, finding "extreme, pervasive and substantial deviations" from fair

representation, and again opening opportunities for minority candidates.<sup>52</sup> In 2001, the LCCR obtained a federal court injunction to prevent the city of Lawrence from implementing a voter identification requirement that would have discouraged Latino voting.<sup>53</sup> In 2002, the Lawyers' Committee filed an amicus brief with the SJC to protect several majority black state House districts.<sup>54</sup>

## SETTING AN EXAMPLE

In the Committee's early years, a small professional staff, located in a suite of offices in Park Square, would prepare projects and cases, and then enlist a local law firm's pro bono involvement. Over the years, the Committee has spawned and supported an impressive array of affiliated entities with cognate social justice missions. In the beginning, it housed the Urban Legal Laboratory of Boston College Law School, which assigned a faculty member and full-time student interns to the work of the Committee, in an early collaboration between the bar and the law schools on clinical education. The Committee was instrumental in establishing the Volunteer Lawyers Project. It also has spun off the Fair Housing Project of Greater Boston and the Prisoners' Rights Project (now Massachusetts Correctional Legal Services).

In 2001, the LCCR embarked on a significant transition, expanding its mandate to include the Economic Justice Project, and later changing its name to the Lawyers' Committee for Civil Rights and Economic Justice (LCCREJ). Harking back to the Kerner Commission's warning of two separate and unequal Americas, this change reflected the fact that the civil rights struggle always has been intimately tied to the stark reality of economic inequality. The Economic Justice Project annually connects more than 250 entrepreneurs with free legal and business support through initiatives such as BizGrow, a small business accelerator.<sup>55</sup>

In its corporate documents, the LCCR expands on the ambitious goals for bar activation set by President Kennedy in 1963:

47. See, e.g., *N.A.A.C.P. v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987) (federal housing funds).

48. *S. Bos. Betterment Trust Corp. v. Bos. Redevelopment Auth.*, 438 Mass. 57 (2002) (Committee filed an amicus brief in case).

49. Many of these matters were resolved with grants of preliminary injunctions and so published opinions are not available.

50. *Black Voters v. McDonough*, 421 F. Supp. 165 (D. Mass. 1976), *aff'd*, 565 F.2d 1 (1st Cir. 1977).

51. *Latino Political Action Comm., Inc. v. City of Boston*, 568 F. Supp. 1012 (D. Mass. 1983).

52. *Black Political Task Force v. Connolly*, 679 F. Supp. 109, 130 (D. Mass. 1988).

53. *Morris v. City of Lawrence*, Civ. Action No. 01-11889 (D. Mass. 2001).

54. *Mayor of Cambridge v. Sec'y of the Commonwealth*, 436 Mass. 476 (2002).

55. Saphia Suarez, *Lawyers for Civil Rights hosts 3rd annual small business event*, THE BAY STATE BANNER (July 24, 2019), <https://www.baystatebanner.com/2019/07/24/lawyers-for-civil-rights-hosts-3rd-annual-small-business-event/>.

Specifically, the purposes of the Corporation are to provide legal representation to individuals who are victims of discrimination, harassment or violence based upon race or national origin or to assist such individuals in obtaining adequate legal representation; to develop legal strategies to address racial violence, housing and employment discrimination and economic development activities affecting communities of color in a systematic and comprehensive manner; to increase public understanding and awareness of civil rights and the judicial and legal processes involved in civil rights controversies; to gather and transmit to the appropriate governmental bodies and to the bar pertinent facts bearing upon civil rights conditions in the area served by the Corporation; to encourage and assist local citizens to solve civil rights problems arising in their own communities....<sup>56</sup>

### THE PATH AHEAD

The Boston office has grown to include a litigation director, education project director, economic justice project director, health disparities director, two staff attorneys, a paralegal, and several fellows and interns. Under its energetic executive director, Iván Espinoza-Madrigal, the newly rebranded Lawyers for Civil Rights has continued past causes and thrown itself into the new challenges of our day surrounding immigration policies.

Recent suits have been filed against a prominent national steakhouse chain to protect Latina workers from pervasive sex harassment;<sup>57</sup> against Boston Latin School for failure to address racial harassment of students;<sup>58</sup> and against Amazon on behalf of minority drivers who were summarily terminated pursuant to a newly

imposed background check policy that dredged up outdated minor offenses.<sup>59</sup> The Committee's intervention in a case involving charter school enrollment caps has helped preserve vital resources for traditional public schools.<sup>60</sup>

Throughout its history, the Boston Lawyers' Committee has steadily continued to expand its mission, engaging in litigation and advocacy in the areas of immigrants' rights, LGBT equality, racially disparate discipline in public schools, environmental justice, and economic opportunities for low-wage workers and minority entrepreneurs. Always at the cutting edge of civil rights protection, the LCCR has recently filed suits against the Trump administration challenging the targeting of Chelsea and other "sanctuary cities" for termination of federal funds;<sup>61</sup> seeking to prevent Immigration and Customs Enforcement officers from arresting immigrants when they appear in courthouses on unrelated matters (which, the suit alleges, puts "access to justice in the Commonwealth under siege");<sup>62</sup> and trying to save the Temporary Protected Status (TPS) humanitarian program for Salvadoran, Haitian and Honduran immigrants following natural disasters in those countries.<sup>63</sup> In another recent immigration case, the Lawyers' Committee joined forces with WilmerHale to sue federal officials on behalf of a mother forcibly separated from her 9-year-old child at the southern border as part of the administration's harsh asylum policy.<sup>64</sup>

### CONCLUSION

From his experience in the Civil War, Oliver Wendell Holmes Jr. learned at the outset that "life is a profound and passionate thing .... But, above all, we have learned that ... the one and only success which it is [ours] to command is to bring to [our] work a mighty heart."<sup>65</sup> Holmes believed fervently that no profession had higher standards than lawyers:

56. Articles of Organization at <http://www.sec.state.ma.us/cor/coridx.htm>.

57. *Romero v. McCormick & Schmidt Restaurant Corp.*, Civ. Action No. 18-10324 (D. Mass. 2019).

58. *U.S. Attorney Ortiz Concludes Investigation into Civil Rights Allegations at Boston Latin School*, U.S. DEPT. OF JUSTICE (Sept. 26, 2016) <https://www.justice.gov/usao-ma/pr/us-attorney-ortiz-concludes-investigation-civil-rights-allegations-boston-latin-school>; see Milton J. Valencia et al., *Federal probe finds discrimination at Boston Latin*, THE BOSTON GLOBE (Sept. 26, 2016, 4:10 PM), <https://www.bostonglobe.com/metro/2016/09/26/federal-probe-finds-harassment-discrimination-boston-latin-school-orders-reforms/EgjoGiZVzF56ilYfIKK3PL/story.html>.

59. *Andrews v. Amazon.com Inc.*, Civ. Action No. 19-11182 (D. Mass. 2019).

60. *Doe No. 1 v. Sec'y of Educ.*, 479 Mass. 375 (2018).

61. *City of Chelsea v. Trump*, Civ. Action No. 17-10214 (D. Mass. 2017).

62. *Ryan v. United States Immigration and Customs Enf't*, 382 F. Supp. 3d 142 (D. Mass. 2019).

63. *Centro Presente v. United States Dep't. of Homeland Sec.*, 332 F. Supp. 3d 393 (D. Mass. 2018).

64. *W.R. v. Sessions*, Civ. Action No. 18-11380 (D. Mass. 2018).

65. Oliver Wendell Holmes Jr., Memorial Day Address (May 30, 1884) *reprinted in* OLIVER WENDELL HOLMES, JR. SPEECHES 1, 11 (1934).

And what a profession it is! .... Every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life – so share its passions, its battles, its despair, its triumphs, both as witness and actor?<sup>66</sup>

Since 1968, the Boston Lawyers' Committee for Civil Rights, its dedicated and talented attorneys, and the many committed lawyers and law firms who have contributed their skills to its causes, have been fully immersed in the passions and actions of their times.

Massachusetts has benefited greatly from their efforts. The author is proud to have participated in the journey.

President Kennedy's vision of an activated private bar deeply engaged in the struggle for civil rights and equal justice is as crucial as ever. The Lawyers' Committee will continue to work for the fulfillment of that prophetic vision in the years to come. The long tradition of Massachusetts lawyers working to protect liberty and freedom, provide pro bono public service, and strive for the greater good of our society bodes well for continued success.

66. Oliver Wendell Holmes, Jr., *The Law* (February 5, 1885) reprinted in 1 OLIVER WENDELL HOLMES, JR. SPEECHES 16-17 (1934).

# Parole's Narrow Escape: Limiting the Reach of *Commonwealth v. Moore*

*Commonwealth v. Judge*, 95 Mass. App. Ct. 103 (2019)

In *Commonwealth v. Judge*,<sup>1</sup> a panel<sup>2</sup> of the Appeals Court affirmed a Superior Court judge's order allowing the defendant's motion to suppress evidence seized by parole officers during a routine unannounced<sup>3</sup> home visit. At the same time, the court acknowledged the general right of the Parole Board to carry out such unannounced visits — and implicitly to seize evidence derived from such intrusions in some circumstances — provided that the visits are “non-investigatory and conducted pursuant to standard, neutral procedures . . . devised in advance by law enforcement.”<sup>4</sup> In this particular case, the court determined that inadequate evidence of such procedures had been admitted by the commonwealth, and on that basis affirmed the trial judge's order. In essence, the court handed the government the rule it had sought — an important principle left in doubt after the Supreme Judicial Court's (SJC) decision in *Commonwealth v. Moore*<sup>5</sup> — even if, in applying it to the present facts, the government came up short.

This case has a somewhat lengthy procedural history spanning approximately three and one-half years. On Dec. 8, 2015, a judge<sup>6</sup> of the Bristol Superior Court heard the defendant's motion to suppress. The relevant portions of the motion judge's findings, supplemented by other relevant uncontested evidence presented at the hearing, may be summarized as follows:

On May 22, 2015, while serving a house of correction sentence for various minor drug offenses, the defendant was placed on parole subject to specified conditions, including compliance with all of the standard requirements listed in the parole manual,<sup>7</sup> a copy of which was provided to the defendant at the time of his release. To ensure

compliance with these rules, the parole manual provides that parole officers may visit the defendant “at home, work, school or other place in the community with or without notifying [him] in advance.”<sup>8</sup> The manual further states that unannounced visits might occur “at reasonable hours including weekends,” or at any time in “emergency situations.”<sup>9</sup> The court in *Judge* noted that the “manual is silent as to the frequency, duration, or scope of routine home visits.”<sup>10</sup>

The manual further purports to authorize parole officers to “search a parolee's home and property and seize contraband,” defining “search” as including examination of areas “closed from general public view, with some measure of intrusion, for the purpose of detecting,” but explicitly excluding “[v]isual observation of an open space.”<sup>11</sup> The manual states further that parolees are required to allow parole officers to conduct searches of their person, home and property, but that officers “may insist upon a search only when that officer has reason to believe that [the parolee] ha[s] contraband or illegal items in [the parolee's] possession or control,” or that the parolee has used such items.<sup>12</sup>

On June 23, 2015, during one such home visit, the defendant was arrested by two parole officers, Richard Valenti and Nancy Lyons, for technical violations<sup>13</sup> of his parole conditions and various new criminal violations.<sup>14</sup> More specifically, Valenti and Lyons, in conformity with the aforementioned procedures, were conducting routine home visits of multiple parolees in Fall River to ensure compliance with parole conditions.<sup>15</sup> They arrived at the defendant's residence on Essex Street and knocked on the door.<sup>16</sup> They were admitted into the defendant's home by the defendant's girlfriend,

1. 95 Mass. App. Ct. 103 (2019).

2. Wolohojian, Lemire, & Englander, JJ.

3. Whether the visit was, in fact, unannounced was unclear on the record. While the defendant testified at the suppression hearing that he had been told that parole officers would visit his home a day in advance, police witnesses appeared to concede that the visit was unannounced. The judge made no findings on the issue and the Appeals Court proceeded on the basis that the visit was unannounced.

4. *Judge*, 95 Mass. App. Ct. at 109.

5. 473 Mass. 481 (2016).

6. Pasquale, J.

7. Codified at 120 PAR 431 et seq.

8. *Judge*, 95 Mass. App. Ct. at 104.

9. *Id.*

10. *Id.*

11. *Id.* at 104-05.

12. *Id.* at 104. Although the manual generally requires a parolee to sign a “consent to search” form in which the parolee agrees to “consent to the search of [the parolee's] person, premises and property owned by [him] and/or under [his] care, custody and control, without a search warrant,” the defendant did not, in fact, sign any such form here. *Id.* at 104, n.1

13. “Technical violations” are transgressions of the agreed conditions of parole that do not necessarily rise to the level of criminal offenses. A parolee may be lawfully arrested and his parole revoked on the basis of technical violations alone.

14. *Commonwealth v. Judge*, 95 Mass. App. Ct. 103, 105 (2019).

15. Motion to Suppress Order at 3-4.

16. *Id.* at 4.

Tamika Pruitt, who also resided there.<sup>17</sup> The defendant emerged from the bathroom, appearing uneasy and confused. Valenti and Lyons formed the opinion that he was under the influence of illegal drugs and announced their intention, pursuant to the defendant's parole agreement, to administer an on-the-spot drug test.<sup>18</sup> Lyons accompanied the defendant to the bathroom to supervise the test.<sup>19</sup>

In the meantime, Valenti asked Pruitt if anyone else was in the house.<sup>20</sup> Pruitt indicated that she and the defendant were home alone. In order to verify her claim, and also to ensure that the defendant was really living at the house (living at a specified and disclosed address is a standard condition of parole), Valenti entered the defendant's bedroom.<sup>21</sup> There, in plain view, he saw what he believed to be (and what later turned out to be) cocaine, heroin and drug paraphernalia. The defendant was placed under arrest. On the way to the regional parole office, the defendant made various inculpatory statements.<sup>22</sup>

Thereafter, the defendant was indicted in the Superior Court for trafficking in cocaine, possession of heroin with the intent to distribute same, and simple possession of heroin. Through the medium of a motion to suppress, the defendant sought to exclude all of the evidence seized from his bedroom, as well as all post-arrest statements made to Valenti and Lyons, as the fruits of an unlawful warrantless search. By way of legal authority for his motion, the defendant relied chiefly on the SJC's then-recent holding in *Commonwealth v. Moore*<sup>23</sup> relating to the permissible scope of parole home searches.

On May 19, 2016, the motion judge allowed the defendant's motion to suppress.<sup>24</sup> Pursuant to Rule 15(a)(2) of the Massachusetts Rules of Criminal Procedure,<sup>25</sup> the commonwealth filed a timely notice of its intention to seek interlocutory review of that order.<sup>26</sup> In its subsequent petition for review, the commonwealth argued that *Moore* was never intended to apply to routine parole home visits, but rather reached only investigatory searches aimed at uncovering evidence of a particular crime. A Single Justice of the SJC, on or about July 19, 2016, granted the government leave to appeal. The record was assembled and transmitted to the Appeals Court on Sept. 29, 2017, and the appeal was ultimately docketed on Oct. 2, 2017. The

case was argued on Sept. 13, 2018, and the court released its opinion six months later on March 28, 2019 — nearly three years after the defendant's motion to suppress was allowed.

The present case decided a significant question left open in *Commonwealth v. Moore*:<sup>27</sup> namely, whether and/or to what extent investigative searches and routine parole home visits should be treated similarly under article 14.<sup>28</sup> In *Moore*, the SJC began its analysis by acknowledging that parolees have a sharply reduced expectation of privacy due to their unique status as “wards of the Commonwealth.”<sup>29</sup> A parolee is still serving a sentence under the supervision of the state; he is merely doing so in the community rather than in prison. However, that diminished expectation of privacy notwithstanding, the SJC went on to conclude in *Moore* that “individualized suspicion is still the appropriate standard [to be met], at least with respect to a search of the parolee's home.”<sup>30</sup> Needless to say, were such a rule applied to routine parole home visits, as the motion judge apparently did in *Judge*, it would essentially bar that practice altogether; such visits, by definition, are not conducted on the basis of any particularized suspicion. However, this would have been a problematic result for multiple reasons.

In the first instance, extending *Moore* to the current context — i.e., to deprive the Parole Board of its ability to conduct routine home visits — would defy settled law relating to the specific authority of parole officers. For example, in *Commonwealth v. Cole*, Justice Cordy noted that: “all parolees, are subject to constraints and intrusions necessary to ensure oversight and compliance with the conditions of their supervision, including mandatory home visits by parole officers.”<sup>31</sup> Similarly, the Appeals Court has routinely accepted, without comment, the validity of seizures by parole officers occurring in the context of unannounced parole home visits.<sup>32</sup> The same approach has also been adopted in other jurisdictions.<sup>33</sup>

Moreover, construing *Moore* to govern routine parole home searches would have been inconsistent with the SJC's long-standing views on the significant public safety interest in promoting broad supervisory authority generally over parolees.<sup>34</sup> As the SJC noted in *Baxter v. Commonwealth*,<sup>35</sup> the Parole Board's ability to conduct

17. *Id.*

18. *Id.* at 4-5.

19. *Id.*

20. *Id.*

21. Motion to Suppress Order at 4-5.

22. *Id.*

23. 473 Mass. 481 (2016).

24. The judge's order is dated May 13, 2016, but was not entered onto the docket until May 19, 2016.

25. Rule 15(a)(2) provides: “Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may report it to the full Supreme Judicial Court or to the Appeals Court.”

26. See *Commonwealth v. Jordan*, 469 Mass. 134, 147-48 (2014).

27. 473 Mass. 481 (2016).

28. The SJC made it clear in *Moore* that the defendant's claims arose, if at all, exclusively under art. 14. The Supreme Court has already determined that any suspicionless search of a parolee's residence, whether by police or parole officers,

and whether for investigative or general supervisory purposes, is permissible under the Fourth Amendment. See *Samson v. California*, 547 U.S. 843, 854-56 (2006); Cf. *Griffin v. United States*, 483 U.S. 868, 875-76 (1987). The SJC acknowledged, however, that article 14 provides incremental protection in this area compared to its federal analog.

29. *Moore*, 473 Mass. at 485.

30. *Id.* at 487 (emphasis added).

31. 468 Mass. 294, 315 (2014) (Cordy, J, concurring) (emphasis added).

32. See, e.g., *Commonwealth v. Pacheco*, No. 13-P-1407, 2015 WL 5458045 (Mass. App. Ct.) (Rule 1:28 order).

33. See, e.g., *Volkomer v. State*, 168 Md. App. 470, 486-87 (2006) (parole home visit is constitutionally distinct from an investigatory search); Cf. *Le-Grande v. State*, 947 A.2d 1103, 1106 (2008) (differentiating parole home visits from administrative searches).

34. The board's enabling statute provides that parole permits “shall be granted only if the [parole] board is of the opinion . . . that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law.” MASS. GEN. LAWS ch. 127, § 130; see *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 471 Mass. 12, 27 (2015).

35. 359 Mass. 175, 184 (1971).

“[r]egular home visits and employment checks,” at least once a month including “an actual interview of the parolee,” is essential to its supervisory function. By means of these visits, “[a] parole officer maintains records on each parolee under his direction. These records include a chronological history with current, up to date, factual information.” On the basis of this information,<sup>36</sup> “the parole officer keeps the (b)oard informed of the . . . progress being made.”<sup>37</sup> The success of the parole system depends entirely on such “enhanced supervision.”<sup>38</sup> It seems unlikely that *Moore* would have eliminated this fundamental — even defining — feature of parole supervision without addressing its impact on compliance. Indeed, in *Moore* itself, the SJC acknowledged that the Parole Board’s supervisory “interests . . . are substantial.”<sup>39</sup>

Finally, treating routine parole home visits differently than police investigatory searches for the purposes of article 14 comports with the law in cognate areas. For example, it is well established in Massachusetts that administrative searches, carried out to ensure regulatory compliance, and which are in many ways the functional equivalent of parole home visits, may be conducted without any showing of a particularized suspicion — i.e., either reasonable suspicion or probable cause. Only when such encounters are driven by a specific investigatory purpose do they become subject to article 14 protections.<sup>40</sup> Thus, in *Commonwealth v. Tremblay*,<sup>41</sup> the court “recognized and respected” a strict “dividing line between administrative procedure and pursuit of evidence of . . . crime.”<sup>42</sup> As noted already, mandatory parole home visits of the sort conducted here are directed solely at ensuring compliance with the conditions of parole and so fall squarely in the former category.<sup>43</sup>

The Appeals Court was apparently guided by the foregoing principles in applying the SJC’s holding in *Moore* to the facts of the present case. In *Judge*, the court began its analysis by reciting the core holding of *Moore*:

Though parolees have a significantly diminished expectation of privacy in their homes, their privacy interest

is not extinguished. See *Commonwealth v. Moore*, 473 Mass. 481, 487 (2016). The warrantless investigatory search of a parolee’s home is accordingly reviewed using “the reasonable suspicion standard associated with stop and frisks.” *Id.* at 488. Parole conditions of release may not lower this standard by “contract[ing] around the reasonable suspicion requirement [and] making the issuance of a prisoner’s parole subject to suspicionless searches and seizures of his home.” *Id.* at 487 n.6.<sup>44</sup>

In considering whether the reasonable suspicion standard was met here, the court considered a range of relevant factors adduced by the commonwealth, including: “the delay after knocking but before the parole officers were admitted to the defendant’s home, the demeanor of the defendant’s girlfriend, and the defendant’s criminal history.”<sup>45</sup>

The court held that even if those factors amounted to “reasonable suspicion to believe that the defendant had violated the conditions of his parole,” Valenti’s “search of the bedroom remained unreasonable because the scope of the search at issue exceeded that justified by any suspicion raised by the circumstances.”<sup>46</sup> “Searches,” the *Judge* court held, “must be ‘strictly tied to and justified by’ the circumstances which render[] [their] initiation permissible.”<sup>47</sup> The court added that “the degree of intrusiveness that is permitted is that which is ‘proportional to the degree of suspicion that prompted the intrusion.’”<sup>48</sup> That standard, the court determined, was simply not met here with respect to the entry into the defendant’s bedroom — even if it might have supported his arrest for a parole violation.<sup>49</sup>

However, for the government, there was a silver lining in *Judge*. While deciding that the reasonable suspicion standard of article 14 had not been met, the court also acknowledged that Massachusetts, under the rubric of “special needs,” has permitted “limited exceptions to the reasonable suspicion requirement where an intrusion is limited and serves a pressing public purpose.”<sup>50</sup> The government, the court held, “has an ‘established and indisputable interest’ in the

36. *Id.*

37. *Id.*

38. *Moore*, 473 Mass. at 486.

39. *Id.*

40. See *Commonwealth v. Bizarria*, 31 Mass. App. Ct. 370, 375 (1991); see also *Commonwealth v. Eagleton*, 402 Mass. 199, 207 n.13 (1988); *Commonwealth v. Frodyma*, 386 Mass. 434, 438 (1984).

41. 48 Mass. App. Ct. 454, 462 (2000).

42. *Id.* at 462.

43. Federal courts have applied a three-part test in determining when a search or seizure may be conducted in the absence of individualized suspicion that looks to: “(1) the gravity of the public concerns served by the [search or] seizure, (2) the degree to which the [search or] seizure advances the public interest, and (3) the severity of the interference with individual liberty.” *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

44. *Judge*, 95 Mass. App. Ct. at 106.

45. As the court recited in its decision:

Here, the parole officers heard the defendant say, ‘Hold on,’ from inside the apartment and, once they were admitted by the defendant’s girlfriend, saw the defendant exit the bathroom after around ten seconds. The arguable inference arising from these facts is that the defendant had attempted to conceal contraband in the bathroom or on his person, or that he had attempted to destroy contraband while in the bathroom. The facts, however, provide no reason to believe that the defendant had secreted contraband in his bedroom.

*Id.* at 106.

46. *Id.*

47. *Id.*; see also *Commonwealth v. Silva*, 366 Mass. 402, 407 (1974) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

48. *Judge*, 95 Mass. App. Ct. at 106; see also *Commonwealth v. Moses*, 408 Mass. 136, 141 (1990) (quoting *Commonwealth v. Borges*, 395 Mass. 788, 794 (1985)).

49. *Judge*, 95 Mass. App. Ct. at 106.

50. *Id.* at 107 (quoting *Commonwealth v. Rodriguez*, 430 Mass. 577, 580-81 (2000)).

ability to mandate periodic access by parole officers to the homes of parolees without prior announcement, in order to fulfill its custodial and supervisory duties.”<sup>51</sup> “Because ‘the Commonwealth’s supervisory interests are more significant than a parolee’s diminished expectation of privacy,’ the balance of interests *weighs in favor of permitting a system of routine parole home visits.*”<sup>52</sup> With that, the Appeals Court clarified that *Moore* does not — at least pending further action by the SJC<sup>53</sup> — preclude suspicionless parole home visits.<sup>54</sup>

Unsurprisingly, the Appeals Court imposed limits on the scope of such intrusions. “To survive constitutional review,” the court held, “such a system must be non-investigatory and conducted pursuant to standard, neutral procedures.”<sup>55</sup> The court then cited, by way of example, cases involving both sobriety checkpoints and automobile inventory searches.<sup>56</sup> The court indicated that, in the parole context, lawful guidelines must contain, at a minimum, rules regarding “the discretion given . . . parole officers [concerning] the frequency [and] the scope of routine home visits to parolees, and whether a tour of the entire home is mandated during such visits, or merely permitted.”<sup>57</sup>

Unfortunately for the government in *Judge*, the court determined that inadequate evidence of such “neutral procedures” had been presented. “In the case at bar,” the court stated,

“the Commonwealth has failed to introduce any internal parole board policy guiding parole officers in their execution of routine home visits. To the extent that the parole manual included in the record represents parole board policy, unannounced routine home visits are essentially without mandate or limit, to a degree that ‘unacceptably invites the exercise of [parole] officer discretion.’”<sup>58</sup>

The court then concluded that “‘given the omissions in the Commonwealth’s proof, there is no way for [the court] to scrutinize what

the policy encompassed and the precision with which the procedures set forth therein were defined,’ or whether . . . officers complied with such a policy in the case at bar.”<sup>59</sup> On that basis, the court affirmed the motion judge’s ruling on the defendant’s motion to suppress.

This amounted to a split decision for the government to be sure. However, as noted already, it was doubtless a compromise that the commonwealth was not displeased to accept. Given the public safety implications that any significant restrictions on parole home visits — a very real possibility in light of *Moore* — would have had, the outcome unquestionably came as a relief to the Parole Board.

In sum, mandatory home visits are the long-accepted, ubiquitous and least intrusive means of discharging the Parole Board’s responsibility to minimize the risk of recidivism among parolees.<sup>60</sup> Specifically, such visits address serious public safety concerns around the issue of community supervision, particularly of violent offenders; advance the “public interest” in ensuring compliance with the conditions of parole and reducing the risk of recidivism; and do so with minimal interference to what is already a sharply reduced expectation of privacy. The Appeals Court acted in conformity with settled law in applying the “special needs” exception to the requirements set out in *Moore* to permit the Parole Board — like similar bodies across the country and around the world — to continue to conduct home visits for the purpose of ensuring compliance with parole conditions. Any other approach would have dramatically, and without warning, hobbled the Parole Board in carrying out its public safety function. While future parole decisions might have been made mindful of such a change — with the inevitable result that parole would be much more difficult to obtain — many offenders who never would have been paroled into a system that precluded mandatory home visits would have suddenly presented a grave public safety risk.<sup>61</sup> It is unlikely that the SJC in *Moore* intended such a result.

— Roger L. Michel Jr.<sup>62</sup>

51. *Judge*, 95 Mass. App. Ct. at 108 (quoting *Landry v. Att’y Gen.*, 429 Mass. 336, 347 (1999)).

52. *Id.* at 108 (emphasis added).

53. *Judge* was not accepted for further appellate review.

54. *Judge*, 95 Mass. App. Ct. at 107-08.

55. *Id.* at 109.

56. *Id.*; see *Commonwealth v. Anderson*, 406 Mass. 343, 347 (1989) (roadblocks required to “meet standard, neutral guidelines, and be conducted pursuant to a plan devised in advance by law enforcement supervisory personnel”); *Commonwealth v. Bishop*, 402 Mass. 449, 451 (1988) (neutral written protocols required to justify automobile inventory searches).

57. *Judge*, 95 Mass. App. Ct. at 109.

58. *Id.* (quoting *Commonwealth v. Peters*, 48 Mass. App. Ct. 15, 21 (1999)); *Commonwealth v. Rostad*, 410 Mass. 618, 622 (1991).

59. *Judge*, 95 Mass. App. Ct. at 109 (quoting *Commonwealth v. Silva*, 61 Mass. App. Ct. 28, 36 (2004) (suppression required where commonwealth did not introduce sufficient evidence as to policies allowing police to search motor vehicle

for ownership information prior to towing)); *accord Peters*, 48 Mass. App. Ct. at 20-21 (suppression required where commonwealth failed to introduce motor vehicle inventory policy).

60. See Commonwealth of Massachusetts, “2018 Parole Officer A/B Exam Poster,” available at: <https://www.mass.gov/files/documents/2018/04/27/2018-Parole-Officer-AB-exam-poster.pdf> and Bradley, Katharine and R.B. Michael Oliver, Community Resources for Justice, “The Role of Parole,” available at: [https://www.cjinsitute.org/assets/sites/2/2001/05/52\\_THE\\_ROLE\\_OF\\_PA-ROLE.pdf](https://www.cjinsitute.org/assets/sites/2/2001/05/52_THE_ROLE_OF_PA-ROLE.pdf) (visited January 18, 2020).

61. Indeed, many of the special conditions of parole that are crucial to avoiding recidivism can only be verified during mandatory home visits, including restrictions on computer access for certain sex offenders, residency requirements, GPS monitoring restrictions and associational restrictions, to name just a few.

62. The author was an assistant district attorney and deputy chief of appeals in the Bristol District at the time that the motion to suppress was heard and decided in this case. He thereafter filed and argued the subsequent petition for interlocutory appeal. The author also was a member of the Parole Board from 2009 to 2012, but did not participate in any of the parole decisions at issue here.

# BOOK REVIEW

## *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*

By John Pfaff (Hachette Book Group 2017), 304 pages

## *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*

By Rachel Barkow (Harvard University Press/Belknap 2019), 320 pages

Last June, in *United States v. Davis*,<sup>1</sup> the Supreme Court struck down the residual clause of 18 U.S.C. § 924(c) — a statute that “threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes” — as unconstitutionally vague.<sup>2</sup> Justice Neil Gorsuch wrote the opinion for the court, joined by its four more liberal members. But he did so over a blistering, emotionally charged dissent authored by Justice Brett Kavanaugh, which started: “Crime and firearms form a dangerous mix.”<sup>3</sup> It explained that “violent gun crime was rampant in America” during the 1960s through the 1980s; Congress passed § 924(c) in 1968 in the face of this “onslaught”; “tens of thousands of § 924(c) cases have been prosecuted in the federal courts” since then, and, today, “violent crime with firearms has decreased significantly.”<sup>4</sup> Justice Kavanaugh suggested that the heightened penalties of § 924(c) were somehow responsible for the drop in violent crime in America.<sup>5</sup>

To reach that conclusion, Justice Kavanaugh relied on an intuitively tempting premise: that longer sentences reduce crime. Indeed,

that notion seemed so obvious that he did not even bother to defend it. But, as it turns out, data shows that notion to be false. In fact, longer sentences may actually *increase* crime.<sup>6</sup> This surprising data point makes its way into two recent books on mass incarceration that unite around a common goal — identifying and correcting such intuitive falsehoods.<sup>7</sup> Rachel Barkow’s *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* takes on the innumerable assumptions that infect how the justice system operates. She convincingly explains how, even if we entirely set aside the ethics of mass incarceration, the system is counterproductive to its stated purpose of ensuring public safety, and how we can only make it work better if we remove it from politics.<sup>8</sup> John Pfaff’s *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* takes on the current reform movement as much as the system itself.<sup>9</sup> Pfaff seeks to explain the true drivers of mass incarceration, arguing that we cannot reform a system built on myths merely by better mythmaking.

1. 139 S. Ct. 2319 (2019).

2. *Id.* at 2323. Section 924(c) adds a five-year mandatory minimum sentence to those charged under it, above and beyond any sentence received for the underlying crime. *Id.* at 2324. That five-year sentence increases to seven years if the firearm is brandished, and 10 years if the firearm is discharged. *Id.*

3. *Id.* at 2336.

4. *Id.* at 2336-37.

5. Justice Kavanaugh conceded that “[m]any factors have contributed to the decline of violent crime in America,” but nonetheless argued that “one cannot dismiss the effects of state and federal laws that impose steep punishments on those who commit violent crimes with firearms.” *Id.* at 2337.

6. RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 44 (Harvard University Press/Belknap, 2019). Of course, this empirical reality has intuitive appeal too. See Andrew Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1586 (2019) (“Research supports the common-sense notion that spending years in very close quarters with other convicted felons has a criminogenic effect, particularly when more dangerous inmates are mixed in with less dangerous ones.”); see also Press Release, Rachael Rollins, Suffolk County District Attorney’s Office, Statement in response to Deputy AG Jeffrey Rosen’s speech at Wake Forest (Nov. 19, 2019), <https://www.suffolkdistrictattorney.com/press-releases/items/2019/11/19/statement-in-response-to-deputy-ag-jeffrey-rosens-speech-at-wake-forest>

(“I have not seen any persuasive data supporting the theory that longer sentences reduce crime; to the contrary, the evidence shows that more draconian sentences likely create crime...”).

7. Justice Kavanaugh also sidestepped two other inconvenient truths: the federal government holds just 12% of the nation’s prisoners, and over 90% of criminal prosecutions are resolved by guilty pleas rather than trial. Thus, the reality is that the heightened penalties of § 924(c) are on the books, but rarely served, and act mostly as leverage to extract guilty pleas in the fraction of criminal cases prosecuted in federal court. Of course, even if none of that were true, Justice Kavanaugh’s argument would still be wrong. Justice Clarence Thomas (who joined Justice Kavanaugh’s dissent) had helpfully pointed out just three days earlier that “correlation is not causation.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2261 (2019) (Thomas, J., dissenting). Thus, one cannot prove cause and effect just by saying that the enactment of § 924(c) occurred before the drop in crime. “This defective analysis does not even begin to provide probative evidence” of causation. *Id.* at 2262.

8. By contrasting sentences for different crimes, Barkow also persuasively explains how our system is irrational even from a purely retributive perspective. For example, “the average sentence for federal drug traffickers is 6 years, roughly double the average state sentence for rape, which is less than 3 years for first-time offenders.” Barkow, *supra* note 6, at 39.

9. JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (Hachette Book Group, 2017).

These books are not for casual readers; they are detailed and data-driven. Nor are they the polemics that some might hope for; nowhere in these pages do Barkow or Pfaff accuse the criminal justice system of being one of social control,<sup>10</sup> or a renewed racial caste system.<sup>11</sup> They never question whether we should assign blame to individuals when crime is highly contextual and often the product of institutional failure.<sup>12</sup> Were Pfaff and Barkow to attribute motive to the system they describe, they might say it is one of well-intentioned good faith. Those setting criminal justice policy are simply too reliant on their errant assumptions instead of what years of data have shown to be true. Pfaff and Barkow's goal is to bring the facts to the fore, and empower empiricism over intuition. The morality of mass incarceration is left to other works.<sup>13</sup> Barkow and Pfaff instead take on many of the false tropes that have become so baked into our thinking about the criminal law — like the notion that longer sentences reduce crime — that they can be taken as an unspoken and unquestioned premise of an opinion from four justices of the Supreme Court of the United States.

The grounding thesis of Barkow's book is delivered in its pithiest form about halfway through: “[j]ust about everywhere in the United States, most critical decisions about criminal justice policy are nothing more than highly politicized gut reactions.”<sup>14</sup> She explains how the system is overbroad in its definition of crimes, affixing identical labels, sentences and collateral consequences to offenders with vastly differing levels of culpability. And we have done all of that on the front end of punishment, she argues, while eliminating the “second look” mechanisms of parole, clemency and good time credit that had previously helped to individualize sentences on the back end. Barkow walks through the history of how this happened, describing a political system so obsessed with punishment that it is rewarded even when it undermines public safety. These punitive laws have caused institutional breakdowns: judges cannot check harsh sentences when constrained by mandatory minimums, juries cannot check needless prosecutions when almost all convictions are obtained by guilty plea, and parole cannot check needless continuing

incarceration where it has been eliminated or narrowed across the country. The only institution that could plausibly stop this runaway train, the prosecutor, is an “imperfect” one because they have the same political “incentive to bill themselves as tough on crime” as legislators and executives.<sup>15</sup> To Barkow, the only way forward is to eliminate the influence of politics in the system as much as possible, because any reform targeted at what she calls the “pathological” political actors who currently set criminal justice policy “will achieve only so much before running up against these political forces.”<sup>16</sup>

Informed by her own experience as a member of the U.S. Sentencing Commission, Barkow says that the best way to reform the system is to make it less democratic: “We need to establish expert agencies charged with instituting and evaluating criminal justice policies so that we get better outcomes.”<sup>17</sup> Indeed, Barkow points out, this is where the most impactful reforms are already coming from. The two biggest drivers of recent decarceration — realignment in California<sup>18</sup> and a retroactive reduction in drug sentencing guidelines — came from outside of the political system (one from the Supreme Court and the other from the Sentencing Commission). The details of criminal justice policy should be no different than the details of policy in other areas, in which an agency staffed by experts writes rules driven by rigorous cost-benefit analysis. Right now, a single salient crime can trigger systemic punitive policy changes, but “policies need to account for the overall pattern of cases, not exceptional outliers.”<sup>19</sup> An expert agency must be created and specifically designed to withstand the political pressure that infects the rest of the system.

The other actors that Barkow focuses on are in the courts. Also not subject to democratic accountability, Barkow says, courts have the power to impose a limit on punishment when the political branches run amok. She suggests that reformers focus their attention on who occupies the bench, citing the massive disparity between judges with prosecutorial backgrounds versus those who served as public defenders.<sup>20</sup> And she highlights a few doctrinal areas that she regards as ripe for reinvigoration: limits on coercive plea offers,

10. See, e.g., ALEX VITALE, *THE END OF POLICING* 34 (Verso, 2017) (“The reality is that the police exist primarily as a system for managing and even producing inequality by suppressing social movements and tightly managing the behaviors of poor and nonwhite people.”).

11. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 17 (The New Press, 2012) (“These legal rules ensure that the undercaste is overwhelmingly black and brown.”). To Barkow, for example, the massive punitive disparity between crack and powder cocaine — perfectly correlated with racial disparities — is “disturbing,” but she abstains from assigning motive. Barkow, *supra* note 6, at 74. Pfaff even argues that money spent on corrections would be better spent funding the police. See Pfaff, *supra* note 9, at 117 (“[I]nvesting in police has a much bigger deterrent effect [than prisons] and avoids all the capital expenditures of prisons.”).

12. See, e.g., BRUCE WESTERN, *HOMeward: LIFE IN THE YEAR AFTER PRISON* 82, 172-73 (Russell Sage Foundation, 2018) (“The punitive function of incarceration had failed because punishment was applied, not to cases of individual moral failure, but to moral failures that occurred in contexts of deep neighborhood and economic disadvantage.”).

13. See, e.g., Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* YALE L. J. F. (2019).

14. Barkow, *supra* note 6, at 137.

15. *Id.* at 132. Here, Barkow cites to Pfaff's work on prosecutorial incentives. *Id.*

16. *Id.* at 124.

17. *Id.* at 165. Barkow also advocates institutional changes in the structure of prosecutors' offices to make them more like administrative agencies. *Id.* at 144-54. For example, she argues that prosecutors should not be placed in charge of areas outside of their core law enforcement responsibilities, and that they should separate law enforcement power from adjudicative power, have veteran prosecutors screen new cases, and create institutional incentives that reward ethical behavior over conviction rates. *Id.*

18. Forty percent of the reduction in state prison populations occurred in California after a Supreme Court decision, *Brown v. Plata*, 563 U.S. 493 (2011), ordered the state to reduce its population due to overcrowding. See Barkow, *supra* note 6, at 119. Although many of those prisoners were just shifted into county jails, Pfaff argues that this shift has a virtue of its own, as it reduces the budgetary moral hazard that allows prosecutors to send defendants into state prisons that they do not pay for. See Pfaff, *supra* note 9, at 150-53. “The hope is that prosecutors will start to ask if incarceration is really worth it for these lower-level cases.” *Id.* at 151.

19. Barkow, *supra* note 6, at 77.

20. More recently, on Oct. 21, 2019, Barkow tweeted statistics from a panel she sat on with Third Circuit Judge (and former public defender) Felipe Restrepo. According to Judge Restrepo, 19 former prosecutors have been on the Supreme Court and zero former public defenders; of 163 active federal circuit judges, 57 are former prosecutors and five are former public defenders; and of appointed state supreme court justices, 53% are former prosecutors and 3% are former public defenders. Rachel Barkow (@RachelBarkow), TWITTER (Oct. 21, 2019, 11:41 AM), <https://twitter.com/rachelbarkow/status/1186352274169356294>.

substantive review of sentences under the Eighth Amendment, the scope of prosecutorial and qualified immunity, and incarceration for nonpayment of unaffordable fines, among others. This is Barkow's "Constitution in waiting."<sup>21</sup>

Barkow's recommendations are expressly intended to be realistic. Barkow "seeks to offer solutions that are feasible in the political environment we live in."<sup>22</sup> One thing she overlooks, however, is the notion that courts may not be quite as genuinely apolitical as she might think (or hope). Although there is cause *to hope* that courts might make the doctrinal changes she describes, there is vanishingly little reason to view those changes as realistic. First, of course, Barkow's near-exclusive focus on the U.S. Supreme Court fails to grapple with the fact that most judges across the country are actually elected, not appointed — about 90% of state judges are subject to some form of election, making them equally susceptible to the political dynamic Barkow describes.<sup>23</sup> Barkow's focus on the federal system, where she has spent most of her career, obscures the political reality of judicial elections in state courts. Even more fundamentally, Barkow also does not recognize that courts — even where judges are appointed — often rely upon the exact same counterfactual, pro-punishment logic she sees so clearly in the political branches. She brings the optimism of someone who has spent little time litigating. The four dissenters in *Davis*, for example, play on the identical "intuition about the deterrent or incapacitative effect of long sentences without considering the downsides" that she assigns to legislators.<sup>24</sup>

*Davis* was not a one-off. Courts constantly rely upon intuition that is (at best) empirically baseless, or (at worst) provably false. Indeed, counterfactual logic is built into the very standards of review that drive legal analysis. A statute must be upheld under so-called "rational basis" review, for example, even if it is only justified by "rational speculation unsupported by evidence or empirical data."<sup>25</sup> Courts may only strike down a statute if there is no "reasonably conceivable state of facts" to support it, even if those conceivable facts are known to be untrue.<sup>26</sup> In other words, courts assess statutes by asking only whether they have a *logical* basis, not a *true* basis.

Perhaps the most famous example of giving errant facts

precedential value happened in 2002, when the Supreme Court assigned convicted sex offenders "a frightening and high risk of recidivism,"<sup>27</sup> a phrase that later found its way into more than 100 opinions in the lower courts.<sup>28</sup> But that notion has been widely debunked, as it "was rooted in an offhand and unsupported statement in a mass-market magazine, not a peer-reviewed journal."<sup>29</sup> The Supreme Court has never corrected the record, though our Supreme Judicial Court (SJC) has since recognized the reality that, "contrary to popular belief, the rates of recidivism for sex offenders are actually lower than the rates of recidivism for those convicted of other crimes."<sup>30</sup>

This unempirical dynamic is persistent, and seems to always counsel in favor of more criminalization and incarceration. A recent SJC decision, *Commonwealth v. Eldred*,<sup>31</sup> is illustrative. In that case, the court held that defendants with substance use disorder (SUD) can be jailed for a relapse. To reach that result, according to the *Harvard Law Review*, "[t]he court virtually ignored evidence and precedent suggesting that some drug use is not willful" and "neglected to consider addiction science's implications for criminal responsibility."<sup>32</sup> It also failed to consider that a court cannot punish a person into abstinence, and that punishment for drug use may do more harm than good: the ruling "forced Eldred into withdrawal in jail" and "compelled her to hide a relapse . . . for fear of further incarceration."<sup>33</sup> "Eldred and her amici's position reflect[ed] the consensus in the scientific community on SUD."<sup>34</sup> Rather than grapple with the many studies collected in the briefs, the court largely ignored them. On the other hand, the SJC — to its credit — recently changed the standard for analyzing whether the police had constitutionally seized a citizen to "line up with empirical evidence on the matter."<sup>35</sup> The court recognized that the old standard had relied upon the falsehood that citizens will feel free to end an encounter with a police officer who does not issue any commands or orders. In reality, studies show that police authority itself compels acquiescence, even in the absence of an explicit demand for it.<sup>36</sup> Yet, that unrealistic standard, about something as fundamental as when a citizen is seized by an officer and entitled to Fourth Amendment protection, had persisted

21. Barkow, *supra* note 6, at 187.

22. *Id.* at 140.

23. See Michael S. Kang and Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 929 (2016).

24. Barkow, *supra* note 6, at 49.

25. *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993).

26. *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012).

27. *McKune v. Lile*, 536 U.S. 24, 34 (2002).

28. See Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (March 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html> (citing two law review articles and a Sixth Circuit opinion disputing this notion).

29. *Id.*

30. *Doe, SORB No. 380316 v. Sex Offender Registry Bd.*, 473 Mass. 297, 312 n.22 (2015). Another example is the expansive exception to the hearsay rule, referred to as "spontaneous" or "excited" utterances, rooted in the notion that people who have just witnessed a startling or exciting event are more likely to

be truthful. See, e.g., *Commonwealth v. King*, 436 Mass. 252, 254-55 (2002). Even more absurdly, "[t]he underlying exciting event may be proved by the excited utterance itself." *Id.* at 255. There is an intuitive appeal to that argument, such that the exception persists to this day, but it is empirically wrong. See Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111 (2017) (collecting scholarship on the subject).

31. 480 Mass. 90 (2018).

32. Case Comment, *Massachusetts Supreme Judicial Court Holds Drug-Free Probation Requirement Enforceable for Defendant with Substance Use Disorder: Commonwealth v. Eldred*, 132 HARV. L. REV. 2074 (2019).

33. *Id.* at 2081 n.65.

34. *Id.* at 2076.

35. *Commonwealth v. Matta*, 483 Mass. 357, 361 n.3 (2019).

36. See *id.* This same idea — that citizens feel a strong measure of compulsion from mere police "requests" — should likewise call for a change in "consent search" jurisprudence. See generally Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962 (2019).

for 40 years. A single judicial intuition can have such extraordinary staying power that it gets baked into precedent for a generation.<sup>37</sup>

Those who spend little time in court would be surprised just how counterfactual the law can be. In case after case, courts ignore empirics in the guise of logic and intuition.<sup>38</sup> Indeed, the system of mass incarceration could not survive if courts actually gave rigorous empirical scrutiny to the laws that legislators pass.<sup>39</sup> Unfortunately, courts are subject to the very same dynamic that Barkow sees so clearly in the political branches. Indeed, in most states, courts are a political branch, subject to direct election. The overall theme of Barkow's book is that "feasible" reform must start by extricating politics from crime policy, because "the political system is not the right location for debating and addressing the flaws in criminal justice."<sup>40</sup> That diagnosis seems correct, and her call for greater reliance on expertise to remove a measure of political influence is spot on.<sup>41</sup> But her faith in the judiciary, as an apolitical branch, may be misplaced.

For his part, Pfaff starts *Locked In* by taking on what he calls the "Standard Story" of the reform movement. The war on drugs does not drive mass incarceration, nor does it cause racial imbalances in the prison population (because drug prosecutions are just as racially disparate as the rest). He repeatedly namechecks one of the most important works that helped kick off the reform movement, Michelle Alexander's *The New Jim Crow*, mainly to point out where she goes wrong.<sup>42</sup> To Pfaff, the low-level, nonviolent drug offender — the poster-child of the reform movement — is a "myth."<sup>43</sup> Long

sentences are not the problem either, because even as the official sentences in the statute books have increased, time *actually served* has barely budged. And private prisons — a favorite boogeyman of the reform movement — hold relatively few prisoners and are really no worse than public prisons. By Pfaff's description, this is a reform movement that is itself imprisoned by the very same political dynamic that Barkow identifies in the system as a whole.

Why antagonize a movement with which he so clearly sympathizes? Because Pfaff is an ambitious reformer, and policy change targeted at the wrong things will not accomplish enough. For example, "[f]reeing every single person who is in a state prison on a drug charge would only cut state prison populations back to where they were in 1996–97, well into the 'mass incarceration' period."<sup>44</sup> Worse yet, the rhetoric of such ineffective reforms might crowd out steps that could make a bigger difference. Expending political capital to abolish private prisons, for instance, "effectively gives the public prisons an undeserved pass."<sup>45</sup>

So what really drives mass incarceration? To Pfaff, the answer is rather simple: prosecutors. In a chapter titled "The Man Behind The Curtain," Pfaff explains how, for much of the era of mass incarceration, crime and arrests fell while the number of felony cases filed in state court rose sharply.<sup>46</sup> If arrests are down but felony filings are up, prosecutors are filing more charges per arrest. Pfaff offers a handful of theories for why that might be so: increased staffing,

37. On April 6, 2020, the Supreme Court decided a case that raised this exact clash between empirics and intuition. *Kansas v. Glover*, 140 S. Ct. 1183 (2020). The case turned entirely on a single, empirically knowable data point: how often do unlicensed owners of cars drive anyway? The issue in the case was whether the police can pull over a car for the sole reason that its registered owner has a revoked license, on the assumption that the owner is driving the car. The court answered that question in the affirmative. To the court majority, "common sense suffice[d] to justify this inference." *Id.* at 1188. A leading commentator argued that using data rather than "common sense" to answer this question would just "feel like we're being all scientific" but would "actually blind[] ourselves to the intuitions needed to assess probable cause accurately." Orin S. Kerr, Reasonable Suspicion From Driver to Car: A Few Thoughts on *Kansas v. Glover*, Volokh Conspiracy (Oct. 31, 2019, 7:25 AM), <https://reason.com/2019/10/31/reasonable-suspicion-from-driver-to-car-a-few-thoughts-on-kansas-v-glover/>. Yet, neither he nor the majority explain how using empirical evidence to answer an empirical question would somehow yield a less accurate answer than pure gut instinct. As Justice Sonia Sotomayor wrote in her dissent, "simply labeling an inference 'common sense' does not make it so, no matter how many times the majority repeats it." *Glover*, 140 S. Ct. at 1196 (Sotomayor, J. dissenting); *see also Glover*, 140 S. Ct. at 1192 (Kagan, J. concurring) (expressing "doubt whether our collective common sense could do the necessary work").

38. Scholars have started to notice this dynamic and conduct the empirical analyses that will allow litigators to push back. For example, a recent study showed that a police officer's testimony that an incident occurred in a "high-crime area" is barely correlated with the area's actual crime rates, and is actually better correlated with the racial composition of the area in question. *See* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345 (2019); *see also* Sommers & Bohns, *supra* note 37 (conducting research calling into question the consent exception to the Fourth Amendment); Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 702 (2019) (conducting research on traffic stops to "lay an early empirical foundation for rethinking fundamental assumptions" about how courts govern them).

39. *See* Karakatsanis, *supra* note 13, at 856–62 (explaining the empirically baseless nature of criminalization and sentencing decisions). Karakatsanis notes

a fundamental irony in the legal system: it "appl[ies] extreme rigor to decisions about when a person can be caged," but it "does not apply any rigor to an antecedent question: Is this conduct something for which we should cage a human being?" *Id.* at 865; *see also id.* at 867 ("Thus we have a central paradox of American criminal law: in order to put a person in prison, we have to prove by overwhelming evidence that she merits punishment in a narrow factual sense; but in order to put millions of people in prison, we do not need [to] show that doing so would do any good.").

40. Barkow, *supra* note 6, at 140.

41. A recent review of Barkow's book in the *Yale Law Journal* argues to the contrary that electoral politics may be more likely to bring about reform than Barkow suspects, given public opinion data suggesting that young voters are less punitive than their older counterparts. *See* Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L. J. 446 (2019).

42. *See* Pfaff, *supra* note 9, at 5, 21, 37, 50, 187. At one point, however, Pfaff does acknowledge that Alexander "is unquestionably right to call our attention to" the collateral consequences of convictions. *Id.* at 64.

43. *Id.* at 35. He offers two hypotheses for the reform movement's focus on this tiny slice of the prison population. The first is that "there has been an overemphasis on the federal system and its pathologies," and the federal system actually does skew disproportionately toward drug offenders. *Id.* at 189. The second is the nature of media coverage of these types of cases — they get attention precisely because they are exceptional. *Id.* Another hypothesis, of course, is that this is a genuine problem that Pfaff obscures by focusing only on the inmate population, overlooking the massive number of arrests for low-level drug crimes. In 2015, for example, arrests for marijuana offenses outnumbered those for all violent crimes combined. *See* Timothy Williams, *Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/marijuana-arrests.html>.

44. *See* Pfaff, *supra* note 9, at 49.

45. *Id.* at 93; *see also* Karakatsanis, *supra* note 13, at 921–22 (explaining how current reform movement can undermine efforts that would have far greater impact).

46. *Id.* at 127.

greater leverage gained from harsher laws, weak public defender systems, higher quality arrests by officers, and political ambition on the part of elected district attorneys. Pfaff also describes a vicious cycle in which prosecutors rely more on plea bargains, so they can process more cases and charges, so more people get criminal records, so those records justify greater prosecutorial aggressiveness when they pick up new charges in the future, and so on it goes.

This dynamic occurs, Pfaff argues, because prosecutorial incentives are badly misaligned. Offices funded at the county level send people to prisons paid for by out-of-state budgets, so “there’s no real financial limit on prosecutors’ ability to send people to prison.”<sup>47</sup> To the contrary, “leniency is actually more expensive than severity” because local budgets fund the probation system and the county jail where defendants serve shorter sentences.<sup>48</sup> Finally, Pfaff attributes the punitive tilt to the fact that accountability is almost impossible to trace because responsibility for different components of the system is dispersed among a range of political actors.

Like Barkow, Pfaff also does a deep dive on the poisonous political dynamic of crime. He sees “four interrelated — and admittedly hard-to-repair — defects in the politics of crime that predate the rise in incarceration and that explain why elected leaders are consistently, predictably harsher in their attitudes than the people who vote them into office.”<sup>49</sup> First, is the “false-positive problem”: people who commit a crime upon release are far more salient than the person who is needlessly incarcerated. The public does not notice if a person sits in prison longer than that person should; it is outraged if a person released “early” commits a new crime.<sup>50</sup> Second, prosecutorial elections are “low information, high salience,” meaning that voters do not really know anything about the policies or practices of their local prosecutor’s office, but they “instead vote based on one or two particularly shocking ... cases.”<sup>51</sup> Third, is the geography of the elections: white suburban voters “exert undue influence on who is elected to prosecute disproportionately urban crime.”<sup>52</sup> Those suburban voters do not feel the over-enforcement that they vote for, yet another example of misaligned incentives. Fourth, and finally, is prison gerrymandering. In most places, inmates cannot vote but are still counted as constituents of the place in which they are incarcerated. “This policy results in greater political power for nonurban politicians, and thus for more conservative parties.”<sup>53</sup>

If prosecutors are the problem, Pfaff looks to them for the solution. He sees a number of possible reforms that can occur within each prosecutor’s office. First, the creation of plea bargaining guidebooks (as has been done in New Jersey) would ensure that like cases are treated alike. Second, prosecutorial financial incentives (as in California) should be realigned to end the correctional free lunch;

prosecutors should be forced to internalize the financial externalities that they impose on state budgets. To fix the political dynamic, he agrees with Barkow: make policy decisions less democratically accountable by creating sentencing commissions and guidelines, expanding reliance on parole, and ending judicial and prosecutorial elections. To the extent such decisions must be made democratically, Pfaff extols the virtue of localism — “ensure that prosecutors (and judges) [are] selected by people who directly experience both the gains from enforcement and its costs.”<sup>54</sup> And to close prisons, he suggests that we learn from how Congress closed military bases to eliminate logrolling by legislators to keep the prisons *in their district* open.<sup>55</sup> The prisons that remain — in a proposal Pfaff admits is “preposterously contrarian” — maybe *should* be privatized, but with better contracts to reward outputs (like successful re-entry) over inputs (like time spent in prison). Make it “in the prison’s interest to get the inmate out quickly, but with proper treatment.”<sup>56</sup>

These books are an education, and they are useful contributions to the discourse around criminal justice reform. But their approach can feel sterilized and incomplete. Only in the most fleeting moments do they take up the sorts of moral and ethical questions that cannot be answered by data. In perhaps her best passage, for example, Barkow makes an impassioned case for rationality over emotion. She recognizes that “[t]here is, of course, a place for emotions” in the setting of policy about something as personal as crime, but when those emotional gut reactions actually undermine public safety, “we must confront the trade-off we are making.”<sup>57</sup> By relying on errant intuitions, people do not even know that they are sacrificing public safety to indulge their retributive impulses.<sup>58</sup> Between his reams of charts and graphs, Pfaff argues that, fundamentally, what we really need to do is “change people’s attitudes toward crime.”<sup>59</sup> Violence is a transient phase, not a steady state. And, in just one page, he acknowledges that the public perception of safety is inevitably racialized — “when the costs of enforcement fall disproportionately on black Americans, ‘safety’ will consistently receive undue emphasis.”<sup>60</sup> To Pfaff, a book that just advocates educating the public about race or attitudes toward violence “is the worst sort of useless idealism.”<sup>61</sup> But there is more virtue in those lessons than Pfaff might realize. In a book about the criminal justice system, they deserve more than a handful of pages.

Overall, these books are not rules for radicals; they are roadmaps for pragmatic reformers. Their recommendations are all to the good, if less feasible than the authors appreciate. They describe, perhaps, the *very least* we can do to change the criminal justice system. We should all roll up our sleeves and get to work.

— David Rangaviz

47. *Id.* at 142.

48. *Id.* at 143.

49. *Id.* at 167.

50. Barkow cites the same dynamic, and also uses the endowment effect to explain why “society thinks it owns” a sentence after it is imposed, and the public therefore views cutting short a sentence (via parole) as something that is blameworthy, while the fundamental failure of the criminal justice system as a whole (shown by high rates of recidivism) is not scrutinized or even noticed by the public. *See* Barkow, *supra* note 6, at 75.

51. Pfaff, *supra* note 9, at 169.

52. *Id.* at 171.

53. *Id.* at 172.

54. *Id.* at 183.

55. *Id.* at 222-23.

56. *Id.* at 225.

57. Barkow, *supra* note 6, at 176.

58. On the very last page of her book, Barkow acknowledges that some people may in fact value retribution over public safety, but she thinks they should at least be made to “know they are making that sacrifice.” *Id.* at 205.

59. Pfaff, *supra* note 9, at 227; *see also id.* at 122 (“[W]e need to think carefully about how to balance the costs of crime against the costs (and benefits) of enforcement.”).

60. *Id.* at 228.

61. *Id.* at 231.

# BOOK REVIEW

## *The Free Speech Century*

Lee C. Bollinger and Geoffrey R. Stone (eds.), (Oxford University Press 2019), 376 pages

### I. THE FREE SPEECH CENTURY

The injunction “Congress shall make no law . . . abridging the freedom of speech, or of the press” has appeared in the federal Constitution ever since that charter became effective in 1791. But, as the United States Supreme Court had occasion to observe in the mid-20th century, “[n]o important case involving free speech was decided by this Court prior to [1919]. Indeed . . . the Court at earlier dates placed no unique emphasis on that right.”<sup>1</sup> It was only in 1919 that the freedom of speech truly began to take form.

The two years preceding 1919 had seen the United States enter World War I against Germany and the Central Powers. One way in which the federal government sought to support the American war effort was to enact the Espionage Act in 1917 and the Sedition Act in 1918. The Espionage Act declared it a crime, at least during wartime, to “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . .”<sup>2</sup> The Sedition Act additionally declared it a crime to utter or to publish: (1) “disloyal, scurrilous and abusive language about the form of government of the United States”; (2) language “intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute”; or (3) language “intended to incite, provoke, and encourage resistance to the United States” in its war effort.<sup>3</sup>

The Department of Justice enforced those prohibitions with vigor, no doubt reflecting the tenor of wartime. And so, during its October 1918 and October 1919 terms, the Supreme Court was asked to review the convictions of:

- Eugene Schenck for distributing a leaflet suggesting that “conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few”;
- Jacob Frohwerk for publishing a German-language newspaper, the *Missouri Staats-Zeitung*, that included some dozen articles critical of the military draft and complimentary of imperial Germany;
- Eugene V. Debs, the former (and future) Socialist

candidate for president, for exhorting an Ohio crowd that they “are fit for something better than slavery and cannon fodder”; and

- Jacob Abrams for throwing circulars from a Manhattan window denouncing the Wilson administration for its intervention in the Russian Civil War that followed the 1917 Bolshevik revolution.

The Supreme Court’s decisions in these cases yielded two epochal innovations in the law of free speech, both from the pen of Justice Oliver Wendell Holmes Jr.

In *Schenck*, Holmes, writing for the court, articulated a test for when the law may punish speech as contrary to the public good: Specifically when words “are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>4</sup> The court applied this “clear and present danger” test to affirm Schenck’s conviction, and later those of Frohwerk,<sup>5</sup> Debs<sup>6</sup> and Abrams.<sup>7</sup>

In *Abrams*, however, Holmes refused to join the court in affirming the conviction. Instead, in dissent, while reiterating his commitment to the “clear and present danger” test, he deemed that test unsatisfied under the circumstances of the case. In doing so, Holmes expanded on his views of the value of free speech. He emphasized that, absent a powerful exigency such as a “clear and present danger,” “the ultimate good desired is better reached by the free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”<sup>8</sup> He also warned that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>9</sup>

So dawned a new era in the law of free speech. At least, that is the premise of *The Free Speech Century*, the new volume edited by Lee Bollinger and Geoffrey Stone. Around this premise, Bollinger<sup>10</sup> and Stone<sup>11</sup> have collected essays by 16 professors, practitioners and

1. *Dennis v. United States*, 341 U.S. 494, 503 (1951).
2. Pub. L. No. 65-24, 40 Stat. 217 (1917).
3. Pub. L. No. 65-150, 40 Stat. 553 (1918).
4. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
5. *Frohwerk v. United States*, 249 U.S. 204 (1919).
6. *Debs v. United States*, 249 U.S. 211 (1919).
7. *Abrams v. United States*, 250 U.S. 616 (1919).
8. *Id.* at 630 (Holmes, J. dissenting).
9. *Id.* Justice Louis Brandeis, who joined Holmes’ dissent in *Abrams*, succinctly amplified both of these sentiments some years later in a dissent of his

own:

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

*Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

10. President, Columbia University and Seth Low Professor of the University.
11. Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School.

jurists, each of whom addresses a different aspect of the freedom of speech in the 1919–2019 period. Each essay is crisp, focused, and organized in a consistent fashion, reflecting the strength of the editing. Although the editors group the essays into four categories — (1) “The Nature of First Amendment Jurisprudence,” (2) “Major Critiques and Controversial Areas of First Amendment Jurisprudence,” (3) “The International Implications of the First Amendment,” and (4) “New Technologies and the First Amendment of the Future” — those categories are somewhat unscientific, since most of the essays transcend their assigned category in ways both explicit and implicit. For example, Cass Sunstein’s<sup>12</sup> essay titled *Does the Clear and Present Danger Test Survive Cost-Benefit Analysis?* is categorized as addressing a “major critique and controversial area of First Amendment jurisprudence,” and Justice Albie Sachs’<sup>13</sup> *Reflections on the Firstness of the First Amendment in the United States* is categorized as addressing “the international implications of the First Amendment,” even though each necessarily engages the nature of First Amendment jurisprudence and offers insights into the First Amendment of the future.

Shorn of those categories and taken in the aggregate, the essays clearly depict an evolutionary arc for the freedom of speech between 1919 and 2019 — specifically, an evolution in the rationale for why the freedom of speech protects what it does. The essays reveal how the Holmesian freedom of speech that emerged around 1919 was conceived as a limited guarantee, tethered to a purpose of serving the development of public opinion in aid of the process of self-government (Part II below). They reveal how, over the course of the “free speech century,” the freedom of speech was reconceived as serving the autonomy and dignitary interests of each speaker (Part III below). And the essays reveal the tensions that have emerged as this expanded conception of the freedom of speech has been applied to protect an ever-expanding swath of speech and has begun to encounter a truly postmodern communications environment (Part IV below).

## II. THE HOLMESIAN FREEDOM OF SPEECH

Several essays in *The Free Speech Century* sketch the contours and implications of the Holmesian freedom of speech that first began to emerge around 1919. Those essays reveal a conception of the freedom of speech that assessed legal restrictions of speech based on whether the restriction infringed speech necessary to the development of public opinion, and thus to the process of self-government.

The essays open with Vincent Blasi’s<sup>14</sup> *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, a history of

the ideas that impelled Justice Holmes, Justice Brandeis and then-District Judge Learned Hand<sup>15</sup> to blaze their respective paths in support of the freedom of speech and in opposition to the Espionage and Sedition Acts. Blasi offers the revealing insight that those “founding fathers” of the freedom of speech were, in fact, skeptical of individual liberties.<sup>16</sup> They were, after all, among the judiciary’s most stalwart opponents of the prevailing *Lochner* regime,<sup>17</sup> which invalidated social and economic welfare legislation based on a purported individual liberty of contract. Blasi demonstrates how Holmes, Brandeis and Hand each reconciled that skepticism with support for free speech by framing the freedom of speech not as a free-ranging individual liberty, but rather as a way to inform and develop popular opinion — that is, as a means to the civic end of self-government.<sup>18</sup> Blasi demonstrates how Holmes, in particular — perhaps influenced by Charles Darwin’s *On the Origin of the Species*, published when Holmes was an undergraduate — conceived of free speech as serving the slow, iterative and incremental formation of popular opinion.<sup>19</sup> This conception, Blasi argues, can be seen in the importance that Holmes ascribed to the sheer passage of time as a salient feature of the free speech landscape: Only “when men have realized that time has upset many fighting faiths,” Holmes wrote, “may they appreciate the value of free speech as a device for seeking the truth.”<sup>20</sup>

Laura Weinrib’s<sup>21</sup> *Rethinking the Myth of the Modern First Amendment* departs from Blasi’s implication that, as a historical matter, the judiciary was the chief protagonist of the freedom of speech. She prefers instead to award the laurels to the American Civil Liberties Union, which, she argues, moderated its roots in radical labor “agitation” in order to join forces with anti-regulatory business interests and form a coalition that, just before and after World War II, successfully advocated for robust speech protections.<sup>22</sup> Weinrib is correct to suggest that 1919 was merely the beginning of the story. The Holmesian freedom of speech began as a dissenting point of view, progressed fitfully, and took decades to become the law of the land.<sup>23</sup> But Weinrib is so intent on viewing the freedom of speech through a revisionist lens of class conflict that she gives inadequate consideration to the political and civic values of free expression, values that were most assuredly on the minds of Americans and their leaders around the time of World War II.<sup>24</sup>

Heather Gerken’s<sup>25</sup> *The Discursive Benefits of Structure: Federalism and the First Amendment* illuminates the harmony between the Holmesian freedom of speech and the federalist structure of American government. Her thesis is that free speech and federalism are complementary, in that the ability of a national minority to gain

12. Robert Walmsley University Professor, Harvard University.

13. Justice (ret.), Constitutional Court of South Africa.

14. Corliss Lamont Professor of Civil Liberties, Columbia Law School.

15. *See Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

16. *THE FREE SPEECH CENTURY* 13-14 (Lee C. Bollinger and Geoffrey R. Stone, eds., 2019).

17. *Lochner v. New York*, 198 U.S. 45 (1905).

18. *THE FREE SPEECH CENTURY*, *supra* note 16, at 14-28.

19. *Id.* at 23-24.

20. *Abrams*, 250 U.S. at 630.

21. Professor of Law, Harvard Law School.

22. *THE FREE SPEECH CENTURY*, *supra* note 16, at 54-56.

23. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

24. *See, e.g.*, Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 6, 1941) (identifying the freedom of speech as one of the “four freedoms” that undergird the “kind of world [that] is the very antithesis of the so-called new order of tyranny which the dictators seek to create”).

25. Dean and Sol & Lillian Goldman Professor of Law, Yale Law School.

control of a state or local government, and to use it as a real-world test of its views, helps to advance the development of public opinion.<sup>26</sup> Somewhat incongruously, Gerken equates the development of public opinion with the act of “effecting change” — as though the freedom of speech were biased against maintaining the status quo.<sup>27</sup> Gerken also seems uncomfortable with some of the implications of her own argument, going out of her way to assure her readers that the contemporary power imbalance between the national and state governments means that state-level abuses (Jim Crow is the example she repeatedly invokes) cannot persist for long before the federal government corrects them.<sup>28</sup> Nonetheless, her core point is powerful: The Holmesian freedom of speech both reinforces, and is reinforced by, the presence of so many “laboratories of democracy” in our midst.<sup>29</sup>

Finally, two essays addressing campaign finance both, in their own ways, work from the Holmesian conception of the freedom of speech. In the first, *Citizens United: Predictions and Reality*, the renowned free speech litigator Floyd Abrams<sup>30</sup> reprises the argument he made in *Citizens United v. Federal Election Commission*<sup>31</sup> that to limit independent election-related expenditures by institutions is in tension with the holding of *Buckley v. Valeo*<sup>32</sup> that the First Amendment forbids limiting such expenditures by individuals. Both limitations, Abrams argues, “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,” thus diminishing the quality of the public debate.<sup>33</sup> In addition to defending *Citizens United*, Abrams observes that doomsday predictions about its effect have not come to pass: In the 2016 presidential election cycle, corporations made only minimal contributions to independent expenditure-only committees (so-called “Super PACs”), a reticence that Abrams attributes to the requirement, upheld nearly unanimously by the Supreme Court in *Citizens United*, that corporations disclose such contributions.<sup>34</sup>

For his part, Lawrence Lessig,<sup>35</sup> in *On the Legitimate Aim of Congressional Regulation of Political Speech: An Originalist View*, explores the inverse of the Holmesian freedom of speech: If the Holmesian freedom of speech protects speech that facilitates the process of self-government, Lessig outlines how free speech doctrine might permit regulation of speech that harms the process of self-government. To do so, Lessig focuses on the Supreme Court’s use of the prevention of “corruption”<sup>36</sup> as a warrant for upholding restrictions on political expenditures.<sup>37</sup> Arguing that the Supreme Court has defined “corruption” too narrowly by limiting it to quid-pro-quo exchanges,<sup>38</sup>

Lessig suggests that “corruption” should be defined as what happens when an institution comes to depend on something upon which it was not intended to depend.<sup>39</sup> Thus, in Lessig’s view, Congress’ dependence on donors represents a corruption of the framers’ intention that Congress answer only to the electorate, and thus has rendered Congress so institutionally corrupt as to warrant enhanced regulation of campaign contributions.<sup>40</sup>

### III. THE RECONCEPTION OF THE FREEDOM OF SPEECH

Other essays in *The Free Speech Century* document the reconception of the rationale for free speech away from protecting the development of public opinion, and thus the process of self-government, and toward serving the autonomy and dignity of each speaker.

Robert Post<sup>41</sup> begins his essay on *Freedom of Speech and the University* from a self-consciously Holmesian perspective, articulating three principles that he characterizes as “essential” to the “classic First Amendment tradition”: (1) no content discrimination; (2) official equality of ideas, in the sense that no idea may be deemed less deserving of protection than another; and (3) no compelling of speech.<sup>42</sup> Post then illustrates how little relevance those principles have in the campus setting: “In pursuing their mission to advance knowledge, universities regularly and routinely exercise content and viewpoint discrimination”; nor do they consider all ideas to be equal, because “if there were no such thing as a false idea, there would be no such thing as a true idea, and the entire aspiration of [academic] disciplines to produce expert knowledge would collapse.”<sup>43</sup> Post specifically criticizes the notion of a “marketplace of ideas” at a university, arguing that the notion of competition among equal ideas, each seeking the mantle of truth, has little purchase in the hierarchical, expert-driven dialogue of academia.<sup>44</sup>

Post diagnoses the source of current campus free speech controversies as the disconnect between the “classical” (i.e., Holmesian) purpose of the freedom of speech to protect speech necessary to the development of public opinion, and the university’s purpose of cultivating the mind through research and education.<sup>45</sup> While his “essential principles” serve the Holmesian freedom of speech, Post argues that the different purpose of higher education calls for “an entirely different framework.”<sup>46</sup>

Here, Post identifies something pivotal. As he explains, “[a]lmost all human action is communicative, and if First Amendment rights were interpreted to endow persons with sovereignty every time they spoke,” the people (collectively) would eventually find themselves in a world in which nothing was subject to regulation and nobody

26. THE FREE SPEECH CENTURY, *supra* note 16, at 70-75.

27. *Id.* at 69.

28. *Id.* at 76.

29. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

30. Senior Counsel, Cahill Gordon & Reindel LLP.

31. 558 U.S. 310 (2010).

32. *Buckley v. Valeo*, 424 U.S. 1 (1976).

33. THE FREE SPEECH CENTURY, *supra* note 16, at 91 (quoting *Buckley*, 424 U.S. at 19).

34. THE FREE SPEECH CENTURY, *supra* note 16, at 86-89.

35. Roy L. Furman Professor of Law and Leadership, Harvard Law School.

36. See, e.g., *Buckley*, 424 U.S. at 24-28; *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014).

37. THE FREE SPEECH CENTURY, *supra* note 16, at 96-103.

38. See *McCutcheon*, 572 U.S. at 235-44 (Breyer, J., dissenting) (offering similar criticism).

39. THE FREE SPEECH CENTURY, *supra* note 16, at 99-101.

40. *Id.* at 103-05.

41. Sterling Professor of Law, Yale Law School.

42. THE FREE SPEECH CENTURY, *supra* note 16, at 106-08.

43. *Id.* at 112-17.

44. *Id.* at 115-16.

45. *Id.* at 117.

46. *Id.* at 112.

was truly sovereign.<sup>47</sup> Post identifies the Supreme Court's extension of First Amendment protection to commercial speech in the 1970s as the fateful turning point away from the Holmesian freedom of speech.<sup>48</sup> As to campus speech, Post offers a two-part remedy: The university must clarify the nature of its educational mission (and how such speech fits with it), and free speech doctrine must halt its growth away from its core purpose of protecting the development of public opinion in aid of the process of self-government.<sup>49</sup>

In *Every Possible Use of Language?*, Frederick Schauer<sup>50</sup> sketches the same problem as Post and proposes a slightly different solution. The essay's title, of course, interrogates Holmes's admonition in *Frohwerk* that "the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language."<sup>51</sup> As Schauer argues,

there are few forms of human behavior that do not in some way involve the use of language. If "every possible use of language" generated First Amendment-inspired scrutiny, even if not ultimate protection or immunity, the First Amendment would apply to a truly vast range of behavior and to an equivalently vast range of government regulatory action [and] . . . would produce a constitutional environment in which the First Amendment dwarfed the remainder of the Constitution in importance.<sup>52</sup>

But, where Post fears that an expanded conception of the freedom of speech would stymie commonplace speech regulations such as food/drug labeling requirements and product safety instructions, Schauer fears that the judiciary would ultimately uphold such regulations and, in doing so, would dilute the force of the First Amendment.<sup>53</sup> In this connection, Schauer draws an illuminating distinction between "doctrinal" and "cultural" perceptions of the First Amendment, noting that one source of the First Amendment's force is the popular view that it safeguards something truly special.<sup>54</sup> Schauer's remedy is that the law should address issues of whether the First Amendment covers particular speech in a systematic fashion rather than on the current "case-by-case, ad hoc, and often

intuitive" basis.<sup>55</sup>

Sarah Cleveland's<sup>56</sup> *Hate Speech at Home and Abroad*, which compares and contrasts the treatment of extremist speech under American and international law, also reflects the First Amendment's turn away from the Holmesian rationale of serving self-governmental processes. Cleveland observes<sup>57</sup> how American law progressed from refusing to protect some hate speech — including in court decisions that reasoned that certain words "are no essential part of any exposition of ideas"<sup>58</sup> — to protecting equally extreme speech.<sup>59</sup> Comparing the approach of American law with that of the United Nations International Covenant on Civil and Political Rights, Genocide Convention, and Convention on Racial Discrimination, Cleveland concludes that, "while the international community has been much more willing to restrict expression that is hateful and discriminatory, in the name of protecting other rights, the United States' commitment to free expression in a democracy and its suspicion of government regulation have vitally shaped global norms regulating hate speech."<sup>60</sup>

#### IV. THE POSTMODERN FREEDOM OF SPEECH

A final set of essays in *The Free Speech Century* reveals the tensions that have emerged as the expanded conception of the freedom of speech has been applied to protect an ever-expanding swath of speech and has begun to encounter a truly postmodern communications environment.

Catherine MacKinnon's<sup>61</sup> *The First Amendment: An Equality Reading* exemplifies one consequence of the expanded rationale for protecting speech. She rejects the hallowed free speech doctrine of subject/viewpoint neutrality, arguing that "[n]eutrality as a doctrinal approach can be seen to support the status quo distribution of power — that is, inequality, enforced by practices of discrimination, including expressive ones . . . ."<sup>62</sup> She argues that the legality of a speech regulation should instead be judged by a standard of "substantive equality" — an exercise that would require "asymmetrically exposing harms of discrimination done by expressive means, permitting their careful restriction, and supporting expression by subordinated groups against their inequality."<sup>63</sup>

There is much to criticize in MacKinnon's proposal, including

47. *Id.* at 109.

48. *THE FREE SPEECH CENTURY*, *supra* note 16, at 109-10; *see, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). One might alternatively argue that it was the Supreme Court's extension of First Amendment protection to pornography in the 1960s. *Redrup v. New York*, 386 U.S. 767 (1967) (books); *Stanley v. Georgia*, 394 U.S. 557 (1969) (movies).

49. *THE FREE SPEECH CENTURY*, *supra* note 16, at 119-20, 122.

50. David and Mary Harrison Distinguished Professor of Law, University of Virginia.

51. 249 U.S. at 206.

52. *THE FREE SPEECH CENTURY*, *supra* note 16, at 41-42.

53. *Id.* at 41-46.

54. *Id.* at 45-46.

55. *Id.* at 39-41, 46.

56. Louis Henkin Professor of Human and Constitutional Rights, Columbia Law School.

57. *THE FREE SPEECH CENTURY*, *supra* note 16, at 212-15.

58. *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (affirming conviction for distribution of literature calling for "halt [to] the further encroachment, harassment

and invasion of white people, their property, neighborhoods and persons, by the Negro" and claiming that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will").

59. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing conviction for exhorting crowd to "Send the Jews back to Israel," "Save America," and "Bury the n\*\*\*\*rs") (per curiam); *Brandenburg*, 395 U.S. at 457 ("Apart from rare instances . . . speech is, I think, immune from prosecution.") (Douglas, J., concurring); *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir. 1978) *cert. denied* 439 U.S. 916 (1978) (rejecting argument that proposed neo-Nazi march in Skokie, Ill., is "totally lacking in social content" on ground that "every person must be his own watchman for truth") (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); *see also Snyder v. Phelps*, 562 U.S. 443, 451-55 (2011) (characterizing statements such as "Thank God for IEDs," "Thank God for Dead Soldiers," "God Hates F\*\*s," "You're Going to Hell," and "God Hates You" to comprise speech "on matters of public concern").

60. *THE FREE SPEECH CENTURY*, *supra* note 16, at 210, 216-29.

61. Elizabeth A. Long Professor of Law, University of Michigan; James Barr Ames Visiting Professor of Law, Harvard Law School.

62. *THE FREE SPEECH CENTURY*, *supra* note 16, at 142.

63. *Id.*

the vague and subjective definition of “substantive equality.” But her proposal can be viewed as a natural consequence of the unmooring of the freedom of speech from its Holmesian rationale of serving the development of public opinion in aid of the process of self-government. As others have observed, the expansion of free speech rights in recent decades “has brought on an awareness of their emptiness in serving the larger, common political good. The yearning for political community and a shared purpose transcending individual interest has in turn generated vigorous calls for First Amendment constriction in service of what are claimed to be higher ends . . . .”<sup>64</sup> One suspects that MacKinnon’s will not be the last such call.

Focusing on the narrow issue of government leaks, David Strauss<sup>65</sup> in *Keeping Secrets* illustrates how the law around publication of secret government information has failed to keep pace either with the expanded rationale for free speech or with postmodern technology. Strauss starts from *New York Times Co. v. United States*,<sup>66</sup> the 1971 Supreme Court decision that, without condoning Daniel Ellsberg’s leak of the “Pentagon Papers,” permitted the *New York Times* to publish those papers. Strauss observes that *New York Times* preserved an important means by which the citizenry could learn about a matter of public concern and could hold the government accountable — at least, as long as some institutional media outlet agreed to publish the story.<sup>67</sup> But, by refusing to condone the act of leaking, *New York Times* also ensured that leakers would continue to risk consequences, thereby encouraging them to be deliberate in both their choice to make the leak and their selection of specific information to leak.<sup>68</sup> As Strauss argues, the “Pentagon Papers” system has been outmoded as the availability of sensitive information to potential leakers has increased and the role of traditional media outlets as “gatekeepers” has decreased.<sup>69</sup> Strauss is particularly troubled by the rise of bulk leakers such as Edward Snowden, whose leaks are indiscriminate (and indiscriminately destructive).<sup>70</sup> But it is one of Strauss’ own prescriptions that reveals just how outmoded the First Amendment of the past has become. Specifically, he suggests that the postmodern world of leaks might require the government “to

operate with a distinction between responsible media outlets that are committed in some way to journalistic professionalism and other outlets that are not”<sup>71</sup> — a suggestion fraught with risks that the government might abuse any authority it is given to deem journalism “responsible” or “irresponsible.”

*The Free Speech Century* includes two essays that purport to address the role of online media platforms in free speech law, Emily Bell’s<sup>72</sup> *The Unintentional Press* and Monika Bickert’s<sup>73</sup> *Defining the Boundaries of Free Speech on Social Media*. Unfortunately, both represent missed opportunities. Bell despairs the role that online platforms can play in promoting or suppressing speech and argues that “it is important that the new gatekeepers of public discourse understand the role they play in the creation and maintenance of a networked public sphere.”<sup>74</sup> But she neither describes the legal parameters of what that role is — not even exploring the most obviously relevant regulation, the Communications Decency Act of 1996<sup>75</sup> — nor argues for a normative vision of what that role should be. Bickert’s essay alternates between airy platitudes (“For [social media] companies, good policy is not just about doing the right thing. It’s good business.”<sup>76</sup>) and inscrutable technical talk, and ultimately comes across as merely an attempt to defend the technology industry’s existing business practices.

*The Free Speech Century*, though, saves some of its best material for last. It comes in the form of Tim Wu’s<sup>77</sup> *Is the First Amendment Obsolete?*, an essay both less sensational and more electrifying than its title suggests. Wu’s crucial insight is that the American law of free speech was designed to fit a world in which: speech was expensive and difficult; government action posed the primary threat to speech; and the law needed to protect speakers from government censorship in order to ensure that speech would not become scarce.<sup>78</sup> Those assumptions, Wu matter-of-factly observes, no longer hold: speech is cheap, easy and abundant; and the struggle is not to speak, but rather to capture the audience’s increasingly scarce attention so as to be heard.<sup>79</sup> What’s more, Wu observes, some of the most grave threats to being heard are posed not by government censorship, but rather

64. Marc O. DeGirolami, *The Sickness Unto Death of the First Amendment*, 42 Harv. J.L. & Pub. Pol’y 751, 754 (2019) (arguing that proposals to “constrict” scope of free speech rights are “predictable”).

65. Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School.

66. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

67. *THE FREE SPEECH CENTURY*, *supra* note 16, at 125-27; *accord New York Times Co.*, 403 U.S. at 728 (“[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry — in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”) (Stewart, J., concurring).

68. *THE FREE SPEECH CENTURY*, *supra* note 16, at 126-27

69. *Id.* at 127-28.

70. *Id.*

71. *Id.* at 137.

72. Director, Tow Center for Digital Journalism, Columbia Journalism School.

73. Head of Policy Management, Facebook.

74. *THE FREE SPEECH CENTURY*, *supra* note 16, at 248.

75. 47 U.S.C. § 230 (1996).

76. *THE FREE SPEECH CENTURY*, *supra* note 16, at 271.

77. Julius Silver Professor of Law, Science and Technology, Columbia Law School.

78. *THE FREE SPEECH CENTURY*, *supra* note 16, at 274-76.

79. *Id.* at 279-84; *see id.* at 278 (“Every hour — indeed, every second — of our time has commercial actors seeking to occupy it in one way or another.”).

by the aggressive use of speech itself, often through tactics that take advantage of the audience's very scarcity of attention by dealing in sensationalism and outrage.<sup>80</sup> Wu identifies "flooding" and "shaming/trolling" as two such tactics and identifies how those tactics have been employed by the Chinese and Russian governments.<sup>81</sup>

Therefore, Wu argues, the law of free speech must either evolve or find itself playing an increasingly cabined, although still important, role.<sup>82</sup> Wu prefers evolution, especially as to how free speech law serves to create and maintain a healthy "speech environment."<sup>83</sup> He argues that fresh thinking on that topic "may force us to confront buried doctrinal and theoretical questions," such as whether free speech would ultimately be well-served by: (1) expanding what counts as "state action" for First Amendment purposes; (2) strengthening and enforcing legal prohibitions on cyberstalking, harassment, threats, trolling and the like, with an eye to interdicting the use of speech as a weapon; and (3) reinvigorating free speech concepts that seek to protect listeners' interests, such as the "captive audience" doctrine<sup>84</sup> and something akin to a "fairness doctrine"<sup>85</sup> for online media platforms.<sup>86</sup>

Wu's essay responds to the same concerns identified by Post: specifically that, as the rationale for the freedom of speech has grown afield from its Holmesian rationale of protecting the development of public opinion in aid of the process of self-government, ever more speech has been protected, government regulation of speech has become ever harder to justify, and the freedom of speech has begun to strain under the weight of its own demands. To those concerns, Wu offers a refreshingly outside-the-box perspective that focuses not merely on identifying what speech the law ought to protect, but rather on the law's role in vouchsafing an environment that ensures that the freedom of speech is not overwhelmed by our postmodern times.

— Eric A. Haskell

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80. *Id.* at 280-84.

81. *Id.*

82. *Id.* at 285.

83. THE FREE SPEECH CENTURY, *supra* note 16, at 287-91; *see also* Tim Wu, *Is the First Amendment Obsolete?*, 117 Mich. L. Rev. 547, 571-72 (2018) (arguing that it is within the province of free speech law to create duties to "protect both

listeners and speakers, and thereby promote an environment conducive to political debate").

84. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474 (1988); *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

85. *See Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

86. THE FREE SPEECH CENTURY, *supra* note 16, at 274, 285-91.