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Provocative, Human, Eclectic

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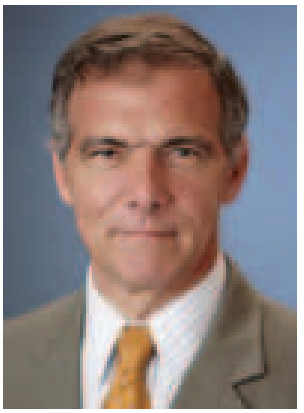
From the President

The More We Grow, the More Our Community Receives

By Robert J. Anello



In 1932, the Federal Bar Council – then known as the Federal Bar Association of New York, New Jersey and Connecticut – separated from the national Federal Bar Association over that association's then-restrictive racial policies and established itself as an organization designed to encourage inclusion and fellowship among practitioners. Since then, the Federal Bar Council has risen to be the premier bar association for lawyers practicing in the courts of the Second Circuit. Today, although still holding true to its original ideals, the Council has expanded its mission to provide an array of assistance to the lawyers, the bench, and the community served by the courts of this circuit. During my two years as president of this outstanding organization, I have been impressed by the diversity of the members who participate in all areas of federal practice and lend their energy, creativity, and talent to ensure that the Council remains on the leading edge of legal associations. Because of those members' unique sensitivity to the interests of the federal legal community, including the bench, the Federal Bar Council has been able to develop a collaborative working relationship with the leaders of the bar as well as the judges of this circuit and beyond. Through this collaboration, the Council has been able to participate in and develop programs that benefit our members and our community.

Like all bar associations, the Council must address the fundamental question: What makes our organization unique among the many other bar associations? Almost all bar organizations offer a chance for attorneys to network with other lawyers in their field, and almost all offer opportunities for professional development and continuing legal education. The Council's dinners, receptions, and conferences are a mainstay of the area's professional social calendar. Because fostering collegiality is one of the primary missions of the Council, these networking opportunities always will play an important role in the organization. Recently, however, the Federal Bar Council has responded to its membership's and the bench's call to use the skills we help hone and the collaborative dynamic that the Council has developed to provide increased opportunities for our membership to participate in projects that serve the needs of the larger public. Although much of the energy to organize and undertake such programs comes from our practicing members, many of the ideas and inspiration grow out of our members' dialogue with members of the bench.

The Council creates many opportunities for judicial input so valuable to defining and guiding our service to the bar and the public. Our judges have helped us identify that the first step in understanding and responding to the public's needs starts with developing a productive working relationship between lawyers and the courts. The Council fosters collegiality between the bench and bar by welcoming judges at various events, such as the annual Thanksgiving Eve Luncheons and Law Day Dinners and our Fall and Winter Retreats. Our First Decade Committee – devoted to attorneys in their first 10 years of practice – sponsors informal luncheons with judges in our "Brown-Bag Luncheon" series, providing young attorneys a chance to participate in informal discussions with federal judges. Since the series' inception in 2003, the Committee has hosted over 50 of these events, typically attended by 30 to 50 attorneys.

Committees

The Council and its members also benefit from judicial input through the participation of judges on many of our committees – the Council currently has three judges actively involved on our Public Service Committee, three on our

Second Circuit Courts Committee, four on the Committee on Sentencing and Alternatives to Incarceration, and one on the recently formed Federal Criminal Practice Committee. The Council sponsors a chapter of the American Inns of Court; each month, a team of the Inn, made up of a judge, senior members of the Council, and more junior lawyers, gets together to present an intellectually stimulating CLE program. Through these programs and informal discussions, the Inn aims to promote the ideals of professionalism, ethics, and legal skills, and fosters a sense of mentorship among senior and junior members of the legal community.

The insight provided to the Council by federal judges afforded to the Council during our events, retreats, and committee meetings has proved invaluable in directing our public service efforts. Through our proactive Public Service Committee and the dynamic leadership of Lewis Liman, the Council has responded to Chief Judge Robert Katzmann's call for courts to increase access to justice for immigrants in the Second Circuit. Recently, the Council announced that through its charitable foundation, we will sponsor a two-year fellowship in the Immigrant Justice Corps ("IJC"), the country's first fellowship program dedicated to meeting the need for high-quality legal assistance for immigrants seeking citizenship and fighting deportation. The IJC recruits talented lawyers and partners them with New York's top non-profit legal services providers and community-based organizations to provide a wide number of services, including naturalization assistance, deportation defense, and help with applications for asylum seekers. We hope that the success of this new program will lead to opportunities for the Council to promote future fellowships.

Asylum Seekers

In another effort to respond to Judge Katzmann's access to justice initiative, the Council was instrumental in establishing a program for full representation of asylum seekers over the last two years. The program, in partnership with the Immigration Study Group and Human Rights First, screens Immigration Court cases that have been identified as potentially meritorious cases for *pro bono* representation and secures counsel for *pro se* litigants facing removal proceedings. The Council is now looking to expand this successful program beyond the pilot phase, which, to date, has provided full representation to over 75 indigent immigrants and advice to hundreds of *pro se* litigants. Our Public Service Committee has partnered with the Second Circuit and the Immigration Justice Clinic at Cardozo Law School to represent *pro se* petitioners in determining whether their interests are best served by seeking remand to Immigration Court or having the Second Circuit hear their cases on the merits.

Also growing out of the Council's close working relationship with the courts is the Public Service Committee's Limited-Scope Representation Program. As a pilot program conducted in the Southern District of New York, the committee helps appoint *pro bono* counsel for the limited role of assisting *pro se* plaintiffs in taking and defending depositions and related discovery to help those plaintiffs prepare for the summary judgment phase. Under this program, *pro bono* counsel are permitted by the court to limit their voluntary commitment to this discrete phase of the litigation.

In addition to the active public service programs established by the Council, in the last several years the Council also has provided a forum to examine subjects affecting the broader community. In 2012, for example, the Committee on Sentencing and Alternatives to Incarceration chaired by Larry Krantz held two programs moderated by the Honorable John Gleeson, U.S. District Judge for the Eastern District of New York, entitled "Alternatives to Incarceration: The Use of 'Drug Courts' in the Federal and State Systems," and "Reining in Mandatory Minimums: Perspectives from Both sides of the 'V'." Both programs brought attention to the rate of incarceration in our country, a problem in dire need of reform. In one of my previous articles for the *Federal Bar Council Quarterly*, I highlighted several of the Second Circuit's drug court programs. Drug courts – such as POP, STAR, and SOS – are rehabilitation programs aimed at assisting offenders in reintegrating into their communities and society at large. Those

judge-run programs include regular meetings with judges, who, in many cases, step down from the bench, take off their robes, and talk directly to program participants in an effort to reduce their chances of returning to prison.

Over the past decade, the growth of our organization – our membership has grown by 550 just in the past year – has provided the Council with increased opportunities to address some of the needs of our broader community. Through the efforts of our staff and members of the Federal Bar Foundation, we also have been able to increase the limited funds the Council has available to assist in such programs. As the Council continues to develop and participate in important and successful programs that serve the needs of our greater community, the Council and its Foundation will become an increasingly attractive option for firms seeking to donate to charitable legal services. These programs also will help us continue to attract new members. Finally, with the stability of an incredible, hard-working staff, the Council is poised to undertake programs that can make a difference.

As I pass the torch onto our next president, the illustrious and indefatigable Vilia Hayes, I challenge our organization to find new ways to adhere to this expanded mission. I have no doubt the Council, with the inspiration of the judiciary and a force of 3,865 of the sharpest minds in our legal community, will meet this challenge.

From the Editor

My Life on Trains

By Bennette D. Kramer



After the death of my father last year I started thinking about train travel. My father and I shared a love of trains. His arose from his years as a director of, and legal counsel to, two railroads and mine from much train travel beginning at an early age. My father became the director of the St. Louis/San Francisco Railroad when I was quite young and we were living in Chicago. He went on the board at the urging of his old friend Louis Menk, who was the president of the Frisco. After the Frisco Railroad was acquired by Burlington Northern in 1980, Dad became a director and legal counsel to the Burlington Northern.

Because Dad was the director of a railroad, our family traveled everywhere by train for free. As the oldest of five children, I frequently was put on the train to visit grandparents. When we lived in Chicago, I traveled to Kansas City alone to visit my grandparents who lived there. We moved from Chicago to Kansas City when I was 11, so I must have been traveling alone at eight, nine, and 10. I do not have a clear recollection of those trips, but do remember kind Pullman porters (we received free Pullman tickets, too), who helped me pull down the bed and let me know where we were. I always was a great reader so I would dive into the books I had brought along. The thought of sending a child on an overnight train trip by herself at the age of eight or nine would horrify most modern parents, but my parents did not seem to worry at all.

On the Atchison Topeka & Santa Fe

After my family moved to Kansas City, I traveled by train to visit my other grandparents who lived in Tucson, Arizona – a much longer trip. I remember quite a few visits to Tucson where my retired grandfather owned and ran an apartment complex, where his Chicago friends came to spend the winter. I traveled on the Santa Fe Railroad (the Atchison Topeka & Santa Fe Railroad), now part of the Burlington Northern, Santa Fe Railroad. The train trips were long – several days – and I read, talked to fellow passengers, and ate in the dining car. Again, I remember the Pullman porters as kind and friendly men who would lend a hand when necessary and let me know where we were. I remember traveling through Kansas, Oklahoma, Texas, New Mexico, and Arizona. The landscape became

drier and more deserted the further west we went. I read many books during those trips. I must have traveled during school vacations. I do remember being in Tucson in the summer when it was very hot, probably in June before the family traveled to Michigan.

On summer trips to Michigan, my mother and younger siblings would travel overnight by train from Kansas City to Joliet, Illinois, and one or two of my sisters and I would drive with my father. We would pick up my mother along with my brother and sister in the morning and drive the rest of the way to our house in Michigan. In those days, the Interstate Highway System had just begun, so the roads we traveled were two lanes and very slow.

I continued my trips to visit my grandparents in Tucson throughout high school. I loved the Tucson of those days in the 1950s and early 1960s. It was a relatively small town and my grandfather was a big fish – on the board of the University of Arizona and dedicated to contributing to the city of Tucson. He had many friends and would include me in dinners and lunches. I also would play cards and sit and talk to my grandmother for hours. For one of five children, it was a brief opportunity to be an only child.

Changing Trains

In 1962, I went to Smith College. There was never any question that I would travel back and forth between Kansas City and Northampton, Massachusetts, by train. There was not a direct connection between Kansas City and Northampton, like the connection between Kansas City and Tucson, so I would travel to St. Louis or Chicago, change trains, and then go to New York City, where I would catch a train from New York to Northampton. I always went home for Christmas and mostly for spring vacation. I made every trip except for the last one by train. Airline travel was becoming more regular and less expensive, so my period on the train started during the high point of train travel and ended as train travel was winding down. The end of the train travel era occurred with the cancellation of railway postal contracts in the mid-1960s, just as I was graduating from college.

I enjoyed most of my trips back and forth between Kansas City and Northampton. The trips to school seemed long as I went through Missouri, Illinois, Indiana, Ohio, Pennsylvania, New Jersey, New York, Connecticut, and Massachusetts. I developed a good sense of Midwestern and Eastern geography and got a lot of reading done. I was glad to get to school at last. I always spent the trips home after exams sleeping and enjoyed the decompression time.

My train trips, particularly the early ones, took place during the heyday of train travel. There were

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plenty of trains going my way and it was relatively easy to travel across the country. The trains were full. The food in the dining cars was good (at least to my uncultured palate) and the dining experience very civilized. I must admit that the opportunity to always travel on a Pullman car enhanced my train experience.

The increasing availability and convenience of air travel with the advent of jet planes in the 1960s spelled the end of train travel as I had experienced it in the 1950s and early 1960s. Now, train travel is often more expensive than air travel and schedules are unreliable. Part of the problem today is that many tracks have been abandoned and passenger trains share tracks with freight trains. Freight trains have priority, so passenger trains are often put onto side tracks to wait for freight trains to pass. Thus, passenger trains are often interrupted to wait for freight trains.

From time to time, I have tried to go one place or another by train, only to discover that the times were inconvenient and the cost was almost prohibitive. For example, in 1999, my father, his wife, my sister and her husband, and my husband and I tried to travel from San Diego to San Francisco by train. The only train left at 5 a.m. and took all day. We never got into the cost. We drove instead and it took a far shorter time than the train was scheduled to take. I mourn the days of easy and convenient train travel. My time on trains was time apart, suspended between two places, two groups of people. I always had plenty of time to prepare for what was ahead.

In the Courts

Southern District of New York Celebrates Its 225th Anniversary

By Magistrate Judge Lisa Margaret Smith



On Tuesday, November 4, 2014, the Southern District of New York held a celebratory Special Session in its Ceremonial Courtroom at the Daniel Patrick Moynihan U.S. Courthouse in lower Manhattan in honor of the 225th anniversary of "the Mother Court." The First Session of a United States court was held by the District of New York in the Royal Exchange, then located at the foot of Broad Street in New York City, approximately two months before the Supreme Court held its first session, on February 2, 1790, thus making the District of New York the first federal court to sit in the fledgling United States. Both courts were established by the Judiciary Act of September 24, 1789. The First Session of the District of New York took place on the first Tuesday of November 1789, just as this Special Session occurred on the first Tuesday of November, 225 years later. On the occasion of the First Session, 30 men were admitted to the Bar of the District Court, including Richard Harrison, the first U.S. Attorney for the District of New York; Aaron Burr, who was to become the country's third vice president; and Henry Brockholst Livingston, later appointed the sixteenth Justice of the Supreme Court. The minutes of the First Session reflect that no business was conducted that day by the presiding judge, the Honorable James Duane, who had been appointed by George Washington to serve as the first judge of the District of New York.

The Special Session was presided over by the Honorable Loretta A. Preska, Chief Judge of the Southern District of New York, with a crowd of about 500 members of the bench and bar in attendance, in the Ceremonial Courtroom and in several overflow locations. An American flag from the colonial period was escorted into the courtroom to music by members of the New York Ancients Fife and Drum Corps, wearing their colonial garb. The procession included Preet Bharara, the current U.S. Attorney for the Southern District of New York, along with representatives of the Maritime Law Associa-

tion. After the National Anthem was played by the Fife and Drum Corps, Chief Judge Preska called on Robert B. Fiske, Jr., the U.S. Attorney for the Southern District of New York from 1976 to 1980, to comment on the occasion as a representative of the members of the Southern District's bar. Mr. Fiske also had offered remarks 25 years ago, at the court's 200th anniversary celebration. Mr. Fiske refrained from repeating the history of the court that he had delivered in 1989, instead talking about changes that have taken place during the 25 years since his earlier speech. Mr. Fiske noted that both numbers of trials and trials as a percentage of filings have suffered a significant decline during this period, both in the Southern District and nationwide, although filings themselves have increased. He commented on the dramatic change in the diversity profile of the bench during those 25 years, now including significant numbers of women and minorities, including, currently, three openly gay judges. Echoing some of his remarks from 1989, Mr. Fiske commented on the advances in technology that have impacted the court; while in 1989 he was talking about word processing and computers, today we are assisted by electronic case filing and video-conferencing, among many other innovations barely imagined (if at all) in 1989.

The Acting U.S. Marshal, the Honorable Eric Timberman, delivered a Silver Oar, made available for the Special Session by its custodian, the Museum of the City of New York, to the bench. The Silver Oar is, as the name implies, an oar made out of silver, inscribed "Court of Vice-Admiralty New York," and it symbolizes the history of the District of New York as having succeeded the Vice-Admiralty Court of the Province of New York, which sat in New York from 1678 to 1775, and the Admiralty Court of the State of New York, which then existed until the District of New York took its place in 1789. The importance of the court's Admiralty jurisdiction, represented by the Silver Oar as well as by members of the Maritime Law Association, was highlighted in eloquent remarks delivered by the Honorable Charles S. Haight, Jr., District Judge of the Southern District of New York. Judge Haight noted that "it is not surprising that when this court opened for business 225 years ago, it was largely limited in its jurisdiction to maritime cases, and remained so for the next hundred years, a century which ... saw the expansion of the nation's maritime commerce and its increased concentration in the Port of New York. While today the judges of the court deal with issues of civil and criminal law that Judge Duane could never have dreamt of, maritime cases continue to be an important percentage of those filed." Judge Haight observed that cases both famous and infamous, such as the litigation emanating from the collision of the ships *Andrea Doria* and *Stockholm*, have been among the admiralty cases resolved in the Southern District of New York. Using prose which can only be described as lyrical, and with a solemn voice rich in its timbre, Judge Haight commented:

> Admiralty cases will always arise from time to time because, unlike temporal practices that maritime industries may alter, the perils of the sea are eternal. "Protect me, Lord," goes the traditional mariner's prayer, "for Thy sea is so great and my boat is so small." That prayer resonates today, even though some boats are so large they cannot fit into any American port, because however large or automated a ship may be, the world's oceans, which cover two-thirds of the planet and seem to be covering more each day, are greater still, and their fury, when aroused, is not deterred by human technology. Of necessity, this court has always been a great admiralty court. It will remain so.

Judge Haight concluded his remarks with this thought:

> For the sea itself is eternally fascinating, and so are ships and those who go down to the sea in ships, who by their daring or distress, courage or cowardice, foresight or foolishness, triumphs or tragedies of navigation, give employment to admiralty judges and lawyers, thereby generating that equally fascinating body of law that we call admiralty. Chief Judge, I have completed my voyage. I am grateful for

this opportunity to return to my home port.

The co-chairs of the 225th Anniversary celebration, the Honorable P. Kevin Castel and the Honorable Deborah A. Batts, each offered remarks about the occasion. Judge Castel revealed that the court has celebrated this occasion every 25 years since 1939 (the 150th anniversary). He mentioned additional famous cases from the court's admiralty jurisdiction, including claims from the sinking of the *Titanic* in 1912, the torpedo attack on the *Lusitania* in 1915, and the fiery tragedy of the *General Slocum* in the East River that resulted in more than 1,000 deaths in 1904. Criminal cases both large and small have been prosecuted in what is now known as the Southern District of New York (Judge Castel noted that it was 200 years ago that the District of New York was separated into the Northern District and the Southern District), including, among many others, the Rosenbergs, Alger Hiss, former Attorney General John Mitchell, Bernard Madoff, Imelda Marcos, and the East Africa embassy bombers. Included on the docket have been seminal cases such as the Pentagon Papers litigation and *Erie Railroad v. Tompkins*. Judge Castel concluded his remarks by quoting the oath taken by all federal judges:

> We hope that you will appreciate that the glory of the court is not in the personalities and intellects of those who sit on its bench. We are only temporary custodians. It lies in the process, handed down to us by generations before, of deciding disputes without fear or favor according to the facts and the even-handed application of the rule of law. It is summed up in the oath that each of us have taken for the past 225 years: to "administer justice without respect to persons, and do equal right to the poor and to the rich…."

The Southern District of New York held a celebratory Special Session in its Ceremonial Courtroom at the Daniel Patrick Moynihan U.S. Courthouse in honor of the 225th anniversary of "the Mother Court."

Judge Batts offered the committee's appreciation for those organizations and individuals who had contributed in a variety of ways to the anniversary celebration, most especially by making available such unique historic items as the Silver Oar and Judge Duane's original commission, signed by George Washington, which was on display before and after the Special Session. Judge Batts also described many of the events scheduled over the coming year in celebration of the court's anniversary, and invited the assembled multitude to attend as many as possible. The anniversary events include an Exhibition of Courtroom Sketch Art, which is in the main lobby of the Thurgood Marshall U.S. Courthouse, where it will remain through May 4, 2015. Three reenactments of significant cases are scheduled, including the *Pentagon Papers* case, on January 15, 2015 at the Moynihan Courthouse; a patent trial called *American Pin v. National Button*, on February 26, 2015, also at the Moynihan Courthouse; and the trial of John Peter Zenger at the Charles L. Brieant, Jr. Federal Building and U.S. Courthouse in White Plains, on May 14, 2015. Additional presentations will be made about the lives of three significant members of the Southern District bench: Judge Edward Weinfeld on March 26, 2015, Judge Learned Hand on April 23, 2015, and Judge Constance Baker Motley on September 17, 2015, all at the Moynihan Courthouse. The schedule of these and other events can be found at the court's Web site under the "About the Court" dropdown menu, by clicking on "News and Events." *See*, http://nysd.uscourts.gov/events-exhibits.php.

Those in attendance at the Special Session of the Southern District of New York were treated after the session to a festive reception in honor of the occasion, in the Constance Baker Motley Jury Assembly Room in the Moynihan Courthouse. It is fair to say that the entire occasion was both celebratory and solemn, marked as it was by music, laughter, and a large dose of history. The Southern District of New York is rightfully proud of its storied history.

FBC News

FBC Foundation Celebrates 50th Anniversary

By Margie Berman



The majestic Alexander Hamilton U.S. Custom House was the glorious site of the 50th anniversary celebration of the Federal Bar Foundation and the inaugural presentation of the Justice Thurgood Marshall Award for Exceptional Pro Bono Service. Designed by Cass Gilbert, who later designed the U.S. Supreme Court, the Custom House, built between 1902 and 1907, is a masterpiece of the Beaux-Arts style and provided a stately backdrop to the evening's events. Close to 300 Council members enjoyed a fact-filled tour of the interior, delightful delicacies, striking strings, and compelling comments. The evening's program, "Celebrating Access to the Court of the Second Circuit," surveyed the many projects of the Foundation that have expanded access to the court.

Council President-Elect Vilia Hayes opened the presentation with a brief history of the Foundation's many good works in support of the Council, noting programs such as cutting-edge continuing legal education programs, funding for student interns at the U.S. Attorney's Office, and the Federal Courts Visits Program, in which middle school and high school students observe the court in action. She praised the work of the Public Service Committee, whose work Hayes first learned of in connection with its representation of families of first responders following September 11th. She went on to describe new programs, including a Limited Representation project that matches *pro bono* lawyers (who get deposition experience) with Section 1983 plaintiffs who need representation. She also noted the formation of the Asylum Representation Project where lawyers screen and provide representation to indigent immigrants facing deportation.

Tom Bezanson, president of the Federal Bar Foundation, followed Hayes focusing on additional programs that promote access to the courts. He proudly announced that the Council, with support from the Foundation, will be funding a two-year Immigrant Justice Corps Fellowship. The Immigrant Justice Corps began this year at the initiative and under the leadership of Chief Judge Robert Katzmann. Its purpose is to train recent law school graduates to provide critically needed representation to non-citizen immigrants so as to prevent deportation and to find a path to citizenship. In the words of Judge Katzmann, in the area of immigration, "competent counsel can make the difference between staying in this country and pursuing the American dream, or facing deportation."

Pro Bono Award

The evening's highlight was the presentation of the first annual Justice Thurgood Marshall Award for Exceptional Pro Bono Service to Alan Schoenfeld, counsel at Wilmer Hale. Lewis Liman, chair of the Public Service Committee, explained that the award was created to honor attorneys in private practice who demonstrate exemplary commitment to *pro bono* legal services, and who provide or facilitate the provision of *pro bono* services in federal courts or agencies within the Second Circuit. "Competition was stiff," Liman reported, with many nominees considered for the honor. After much deliberation, however, Schoenfeld was an obvious candidate, Liman explained. Noting specifically Schoenfeld's work in the area of immigration rights, LGBT rights, special education, and federal Indian law, Liman presented Schoenfeld with the much deserved award.

Pay It Away

Schoenfeld humbly accepted the award, recognizing the privileges with which he has been blessed, and the need to give back. Sharing the words of Emerson to

"beware of too much good staying in your hand ... pay it away quickly in some sort," Schoenfeld's *pro bono* work is his means to "pay it away." Grateful for the opportunities to represent people in need, Schoenfeld described justice as follows:

> Our *pro bono* clients each have a story to tell in the service of some ultimate goal in the law. Those stories are uplifting and terrifying and complicated and frustrating and sad. But told well and powerfully, and told patiently to judges and juries who can be made to understand the challenges and indignities that face people in need, those stories can become new chapters in our clients' lives, and in the law, and make a fairer and more just society.

The evening's highlight was the presentation of the first annual Justice Thurgood Marshall Award for Exceptional Pro Bono Service to Alan Schoenfeld.

The celebration and recognition of Schoenfeld's work was an inspiring conclusion to an evening celebrating justice and access to the courts.

The 50th anniversary celebration was organized by Bob Anello, Lewis Liman, and Tom Bezanson with the able assistance of FBC Executive Director Joan Salzman and her staff, including Donna-Jean Plante Plante and Lorraine Letizia.

Legal History

P.T. Barnum, Justice Harlan, and Connecticut's Role in the Development of the Right to Privacy

By James I. Glasser and Benjamin M. Daniels





Next year marks the 50th anniversary of *Griswold v. Connecticut*, 381 U.S. 479 (1965), the landmark case that recognized a constitutional right to privacy. Although the case is well known, the history leading to this important decision is not. The challenged statute in *Griswold* was championed by none other than Phineas T. Barnum, the founder of Barnum & Bailey circus. Barnum supported the legislation to curb both obscenity and the burgeoning use of contraceptives. Once passed, the law was on the books but was largely ignored for nearly 75 years. It was not until birth control clinics began popping up during World War II that Connecticut began to enforce the law. In 1939, two doctors and a nurse working at a clinic were arrested. These arrests were the opening salvo of court battles that would span the next 25 years. Ultimately, Justice John Marshall Harlan II (another Connecticut resident) would play a central role in overturning the Connecticut law championed by Barnum and in establishing the enduring right of privacy. *Griswold* profoundly changed civil liberties, laying the groundwork for recognition of the right to terminate a pregnancy (*Roe v. Wade*), the right to private, consensual same-sex relations (*Lawrence v. Texas*), and the right to choose family living arrangements (*Moore v. East Cleveland*).

P.T. Barnum, Champion of Victorian-Era Values

Connecticut's anti-contraception statute was part of a na-

tional, Victorian-era movement to criminalize birth control. Born from complex issues of race, gender, and class that arose during post-Civil War urbanization, the anti-contraception movement was led by New Canaan, Connecticut, native Anthony Comstock, "a prominent anti-vice crusader who believed that anything remotely touching upon sex was obscene." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.19 (1983). Comstock founded the New York Society for the Suppression of Vice, a vigilante vice squad that seized obscene materials and arrested its distributors.

Comstock also lobbied for federal legislation to prohibit the circulation of obscene literature. In 1873, Congress passed the "Comstock Act," which made it illegal to sell or distribute "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion" through the U.S. Mail. *See* 42 Cong. Ch. 258, March 3, 1873, 17 Stat. 598. Comstock secured a position as a special Postal Inspector to enforce the Comstock Act, and used his position to impound or destroy items he considered lewd or obscene ranging from fine art to anatomy textbooks.

Soon after Congress passed the Comstock Act, states began enacting "mini-Comstock Acts." In Connecticut, P.T. Barnum (by then a state senator from Bridgeport) took up the anti-obscenity cause. Initially, the Connecticut anti-contraception bill prohibited only the distribution of literature addressed to contraception and abortion. However, Barnum changed the bill's focus when it reached the Connecticut legislature's Joint Committee on Temperance. As chair of that committee, Barnum prepared a substitute bill that prohibited the "use" of "any drug, medicine, article, or instrument" for the "purpose of preventing conception." Barnum also made it a crime to act as an "accessory" to the use of contraception, a clause aimed at doctors who prescribed contraceptives. The bill passed the legislature and became the most restrictive law in the United Sates, subjecting married couples (and their doctors) to arrest and possible imprisonment for using birth control.

Police Raids, Justice Harlan, and the Road to *Griswold*

Barnum's Act, while on the books, was largely ignored until 1939, when attention was drawn to one group's deliberate disregard of the law. The Connecticut Birth Control League had spent 15 years lobbying the Connecticut legislature to repeal Barnum's Act. The League had found that contraceptives were available only to women who could afford private doctors. Notwithstanding (or perhaps because of) this reality, the legislature was unmoved by repeal efforts. In response, the League opened birth control clinics in Hartford, Greenwich, New Haven, and Stamford. The police and the public turned a blind eye to these public clinics.

However, this indifference changed to outrage when a League member publicly boasted about the opening of a new birth control clinic in Waterbury. A local newspaper reported the clinic's opening and the article provoked a swift and vocal condemnation by Waterbury's Catholic leaders. Police responded by raiding the Waterbury clinic and charging two doctors and a nurse with violations of the Barnum Act. The defendants brought an interlocutory appeal to challenge the constitutionality of the statute. The Connecticut Supreme Court upheld the statute in *State v. Nelson*, 126 Conn. 412 (1940). The State subsequently dismissed the charges against the doctors and the nurse, but the arrests sent a warning shot across the bow of clinics in Connecticut and many closed their doors.

After further efforts to repeal the law stalled, birth control advocates turned their attention to the courts. In 1941, a Yale doctor asked a court to declare that the Barnum Act allowed contraception if a pregnancy would be life-threatening and the statute violated his patients' constitutional right to life. Frederick H. Wiggin (of Wiggin and Dana) argued the case on behalf of the doctor, raising constitutional arguments. Among other things, Wiggin compared the statute to various abortion statutes on the books in other states that provided an exception for situations where life was threatened. The Connecticut Supreme Court rejected these arguments and found the statute contained no exceptions. *Tileston v. Ullman*, 129 Conn. 84 (1942). The court noted that "there is another method

[to protect the patients], positive and certain in result .... absolute abstention." *Id.* at 92. The U.S. Supreme Court dismissed the appeal from this decision for lack of standing.

The next challenge to Barnum's Act came in the fall of 1958. Three patients and their doctor again asked Connecticut courts to declare that the Connecticut statute violated their constitutional rights to life and liberty. All three patients suffered medical conditions that made pregnancy dangerous to their health. The Connecticut courts roundly rejected these claims, citing *Tileston*.

The U.S. Supreme Court dismissed the claims as nonjusticiable. In a decision authored by Justice Felix Frankfurter, *Poe v. Ullman,* the Court held that the controversy was not ripe because Connecticut had not imprisoned or fined anybody under the statute. The Supreme Court noted that contraceptives were widely available in Connecticut and openly sold in pharmacies statewide. The lack of enforcement effectively nullified the statute, meaning that there was no true case or controversy.

Justice John Marshall Harlan II dissented. An unlikely champion of the pro-contraceptive movement, Harlan was a "quiet and sober" man who was a member of the conservative wing of the Court. Often concurring with Justice Frankfurter, Harlan believed that "the Constitution is not a panacea for every blot upon the public welfare" and that the Supreme Court should not be "a general haven for reform movements." *See Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). He also was a Connecticut Yankee with a home in Weston, Connecticut. The Justice used his 7,000-foot estate (known locally as "Little Mountains") to fly-fish, entertain law clerks, and decompress.



The Planned Parenthood Clinic in New Haven at the center of the *Griswold* decision. Photo courtesy Benjamin M. Daniels.

In his dissent from *Poe*, Harlan asserted that the majority's opinion "does violence to established concepts of 'justiciability,' and unjustifiably leaves these appellants under the threat of unconstitutional prosecution." *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). Reaching the merits, he described the Connecticut statute as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." *Id.* at 539. The statute was unconstitutional, Harlan argued, because it violated the right to "liberty" guaranteed by the Fourteenth Amendment. This "liberty ... cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." Instead, Harlan believed "liberty" was "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

Estelle Griswold and the Right to Privacy

Poe presented a quandary for

Planned Parenthood, which had taken up the fight against Barnum's Act. The organization had operated in Connecticut for years, but had not yet violated the statute due to a combination of fear of prosecution and the prospect of legislative reform. Planned Parenthood now had to choose between violating the law by opening a clinic and continuing a legislative reform effort that had failed for 50 years.

Harlan's dissent signaled that at least some members of the Court were willing to strike down Barnum's Act. One day after the Court issued *Poe*, Planned Parenthood disseminated a press release that "welcome[d] the recognition of the Court that the [Barnum] law has become a nullity" and promised to act "as rapidly as possible" to open a public birth control clinic. *See* David Garrow, *Liberty & Sexuality*, 196 (1998). The director of Planned Parenthood of Connecticut, Estelle Griswold, noted that she would "welcome prosecution by the state" so that courts would have the opportunity to overturn the "absurd and antiquated" Barnum Act. *Id.* Griswold was a Connecticut native who had been the director of the Connecticut chapter of Planned Parenthood since 1953. A product of Hartford public schools, Griswold had pursued a career as a singer before finally settling in New Haven. As director of Planned Parenthood, Griswold had helped with prior legislative efforts and with the *Poe* case. Now, she would take center stage.

Griswold announced that Planned Parenthood would open a birth control clinic in New Haven and scheduled a press conference at the clinic on November 2, 1961. Within one week of the clinic's opening, police arrested Griswold and Lee Buxton, the former chair of the obstetrics and gynecology department at Yale's medical school and the co-director of the clinic. Griswold reportedly was "overjoyed" to see the police and offered the officers copies of the clinic's literature and pamphlets. *See* Garrow, at 198. The State formally charged Griswold and Buxton with violating the Barnum Act. Griswold and Buxton were convicted after a bench trial. Connecticut courts rejected all challenges to the convictions, citing *Nelson, Tileston,* and *Poe.* Griswold's arrest and conviction finally put the Barnum Act squarely before the U.S. Supreme Court. In what may be the shortest landmark decision in Supreme Court history, the Court recognized the right to privacy – presaged by Harlan's dissent in *Poe* – in the "penumbras" of the Bill of Rights. Writing for the Court, Justice Douglas noted that the Court previously had recognized constitutional rights that were not express in the Constitution. For example, the Constitution did not expressly recognize a right to control the education of one's children or a right of the press to distribute publications. Yet, the Court found these rights to be an inherent part of the Constitutional fabric that give the guarantees life and substance. The right to privacy, Douglas reasoned, must exist to support the First Amendment (freedom of association), the Third Amendment (prohibition of quartering troops), the Fourth Amendment (unreasonable searches and seizures), the Fifth Amendment (right against self-incrimination), and the Ninth



Justice Harlan is buried in a church graveyard in Weston, Connecticut. Photo courtesy James I. Glasser.

Amendment (rights left to the people).

Harlan concurred in *Griswold*, but took the more expansive view of the right to liberty that he had articulated in *Poe*. Harlan argued that the "penumbra" approach restricted the rights inherent in the Due Process Clause of the Fourteenth Amendment. Harlan worried that the Court's reliance on penumbras could lead to a restrictive view of liberty that narrowed individual rights to those expressly or implicitly found in the Bill of Rights. Instead, Harlan believed that the Due Process Clause protected "basic values implicit in the concept of ordered liberty."

Although his view did not carry the day, Harlan's view of substantive due process has enduring relevance. The Court has described Justice Harlan's *Poe* dissent as "[t]he second major opinion leading to the modern doctrine" of substantive due process. *See Washington v. Glucksberg*, 521 U.S. 702, 762 (Souter, J., concurring). In fact, the Court adopted Harlan's reasoning in *Planned Parenthood v. Casey*, 595 U.S. 833, 850 (1992), which established the "undue burden" standard of evaluating abortion restrictions. Critics charge that Harlan's approach gives judges *carte blanche* to enforce the unwritten purposes of the Due Process Clause, thereby removing important social issues from the democratic process. Harlan responded that judges could be trusted to exercise restraint in enforcing the idea of "liberty" in the Due Process Clause. After all, it was similar to the general language of other "specific rights" such as "freedom of speech," which judges had interpreted and applied for years. Harlan believed that judges would be equally capable of interpreting "liberty."

Although there were two other concurrences, all agreed that the "right to privacy" was "fundamental" and "substantive." Justice Arthur Goldberg concurred, arguing that the Ninth Amendment, which states that the Bill of Rights does not exhaust all the rights retained by the people, contained a "fundamental right to marital privacy" that was not found in any other specific constitutional amendment. Justice Byron White argued for a combination of Harlan's and Goldberg's positions, finding the right in both the Ninth and the Fourteenth Amendment. Justices Hugo Black and Potter Stewart dissented.

Legacy

After *Griswold*, the Supreme Court extended these same privacy protections to unmarried women in 1972. It also opened the door for *Roe v. Wade* the following year. The Court once again relied on *Griswold* when it applied the right to privacy in *Lawrence v. Texas*, the 2003 decision that protected the right of consensual same-sex relations in the privacy of the home. Events leading to these landmark decisions all were put in motion by a puritanical circus impresario who is famously remembered for saying, "the public is wiser than many imagine."

Legal History

Books in Wartime: The Fight Against Censorship During World War II

By Molly Guptill Manning



In 1933, in towns across Germany, heaps of books were set aflame. Most of these books were written by Jewish authors or contained liberal ideas antagonistic to the Nazi platform. These book burnings marked the beginning of Adolf Hitler's "war of words."

As Germany's army and the destruction of books spread across Europe, American librarians began a crusade to protect books. While their colleagues in Europe were forced to purge their shelves to comply with Hitler's bans, American librarians began the fight to protect the freedom to read.

Those who would face Germany's army would need the most armor. American librarians began

a campaign to provide American servicemen with millions of books – of all titles and viewpoints – to protest Germany's actions and provide portable entertainment for the troops' leisure hours. Forming the Victory Book Campaign, virtually every librarian in the United States worked together to collect millions of donated books for American soldiers. In the process, they stressed the importance of books in wartime, and how exercising the freedom to read was the best way for Americans to defend themselves against the propaganda-laden war of words.

By 1943, American servicemen were fighting on fronts around the world, and while they treasured books for their ability to remind them of home and provide a much-needed distraction during their free time, hardcover books were impractical on the front lines. American publishers learned that soldiers were reluctantly tossing hardcover books because they were too heavy and large to carry in their packs. Believing books were an important component in fighting the war, American publishers formed an organization called the Council on Books in Wartime to publish books especially suited for America's soldiers and sailors.

Armed Services Editions

In short order, the Armed Services Editions were born: miniature, lightweight paperbacks that were specially designed to fit the hip or breast pocket of standard issue military uniforms. There was a title for everyone, ranging from *The Republic of Plato* to *The Sad Sack* (comics), and nearly everything between. Each month, bundles of books were delivered to units around the world. As soon as they were loosed from their packaging, titles were eagerly snatched up. These books were the troops' ration on pleasure. The Armed Services Editions were pegged the most successful morale program of the entire war.

Yet, Congress stepped in and censorship began. And it took the unsuspecting form of an absentee voting bill for soldiers. After Congress passed an almost useless bill on absentee voting in 1942 (under which fewer than one percent of soldiers were able to cast a ballot), Congress was under tremendous pressure to pass meaningful absentee voter legislation for the 1944 presidential election.

Polls revealed that the majority of servicemen would vote for Roosevelt. For example, a 1944 poll taken in the South Pacific revealed the 69 percent of American troops favored a fourth term. As this information became common knowledge in Congress, the soldier voting bill became a partisan issue. Democrats were incentivized to create a ballot that would make it as easy as possible for those in the services to cast a ballot (for Roosevelt), while Republicans were tempted to make voting difficult for those serving overseas. After all, Roosevelt had won his third term by a margin of only five million votes. With nearly 12 million Americans serving overseas in 1944, the soldier vote could sway the election.

Republicans became concerned that the Democrat-led government would distribute political propaganda to the armed services to assure that all would vote for Roosevelt. Ohio Senator Robert Taft, a Republican who despised Roosevelt, championed an amendment to the 1944 soldier voting bill, Title V, that prohibited the government from delivering any magazines, newspapers, films, literature, or "other material" that contained "political argument or political propaganda of any kind designed or calculated to affect the result of any [federal] election." Punishment for violation of the law included a fine, one year of imprisonment, or both. With hardly any debate, this amendment was slipped into the bill and became law.

Immediately, the Armed Services Editions felt the pinch. *Yankee from Olympus*, a best-selling biography of Chief Justice Holmes was banned, apparently because one page of the book described a casual conversation between the Chief Justice and President Roosevelt. Charles Beard's *The Republic* could not be printed, most likely because it provided a political history of the United States. Many other titles were banned, as were Army and Navy textbooks (because they displayed a photo of Roosevelt captioned "Commander in Chief"), newspapers that covered politics, and films such as *Wilson* (a movie about the former president).

American publishers refused to be restricted in their book se-

lections and decided to fight Congress. After considering hiring a top constitutional lawyer to wage a legal battle, publishers instead commenced a trial in the court of public opinion, believing this would achieve faster results. The publicity departments of nearly every American publisher made sure that every newspaper and magazine in the United States ran stories on Congress's censorship of soldiers' reading. It was remarkably successful. "If it is to be left to the Adjutant General to decide what the Army is to be permitted to read then we might as well join the Nazis and stop fighting them," Virginia's *Lynchburg Daily Advance* declared. Perhaps those in the services "would rather skip voting this year than to have their reading material censored," the *San Antonio News* said.

The public fiercely opposed the law; letters and telegrams to legislators expressed displeasure with the law in the most colorful of terms. Publishers demanded a meeting with Senator Taft to discuss amendment or repeal, and the embattled Senator agreed. After the meeting, Taft injudiciously remarked that he did not think those in the services should be permitted to vote, as they "were out of touch with the country, lacking knowledge of issues and candidates," and likely to vote for Roosevelt. With these words, Taft became a congressional pariah. His colleagues distanced themselves and promised immediate action to change the law. By August 1944, the political propaganda provision of the Soldier Voting Act was repealed.

It was one of the finest hours in the history of American publishing. In the words of Archibald Ogden, the executive director of the Council on Books in Wartime, "it is a refreshing example of democracy in action to bring a complete turn-about in both the Senate and the House within the space of less than two months."

Editors' Note: Molly Guptill Manning is the author of the newly released book, *When Books Went to War*, which tells the full story of how books served a pivotal role in fighting World War II.

FBC News

Council Holds Fall Retreat

By Bennette D. Kramer[1]



The Federal Bar Council Second Circuit Courts and First Decade Committees hosted the Fall Bench and Bar Retreat on October 24 through 27, 2014 at the Inn at Pocono Manor in Pocono Manor, Pennsylvania. Over 150 people attended the weekend retreat, which brought together federal judges, Council members and their families, and panel members who were experts in their fields for six CLE Programs. On Friday evening, attendees enjoyed a reception and buffet dinner. On Saturday evening, after a reception, a plated dinner was served, followed by a DJ and dancing.

Federal Rules Challenge

The Federal Rules Challenge held on Friday afternoon launched the weekend. The program was a Jeopardy-style quiz game covering the rules and procedures applicable to the Second Circuit, including the Federal Rules of Civil Procedure. The teams of six tested their knowledge of civil and criminal procedure in a wide range of categories, including "Second Circuit Local Rules," "That Ship Has Sailed" (maritime procedure) and "Dude, Where's My Case?" (venue rules). The participants on all teams felt that the program was quite difficult, including the final answer: "The Second Circuit was created in this year." Only two of the six teams provided the correct question: "What is 1891?" The Red Team, composed of Marjorie Barnett, Ira Matetsky, Noah Peters, and Robin Zablow, ultimately prevailed. Everyone had a good time.

The Roosevelt Court

In a reprise of a program first performed at the 2013 Winter

Meeting, Mark Zauderer of Flemming Zulack Williamson Zauderer LLP moderated a panel on the Supreme Court under President Franklin D. Roosevelt. The program focused on the Commerce Clause through *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A video providing background on the New Deal and the *Schechter* Case, produced by Vilia Hayes, was followed by excerpts of the Supreme Court argument of the *Schechter* case. Second Circuit Judge Gerard E. Lynch played Justice McReynolds, Judge Stefan Underhill of the District of Connecticut played Justice Butler, and Professor John Q. Barrett of St. John's University Law School played Justice Stone. Other justices were played by Oriana Carravetta, Robert Kaplan, Randi Kornreich, and Mary Kay Vyskocil. Peter Eikenberry, Law Office of Peter Eikenberry, and Thomas Bezanson, Cohen & Gresser, argued for the government, as Solicitor General Stanley Reed and Donald Richberg, Special Assistant to the Attorney General, respectively. Ronald Fischetti, Fischetti & Malgieri, and Vilia Hayes, Hughes Hubbard & Reed LLP, argued for defendants as Joseph Heller and Frederick Wood. The majority opinion held that there was no interstate commerce in the slaughter and distribution of chickens in Brooklyn and therefore no constitutional jurisdiction. During the following panel discussion, Zauderer moderated with Judges Lynch and Underhill and Professor Barrett as panel members. Zauderer explained that by 1942, after *Schechter*, the Court had changed and expanded the Commerce Clause to the point where it was just prior to the Affordable Care Act case.

Professor Barrett opined that there will be challenges to the scope of the president's authority to rule by executive order, but no more decisions on the activity/inactivity issue, which ended with the Affordable Care Act decision.

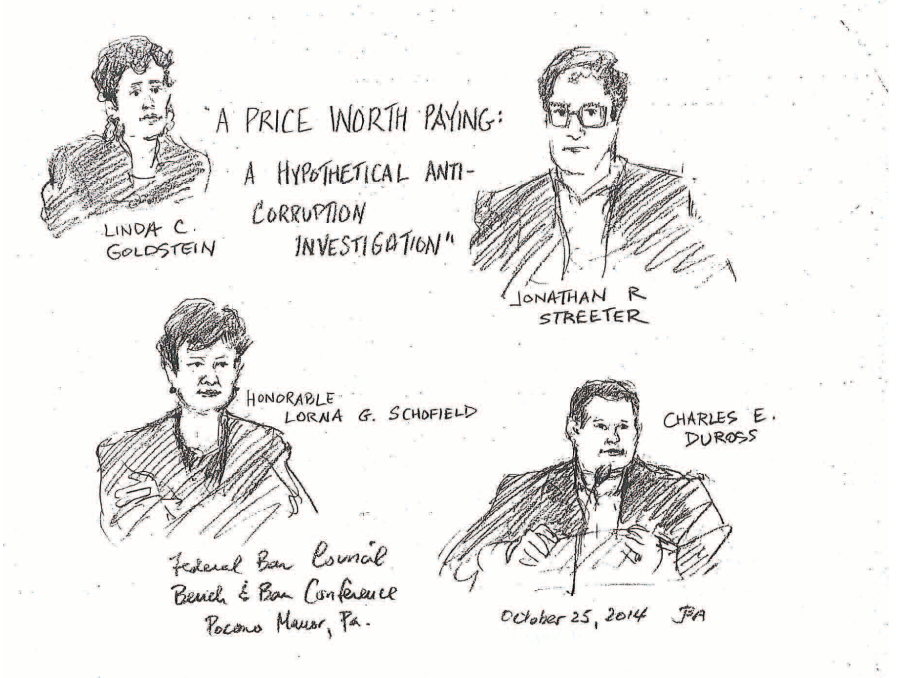
Anti-Corruption Investigations and the Foreign Corrupt Practices Act

Southern District Judge Lorna G. Schofield chaired a panel that explored the right and wrong ways to conduct an investigation of potential Foreign Corrupt Practices Act violations in connection with the acquisition of a foreign company by a British company. Panel members included Linda Goldstein and Jonathan Streeter, Dechert LLP, and Charles Duross, Morrison Foerster LLP. The program began with the first part of an excellent film created by Dechert dramatizing an investigation that took many wrong turns. Film segments were interspersed with a panel discussion. Duross pointed out that the cozy relationship between the acquired company and the local government in a country with a reputation for corruption should have raised red flags and triggered a thorough pre-acquisition investigation, which was not done because of time and expense.

Following the second segment, Streeter highlighted specific failings of the board and management following whistleblower allegations of corruption. In an effort to save money and keep disruption to a minimum, the CEO used an internal audit team instead of outside counsel to investigate and decided not to include review of e-mails as part of the investigation. The CEO overruled the general counsel several times when she suggested conducting a more intensive investigation.

Goldstein discussed who was at fault, concluding that the head of electronics was most culpable because he pushed sales at the acquired company, which he knew or should have known were achieved by bribing a foreign official and violation of trade sanctions – e-mails and side letters demonstrated his involvement. The CEO set the wrong tone by dismissing pre-acquisition and subsequent red flags. He was responsible for assessing the risk. The general counsel should have been more insistent on performing a proper investigation and spelled out the consequences of a failure to investigate. Duross pointed out that the outside directors who had reservations about the acquisition and saw the red flags did not speak up. The outside directors have no criminal liability, but will be subject to civil suits and shareholder derivative actions. As fiduciaries they were reckless.

Goldstein noted that whether D&O insurance would cover the costs of the government investigation depended on whether the company disclosed the initial whistleblower claims. Non-dis-



Drawing courtesy Julie Anello

closure could vitiate insurance in connection with a subsequent investigation.

Legal Challenges to the NCAA's Amateurism Rules

Judge Nicholas G. Garaufis of the Eastern District of New York chaired a panel composed of Benjamin Block, Covington & Burling LLP, Peter A. Carfagna, Magis, LLC, Martin D. Edel, Miller & Wrubel P.C., and Jeffrey L. Kessler, Winston & Strawn LLP, that explored the dichotomy between the big business of college sports and the required amateurism of the players. Edel explained that college sports – primarily football and basketball – are a $12 billion per year industry in which the players do not share. The policy concerns underlying this contrast are:

(1) players receive scholarships that enable them to receive an education, but not money;

(2) the NCAA emphasizes amateurism; and

(3) how to create a level playing field.

The position of the NCAA is that it protects the players from exploitation. However, the fact is that most athletes, particularly basketball players, do not graduate, so do not benefit from the academic scholarships.

In the *Jenkins* litigation, an antitrust case, plaintiffs claimed that college sports are a big business and have formed an illegal cartel by getting together and agreeing not to pay the players. Kessler, who brought the case, seeks a ruling that each school must decide for itself how to compensate players, and not the conference.

Black represents the NFL and other sports entities. He explained that Kessler had brought free agency to professionals and the *Jenkins* litigation will bring free agency to the college level. He noted that college athletics differed from professional sports because the primary mission of college was educational and colleges were not-for-profit institutions. Black viewed the lawsuits as using the antitrust laws to create rights where there was no economic interest.

Hessler responded that the real question was whether athletes should play in exchange for a college education, when they were required to devote 60 to 70 hours a week during the season to athletic programs. This requirement has a serious impact on academics and makes the players into well-paid slaves. All the money coming in through the athletic programs goes into the athletic departments, not the college as a whole. Some funds may benefit women sports or minor sports, but not the English department.

Juror Misconduct

Judge Alison J. Nathan of the Southern District of New York chaired a panel including Mark A. Berman, Ganfer & Shore, LLP, Celeste Koeleveld, Executive Assistant Corporation Counsel for Public Safety, New York City Law Department, Dr. J. Lee Meihls, President and Senior Consultant Trial Partners, Inc., and Michael

S. Ross, Law Offices of Michael S. Ross, that addressed various issues relating to jurors' use of social media. Judge Nathan, stating that she was not aware of any misconduct in her trials, set forth the issues:

(1) jurors use of social media and technology – e-mail, texting, Twitter – during trial;

(2) lawyers use of social media and technology to research jurors and, when learning about juror misconduct, their obligation to report;

(3) the right procedures for the court to impose, including preventative measures, and handling of violations; and

(4) determining how lawyers should deal with clients who use social media.



Drawing courtesy Julie Anello

Berman described software that enables lawyers to look at the number of Tweets in a given area. The software determined that there were 28,000 public tweets during the month of September 2014 in the Pearl Street/ Foley Square area. Restricting the word search to "jury," "duty," "trial," "court," "judge," and "panel," narrowed down the number of public tweets to 1,900. The software creates an approximate digital footprint and is neither expensive nor hard to use.

Meihls, as a trial consultant, focuses on social media postings by jurors. Social media searches are a good tool for lawyers because postings reveal what jurors are talking about when they think no one is looking. Lawyers should be concerned about postings by jurors after they have been warned not to post and who continue to post on social media through the trial. Once Meihls has determined that jurors are posting, she advises attorneys to request an admonition from the judge and to continue to monitor the jurors. A lot of jurors have trouble disconnecting from electronics – 25 percent of prospective jurors admit that they will have trouble disconnecting. It is never acceptable for a juror to friend or research a party or attorney. To address the risk, the court should give a strong admonition, explaining why disconnecting from social media matters and the consequences of not doing so. If jurors understand why it matters they are much more likely to comply; 92 percent of jurors follow admonitions. If they do not stop posting, the judge should remove the jurors from the panel and admonish them, find them in contempt, and fine them.

Koeleveld discussed what lawyers should do when they discover a juror has lied to get on the jury. In *United States v. Parse*, the government received information after trial about a juror who had lied at *voir dire*, but one defendant's counsel had learned some inconclusive information during trial without disclosing that information to the court or the government. On the one hand, Federal Rule of Evidence 606(b)(1) prohibits questioning jurors about the validity of the verdict. In contrast, New York Rule of Professional Conduct 3.5 obligates a lawyer to bring juror

misconduct to the attention of the court. The real question is when the obligation to disclose arises. A lawyer who has "actual knowledge" of juror misconduct must disclose. Ross stated that lawyers have an ethical responsibility to get as much information as they can. The bottom line is that all defendants, except the one represented by the lawyer who had some knowledge of the juror misconduct, got a new trial.

Other issues discussed were how to deal with a client who wanted to use social media in a way a lawyer could not (no obligation to report unless it tainted the proceedings) and whether it was appropriate to remove a client's social media material (very hard to do and watch out for spoliation of evidence). The program concluded with agreement by all that many issues related to social media remain unanswered and more guidance was needed from the courts.

Music Industry Copyright Infringement

The last program of the Fall Retreat explored copyright infringement in the music industry through *Bright Tunes v. Harrisongs*, in which Judge Richard Owen found that George Harrison's song "My Sweet Lord" written for the Beatles infringed on "He's So Fine," composed by Ronald Mack and recorded by the Chiffons. The program was a reprise of a New York Inn of Court program and all participants are members of the New York Inn of Court. The audience heard both songs, followed by a reenactment of segments of the trial before Judge Owen in the Southern District of New York. Judge Owen, the composer of a number of operas and other compositions, took over some of the questioning. The trial segments included the testimony of several expert witnesses and George Harrison himself. Judge Owen decided that, while George Harrison was not aware he was copying the theme, portions of the songs were identical. Judge Owen found in favor of the plaintiff on the issue of copyright infringement and that Harrison was liable for subconscious copying. Participants in the trial and program included Mary Kay Vyskocil, Simpson, Thacher & Bartlett LLP, as the narrator, the Honorable Betty Weinberg Ellerin, the Honorable Helen Freedman, and the Honorable Karla Moskowitz as the Chiffons, and Andrew Mancilla, Sarah Cave, and Mark Pincus as board members of Bright Tunes, the holder of the "He's So Fine" copyright. Others involved were Peter Hoenig (plaintiff's counsel), Ira Brad Matetsky (Judge Owen), Henry Freedman (defense counsel), Chris Fraser (plaintiff's expert), Justice Ellerin (plaintiff's expert), Chris Tumulty (George Harrison), Justice Freedman (Alan Paniser), Brooke Bowen (Harold Barlow), Mark Pincus (defense expert), and Noah Peters (Allen Klein, former manager for several of the Beatles and substitute plaintiff).

In the subsequent damages trial, because a company formed by Harrison's former manager had purchased the copyright, Judge Owen decided that the damages should be based on the amount of that purchase and Harrison would become copyright owner. Judge Owen was displeased by the breach of fiduciary duty.

The last program of the Fall Retreat explored copyright infringement in the music industry through *Bright Tunes v. Harrisongs*.

A panel discussion followed with Vyskocil moderating a panel including the Honorable Helen E. Freedman of the Appellate Division, New York State Supreme Court, the Honorable Betty Weinberg Ellerin, senior counsel, Alston & Bird, LLP (a former Appellate Division justice), Vyskocil, Ira Matesky, Ganfer & Shore, LLP, and Andrew Mancilla. They discussed why the Chiffons' song was so popular and whether Judge Owen needed the experts. There was a lively debate whether Judge Owen should have disclosed his expertise before trial and why no one had requested a jury.

Note

[1] With thanks to Lauren Handelsman for covering the Federal Rules Challenge

New Appointments

Katherine Polk Failla Appointed to the Southern District of New York

By Stephen Ratner and Stephen Holinstat





On June 25, 2012, President Barack Obama, on the recommendation of Senator Charles Schumer, nominated Katherine Polk Failla to serve as a U.S. District Court Judge for the Southern District of New York. On March 4, 2013, the Senate confirmed Judge Failla and on March 5, 2013, President Barack Obama appointed Judge Failla to her judicial post. Judge Failla succeeded Judge Denise Cote, who assumed senior status on December 15, 2011.

Born in 1969 in Edison, New Jersey, Judge Failla received her B.A. *summa cum laude* in 1990 from the College of William and Mary and her J.D. *cum laude* in 1993 from Harvard Law School. While in law school, she served as co-editor-in-chief and articles editor of the *Harvard Journal of Law & Public Policy* and was a member of the Harvard Women's Law Association. From 1993 to 1994, Judge Failla clerked for the Honorable Joseph E. Irenas of the U.S. District Court for the District of New Jersey.

Judge Failla entered private practice in 1994, joining the New York office of Morgan, Lewis & Bockius LLP. As an associate at Morgan Lewis, Judge Failla focused her practice on commercial litigation and securities and enforcement matters. From 1995 through 1999, she defended Merrill Lynch and several of its related entities in a series of civil litigations and regulatory proceedings stemming from the 1994 bankruptcy filing by Orange County, California. While at Morgan Lewis, Judge Failla also devoted substantial time to *pro bono* matters, including the representation of clients in immigration and family court proceedings.

In 2000, Judge Failla became an Assistant U.S. Attorney in the Southern District of New York, during which time she participated in numerous programs focusing on issues of criminal law and attorney ethics. In 2004, Judge Failla was promoted to Deputy Chief of the Criminal Appeals Unit. In 2008, Judge Failla was promoted again to Chief of the Criminal Appeals Unit, a position in which she served until her appointment to the bench. Among Judge Failla's significant cases while working in the Criminal Appeals Unit were: *United States v. Odeh, et al.* (prosecution of Mohammed Odeh and many others for the 1998 United States embassy bombings); *United States v. Sattar, Stewart, Yousry* (prosecution of Lynne Stewart and others for passing information to and from convicted terrorist Omar Abdel-Rahman); *United States v. Stein, et al.* (KPMG tax shelter fraud case); *United States v. Coplan, et al.* (tax shelters promoted by Ernst & Young LLP); and *United States v. Rigas* (prosecution of John Rigas for the Adelphia Communications Corporation fraud case).

Recommending then-Assistant U.S. Attorney Failla for appointment to the bench, Senator Schumer stated that she "will make a fantastic judge on the Southern District court. With her stellar legal credentials, and many years of experience both in private practice and currently as Assistant U.S. Attorney for the Southern District, she is amply qualified for the position and I'm very pleased to recommend her to President Obama." In his statement accompanying the nomination of Judge Failla, President Obama remarked that she would

"serve the American people with integrity and a steadfast commitment to justice." Judge Failla's induction ceremony was attended by, among many others, Judge Irenas and Preetinder Singh "Preet" Bharara, the U.S. Attorney for the Southern District of New York. Judge Irenas noted that Judge Failla is "extraordinarily bright, hard-working, and talented." He remarked that her appointment to the bench is "a tribute to the system and well deserved" and that it "encourages faith in the judicial selection process."

New Appointments

Judith C. McCarthy is New Magistrate Judge

By Magistrate Judge Lisa Margaret Smith



On April 14, 2014, Judith C. McCarthy was sworn in as the newest Magistrate Judge for the Southern District of New York by Chief Judge Loretta A. Preska. Judge McCarthy commenced her service on April 28, 2014, filling the seat in the White Plains courthouse vacated when Magistrate Judge George A. Yanthis retired in October 2013. A public induction ceremony in honor of Judge McCarthy's appointment was held in the ceremonial courtroom of the Daniel Patrick Moynihan U.S. Courthouse in Manhattan on October 28, 2014. Judge McCarthy has been warmly welcomed to the Charles L. Brieant, Jr. Courthouse in White Plains by her new colleagues and by the court staff. She also enjoys the camaraderie and support from the bench, from the Southern District of New York and across the country.

Judge McCarthy received a B.A. *cum laude* from Barnard College, Columbia University, in 1987. She earned her J.D. in 1991 from CUNY School of Law School at Queens College. Upon her graduation from CUNY, Judge McCarthy became an Assistant Corporation Counsel in the General Litigation Division of the New York City Law Department. In 1995, she was honored by the Association of the Bar of the City of New York for outstanding achievement as an Assistant Corporation Counsel, and in 1996 Judge McCarthy was appointed Deputy Assistant Chief of the General Litigation Division. In 1998, Judge McCarthy moved to the Office of Legal Affairs of the New York City Human Resources Administration, climbing steadily from a position as Associate General Counsel to Deputy General Counsel in the Adult Services Division, and to First Deputy General Counsel. After four years with the Human Resources Administration, Judge McCarthy moved to the New York State Attorney General's Office, in the Westchester Regional Office (which covers Rockland, Putnam, and Westchester counties). Over a period of nine years in the Attorney General's Office, Judge McCarthy rose from Assistant Attorney General to the Deputy Assistant Attorney General-in-Charge of the Westchester Regional Office from 2005 to 2006, and in 2006 the Assistant Attorney General-in-Charge, a position she held for more than four years. In 2011, on the recommendation of Governor Andrew M. Cuomo, Judge McCarthy was appointed Acting Executive Vice President and General Counsel of the New York Power Authority; her appointment at the Power Authority was made permanent nine months later.

Before ascending to the bench in 2014, Judge McCarthy thought that a judgeship might be isolating, but she has been pleasantly surprised by the camaraderie and support she feels in her new position. Judge McCarthy feels comfortable in the collegial atmosphere of the White Plains courthouse, able to ask any questions and seek any guidance, whether from fellow judges, attorneys, or courthouse employees. She noted that in the context of criminal cases, with which she had little prior experience, both prosecutors and defense counsel have provided guidance to help her to avoid making mistakes. Judge McCarthy recognizes the particular im-

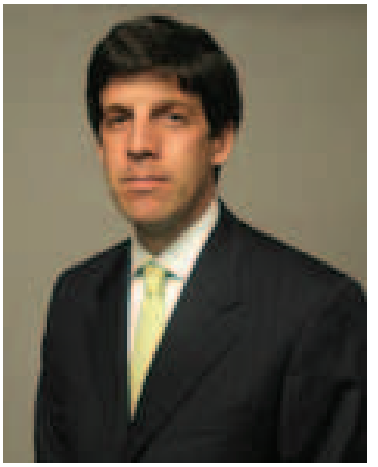
portance of being quite deliberate when setting bail in criminal cases, as this decision may have an impact on the entire posture of a defendant's case, and so she takes great care in considering her options in that regard.

Judge McCarthy's extensive litigation experience has well-prepared her for the wide variety of civil cases assigned to her docket, and she is especially pleased to see many types of cases with which she has had prior experience, including particularly employment related cases, Section 1983 litigation, and personal injury claims of all sorts. Her own experience with similar cases has helped Judge McCarthy supervise the discovery process efficiently, and determine whether the requests made by counsel are reasonable in the context of those cases. Judge McCarthy observes that the magistrate judges in the Brieant Courthouse in White Plains have a hands-on approach to supervision of the cases assigned for General Pretrial Supervision, and this permits her to develop a thorough knowledge of the cases, smoothing the process of discovery as well as settlement. Her experience also has guided her handling of criminal matters – approaching each case deliberately and with an open mind. Judge McCarthy has a significant load of cases where the parties have consented to have her responsible for the entirety of the case. Her first trial of one of these cases is scheduled for early December. It is fair to say that she has hit the ground running.

Legal History

The Belfast Project and the Dangers of the Subpoena Power

By James L. Bernard and Nathan H. Stopper



In 2001, an ambitious project by Boston College ("BC") to document the oral history of a brutal conflict began. Under the auspices of BC, a librarian, a journalist, and a former Irish Republican Army ("IRA") paramilitant began interviewing individuals involved in the decades-long conflict in Northern Ireland. In what became known as the Belfast Project (the "Project"), they conducted candid interviews under the cloak of anonymity with 40 former members of the IRA and its rival Protestant paramilitary groups, along with one former law enforcement officer. By all appearances, this was a well-intentioned and noble project to explore in confidence a dark period in history, and to try to discover what lessons could be learned when all involved were able to speak freely and openly about what happened. Things did not turn out as planned. Once authorities in the United Kingdom learned of the Project, they tried to obtain the information that had been shared in confidence. This article explores what happened in the U.S. courts regarding those efforts, and lessons to be learned from the ensuing legal battle.

The Interviews

The interviews were nominally "donations" made by the subjects to BC, and each interviewee signed an "Agreement for Donation" that restricted access to the tapes and transcripts of their interviews until after their deaths, absent the subject's written consent.[1] An additional agreement between the Project's director, Ed Moloney, and BC provided that "[e]ach interviewee is to be given a contract *guaranteeing to the extent American law allows*" strict safeguards to prevent the unauthorized disclosure of an interview.[2]

Notwithstanding these confidentiality agreements, in 2011 BC was served with two sets of subpoenas (the "Belfast Subpoenas") by a commissioner appointed pursuant to 18 U.S.C. § 3512[3] and a mutual legal assistance treaty between the United States and the United Kingdom (the "US-UK MLAT").[4] The first subpoena sought materials from the interviews of former IRA members Dolours Price and Brendan Hughes, while the second requested all information obtained by the Project

regarding the abduction and murder of Jean McConville, a mother of 10 "disappeared" by the IRA in 1972. With the exception of the materials related to Mr. Hughes,[5] BC sought to have both subpoenas quashed in the U.S. District Court for the District of Massachusetts.

Mr. Moloney and the former IRA paramilitant, Anthony McIntyre, attempted to intervene in the lawsuit filed by BC, and separately filed a similar civil complaint seeking to block the production of these materials. The court, however, ordered the production of all materials responsive to the first subpoena and 85 interviews responsive to the second.[6] While BC did not appeal the order regarding the first subpoena, Messrs. Moloney and McIntyre appealed to the First Circuit.[7] The circuit court affirmed the district court's decision and ordered the production of materials from the interviews of Ms. Price, "who had admitted to being involved in the murder and 'disappearances' of four persons targeted by the IRA, including Jean McConville."[8] BC subsequently filed an appeal regarding the second subpoena, and the First Circuit overturned the denial of the motion to quash as to 74 of the 85 interviews, finding that they were not responsive to the subpoena.[9] Thus, after two separate appeals, BC was ordered to produce both Ms. Price's interview materials and the materials from 11 interviews relevant to Ms. McConville's "disappearance."[10]

The production of even these materials had profound consequences as they led to the recent arrest of Gerry Adams, the president of Sinn Féin and a current member of the Irish Parliament. We explore further below both the scope of subpoena power as relevant to this proceeding and the accompanying statutory protections, as well as additional defenses with particular relevance to the Project: the reporter and academic privilege, and the self-critical analysis privilege.

The Power to Quash

Although the Federal Rules of Civil Procedure grant parties broad subpoena power, they also impose certain limitations. Among such limitations, a court "must quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies."[11] However, "the mere fact that a communication was made in express confidence ... does not create a privilege."[12]

Because the Belfast Subpoenas were issued under 18 U.S.C. § 3512 and the US-UK MLAT, a major threshold issue was whether, because the applicable treaty gives the Attorney General "exclusive prerogative in initiating proceedings[,] federal courts have discretion to quash a subpoena in this context."[13] While the government argued that "the Attorney General's exclusive prerogative … [barred] judicial oversight of the subpoena enforcement process," the First Circuit held that it had jurisdiction because "the enforcement of subpoenas is an inherent judicial function which … cannot be constitutionally divested from the courts of the United States."[14] Thus, resolution of the appeals turned on whether the appellants were able to assert a recognized privilege.

The Reporter's Privilege

The primary substantive issue raised in the Belfast Project litigation was the protection afforded by the First Amendment to academics.[15] Because such protection closely mirrors the protection enjoyed by reporters, a review of the reporter's privilege is helpful.

The seminal case addressing this privilege is the Supreme Court's decision in *Branzburg v. Hayes*, a plurality opinion unevenly interpreted by the circuits. There, and briefly summarized, the Court held that even where revealing materials sought by a grand jury subpoena would break a reporter's promise of confidentiality, the First Amendment does not protect the reporter from having to comply with the subpoena.[16] Taking particular offense to the suggestion that the Constitution protected promises made to criminals that could undermine law enforcement, the Court reasoned that "we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."[17]

Despite the Supreme Court's

reluctance to recognize such a privilege, subsequent decisions in lower courts have approved of some protections for subpoenaed reporters when the facts are distinguishable from *Branzburg*, especially in the context of civil litigation.[18] Building on Justice Powell's *Branzburg* concurrence, courts have held that "a qualified reporter's privilege under the First Amendment should be readily available in civil cases," and that to determine whether the privilege applies, courts should weigh "the public interest in protecting the reporter's sources against the private interest in compelling disclosure."[19] Other courts have gone beyond the civil context, stating that there is "no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence."[20]

Importantly for the Belfast Project litigation, the First Circuit has held that the Constitution offers some protection for reporters' confidential sources.[21] In *In re Special Proceedings*, it held that "the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source."[22] The First Circuit therefore requires "heightened sensitivity" to First Amendment concerns in civil litigation.[23]

The existence of a reporter's privilege, even when limited to civil litigation, is not unanimously accepted. The Seventh Circuit has held that while "[a] large number of cases conclude, rather surprisingly in light of *Branzburg,* that there is a reporter's privilege … courts should simply make sure that a subpoena *duces tecum* directed to the media, like any other subpoena *duces tecum*, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."[24] Similarly, the Sixth Circuit has held that Justice Powell's *Branzburg* concurrence is consistent with the majority opinion and creates no qualified privilege for the media.

Thus, while reporters in federal litigation may enjoy some protection for withholding subpoenaed information, such protection requires a favorable outcome of a balancing test whose existence and application diverge widely by circuit.[25]

The Academic Research Privilege

One of the primary concerns of the *Branzburg* plurality was that, because "almost any author could assert that he contributes to the flow of information to the public," recognizing a reporter's privilege for protecting confidential sources would force courts to define the scope of those covered by such a privilege, including whether it extended to academics.[26] The Supreme Court subsequently declined to recognize an academic privilege in *University of Pennsylvania v. E.E.O.C.*, an employment discrimination case, where it held that the First Amendment's protection of academic freedom did not permit educational institutions to withhold subpoenaed confidential peer review materials relating to the tenure process.[27]

Nonetheless, as many courts recognized some form of a reporter's privilege, they have also defined its scope to include academia. In one of the early cases addressing the coverage afforded by the journalist's privilege, the Second Circuit held in *von Bulow by Auersperg v. von Bulow* that an individual claiming the privilege "must demonstrate … the intent to use material sought to disseminate information to the public," but need not necessarily be a traditional journalist.[28] Citing *von Bulow*, among other cases, the First Circuit endorsed the reach of a privilege beyond journalists in *Cusumano v. Microsoft Corp.*, where it noted that "several of our sister circuits have held that the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work."[29] The *Cusumano* court then held that "[a]cademicians engaged in prepublication research should be accorded protection commensurate to that which the law provides for journalists."[30]

Despite the First Circuit's recognition of this academic privilege, the courts in both Belfast Project appeals held that because the litigation involved underlying criminal proceedings, *Branzburg's* analysis controlled their disposi-

tion.[31] Thus, in the first appeal, the First Circuit held that even though compliance with the subpoenas could have some chilling effect, no academic privilege applied because *Branzburg* compelled the conclusion that the "choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."[32] Similarly, in the second appeal, where BC argued that a heightened sensitivity standard of relevancy should have applied, the court held that under *Branzburg*, "the public's need for information *relevant* to a *bona fide* criminal investigation precludes the recognition of a First Amendment privilege not available to the ordinary citizen," and ordered the production of all relevant materials.[33] The First Circuit was clear that "[t]he choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."[34]

The Self-Critical Analysis Doctrine

An additional, although more tenuous, argument for contesting the Belfast Subpoenas would have been the much-maligned self-critical analysis doctrine. Although frequently cited by parties seeking to protect information, "a majority of the Circuits have refused to recognize or apply the privilege."[35] Originally described in *Bredice v. Doctors Hospital*,[36] the privilege's contours are generally agreed upon: first, "the information [at issue] must result from a critical self-analysis undertaken by the party seeking protection; [second] the public must have a strong interest in preserving the free flow of the type of information sought; [and third] the information must be of the type whose flow would be curtailed if discovery were allowed."[37] Courts have also applied "the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential."[38]

In *Bredice*, a plaintiff in a medical malpractice suit sought to discover information from a hospital's professional staff committee meetings. The court held that because the meetings were "not a part of current patient care, but [were] retrospective with the purpose of self-improvement, [they were entitled] to a qualified privilege on the basis of this overwhelming public interest."[39] The court further elaborated that "the public interest may be a reason for not permitting inquiry into particular matters by discovery," and was especially concerned that the committee's value would be destroyed if its proceedings were discoverable.[40]

Courts have subsequently been skeptical of the self-critical analysis privilege, but have frequently refrained from disavowing it, instead finding that specific facts in a particular litigation preclude its application. In *Dowling*, for example, the Ninth Circuit held that even if the privilege existed, pre-accident safety reviews conducted on a ship were not subject to it because holding such reviews discoverable would not create a "chilling effect" on the candid assessment of safety issues.[41] Likewise, in *In re Currency Conversion Fee*, the court held that while "the availability of the self-critical analysis privilege is an open question in [the Second] Circuit," it did not protect management control studies and internal audit reports.[42] In *Ganious v. Apache Clearwater Operations, Inc.*, however, the court disclaimed the privilege more explicitly, stating that "all of the courts in [the Fifth] Circuit confronting the issue have declined to find that the self-critical analysis privilege exists, even in the instance of a post-accident investigation."[43]

Although not cited by the parties at any stage of the Belfast Project litigation, the Project satisfied some of the privilege's elements. The interviews were certainly undertaken with the expectation of confidentiality, and the flow of sensitive information would undoubtedly cease if the subjects knew they were discoverable. Further, the public may have had an interest in the continuation of the Project, although likely not rising to the level of the hospital meetings at issue in *Bredice*. Most importantly, however, the interviews were not conducted for the express purpose of self-improvement, and lacking such a purpose, the privilege would most likely not have applied.

Conclusion

Individuals must proceed with caution when gathering infor-

mation pursuant to confidentiality agreements. We imagine that everyone involved in the Belfast Project thought the contractual provisions of confidentiality were sufficient. The stakes, after all, were extremely high as individuals would be discussing criminal conduct, and therefore the interviews would not have taken place unless all involved believed those provisions would provide adequate protection. The lesson learned here, however, is that contractual obligations of confidentiality are sometimes insufficient. And here, that vulnerability came from abroad, in the form of a subpoena through a U.S. Commissioner providing assistance in a criminal matter to a foreign government. Imposing the benefit of hindsight on those involved seems harsh; it is hard to blame them for failing to assess the likelihood that a U.S. Commissioner would be appointed to assist a foreign government in a criminal investigation. But after this litigation, it seems clear that even assuming the First Amendment offers some protection to academics (or reporters), information gathered under contractual provisions of confidentiality will nonetheless be highly vulnerable to subpoena, especially for law enforcement purposes. BC learned this lesson the hard way: it recently announced that it will return the original recordings from the Belfast Project to any interviewee who requests them and will not preserve any additional copies or transcripts.[44] That is a shame for the pursuit of academic research projects and good faith efforts to explore dark moments in history with candor, but the First Circuit's decisions make clear that contractual promises of confidentiality must yield to law enforcement requests for information.

Notes

[1] *In re Request from United Kingdom Pursuant to Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 685 F.3d 1, 5 (1st Cir. 2012) [hereinafter "*Moloney*"], *cert. denied*, 133 S. Ct. 1796 (2013).

[2] *Id.* Importantly, "[n]o lawyers vetted the wording of [the underlying agreement for participants], and no one at BC other than [the head librarian and the head of Irish Programs at BC] reviewed Mr. Moloney's contract or the one drawn up for interviewees." Beth McMurtrie, *Secrets From Belfast*, The Chronicle of Higher Education, Jan. 26, 2014, at 4, *available at* http://chronicle.com/article/Secrets-from-Belfast/144059/.

[3] Section 3512 permits the government to seek court orders and the appointment of a commissioner to collect evidence to effectuate a request from a foreign government for assistance in the investigation or prosecution of criminal matters.

[4] *Moloney.* 685 F.3d at 3.

[5] Because Mr. Hughes was deceased, as per his Agreement for Donation, BC was no longer bound by any contractual confidentiality obligations regarding his interviews.

[6] *In re Request from the United Kingdom Pursuant to the Treaty Between the Gov't of the U.S. & the Gov't of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, MISC. 11-91078-WGY, 2012 WL 194432 (D. Mass. Jan. 20, 2012).

[7] *See Moloney*, 685 F.3d at 4.

[8] *Id.* at 5.

[9] *Id*. at 19*; In re Request from the United Kingdom Pursuant to the Treaty between the Gov't of the U.S. & the Gov't of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 718 F.3d 13, 27 (1st Cir. 2013) [hereinafter "*Boston College*"].

[10] *See id.*; *Moloney*, 685 F.3d at 4.

[11] *Id.* 45(d)(3)(A)(iii).

[12] *Branzburg v. Hayes*, 408 U.S. 665, 682 n.21 (1972).

[13] *Boston College*, 718 F.3d at 23.

[14] *Id.*

[15] *See Moloney*, 685 F.3d at 16; *Boston College*, 718 F.3d at 20.

[16] 408 U.S. at 690-91; *see also Moloney*, 685 F.3d at 16.

[17] *Branzburg*, 408 U.S. at 690-91.

[18] *See Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (stating that "every other circuit that has considered the question has ruled that a [reporter's] privilege should be readily available in civil cases, and that a balancing approach should be applied"). *See also, e.g.*, *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (holding that no privilege applied when the "circumstances of the case fall squarely within those of *Branzburg*").

[19] *See, e.g.*, *Grand Jury Proceedings*, 5 F.3d at 400.

[20] *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983). *See also, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3rd Cir. 1980).

[21] *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998); *Bruno & Stillman, Inc. v. Globe Newspa-*

per Co., 633 F.2d 583, 596 (1st Cir. 1980).

[22] *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

[23] *Id.*

[24] *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003). *See also In re Grand Jury Proceedings*, 810 F.2d 580, 583-84 (6th Cir. 1987) (rejecting the existence of a reporter's privilege).

[25] As of 2011, 40 states had enacted laws protecting reporters from subpoenas. *See* Aaron Mackey, *Number of states with shield law climbs to 40*, 35 The News Media & the Law 3, 27 (Summer 2011), *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2011/number-states-shield-law-cl. However, the federal law of privilege applies in federal cases involving state law claims. *See, e.g.*, *Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 n.3 (4th Cir. 2001).

[26] *Branzburg*, 408 U.S. at 703.

[27] 493 U.S. 182 , 199-200. This case is distinguishable from *Branzburg* and the Belfast Project litigation for at least two important reasons: first, *Univ. of Penn.* was reluctant to recognize a privilege where Congress had extended the relevant statute to educational institutions and provided for broad subpoena powers, but chose not to create a privilege for peer reviewed documents; and second, *Univ. of Penn.* found that the asserted infringement of First Amendment rights was "extremely attenuated," because it relied upon a long chain of causation to claim that disclosure affected academic freedom. *Id.* at 189, 199-200.

[28] 811 F.2d 136, 147 (2d Cir. 1987) ("On rare occasions the journalist's privilege has been invoked successfully by persons who are not journalists in the traditional sense of that term").

[29] 162 F.3d at 714.

[30] *Id.*

[31] *Moloney*, 685 F.3d at 16; *Boston College*, 718 F.3d at 24.

[32] *Moloney*, 685 F.3d at 19.

[33] *Boston College*, 718 F.3d at 24.

[34] *Moloney*, 685 F.3d at 19.

[35] *Davis v. Kraft Foods N. Am.*, CIV A 03-6060, 2006 WL 3486461, at *2 (E.D. Pa. Dec. 1, 2006).

[36] 50 F.R.D. 249 (D. D.C. 1970).

[37] *Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (citing Note, *The Privilege of Self–Critical Analysis*, 96 Harv. L. Rev. 1083, 1086 (1983)).

[38] *Dowling*, 971 F.2d at 426 (citing *Peterson v. Chesapeake & Ohio Ry.*, 112 F.R.D. 360, 363 (W.D. Mich. 1986); *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983)).

[39] *Bredice*, 50 F.R.D. at 251.

[40] *Id.*

[41] *Dowling*, 971 F.2d at 426.

[42] *In re Currency Conversion Fee*, MDL 1409, 2003 WL 22389169, at *4 (S.D.N.Y. Oct. 21, 2003). *But see Trezza v. Hartford, Inc.*, 98 CIV. 2205 (MBMKNF), 1999 WL 511673, at *3 (S.D.N.Y. July 20, 1999) (holding that self-critical analysis privilege protected voluntary internal studies regarding employment discrimination).

[43] CRIM.A. 98-207, 2004 WL 287366, at *2 (E.D. La. Feb. 11, 2004).

[44] Peter Schworm, *BC will return its interviews on Ireland*, The Boston Globe, May 6, 2014, *available at* http://www.bostonglobe.com/metro/2014/05/06/boston-college-says-interviewees-northern-ireland-troubles-oral-history-project-can-get-their-tapes-back/cRgXf2Th3My0H3zqOq1q6H/story.html.

The Interview

Congressman John Lewis

By Pete Eikenberry



In May 1963, the infamous Birmingham, Alabama, Public Safety Commissioner Eugene "Bull" Connor ordered police dogs and men with fire hoses to attack civil rights marchers. As a result, President Kennedy gave a televised address in June calling for passage of a civil rights bill. The bill was passed in February 1964. In March 1965, civil rights leaders embarked upon a march from Selma to Montgomery, Alabama. The march was called to dramatize a voter registration drive – and to influence Washington legislators to pass a voting rights bill. The two leaders of the march were Hosea Williams of Dr.

King's Southern Christian Leadership Conference ("SCLC") and John Lewis of the Student Nonviolent Coordinating Committee ("SNCC.") Although the SNCC board had voted not to take part in the march, John Lewis chose to participate as an individual.

On May 20, 2014, Rev. Jerome Robinson (who is married to Sheila Boston, a partner in Kaye Scholer) and I interviewed the now 74-year-old long-time Congressman John Lewis in his offices in Washington. I had worked with the late Hosea Williams when I was a civil rights volunteer lawyer in Grenada, Mississippi, in July and August 1966; I wished to talk to Congressman Lewis about Mr. Williams for a writing project I am undertaking. On March 7, 1965, now known as "Bloody Sunday," John and Hosea led the march across the Edmund Pettus Bridge in Selma in the face of hostile troopers commanded by Sheriff Jim Clark. In May 2014, Mr. Lewis recalled that day to Jerome and me as follows:

> On Bloody Sunday, Hosea was so dignified; he was so peaceful and so quiet. At one point, he asked me when we were walking across the bridge crossing Alabama River, can I swim? I said, "Nope, what about you?" He said, "Yes, a little," and we never said another word to each other; it was just a silent walk until we came on the high point on that bridge and then we looked down below; Hosea said, "You see the guys with the gas masks? John they're going to gas us." When we got within "hand" distance, the Major said, "This is an unlawful march, it will not be allowed to continue; I'll give you two minutes to return to your homes or to your church." Hosea said, "Major give us a moment to kneel and pray," but the Major said, "Troopers advance!" Then we saw these guys putting on their gas masks, and they just came at us.

Roy Reed of the *Times* reported the incident on March 7, 1965, as follows:

> About 525 marchers had left Browns Chapel and walked six blocks to Broad Street, then across Pettus Bridge and the Alabama River, where a cold wind cut at their faces and whipped their coats. They were young and old and they carried an assortment of packs, bedrolls and lunch sacks.

On March 7, 1965, now known as "Bloody Sunday," John and Hosea led the march across the Edmund Pettus Bridge in Selma in the face of hostile troopers commanded by Sheriff Jim Clark.

> The troopers, more than 50 of them, were waiting 300 yards beyond the end of the bridge. Behind and around the troopers were a few dozen possemen, 15 of them on horses, and perhaps 100 white spectators…. The marchers had passed about three dozen more possemen at the other end of the bridge. They were to see more of that group.
>
> The troopers stood shoulder to shoulder in a line across both sides of the divided four-lane highway. They put on gas masks and held their night sticks ready as the marchers approached marching two abreast, slowly and silently. The troopers rushed forward, their blue uniforms and white helmets blurring into a flying wedge as they moved. The wedge moved with such force that it seemed almost to pass over the waiting column instead of through it. The first 10 or 20 marchers were swept to the ground screaming, arms and legs flying, and packs and bags went skittering across the grassy divider strip and on to the pavement on both sides.
>
> ***
>
> A cheer went up from the white spectators lining the south side of the highway. The mounted possemen spurred their horses and rode at a run into the retreating mass. The marchers cried out as they crowded together for protection, and the whites on the sideline whooped and cheered…Sud-

denly there was a report, like a gunshot, and a gray cloud spewed over the troopers and the marchers. "Tear gas!" someone yelled. The cloud began covering the highway. Fifteen or twenty nightsticks could be seen through the gas, flailing at the heads of the marchers.

Among other casualties of March 7, Mr. Lewis suffered a fractured skull, which required his hospitalization for a considerable period of time. On March 9, a Unitarian minister from Boston was beaten to death in Selma. On March 15, President Johnson addressed a joint session of congress calling for passage of a voting rights bill. The Senate adopted the bill on May 25 and the House passed it on July 9 – both by 4-1 majorities. As Andrew Kopkind wrote in the *New Republic* on March 20, 1965, "Selma's Sheriff Jim Clark can take much of the credit for the bill not so much, perhaps, as 'Bull' Connor takes for passage of the Civil Rights Act of 1964, but a fair sized piece nonetheless." I said to Mr. Lewis that in 1966 Hosea had told me repeatedly that "Bull Connor was the hero of the Civil Rights movement." Lewis said that:

> President Kennedy was not the first person to say and not the last person to suggest that if we honored people for the contribution they made, that we shouldn't forget Bull Connor for what he did in 1963, when he let loose the dogs and the water hoses to create the climate, the environment for President Kennedy to come forth and make the speech he made on the night of June 11, 1963. In Hosea's travels in Alabama and throughout the south and around the country, he said, "We have a man in Birmingham named Bull Connor but he's no longer a Bull he's a steer now. Hosea was very, very colorful. He was born in Georgia as you well know, went into the military, came back, studied, and got a job in Savannah where he came under the influence of Dr. King. He became one of the outspoken leaders, some people call him a non-violent "raporizer." He had the ability, he had the capacity to move a crowd, he loved singing, he loved music, not that he had such a great voice, but he could speak loud and he could sing loud and he was a good organizer. Just the average "Joe," pulling people off the street, going into a bar, a pool room and said, "Come on, follow Dr. King we got a movement going." He joined SCLC and became what some people called one of the field hands, one of the individuals that created and moved the crowd or prepared the crowd or prepared the audience for Martin Luther King Jr. to address what some people would say to clean up what Hosea had messed up. When I say mess up, he messed it up in the good sense of the words.

I said to Mr. Lewis, "You said in your book that you rarely did night marches but in Grenada, Hosea led night marches." Mr. Lewis replied:

> Night marches are dangerous. They're very, very dangerous, so in Nashville we tried doing the sit-ins at lunch time. In 1961 during the stand-ins at theaters, we tried everything possible to have all of our marching, and sit-ins, stand-ups, whatever you want to call it, in open daylight- so you can see. When you have people marching at night, bad things can happen.

I said, "But Hosea wanted to prove that people weren't afraid; he wanted to show that white people can't hurt them and to prove that black people should not be afraid. The federal judge required the marchers to go 2 by 2 in squads of 20 in order to award court protection to the marchers. Young women were at the heart of the movement, and when each squad entered the Grenada's town square, the women's singing was reinforced and got louder and louder. They sang this song, 'yahh, yahh, yah, yahdy yah, yahhh' as the hundreds of whites in the square screamed obscenities and worse restrained by 200 white shirted shot gun wielding state highway patrolman." Mr. Lewis said:

> Hosea had the ability to sort of improvise songs like a lot of people; different participants

> would just go out in a line and do these little made up songs. I can't sing; I tell people I sing so low so no one can hear me.

Jerome asked Mr. Lewis how he came to march in Selma, and he replied:

> SNCC didn't want to support the march, and though I was chairman of the organization, I broke with the group after an all-night meeting at a little restaurant in Atlanta. I took the position that I was from Alabama, had been to Selma, and had participated in early organizing and protesting. I had been arrested and gone to jail for that and if local people wanted to march, I'm going to march with them.

Jerome asked, "Did you ask to be head of the line?" He said "No I did not. They drafted me." I asked, "Did Martin Luther King draft you?" He said:

> People like Andy Young because Dr. King was not there that day. They asked me to walk with Hosea because I don't think they knew about the debate. We were in Atlanta; we stayed up most of that night arguing and debating why we shouldn't or should; and I then jumped in the car with two other young people from the student non-violent coordinating committee. We got our sleeping bags and we drove to Selma. We got an hour or two of sleep in a so called "Freedom House."
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> I got up the next morning, got dressed and went to the Brown Chapel Church and after the service, people started showing up for the march. I was wearing a black trench coat and Hosea was wearing a black trench coat.

I asked, "You had your backpack on or something?" He said "I was wearing a backpack." I said, "You looked like one of the young people today." He said, "Mine was not that fashionable …. But Hosea, he was fearless, fearless, fearless. He was strong, not intimidated and it was his mission, it was his calling to get out there and push and pull." I asked, "Do you think that you arrived at a philosophy of provoking people to violence or you think that sort of happens and it kept happening or you think after a while it became a strategy?" Mr. Lewis said, "No, I don't think it was a deliberate effort to provoke people to respond with violence but if people were going to be provoked or to respond in that matter, then it was going to help us make our point."

My own involvement with the civil rights movement in July 1966 followed in time the events of 1963 and 1965 where civil rights marches had led to adoption of civil rights legislation. In June 1966, the Meredith March had come through Grenada, Mississippi and SCLC dropped off 12 organizers including Hosea Williams. They were trying to foment enough activity and response to it to get press coverage that would pressure Congress to enact the 1966 Civil Rights bill. (It would have required juries to be selected at random from voting lists.) In June 1966, Orison Marden, the new president of the ABA and my boss at White & Case, had arranged for me to go to Mississippi at White & Case expense. I spent four weeks full time in Grenada assisting Marion Wright and other NAACP Legal Defense lawyers who were supporting the civil rights demonstrators. Marden spent the summer getting an overwhelming vote from the ABA in support of the bill, but it never passed. During the Meredith March and for a period thereafter, the press focused rather on Stokely Carmichael and the "black power" movement—about which Stokely repeatedly articulated. Stokely at the age of 24 had brought his "slashing black style" as new chair of SNCC replacing the soft spoken John Lewis.

As we left Mr. Lewis in June 2014, I said to him that I felt "so privileged to have been able to participate even in the tiny sliver of time when I was involved," and he replied that "every day I feel privileged to have participated." He was very impressive in his humility. Jerome led Mr. Lewis, a staff member, and me in prayer before we took our leave. Mr. Lewis said that we should call upon him or his staff for any help they could give us.

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