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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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## editor's preface

Many of Michigan's poorest cities, kept black and ghettoized as a matter of law and policy for decades, now find themselves in a state of utter ruination. The legislative and executive branches of Michigan's government have responded to the crisis in these communities by authorizing the governor to appoint whomever he chooses to be an "Emergency Manager" to manage local affairs—and abolishing democratic government there. Black citizens have been disenfranchised under Michigan's Emergency Manager laws with such dramatic disproportionality that no one even casually observing the situation could fail to conclude that extreme racial tone-deafness, or perhaps old-fashioned racism, is animating the decision-making in Lansing. If you look at a map to find Michigan's largest black population centers—places like Flint, Benton Harbor, and Highland Park—you'll notice an alarming number of them are on the list of those ruled by a viceroy from the state capital. Emergency managers can sell city property, privatize municipal services, and ignore customary local practices with impunity. They arrive with a mandate originating from outside the city and are wholly unaccountable to those living within it. Michigan has implemented a new, hyper-racialized form of intra-state imperialism. Its largest and arguably most troubled city, the overwhelmingly black city of Detroit, is now under the authority of an emergency manager.

When I was a kid growing up in metro Detroit during the 1980s and 1990s there were two incontrovertible truths about the area—racial segregation and the production of cars. Communities in and around greater Detroit were separated by race and ethnicity. Buying a foreign car was a damnable offense in all of them. An intense kind of local patriotism was impressed upon white suburban kids like me for the city on which the region's economic health depended, but with the clear understanding that the area actually inside city limits was unfit for us to live in.

Racial segregation is as much a defining feature as ever in Detroit, but, in terms of its benefit to city residents, the auto industry, on which economic life

*Continued inside the back cover*

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## John Philo

### LOCAL GOVERNMENT IN MICHIGAN: DEMOCRACY FOR THE FORTUNATE FEW

Our nation's states are famously described as laboratories of democracy—places where government can “try novel social and economic experiments without risk to the rest of the country.”<sup>1</sup> Michigan's experiments however have gone tragically awry. Michigan has enacted novel laws that permit the appointment of emergency managers who assume the governing power of local elected officials. The state has aggressively pursued such appointments over economically disenfranchised communities, predominately comprised of people of color. Within such communities, local democratic governance has been suspended indefinitely. If this anti-democratic experiment is not ended, it will set a precedent likely to be replicated in states around the country.

#### The Great Recession and municipal finance

The Great Recession of 2007–08 severely impacted the budgets of municipalities across the country pushing thousands of municipalities to the brink of default.<sup>2</sup> The fiscal distress of municipalities is directly related to widespread declines in tax revenue. There is little dispute that the recession was triggered by “significant losses on residential mortgage loans to subprime borrowers that became apparent shortly after house prices began to decline.”<sup>3</sup> Massive losses in mortgage markets caused a spiraling sequence of events that resulted in a tightening of lending to businesses, which in turn contributed to sharp increases in unemployment.<sup>4</sup> At that point, the recession was in dark bloom.

Throughout, the recession was characterized by historically high losses in home values, home foreclosure rates, and unemployment. Despite very modest recovery in some parts of the country, the extreme pressure placed on household finances by the Great Recession has and continues to place extreme pressures on the finances of local government and will continue to do so for the foreseeable future.

Municipalities derive most of their revenue from property taxes and state revenue-sharing programs. Dramatic declines in home values and equally dramatic increases in foreclosure rates resulted in significant declines in property tax revenue for nearly all municipalities. Additionally, many states balanced troubled state budgets by cutting revenue sharing programs with their municipalities. Cities generate additional revenue through a variety of other means as permitted by state law. In Michigan, large cities collect an income tax. Record unemployment levels during the late 2000s and continuing high unemploy-

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ment in low income communities throughout the country resulted in dramatic declines in income tax revenue for both municipalities and state government.

Since the onset of the Great Recession, dozens of states have sought strategies to stabilize and restructure troubled municipalities. While stabilization has been the goal in most state interventions, some have been so radical that they many have begun to wonder whether the economic crisis is being seized upon as an opportunity for the realization of political rather than economic restructuring.

### The Michigan experiment begins

Michigan's experiment with anti-democratic local government is widely seen as having begun in response to a December 2010 court ruling. At that time, a state statute permitted the appointment of an emergency *financial* manager over economically troubled municipalities and school districts.<sup>5</sup> Since 1989, nine communities had been declared in a state of financial emergency and had emergency financial managers appointed. Five were appointed following the onset of the Great Recession. One of those emergency managers was appointed over the Detroit Public Schools.

The school board brought suit against the Detroit Public School's emergency financial manager. The lawsuit alleged that the manager exceeded his powers by attempting to dictate policy over matters unrelated to the school district's finances. The court found that the emergency financial managers' powers were limited to matters relating to the district's finances. While the scope of such matters was acknowledged to be quite broad, the court's ruling inherently recognized limits to the emergency financial manager's powers. Beyond those limits, local elected officials remained in control.

Notably, the court's ruling followed elections in November 2010 when new Republican majorities were voted into both chambers of the state legislature, the governor's office and most other state offices. Many of the newly elected legislators were grounded in a political philosophy that attributes municipal financial distress to "big government" and powerful public sector labor unions rather than to unprecedented losses in home values and entrenched unemployment that resulted from the Great Recession.

Approximately two weeks after being sworn into office, the new legislature introduced Michigan's first emergency manager bill. Within six weeks, the bill was signed into law as the *Local Government and School District Fiscal Accountability Act*, Act No. 4, Public Acts of 2011 (hereinafter PA 4).<sup>6</sup> PA 4 established a new form of local government, unknown within the United States or the State of Michigan, whereby municipalities may be governed by one unelected official who establishes local law by decree. Significantly, the new statute dropped the word "financial" to rename the official's title as "emergency manager."

Under PA 4, the governor was granted discretionary authority to declare a municipality to be in a financial emergency and was empowered to appoint emergency managers over those municipalities. As in previous state law, PA4 granted emergency managers power over all matters relating to a municipality's finances. However, PA4 radically departed from previous law by granting emergency managers the power to fully act *for and in the place of* local elected officials *regarding all aspects of municipal affairs*. The emergency manager was now vested with all governing power.

In fact, emergency managers were granted far greater powers than those possessed by local elected mayors and city councils. Emergency managers were also granted the power—without public notice or comment and at their sole discretion—to amend, enact, repeal or simply disregard local law as stated in a city's charter and ordinances. The emergency manager was further empowered to reorganize, privatize or eliminate any city department or service and was granted the power to unilaterally terminate existing collective bargaining agreements and impose the terms of new agreements without negotiation with city employees' unions.

As we will discuss in more detail, PA 4 was subsequently repealed by a state-wide referendum. However state officials moved quickly to nullify the citizens' vote. Within a month, the state legislature passed a new law, the *Local Financial Stability and Choice Act*, Act No. 436, Public Acts of 2012 (PA 436),<sup>7</sup> with the same emergency manager powers as PA 4. Despite the overwhelming rejection of PA 4 by state voters, PA 436 thus continues Michigan's experiment with emergency managers. What direct democracy ended, indirect democracy and a partisan legislature immediately resurrected.

Analysts readily observed that Michigan's emergency manager laws reflect a belief that the cause of municipal financial distress is excessive city expenditures, not spiraling declines in revenue. The changes to Michigan's law most immediately addressed perceived bloated costs in two areas. First, the size of government and scope of services would be markedly reduced through the elimination or privatization of departments and services. Second, the negotiating power of public sector unions would be reduced, or altogether eliminated. The result has often been a massive transference of public wealth to private corporations and widespread job loss in municipal government.

The legislature moved forward without any recognition that financially distressed cities are often composed of large percentages of economically disadvantaged residents who, during times of economic crisis, are most dependent on expanded public services for their basic needs. Also ignored were the contributions of public sector employment and organized labor to creating a middle-class tax base of residents, whose stable neighborhoods of home owners are less dependent on municipal social services. While distant state legislators may be able to ignore such realities, local officials and residents do not.

As a consequence, state officials simply viewed local elected officials and local residents as too recalcitrant to make changes consistent with the state's political philosophy of downsizing government and breaking union bargaining power. Emergency managers supplanted local elected officials as the governing body of financially troubled cities. A one-size-fits-all program of financial reform was established, untempered by any democratic processes that might suggest alternatives, such as programs to grow revenues and expand services, instead of simply selling off public resources and making cuts. These financial changes occurred within a context of wider political change, whereby the emergency manager possessed sole discretionary authority to exercise the power of any office, council, commission or board of the city and to remove and replace any employees, department heads, and the members of any commission or board regardless of the position's relationship to city finances or the individual's performance.

Emergency managers have been appointed in the cities of Allen Park, Benton Harbor, Detroit, Ecorse, Flint, Hamtramck, and Pontiac. They also preside over the school districts of Detroit, Highland Park, and Muskegon Heights. Benton Harbor, Detroit, Ecorse, Highland Park, Muskegon Heights, and Pontiac are majority black cities and collectively compose over 50 percent of the state's African American population. Hamtramck is a diverse city composed of established white and black residents alongside sizable populations of first-generation immigrants from Albania, Bosnia and Herzegovina, India, Iraq, Kosovo, Pakistan, Poland, the Ukraine and other nations. Each of these cities has poverty rates that are at least double the state average.<sup>8</sup> Unsurprisingly, these cities are among those with the highest home foreclosure and unemployment rates in the state.

### **The opposition organizes**

In response, gatherings of elected officials, activists, public sector unions, community groups, civil rights institutions, and others came together to strategize efforts to restore democratically elected governance to Michigan's cities. The Sugar Law Center for Economic & Social Justice, along with a coalition of lawyers, including attorneys from the Michigan National Lawyers Guild, led efforts to develop a legal strategy in support of efforts to repeal or otherwise invalidate the emergency manager statute.

In June 2011, the first lawsuit was filed challenging the constitutionality of Michigan's emergency manager law. The lawsuit was filed in state court based on violations of Michigan's constitution alleging that the statute violated home rule principles, the nondelegation doctrine, and prohibitions against the enactment of local acts. The state adopted a strategy of protracted delay in the trial court. At the same time, the state invoked a rarely used procedure allowing the governor directly request the state supreme court to remove the case from the trial court and undertake direct expedited review.

During the lawsuit, community organizers gathered signatures for a state-wide referendum to reject PA 4 and in February 2012 submitted petitions with enough valid signatures for the matter to appear on the ballot in the general election in November. A conservative state lobbying group created an organization to contest the petitions before the state board of canvassers. The organization challenged the petitions on grounds that the title on the petitions was printed in type slightly smaller than the 14-point font called for under state law. Despite the printer's affidavit that the type was, in fact, printed in 14-point Calibri font, the state board of canvassers deadlocked on a party line vote at a meeting in March 2012. As a result, the referendum was not certified for the ballot at that time.

Coalition attorneys initiated an action with the state court of appeals to have the petitions certified and the referendum placed on the ballot. In court, the challenger's argument was two-fold: first, that only font styles in existence at the time when the applicable state statute was enacted in the early 1960s could be used on petitions; and second, that font size should not be measured by standards found within the print and graphic design industries but rather by a new method developed by the challengers. The governor and state attorney general individually appeared as *amici* in support of the challengers, while the state attorney general's office appeared on behalf of the secretary of state in support of the petitioners.

In June, a three judge panel of the court of appeals issued its decision. The panel conceded that existing law required the referendum to appear on the ballot; however the panel invoked a request to convene a special panel of the full court of appeals to overturn the existing law. The full court of appeals declined to convene the special panel and an appeal was taken to state supreme court. After briefing and oral arguments, a majority of the Michigan Supreme Court in two separate opinions ordered the petitions to be certified and the referendum to appear on the ballot.

At the elections in November 2012, the referendum passed and PA 4 was rejected rendering the pending lawsuit moot. But state officials moved quickly to overturn the results of the election. On December 12, an unrelated bill that had lain dormant in committee for over a year was referred to the full House with recommendations that a substitute version be adopted. The substituted version contained emergency manager provisions nearly identical to those rejected by voters only a month earlier. The bill passed the House on the same day and passed the Senate the following day. The governor signed the bill into law as PA 436. Notably, the new law contained modest appropriations for the payment of an emergency manager's salary from state funds, thereby excluding the statute from a citizens' referendum under state law.

The Sugar Law Center and coalition attorneys again filed suit against the governor and state treasurer challenging the constitutionality of PA 436. The

new lawsuit was filed in the United States District Court for the Eastern District of Michigan and claimed that PA 436 violates numerous provisions of the U.S. Constitution and the Voting Rights Act of 1965.<sup>9</sup>

Before the defendants answered the lawsuit's complaint, Detroit's emergency manager filed a petition for Chapter 9 bankruptcy. The emergency manager's bankruptcy petition was hurried into court and filed the day before an expected ruling in another state court action against the governor. In that action and two others, plaintiffs raised issues concerning state constitutional protections of Detroit city workers' pensions. Citing the pending pension cases and without notice to coalition counsel, the governor and state treasurer promptly filed a motion to extend the bankruptcy court stay to pending cases against the governor and other state officials. The motion was granted and the governor then asserted the stay in the lawsuit challenging the constitutionality of PA 4.

Coalition attorneys moved in bankruptcy court for an order clarifying that the extended stay was not intended to apply to the pending constitutional challenges or, in the alternative, that the stay should be lifted altogether. The state argued that the Detroit emergency manager's historic bankruptcy filing was too important to risk by limiting on his legal powers. In other words, the state argued that resolving municipal financial issues trump compliance with the Constitution. After oral argument, the bankruptcy court issued an order finding that the extended stay did not apply to the coalition's challenge.<sup>10</sup> Since that ruling, state officials have filed five separate motions and an appeal seeking to stay district court proceedings now that the case has been reopened. To date, the state's extraordinary efforts at delay have been unsuccessful and the case is moving forward to dispositive motions.

Throughout these proceedings, state officials have doggedly pursued extraordinary efforts to prevent any hearing on the historic issues raised by this litigation: (1) whether citizens have a right to elect local governing officials; and (2) whether the state can create one form of government for wealthy communities—an elected one—while reserving another form of government by appointee for poor communities and communities of color. Arguments that the law applies equally to wealthy and poor communities evoke Anatole France's critical observation: "[I]n its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."<sup>11</sup> Communities composed of financially wealthy households are unlikely to become subject to PA 436.<sup>12</sup> Meanwhile selected poor communities and communities of color have had their right to vote for local governing officials suspended—indefinitely.<sup>13</sup>

Poverty alone does not explain the disproportionate appointment of emergency managers in majority minority cities. In majority white communities, Michigan also suffers from rural poverty and poverty resulting from job flight caused by national policies of deindustrialization. Yet to date, seven emergency

managers have been appointed over majority black communities despite the opposition of local elected officials, while only two majority white communities have received an emergency manager, and both of those requested the appointment. Moreover, state fiscal indicator scores and similar scores of private organizations indicate that at least ten other majority white communities and only one other black community were experiencing fiscal distress equal to or greater than the fiscal distress of the black communities that received an emergency manager over the past three years. The appointment of an emergency manager and consequent loss of a right to vote for local officials is thus far more likely to be imposed on black communities and is invidiously discriminatory. On their face and in their application, Michigan's emergency manager laws have re-instituted old bigotries against the poor and against racial minorities.

### Emerging emergency manager laws in other states

At the time Michigan introduced PA 4, Rhode Island's Supreme Court was considering a challenge to new legislation in that state. The Great Recession profoundly impacted the fiscal condition of Rhode Island's cities. One such city was Central Falls. Central Falls faced imminent default to its creditors in 2010 and, as a result, city officials filed a receivership action in state court.<sup>14</sup> State officials had not been consulted and expressed grave concern regarding the precedent it might establish. The Rhode Island General Assembly responded by enacting new legislation permitting, under certain circumstances, the governor to directly appoint a nonjudicial receiver when a local government is facing a fiscal emergency.<sup>15</sup> The state's governor then appointed a nonjudicial receiver over the city of Central Falls, ending the court action.

The text of Rhode Island's 2010 amendments is consistent with that of PA4. The statute states that nonjudicial receivers have the power of any local official "relating to or impacting the fiscal stability of the city or town."<sup>16</sup> This language appeared to limit the scope of receiver's actions to local budgets and finances. However, city officials became concerned that the newly appointed receiver was asserting all the powers of the mayor's office. The mayor filed suit challenging the recent amendments.

In an opinion issued after passage of PA4 in Michigan, the Rhode Island Supreme Court suggested that that the nonjudicial receiver possessed all the powers of Central Falls' elected officials. The court's opinion is not clear on the question whether there may be some limits on the receiver's powers, and these issues are likely to arise in potential future challenges to the state's statute. Central Falls entered Chapter 9 bankruptcy within a year of the receiver's appointment and no further legal challenges were brought. The state has not since appointed a nonjudicial receiver over any other cities. Based on the court's ruling however, Rhode Island's statute may be argued to now be an emergency manager statute similar to Michigan's.

During 2012, the Indiana General Assembly passed legislation that remains unclear as to its scope, but bears significant similarities to both Michigan's and Rhode Island's statutes. Indiana's law allows for the appointment of an emergency manager to:

Assume and exercise the authority and responsibilities of both the executive and the fiscal body of the political subdivision concerning the adoption, amendment, and enforcement of ordinances and resolutions relating to or affecting the fiscal stability of the political subdivision.<sup>17</sup>

The statute's language appears to limit the scope of an emergency manager's authority to matters directly relating to a city's budget and finances. It remains to be seen whether that language will be interpreted consistent with previous understandings of emergency financial manager laws or like the Rhode Island Supreme Court's apparently more expansive understandings. Of most concern, is the legislation's explicit grant of legislative authority to one unelected official, which in many ways replicates the current law in Michigan.

The Pennsylvania General Assembly has also considered, but has not yet adopted, emergency manager-type bills. With states in every region of the country facing municipal financial distress at levels not seen since the Great Depression, other state legislatures are likely to consider new measures to resolve local financial crises. Whether those measures will suspend democracy within local communities will likely turn on the outcome of the ongoing struggles in Michigan.

### **Legal challenges to emergency manager laws**

The profound changes in Michigan's law may appear banal in the context of legal maxims such as "cities are creatures of the state."<sup>18</sup> And that cities exist "solely at the whim and behest of their state"<sup>19</sup> and the state "may destroy or reshape any unit it creates."<sup>20</sup> The stock repetition of such phrases can lead to rationalizations of profoundly undemocratic measures. In the words of Justice Thomas M. Cooley of the Michigan Supreme Court however, "such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice."<sup>21</sup> In short, such general and abstract maxims do not absolve those who violate the fundamental principles underpinning our state and federal constitutions and the basic notions of democracy that these documents were intended to protect.

Emergency manager laws most immediately raise issues under existing state constitutions. In observing that cities are creatures of the state, commentators err in assuming that the "state" is simply the governor or state legislature. The state is the people of the state who express their will first through their state constitution and secondarily through the statutes adopted by elected state officials. State constitutional provisions provide a number of potential protections against the encroachments upon democracy found in emergency manager statutes, including provisions that prohibit the delegation of legislative

authority, that prohibit the passage of local acts, and that permit communities to choose their own charters.

State constitutions typically contain clauses granting general legislative power to state legislatures.<sup>22</sup> These provisions are uniformly understood to prohibit the delegation of general legislative power to executive branch officials. When a statute grants full governing power over a city to an appointed emergency manager, the grant includes the power to adopt, amend and repeal charter provisions and/or ordinances. Such actions are inherently legislative and violate the nondelegation doctrine.

Many state constitutions also prohibit, or markedly restrict, state legislatures from adopting or repealing local acts.<sup>23</sup> State constitutions also often expressly grant the power to adopt ordinances to municipalities.<sup>24</sup> Local acts are state legislation that apply to one local jurisdiction. Examples include county, city and town charters and ordinances. Each time emergency managers enact or amend charters or ordinances they are adopting local acts in violation of state constitutional prohibitions. Simply put, the state legislatures cannot delegate to the emergency manager a power to adopt local laws, because the state legislatures themselves do not possess that power.

Over the past century, state constitutional provisions have been adopted to allow and strengthen home rule for cities, towns, and villages. Such provisions often provide for the right of local residents to adopt their own charter.<sup>25</sup> While state legislatures are permitted to adopt general laws that are superior to the provisions of a city charter, they are often constrained from otherwise altering municipal charters. However when emergency managers adopt, repeal, or amend particular charters, their actions may run afoul of the state constitution's home rule provisions. In other words, the state legislature might be able to directly invalidate a charter provision through the enactment of a general law, but it cannot do so by simply adopting an emergency manager statute that allows the emergency manager to amend charters as she or he sees fit.

Finally, a rich body of case law in many states exists regarding whether local citizens have a right to elect various officials of local government. These cases commonly arose in the late 1800s and early 1900s as urban areas were rapidly growing and various forms of municipal corporations were being established. In a few cases, courts found an inherent right to elect certain officials of local government.<sup>26</sup> Such controversies waned as concepts of home rule became more common. However, those cases may provide precedent that may be helpful in restoring democracy where emergency managers have been appointed.

In addition to state constitutional issues, emergency manager laws also raise important questions under the U.S. Constitution. Most notably, such laws give rise to potential Equal Protection,<sup>27</sup> Substantive Due Process,<sup>28</sup> and Guarantee Clause claims.<sup>29</sup> Emergency manager laws discriminate against racial and ethnic minorities in their right to vote for local officials and condition the

right to vote in local elections upon the wealth of the community. Both give rise to potential equal protection claims under the Fourteenth Amendment.<sup>30</sup> Discriminatory intent in support of a racial discrimination claim is a fact-based inquiry and requires the marshalling of evidence showing the gross disproportionate application and impact of such laws in majority minority communities. In the context of voting rights, wealth remains a suspect class under the Equal Protection Clause.<sup>31</sup> The crux of such claims will require showing a sufficient linkage between the poverty of residents and the financial emergency. Both types of claims are buttressed by the marshalling of social science, demographic, and economic data.

While courts have been reluctant to expand notions of substantive due process,<sup>32</sup> emergency manager laws strike at the heart of concepts of liberty deeply rooted in the nation's history. The Supreme Court describes its analysis of substantive due process protections this way: "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and are "implicit in the concept of ordered liberty."<sup>33</sup> The fundamental right at issue is a right to elect those officials who possess legislative (i.e. lawmaking) power. No court has yet considered this issue, but certain principles are recognized within case law. The Court has stated that "[a]s long as ours is a representative form of government ... the right to elect legislators ... is a bedrock of our political system."<sup>34</sup> There is no concept of ordered liberty more deeply rooted in the nation's history than the idea of democratic governance whereby the people governed have a right to elect those officials who make the laws that the people are asked to obey.

The Constitution's Guarantee Clause requires that each state maintain a "Republican Form of Government."<sup>35</sup> The clause, once litigable, has long been dormant. While in most instances courts ultimately find that Guarantee Clause claims raise nonjusticiable issues, federal courts have not wholly eliminated such causes of action. In *New York v. United States*, Justice Sandra Day O'Connor recognized that "[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."<sup>36</sup> She then proceeded to assume that the claims were justiciable, but found that in the particular case she was considering the right to a "Republican Form of Government" had not been violated.<sup>37</sup> The Supreme Court also recognizes that "the distinguishing feature of that form [of republican government] is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies."<sup>38</sup> Governance by emergency managers clearly violates these principles.

While Equal Protection, Substantive Due Process, and Guaranty Clause claims as described are uncommon, the form of government established by developing emergency manager laws is even more so. Emergency manager

laws have the effect of creating a bifurcated voting system where citizens in communities saddled with an emergency manager vote for officials who have no governing authority while citizens of the other communities vote for officials who both govern and act as their representatives in office. These laws are a radical departure from prior forms of local government known in Michigan and the United States. The right of the people to elect their government by democratic election has long been assumed in this nation. However it is a right that often remains unexpressed in federal and state constitutions. Legal challenges to emergency manager laws seek to force the nation's legal system to clearly affirm this right. Emergency manager laws should share company with the divisive and discriminatory laws that came before them in the dustbin of history.

## Conclusion

Emergency manager laws inherently see the nation's ongoing municipal financial emergencies not as a product of gross exploitation and unbridled greed within the mortgage industry and larger financial markets or as a product of the lax oversight and deregulation of those industries that led to the Great Recession. Rather, these laws see municipal financial distress as a product of governing deficiencies existing in particular cities. In this way, emergency management laws seek to localize the problem. They assume, without any showing, that a city's financial emergency is caused by the poor choices of the local electorate and/or the incompetence or outright corruption of local elected officials. These are bigotries long leveled against the poor, against communities of color, and against nearly every immigrant group that has reached the shores of this country. They are meant to divest certain people of their full right to participate in the political and economic life of their communities.

In defending the emergency manager law, Michigan's attorney general argued emphatically that there is no right to democracy in his state. And that is the very heart of the matter. In the near future, courts will be presented with precisely this question and citizens in cities throughout the country have a very high stake in the answer.

## NOTES

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 331 (1932) (dissent of Justice Louis D. Brandeis).
2. See Jiri Jonas, IMF Working Paper No. WP/12/184, *Great Recession and Fiscal Squeeze at U.S. Subnational Government Level* (July 2012) available at <https://www.imf.org/external/pubs/ft/wp/2012/wp12184.pdf>.
3. Statement by Ben S. Bernake, Chairman, Board of Governors of the Federal Reserve System, Before the Financial Crisis Inquiry Commission, in Washington, DC, September 2, 2010, at 1.
4. *See generally*, U.S. FINANCIAL CRISIS INQUIRY COMMISSION, "THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES," at 389, 394-396 (U.S. Gov't. Printing Office, Dec. 4, 2008).

5. Michigan law has allowed for the appointment of an emergency financial manager to assume control of a municipality's budget and finances since 1988. A number of states have similar laws permitting the appointment of boards, commissions, and/or state officials to oversee the finances of local governments where financial emergencies exist.
6. PA 4 provided no new revenue streams, access to capital, infrastructure investments, ability to revise existing local property tax abatements, or expanded services from the state to stabilize necessary public services in financially distressed communities. Rather, the costs of the emergency manager, their support staff, and a range of consultants are directly imposed on a financially troubled city.
7. MICH .COMP. LAWS §§ 141.1541, *et. seq.* (2012).
8. Allen Park is the outlier. Allen Park issued bonds to finance film production facilities in the city at a time when the state was providing significant incentives for movie studios filming in Michigan. Following the 2010 elections, the state legislature slashed the incentive program and in-state filming markedly declined. As a result, Allen Park was unable to generate sufficient revenue to support the issued bonds.
9. Subsequently, the Detroit Branch of the NAACP filed suit also claiming violations of the Equal Protection Clause and of the Voting Rights Act.
10. The court however declined to lift the stay in the NAACP's challenge.
11. ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., John Lane Co., 1901).
12. *See generally*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 *YALE L. J.* 1118 (2014).
13. No city that has come under an emergency manager has yet been fully returned to local elected governance. The cities of Ecorse and Pontiac have both been declared as out of a financial emergency. Both are now subject to a PA 436 transition advisory board. The former emergency manager of both cities is the vice-chair of the board and the governor's appointee from the treasury department is the chair of the three person boards. The transition advisory boards oversee and can reject any action taken by the cities' mayor and city councils. Moreover, under PA 436, elected officials are prohibited from rescinding any of the emergency manager's orders for a number of years following the removal of the emergency manager. Finally, under the former emergency financial manager law, the average term of appointment was approximately four years. When transition advisory boards are factored into the equation, the term is approximately six years. Under the new law, there is no reason to believe that the appointment of emergency managers will be any shorter.
14. State court receivership may be considered similar in some respects to a federal bankruptcy action.
15. R.I. GEN. LAWS § 45-9-8 (2010).
16. R.I. GEN. LAWS § 45-9-7(b)(2) (2010). The same qualifying language is also used in R.I. GEN. LAWS § 45-9-7(c).
17. IND. CODE 6-1.1-20.3-8.5 (2012).
18. *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).
19. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990) (Brennan, J., concurring).
20. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).
21. *People ex rel. Leroy v. Hurlbut*, 24 Mich. 44, 96 (1871).
22. *See e.g.*, MICH. CONST 1963, art. 3, §2 and art. 4, §1.
23. *See e.g.*, MICH. CONST 1963, art. 4, §29.
24. *See e.g.*, MICH. CONST 1963, art. 7, § 8, § 18; and § 22.
25. *See e.g.*, MICH. CONST 1963, art 7, § 22.
26. *See e.g. Attorney Gen ex rel Lawrence v. Trombly*, 89 Mich 50 (1891) and *People v. Hurlbut*, 24 Mich 44 (1871);
27. U.S. CONST. amend. XIV, §1.
28. *Id.*
29. U.S. CONST. art. IV, § 4.

30. U.S. CONST. amend. XIV, § 1.
31. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).
32. Substantive due process is "a doctrine holding that the Fifth and Fourteenth Amendments require all governmental intrusions into fundamental rights and liberties be fair and reasonable and in furtherance of a legitimate government interest. The U.S. Supreme Court during the middle of the 20th Century used substantive due process to give added force to the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution by constraining certain actions by law enforcement, prosecutors, and judges." Cornell University Law School Legal Information Institute: Substantive Due Process, [http://www.law.cornell.edu/wex/substantive\\_due\\_process](http://www.law.cornell.edu/wex/substantive_due_process) (last visited, Aug. 18, 2014).
33. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted and emphasis added).
34. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).
35. U.S. CONST. art. IV, § 4.
36. *New York v. United States*, 505 U.S. 144, 185 (1992).
37. *Id.*
38. *In re Duncan*, 139 U.S. 449 (1891).



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**Kathryn R. Taylor**

**“ANYTHING YOU POST ONLINE CAN  
AND WILL BE USED AGAINST  
YOU IN A COURT OF LAW”:  
CRIMINAL LIABILITY AND FIRST  
AMENDMENT IMPLICATIONS OF  
SOCIAL MEDIA EXPRESSION**

**Introduction**

The next decade of Justin Carter’s life hangs in the balance because of Facebook comments he now deeply regrets. It was a typical night for this then 18-year-old. He was engaged in an online, multiplayer fantasy game called the “League of Legends.” While gaming, he got into a heated argument with another player. As the two communicated over Facebook, their online exchange quickly turned violent. At one point, the other player wrote a comment that in effect called Justin insane. Justin responded by commenting, “I’m fucked in the head alright. I think I’m a SHOOT UP A KINDERGARTEN. AND WATCH THE BLOOD OF THE INNOCENT RAIN DOWN.” The other player wrote back, “I hope you fucking bring [sic] in hell you fucking prick.” Justin replied, “AND EAT THE BEATING HEART OUT OF ONE OF THEM.” Then, he added, “Just kidding” and “LOL.”<sup>1</sup>

Although this Facebook conversation was between these two individuals, they were not the only ones reading it. Unbeknownst to either, a woman in Canada saw the postings and took the next step of trying to find Justin’s Texas address. After she determined that Justin actually lived near an elementary school, she contacted her local officials and lodged an anonymous complaint in Canada over his postings. This sparked an investigation by the police in Austin, Texas, and eventually led to Justin’s hometown.<sup>2</sup> Justin was arrested and charged for making a terrorist threat under Texas Code 22.07 (a)(4-6), which is a third degree felony.<sup>3</sup> He spent nearly five months in jail after he was initially unable to post the \$500,000 bond that had been set.<sup>4</sup> Justin is currently preparing to go to trial. If he is convicted, he could face up to ten years in prison.<sup>5</sup>

Justin’s arrest and potential conviction is not the first example of an individual being prosecuted for a social media post. As social networking websites such as Facebook, Myspace, Twitter, YouTube, and Instagram continue to expand and

become a more predominant means of communication worldwide, they provide ever-increasing access to information that was once thought to be unavailable. What one thinks is only being viewed by family and friends, might actually be viewed by countless anonymous audiences, including law enforcement.

With the expansion of social media, the courts are now faced with the issue of whether an individual can be criminally liable for what he communicates through his social networking activity. In Pennsylvania, an 18-year-old was convicted of harassment after posting a Facebook comment about someone having herpes.<sup>6</sup> In Virginia, an ex-boyfriend’s rap lyrics displayed on his Myspace page were the basis for his conviction of a Class 6 felony of knowingly communicating a written threat.<sup>7</sup> In the United States Court of Appeals for the Sixth Circuit, a father was found guilty of transmitting a threat against a judge, when he posted a video of himself singing a self-written song on YouTube and Facebook.<sup>8</sup> Although all these convictions were based on communications on social networking sites that were determined to have violated criminal statutes, only the aforementioned Sixth Circuit applied a First Amendment analysis to the prosecution.<sup>9</sup> But couldn’t all of these social media expressions have claimed a First Amendment defense? Doesn’t it seem obvious that social media activity should be considered speech, subject to free speech analyses before being used against a defendant in a court of law?

Surprisingly, the Supreme Court has yet to address specifically whether activity on social network sites in general is considered speech. This can become particularly troubling in online situations where the nature of such a forum makes it difficult to discern whether dangerous, offensive or violent speech is, truly threatening, meant to incite violence or is just highly exaggerated. Though the Court has not yet explicitly adapted existing First Amendment doctrines to apply to dangerous or odious Internet speech,<sup>10</sup> the Court has previously held that as new technologies emerge, they merit the same level of First Amendment protection as traditional mediums of speech.<sup>11</sup> Accordingly, lower courts are moving towards considering activity on these social networking sites speech subject to a First Amendment analysis.<sup>12</sup>

This article seeks to further that trend. We will examine the rise of social media as a modern public forum and then look at the use of social media activity in discovery and as evidence in various areas of the law. After observing relevant First Amendment doctrines, we will then argue that social media qualifies as speech. Social media activity should therefore be analyzed under a First Amendment framework with all its attendant protections before it can be used as a basis for a defendant’s conviction. We will take several current examples in which the courts have properly recognized and evaluated a potential speech violation as well as other instances where a necessary speech analysis was not undertaken, effectively infringing upon the defendants’ First Amendment rights.

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### Social media as a modern public forum

Since their introduction in the late 1990s,<sup>13</sup> the proliferation of web-based social networking sites has revolutionized the way society connects, communicates, and develops relationships. Social networking or social media generally refers to online activities such as blogs, forums, wikis, social networking sites, and photo-sharing sites that enable users to share information, opinions, content, interests, and experiences.<sup>14</sup> Some of the most common social media sites include Facebook, Myspace, Twitter, YouTube, Instagram, and Tumblr. These sites have attracted billions of users worldwide,<sup>15</sup> who come from a wide range of demographic groups.<sup>16</sup> While joining social networks remains popular mainly among younger people,<sup>17</sup> adult usage has grown steadily: 72 percent reported using social networking sites in May 2013, compared to only 8 percent in February 2005.<sup>18</sup>

Once people gain access to any of these free social networking sites by signing up and creating individualized accounts, users generally have control over their own connections and what they choose to display or communicate. After you sign into your account, you write your own status updates, select the photos and videos to upload, craft your own tweets or decide to “favorite” or re-tweet another’s posting, accept or decline friend requests, “follow” other users, and much more.<sup>19</sup> Even if another individual posts something to your account that you do not want displayed, you can generally control that. For example, on Facebook, if a user posts anything on your wall you do not want others to see, you can “hide” or “delete” the post, mark the post as “spam,”<sup>20</sup> or file a report that the post is abusive.<sup>21</sup>

Using these various sites, account holders can connect with friends and family to discover what’s going on in the world and to share and express what matters to them. Users can follow real time news feeds and watch as well as share originally created videos. They can access and contribute to the world’s largest digital music library<sup>22</sup> as well as snap photos with their phones while simultaneously viewing others’ private lives through their posted pictures.<sup>23</sup> With a click of a mouse, a user can interface with any other users instantly and globally.

With their ability to reach widespread audiences, to allow rapid exchange of information and to provide a low-cost place to gather and organize, it comes as no surprise that these social media sites have become a modern public forum. A public forum is “a public space where people traditionally gather to express ideas and exchange views.”<sup>24</sup> Traditional public forums can include sidewalks, streets, parks or areas that “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>25</sup> According to the mission statements of these popular social media sites, these online spaces were similarly designed to provide an unrestricted forum where people across the globe can form communities as they are given the power to

share, connect, create, inform, and inspire.<sup>26</sup> By any reasonable definition, these online networking sites certainly qualify as a modern public forum.

### Use of social media in discovery and as evidence

The use of social media material in litigation has progressively become more recognized and accepted by both practicing attorneys and the courts.<sup>27</sup> With the expansion of social networking sites as popular vehicles for the dissemination of personal information, lawyers from all areas of practice search these online accounts for any useful information, which can with increasing frequency be case-making or case-breaking.<sup>28</sup> Thus, despite various issues regarding the discoverability and admissibility of social media evidence based on relevancy, authentication, hearsay, and probative versus prejudicial value, litigators have seen how the discovery of evidence from these sites can prove crucial in all kinds of cases.

In family law cases, courts have chosen to permit evidence from social media sites in adjudicating divorce proceedings or determining parental fitness in custody battles, holding such information relevant in determining a litigant’s character and allowing it to influence the outcomes of such cases.<sup>29</sup> Within employment law, courts are often faced with determining whether evidence of an employee’s social media activity, such as pictures, status updates, comments, or “likes” on Facebook, can be the basis for termination.<sup>30</sup> In certain tort cases, such as those involving insurance and personal injury claims, admittance of evidence from social networking sites is often used to counter allegations of serious injury—for example, insurance companies might seek to introduce material that reflects an active, happy life of an allegedly injured plaintiff.<sup>31</sup> In the area of education law, social media activity has become especially significant in the courts’ ongoing debate of whether school officials have the authority to discipline online, off-campus speech of their students. Coupling the increasing pervasiveness of student social media use<sup>32</sup> with the fact that the Supreme Court has yet to rule on whether a student’s off-campus Internet speech may be afforded First Amendment protections, lower federal courts as well as state courts struggle to find a standard to follow and have differed on how to resolve this issue.<sup>33</sup>

Because of the treasure trove of information that can be found on social networking forums, it is no wonder that prosecutors and defense attorneys alike scour these sites for content that might assist their cases. Law enforcement officers also use social media material to gather evidence to arrest individuals.<sup>34</sup> While there are instances in which social media activity directly provides the evidence at trial to convict a defendant,<sup>35</sup> social media activity can also provide leads in police investigations,<sup>36</sup> link perpetrators to unreported crimes,<sup>37</sup> as well as undermine a defendant’s claim of good character and illuminate his corrupt lifestyle.<sup>38</sup>

When social media communications are brought before a criminal court as evidence to convict an individual, the defendant may well assert a Fourth Amendment right to privacy defense.<sup>39</sup> On the civil side, despite the ongoing debate about the applicability of privacy protections for social media activity, especially in light of the varying levels of privacy that these online forums can provide,<sup>40</sup> the prevailing tendency by the majority of courts appears to be that an individual's privacy interests do not trump the other party's right to the discovery of social media evidence.<sup>41</sup> As a result, social networking evidence is more readily available in the courtroom, making it much easier for a defendant to be convicted criminally or found civilly liable for his online expressions.

### Modern First Amendment jurisprudence

Before it can be decided whether a person should be criminally liable for his social media activity under a First Amendment analysis, courts must determine whether the online conduct or words are properly considered speech at all.<sup>42</sup> While First Amendment jurisprudence has historically addressed traditional media—television,<sup>43</sup> newspapers,<sup>44</sup> and radio<sup>45</sup>—the Internet and specifically social media present new challenges and legal issues within the arena of First Amendment litigation.<sup>46</sup> Nevertheless, the “basic principles of freedom of speech . . . like the First Amendment's command, do not vary when a new and different medium for communication appears.”<sup>47</sup> Therefore, when emerging challenges develop in determining the reach of First Amendment protections, the underlying philosophy for why expression is protected remains “vital for giving due respect to the benefits and inventiveness that arises when an individual sets off in previously untried directions.”<sup>48</sup>

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>49</sup> Being interpreted to grant strong, though not absolute, protections to citizens' speech rights,<sup>50</sup> the Supreme Court has long recognized the freedom of speech as a fundamental right.<sup>51</sup> In doing so, it “reflects the belief of the framers of the Constitution that exercise of the right[] lies at the foundation of free government by free men.”<sup>52</sup> There are four principal justifications for protecting speech: to further self-governance, to aid in the discovery of truth via the marketplace of ideas, to promote autonomy and protect self-expression, and to foster tolerance.<sup>53</sup> These objectives are obviously not mutually exclusive, and all are crucial in considering what expressions should be safeguarded or regulated as well as in appraising Supreme Court decisions in this area.<sup>54</sup>

A communicative expression must first be considered speech before it is eligible for First Amendment protection.<sup>55</sup> The greatest constitutional protection is given to “pure speech,” which is defined as “[w]ords or conduct limited in form to what is necessary to convey the idea.”<sup>56</sup> While pure speech has been notoriously difficult to define, at the very least it includes both written and spoken words.<sup>57</sup>

Since the Free Speech Clause explicitly protects only “speech,” the Supreme Court has expanded the term to encompass symbolic acts,<sup>58</sup> expressive conduct,<sup>59</sup> as well as “the expression of an idea through activity.”<sup>60</sup> Acknowledging that “[s]ymbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind,”<sup>61</sup> the Supreme Court has determined that First Amendment protections “are not confined to verbal expression.”<sup>62</sup> Rather, these protections embrace appropriate types of action as well.<sup>63</sup> Against this backdrop, lower courts have noted that “[s]ome nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement.”<sup>64</sup> Now, this “symbolism principle” has evolved to become one of the core principles in modern First Amendment jurisprudence.<sup>65</sup>

In an abstract sense, all conduct “expresses” something, but this alone cannot justify treating all conduct as speech.<sup>66</sup> To distinguish between mere conduct and symbolic conduct that would fall within the ambit of the First Amendment, the actor must be expressive in a more deliberate sense and undertake the action to *communicate*.<sup>67</sup> To determine what conduct is sufficiently communicative to fall within the purview of the First Amendment, the Supreme Court articulated a two-pronged test in its 1974 *Spence v. State of Washington* decision.<sup>68</sup> In this case, it examined whether a defendant's conviction for displaying a peace sign attached to an inverted American flag infringed upon his right to free speech.<sup>69</sup> In holding that the action was expressive conduct, warranting First Amendment protections, the Court emphasized two factors: “[1] [a]n intent to convey a particularized message was present, and [2] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>70</sup> Over 20 years later, the Court clarified the “particularized message” prong of the *Spence* test by noting that “a narrow, succinctly articulable message is not a condition of constitutional protection” since such a constraint might never reach certain artistic expressions whose messages could be open to interpretation.<sup>71</sup>

Once it concludes that a person has engaged in pure or symbolic speech, a court must determine whether that speech is protected under the First Amendment.<sup>72</sup> While there are no established categories of protected speech, the Supreme Court has protected certain types of communications. In light of the nature of social media activity and recent cases where these postings have been contentious, the privileged areas of speech that are relevant here include artistic expressions, political speech, speech that could be considered offensive or harassing, violent works, and Internet speech.

Though the Supreme Court has not explicitly defined artistic expression, it has suggested that artistic works are constitutionally protected under two rationales: (1) art resembles in function the spoken or written word because it invokes thoughts or feelings in others by communicating; and (2) as a result of

an artist's self-expression, regardless of whether such expression is intelligible to others.<sup>73</sup> While the Court is willing to limit speech that, taken as a whole, lacks serious literary, artistic, political, or scientific value,<sup>74</sup> Justice Souter has also noted that, "The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected 'speech' extending outward from the core of overtly political declarations . . . [A]rt is entitled to full protection because our 'cultural life,' just like our native politics, 'rest[s] upon [the] ideal' of governmental viewpoint neutrality."<sup>75</sup>

Whatever differences may exist about interpretations of the First Amendment, there remains universal agreement that a major underlying purpose of protecting speech is to enable and foster free discussion of the government.<sup>76</sup> This would include "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."<sup>77</sup> Because speech is an "essential mechanism of democracy,"<sup>78</sup> "political speech must prevail against laws that would suppress it, whether by design or inadvertence."<sup>79</sup> As a result, any laws that burden political speech will be subject to strict scrutiny, and the government may restrict such speech only for compelling reasons.<sup>80</sup> While political speech is generally considered pure speech, the Court has also protected political conduct as speech—flag desecration,<sup>81</sup> wearing particular pieces of clothing in protest against a war,<sup>82</sup> refusing to salute the American flag or say the pledge of allegiance,<sup>83</sup> sit-ins,<sup>84</sup> picketing,<sup>85</sup> and marching in parades.<sup>86</sup> Most recently, the U.S. Court of Appeals for the Fourth Circuit found that "liking" the Facebook page of a campaign election candidate was protected speech.<sup>87</sup> Yet, even if certain political conduct, like draft-card burning, can be considered speech,<sup>88</sup> there are still times when the governmental interests in regulating that expressive conduct outweigh the individual's free speech protections.<sup>89</sup> In these instances, the burden is on the government to prove that the laws that seek to suppress the speech must further a compelling interest and be narrowly tailored to achieve that interest.<sup>90</sup>

### Is offensive or harassing language protected by the First Amendment?

Despite the expansive Supreme Court's jurisprudence on the issue of free speech and its regulation, one question remains unanswered. Namely, does the government have any authority to restrict "offensive," "indecent," or "repugnant" speech or to regulate "harassing" or "bullying" speech that does not fit any of the established constitutional exceptions? In terms of civil liability, the Court has already made it clear in *Snyder v. Phelps* and *Hustler Magazine, Inc. v. Falwell* that deliberately offensive or extreme speech does not carry civil liability even when the speech is outrageous and purposefully causes severe emotional distress.<sup>91</sup> Accordingly, this kind of speech cannot then

lead to criminal liability under statutes that have comparably lower standards, such as criminal harassment laws.<sup>92</sup> "As a general matter, Americans are free to say and write bad things about each other," and, however much one might dislike others saying offensive things, it doesn't follow that subjecting people to criminal liability is the appropriate method of restricting such criticism.<sup>93</sup>

Perhaps the most famous "offensive" speech case is *Cohen v. California* in 1969. In the Court of Appeals, Cohen's behavior of wearing a jacket bearing the words "Fuck the Draft" in a courthouse while women and children were present was held to be "offensive conduct" that the court defined as "behavior which has a tendency to provoke others to acts of violence or in turn disturb the peace."<sup>94</sup> The Supreme Court disagreed and held that Cohen's behavior retained First Amendment protections since the state could not make the public display of a single four-letter expletive a criminal offense, without a more specific and compelling reason than a general tendency to disturb the peace.<sup>95</sup>

Finally, the *Cohen* Court considered the question of whether Cohen could be prosecuted for imposing on unwilling viewers the distasteful expression. Generally, the government can regulate offensive speech solely to protect listeners only with a "showing that substantial privacy interests are being invaded in an essentially intolerable manner," and specifically if a speaker imposes his "unwelcome views" into the privacy of another's *home*.<sup>96</sup> However, in this instance, the Court found that "we are often 'captives' *outside* the sanctuary of the home and [may be] subject to objectionable speech."<sup>97</sup>

While Cohen could have made his point using less offensive language, the Court held that courts could not control the content of individual expression within public discourse.<sup>98</sup> Understanding that courts cannot control the form of words without running the risk of suppressing individual ideas, the Court also acknowledged and approved of "distasteful" language that could very well be chosen because of its emotional impact on the listener, since much linguistic expression conveys, not only ideas capable of relatively precise, detached explication, but also inexpressible emotions as well.<sup>99</sup>

Though *Cohen* demonstrated that even "offensive" or "distasteful" speech may warrant First Amendment protections, most such cases end up being decided on "vagueness" or "overbreadth" grounds.<sup>100</sup>

Taking "offensive" speech one step further, should expressions that are violent or promote violence be restricted under the First Amendment? In a recent 2011 case, the Supreme Court determined that violent videos are, in fact, entitled to First Amendment protection, even when minors purchase them.<sup>101</sup> Striking down a content-based California statute that prohibited the sale or rental of violent video games to minors, the Court concluded that, "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features

distinctive to the medium (such as the player's interaction with the virtual world).<sup>102</sup> Comparing violent video games to artistic and literary expressions, the Court noted that any esthetic or moral judgments concerning them "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."<sup>103</sup> Thus, despite the violence portrayed in video games, these works were conferred First Amendment protection.<sup>104</sup>

While the State attempted to justify its statute by analogizing violent speech prohibitions to obscenity restrictions, which follows an excepted class of speech, the Court refused to equate violence with obscenity.<sup>105</sup> Against this backdrop, even if the State in fact asserted a compelling interest to justify the statute as designed to protect children from potential harm, the State simply did not have a "free-floating power to restrict the ideas to which children may be exposed [for] [s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."<sup>106</sup>

The Court also addressed the state's claim that violent video games should be restricted due to their "interactive" nature—in that the player actively participates in the violent action.<sup>107</sup> However, in comparing video games to literature, the Court noted that all literature is interactive and is considered successful if it can draw the reader into the story, make him identify or quarrel with the characters, and experience their joys and sufferings.<sup>108</sup> Even when the levels of violence in these games could be considered "astounding" and "disgusting," where "[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces" and "[b]lood gushes, splatters, and pools," the Court determined that disgust remains an invalid basis for restricting expression.<sup>109</sup> Therefore, the Court affirmed the idea that the government may not prohibit expression because of its message, its ideas, its subject matter or its content, such that even violent works can be considered constitutionally protected.<sup>110</sup>

### Internet speech

Recognizing rapid changes in technology, the Supreme Court has noted that minds are no longer being changed in streets and parks as they once were, but rather, the more significant interchanges of ideas and shaping of public consciousness are increasingly occurring in mass and electronic media.<sup>111</sup> Appreciating that "the growth of the Internet has been and continues to be phenomenal,"<sup>112</sup> the Court first considered whether the Internet should be regulated in the same manner as traditional media in *Reno v. American Civil Liberties Union*.<sup>113</sup> In specifically addressing Internet speech, the Court notably recognized that "each medium of expression . . . may present its own problems."<sup>114</sup> However, it went on to hold that none of the "special justifications" that support increased governmental regulation of broadcast media are present in cyberspace.<sup>115</sup> Thus, as a matter of constitutional tradition, the Court determined that the benefit of censorship did not outweigh the interest in en-

couraging freedom of expression in a democratic society since the regulation of Internet speech would more likely interfere with a free exchange of ideas, rather than foster it.<sup>116</sup> As a result of *Reno*, the Court now generally extends full First Amendment protections to Internet speech<sup>117</sup> and will apply the same level of scrutiny to the Internet as it does to other types of speech.<sup>118</sup>

### Prohibited speech

Though the freedom of speech is indeed a fundamental right, it is not absolute.<sup>119</sup>

Specifically, criminal or tort liability will not be avoided merely because the wrongdoer uses speech to accomplish his illicit purpose.<sup>120</sup> Nevertheless, when the government does attempt to regulate speech, the starting point remains rooted in the First Amendment principle that denies the government the "power to restrict expression because of the message, ideas, its subject matter or its content."<sup>121</sup> Despite this basic premise, content regulation may be permissible under certain circumstances.<sup>122</sup> This can include instances where a state's regulatory interest is balanced against and outweighs an individual's free speech interest<sup>123</sup> as well as when the speech fits within an established category of unprotected speech, such as true threats,<sup>124</sup> incitement,<sup>125</sup> fighting words,<sup>126</sup> or obscenity.<sup>127</sup>

Historically, within traditional public forums, speakers generally receive strong First Amendment protections, where "the rights of the state to limit expressive activity are sharply circumscribed,"<sup>128</sup> and "the government may not prohibit all communicative activity."<sup>129</sup> When the government regulates speech, it will either restrict based on the ideas communicated or restrict based on the content-neutral time, place or manner of the expression, without reference to the ideas or views expressed.<sup>130</sup> In order to survive the strict-scrutiny review of content-based restrictions, the regulation of the speech must be "necessary, and narrowly drawn, to serve a compelling state interest."<sup>131</sup> For the intermediate scrutiny review of content-neutral restrictions, the Court has made clear that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."<sup>132</sup>

Whether content-based or content-neutral, government speech regulations remain subject to First Amendment scrutiny and may be challenged on both overbreadth and vagueness grounds. Under the overbreadth doctrine, statutes restricting First Amendment rights must be "narrowly drawn,"<sup>133</sup> where their broad sweep cannot "result in burdening innocent associations."<sup>134</sup> While the application of this doctrine is a "strong medicine" and should be employed "sparingly and only as a last resort,"<sup>135</sup> it allows for the facial invalidation of

a statute that has a substantial number of impermissible applications “judged in relation to the statute’s plainly legitimate sweep.”<sup>136</sup>

The void-for-vagueness doctrine can also be invoked to strike down state restrictions on speech that are worded in such a way that citizens cannot reasonably discern what expressive conduct is prohibited.<sup>137</sup> Under this doctrine, a statute cannot restrict an individual’s speech unless it can establish standards for the public “that are sufficient to guard against the arbitrary deprivation of liberty interests.”<sup>138</sup>

### Free Speech Clause exceptions

Despite the expansive protection that is generally afforded individuals under the Free Speech Clause, there are a few exceptions that lie outside the clause’s protective ambit.<sup>139</sup> In fact, the Court has established that “The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>140</sup> The most common exceptions include true threats, incitement of illegal activity, fighting words, and obscenity.<sup>141</sup>

A well-recognized exception to First Amendment protections involves speech that constitutes a “true threat.”<sup>142</sup> There are many reasons for not affording free speech protections to true threats, such as protecting people from fear of violence, thwarting the disruption that such fear of violence might cause, and protecting people from the possibility that the threatened violence will occur.<sup>143</sup> The modern true threats doctrine can be traced back to *Watts v. United States*.<sup>144</sup> In this case, the defendant was convicted under a federal statute that prohibited making threatening statements aimed at the President.<sup>145</sup> To determine whether the actual meaning of the defendant’s statement constituted an unprotected true threat, the Court examined the context of the remark and the reaction of the listeners.<sup>146</sup> In doing so, the Court made clear that the figurative or colorful use of threatening language in a situation in which the words constitute mere hyperbole or political rhetoric did not constitute a “true threat.”<sup>147</sup> Thus, the *Watts* Court reversed his conviction and distinguished between a true threat and threatening language that is simply used figuratively or as hyperbole, with no genuine and objective intent to induce actual fear of illegal harm.<sup>148</sup>

The Court then further articulated the true threat concept in *Virginia v. Black*, where the Court struck down a State statute to the extent that it considered the expressive conduct of cross burning as prima facie evidence of intent to intimidate.<sup>149</sup> Here, true threats were defined to “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . [where] [t]he speaker need not actually intend to carry out the threat.”<sup>150</sup> Within this definition, the Court also provided that intimidation could

be a type of threat, “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>151</sup>

Generally, in the context of a threat of physical violence, the expressive communication will be governed by an objective standard.<sup>152</sup> A true threat, where a reasonable person would foresee that the listener would believe he would be subjected to physical violence upon his person, is unprotected by the First Amendment.<sup>153</sup> Alleged threats should also be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.<sup>154</sup>

Since *Virginia v. Black* and with the proliferation of the use of digital devices and the Internet, the true threats doctrine is once again being challenged, specifically in light of threats made over social networking sites.<sup>155</sup> Currently, the Supreme Court has granted a writ of *certiorari* to address in its 2014 October Term the lower courts’ split on whether threats of violence should be judged based on a defendant’s subjective intent to threaten or whether it is enough to show that a “reasonable person” would regard these statements as threatening.<sup>156</sup> As one commentator has noted, this case will be particularly significant because it will hopefully force the Court to clarify its own true threats doctrine in light of modern modes of communication and finally apply it to activity on social media sites.<sup>157</sup>

Closely related to the true threats doctrine is another exception to First Amendment protections involving speech that incites imminent lawless action and is likely to incite or produce such action.<sup>158</sup> This intent and imminence standard emerged from *Brandenburg v. Ohio*.<sup>159</sup> In this landmark case, a Ku Klux Klan leader was convicted under an Ohio criminal syndicalism law after he delivered a speech that was filled with racist and anti-Semitic remarks and was later televised.<sup>160</sup> Overturning the conviction, the Court held the Ohio statute unconstitutional and ruled that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.”<sup>161</sup>

The Court’s holding in *Brandenburg* remains the governing First Amendment test for measuring laws that purport to restrict speech because it poses a danger of inciting imminent lawless action.<sup>162</sup> Further clarifying this standard in later cases, the Court would specifically reinforce the critical *Brandenburg* requisites of finding both *immediacy* and *likelihood* before particular expressions could be deemed constitutionally unprotected.<sup>163</sup>

In *Chaplinsky v. New Hampshire*, the Supreme Court carved out another exception to the Free Speech Clause in expressions that are deemed “fighting words.”<sup>164</sup> Walter Chaplinsky, a Jehovah’s Witness, was convicted under a New Hampshire statute outlawing intentionally offensive speech directed at others in a public place, after he called the City Marshall “a God-damned

racketeer” and “a damned Fascist” on a public street.<sup>165</sup> Reaffirming that the freedom of speech is not an absolute right, the Court sustained Chaplinsky’s conviction and held that his statements were words, which by their very utterance, inflicted injury or directly tended to cause acts of violence and incite an immediate breach of the peace.<sup>166</sup> The Court also established that fighting words constitute “what men of common intelligence would understand would be words likely to cause an average addressee to fight.”<sup>167</sup>

While *Chaplinsky* held that fighting words are not protected speech, it is generally very difficult to draft a valid fighting words ordinance.<sup>168</sup> As a result, many convictions under these statutes are reversed on overbreadth or vagueness grounds.<sup>169</sup>

Modern obscenity law grew out of the common law’s prohibition against public indecency, such that the current doctrine governing obscenity and the First Amendment began in *Roth v. United States*.<sup>170</sup> While *Miller v. California*<sup>171</sup> later superseded it, *Roth* was significant because it established the proposition that obscenity is not protected speech.<sup>172</sup> Here, the Court emphasized the long-standing notion that obscenity was “utterly without redeeming social importance.”<sup>173</sup> The *Roth* Court more strictly defined obscenity as a determination of “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”<sup>174</sup> Furthermore, the Court defined “prurient interest” as “material having a tendency to excite lustful thoughts”<sup>175</sup> and also distinguished that sex and obscenity were not synonymous terms.<sup>176</sup>

Despite the *Roth* standard on obscenity, courts continue to struggle with a viable definition for obscenity.<sup>177</sup> Since *Roth*, the modern standard to approach obscenity is the test found in *Miller v. California*,<sup>178</sup> where the Court retained the threshold requirement from *Roth* that obscene material must appeal to the “prurient interest,”<sup>179</sup> but created a three-part framework for juries to identify obscenity.<sup>180</sup>

### **Does social media activity fall within the First Amendment?**

With the rise of online speech and the developing pervasiveness of social media use, it was only a matter of time before the courts needed to address First Amendment applicability to social media activity. Among the lower courts, the trend appears to be that activities on social media sites would constitute speech.<sup>181</sup> Specifically in school speech cases, where the courts are increasingly confronted with the issue of whether off-campus social media activity can be regulated by school officials, federal circuit courts as well as district courts are addressing these claims using a First Amendment analysis.<sup>182</sup> For example, the Ninth Circuit applied the *Tinker* standard<sup>183</sup> and found no First Amendment infringement after a Nevada high school student was punished for his disturbingly graphic Myspace messages about school violence.<sup>184</sup> In the District Court of Minnesota, the court found that a 12-year-old girl’s First Amendment rights

were violated after she was disciplined for derogatory Facebook statements that were not threatening or “so egregious as to pose a serious safety risk or other substantial disruption in [the school] environment.”<sup>185</sup> In another case in the Nevada District Court, a student was expelled under a cyberbullying statute after he sent a series of offensive tweets about his coaches and school administration to his private twitter account from an off-campus restaurant.<sup>186</sup> On a motion to dismiss several of the student’s claims, his First Amendment claim survived after the court found no reason to find the majority of the tweets unprotected as a matter of law, but did rule one tweet amounted to unprotected obscenity.<sup>187</sup>

The importance of analyzing social media activity as speech is also reflected in many cases involving government employees being terminated based on their social media activity.<sup>188</sup> In *Mattingly v. Milligan*, the U.S. District Court for the Eastern District of Arkansas held that an employee’s constitutionally protected speech as a public employee was violated when she was dismissed for posting two Facebook statements regarding the recent termination of other county employees.<sup>189</sup> In a more recent case, the U.S. District Court for the District of Oregon ruled that the Government’s interest in terminating an employee for her Facebook postings was greater than her First Amendment speech rights because her posts created credibility problems and substantially interfered with her ability to fulfill the duties of her state position.<sup>190</sup>

Moving beyond published written social media postings, the courts have also considered speech implications of expressive conduct done on social networking sites. In a case involving the suspension of two high school students as a result of their posting provocative, sexually suggestive pictures on Myspace and Facebook, a federal district court in Indiana found that, whether it was the “acts depicted in the photographs, the taking or existence of the images themselves, or the posting of the photographs to the internet, each of those possibilities qualifie[d] as ‘speech’ within the meaning of the First Amendment.”<sup>191</sup> Most recently, the U.S. Court of Appeals for the Fourth Circuit has ruled that the act of “liking” something on Facebook does rise to the level of speech.<sup>192</sup> In *Bland v. Roberts*, six employees of a local Virginia sheriff were fired for their lack of political allegiance, which included conduct on social media sites that supported the sheriff’s opponent.<sup>193</sup> They sued, claiming that their actions should have been considered speech under the First Amendment.<sup>194</sup> While the lower court initially disagreed with the Plaintiffs’ argument,<sup>195</sup> the Court of Appeals found that their online activity indeed constituted “pure speech” as well as “symbolic expression” and was akin to displaying a political sign in one’s front yard, which the Supreme Court has held to be substantive speech.<sup>196</sup>

As social networking continues to rise as a major means of communication as well as becomes increasingly significant as evidence in trials, social media activity must be considered in a proper constitutional framework in a court of law to ensure a person’s fundamental rights are not violated. Next, we will

focus on how social media activity indeed passes the threshold for speech consideration and argue that, as speech, social media activity should be considered under a First Amendment analysis before it can be used to criminally convict an individual.

Whether considered to be pure speech, symbolic speech or expressive conduct, activity conducted on social networking sites qualifies as speech. Most activity that occurs on social media sites involves the publication of written text. This can include displaying song lyrics on Myspace or posting a status update on Facebook or crafting a tweet on Twitter. Even the act of “liking” a post, a photo, a link, a video or any activity conducted on Facebook will exhibit the literal words “[your name] likes this,” accompanied by a thumbs up symbol. This textual component is precisely what courts have time and time again held to constitute pure speech. Along the same lines, the verbal expressions that can be found on videos uploaded to YouTube, Myspace, Facebook, or any of the other social media sites are plainly spoken words. Thus, they are also classified as pure speech.<sup>197</sup>

Even if the activity on social media sites is neither written nor spoken but is purely nonverbal, symbolic acts or expressive conduct will fall within the categorization of speech under the Free Speech Clause.<sup>198</sup> For example, the action of “liking” a posting on Facebook has been determined to be “pure speech” as well as “symbolic speech.”<sup>199</sup> Along the same lines, “favoriting” or re-tweeting another’s tweet on Twitter can reflect a user’s nonverbal assertion of his opinion that could be regarded as a statement for First Amendment purposes.<sup>200</sup> Because every user of a social networking site has to first create an individualized account and then must always sign into the accounts to conduct any actions,<sup>201</sup> the user’s subsequent online activity on any of these social media sites should be deemed intentional expressive conduct.<sup>202</sup> Any activity becomes a purposeful, deliberate communication, generally reflecting that the user had a clear intent to convey a particular message and that it was likely others would understand that message.<sup>203</sup> And, even if the message was not clear, a “narrow, succinctly articulable message” is not necessary to consider the activity as speech under the Free Speech Clause.<sup>204</sup>

### Using social media activity as a basis for a criminal conviction

Having established that social media activity qualifies as “speech,” the next step is to determine its First Amendment applicability, specifically as to criminal liability. It is important to remember that the Court is clear that First Amendment jurisprudence must remain resolute when emerging technologies become the preferred channels of communication.<sup>205</sup> Furthermore, the mere fact that these expressive communications take place within an Internet forum does not remove it from necessary First Amendment scrutiny. Conversely, if the expressive conduct found on these social networking sites is undeniably illegal, it will in no way avoid criminal liability.<sup>206</sup> Nonetheless, the fundamental

principle that prohibits any law resulting in self-censorship must remain intact, even if such a law seeks to restrict online speech that appears disruptive, violent, threatening, harassing, or repugnant.

With the rise of cases that impose criminal liability for social media activity, it is hard to predict when courts will analyze the online conduct under a First Amendment framework and when they will not. This may be due to the fact that attorneys are simply not raising the defense because of the absence of firm case law establishing social media activity as speech or because the issue at hand can more facily be resolved on other grounds. Whatever the reason, courts need to recognize that social media activity is speech. Next, to preserve an individual’s fundamental speech right, one’s social media activity, even if menacing or distasteful, must be analyzed in light of First Amendment principles to determine if it should be afforded constitutional protection or if it is speech that should result in a criminal conviction.

### Properly recognizing a potential first amendment speech violation

Generally, when social media speech has come to the criminal courts’ attention, it is seen as threatening, harassing, offensive, distasteful or violent.<sup>207</sup> In considering recent cases where a First Amendment defense was properly raised, it is helpful to examine how judges have based their conclusions on a thorough application of relevant First Amendment jurisprudence, whether the speech was eventually deemed protected or not.<sup>208</sup> For example, in *United States v. Jeffries*, the court dealt with a defendant who had posted a music video on YouTube that expressed his dissatisfaction with a particular county judge and threatened to inflict bodily injury on him.<sup>209</sup> Applying the true threats doctrine to this threat of physical violence, the court held Jeffries to an objective standard and found that a reasonable person would have considered his speech as an attempt to intimidate and influence the judge.<sup>210</sup> Therefore, the speech was a “true threat” and was not protected.<sup>211</sup>

In a similar case, a defendant’s conviction was upheld after the Court of Appeals for the Third Circuit also held the defendant’s violent Facebook posts about murdering his estranged wife, massacring a class of kindergarteners and slitting an FBI agent’s throat to an objective standard and would be viewed as a legitimate “true threat” by a reasonable person.<sup>212</sup> By contrast, in another true threats case, a federal judge for the district court in Iowa ruled in favor of First Amendment expression for the defendant’s particular controversial Facebook posts.<sup>213</sup> While the case mainly involved drug charges, the prosecution also alleged an obstruction of justice charge after the defendant posted the Government’s witness list on his personal Facebook page, calling it a “snitch list” and also referring to people on the list as “rats.”<sup>214</sup> Considering whether the defendant’s Facebook post merited constitutional protection and whether it constituted a “true threat” because of the use of the words “snitch” and “rats,” the court ruled that the defendant “never intended to, directly or indirectly,



intimidate or influence any witness by this posting.”<sup>215</sup> Hence, his social media activity was properly characterized as protected speech.<sup>216</sup>

In other instances, there are situations where the social media speech does not fall within an established First Amendment exception. Yet, courts must still decide if government regulation of the speech is permissible by balancing its interests in restricting the speech against the individual’s interest in freedom of expression. Engaging in this content-based or content-neutral scrutiny would become particularly significant in cases of harassing social media activity or in claims of cyberstalking or cyberbullying, all of which are not categorical exceptions to protected speech and could still be criminalized. In these situations, when a defendant is being faced with charges under such things as harassment or cyberstalking statutes for his social networking conduct, he can still raise a First Amendment defense to challenge either the constitutionality of the statute as applied or the facial validity of the statute based on overbreadth or vagueness. For example, in *United States v. Cassidy*, after the defendant was charged under a federal cyberstalking law for posting nearly 8,000 insulting Twitter messages about a leading American Tibetan Buddhist religious figure, the defendant subsequently filed a motion to dismiss on several grounds.<sup>217</sup> Two of these grounds included that the cyberstalking statute violated the Free Speech Clause because it was overbroad and implicated a broad range of otherwise constitutionally protected speech and that it was unconstitutionally vague.<sup>218</sup> Considering these First Amendment defenses, the district court held that the statute was content-based and failed the first prong of the strict scrutiny analysis since the statute did not serve a compelling state interest.<sup>219</sup> Since the cyberstalking statute was unconstitutional as applied to the defendant, the court did not need to reach the questions of overbreadth or vagueness.<sup>220</sup>

Whether the court is dealing with the content of the actual online communications or the constitutionality of a speech regulation involving contentious social media activity, all these cases provide good examples of when and how the courts should apply a First Amendment analysis to social media activity in light of a potential criminal conviction.

### **Cases in which a First Amendment analysis should have taken place**

Although it appears that courts are moving in the right direction by beginning to recognize the First Amendment implications in cases involving social media speech, there are still many courts across the nation that continue to impose criminal liability on defendants who would most likely have had successful First Amendment defenses to their charges. This happened in two cases mentioned earlier, *Holcomb v. Commonwealth*<sup>221</sup> and *Commonwealth v. Cox*,<sup>222</sup> where the courts ultimately convicted defendants for social media speech that should have been protected had a First Amendment evaluation occurred.

John Andrew-Collins Holcomb was charged with “knowingly communicating a written threat in violation of VA Code § 18.2-60(A)(1).”<sup>223</sup> Prior to his

arrest, while Holcomb was involved in a custody battle with the victim, he began posting “incendiary messages” on his Myspace profile that eventually led to his arrest.<sup>224</sup> The victim initially alleged that these postings made her fear for her life and her daughter’s life.<sup>225</sup> However, on cross-examination, the victim also admitted that Holcomb considered “himself to be something of a lyricist of [rap] music” and “speculated that [Holcomb] considered the posts ‘one long song.’”<sup>226</sup> Holcomb then testified in his own defense and characterized the compilations of words he composed and posted as “art,” “meant to be songs” and “just clever limericks.”<sup>227</sup> He testified he had “been writing songs since [he] was eleven years old” and put them on Myspace as a way to express himself.<sup>228</sup> Though he acknowledged that he knew the victim had a Myspace profile, he did not invite her or her family to view his profile and purposefully displayed his posts only for other members to see.<sup>229</sup> He also testified that he had attempted to block the victim from accessing his profile and eventually deleted his profile altogether.<sup>230</sup> In the end, the Virginia Court of Appeals affirmed Holcomb’s conviction, holding the evidence supported a finding that Holcomb had posted a threat on his Myspace profile using graphic and violent imagery that placed the victim in reasonable apprehension of death or bodily injury.<sup>231</sup>

While Holcomb argued that his Myspace posts were not a threat, he did not raise a First Amendment defense nor did the court address the potential of his posts being protected.<sup>232</sup> Simply because his postings were violent, threatening, and publically available, the court upheld Holcomb’s conviction without considering whether his postings actually fell within the First Amendment true threats doctrine.<sup>233</sup> His postings appear to have been expressed out of frustration with the custody battle he was having with the victim. Though the postings seemingly were addressed to the victim, he did not have the express intention to make her feel threatened, since he never invited her to see his profile and even attempted to block her from seeing his Myspace page. Furthermore, his testimony revealed that he expected others to see it, but his intended audience was never the victim herself. Accordingly, this removed the possibility that Holcomb attempted to intimidate the victim, since he was not directing his speech to her with the intent of placing her in fear of bodily harm or death. If anything, Holcomb’s social media speech should be considered “hyperbole” in light of the custody battle he was experiencing.

Moreover, Holcomb described himself as a lyricist of rap music and the victim acknowledged that he was. He illustrated his propensity to display his rap lyrics online. In fact, he most likely could have argued that he had a right to artistic expression. And, although his lyrics contained graphic and violent imagery, this still might not be enough to remove his communications from First Amendment protections.

In *Commonwealth v. Cox*, 18-year old Lindsay Marie Cox posted the following comment on her Facebook page: “[Victim] has herpes. Ew, that’s gross.

She should stop spreading her legs like her mother.”<sup>234</sup> The post subsequently received a number of comments and “likes” from other Facebook users.<sup>235</sup> The victim and her mother filed charges against Cox, and she was convicted of harassment following a jury trial.<sup>236</sup> On appeal, the Superior Court of Pennsylvania considered the issue of whether the comments made in an online forum could constitute a criminal offense.<sup>237</sup> While Cox did not raise a First Amendment defense and merely argued that there was insufficient evidence to support her conviction,<sup>238</sup> the court disagreed and noted that Cox’s misuse of the Internet and social media was criminal.<sup>239</sup> The court then concluded that the record established that there was sufficient evidence to support a finding that Cox communicated seemingly lewd or obscene sentiments about the victim to others and, in doing so, intended to harass, annoy, or alarm the victim.<sup>240</sup> Thus, Cox’s conviction was affirmed.<sup>241</sup>

The verdict in *Cox* was widely criticized by legal commentators.<sup>242</sup> Their criticism centered on the fact that the defendant’s single statement by itself was not really threatening or harassing.<sup>243</sup> While it could have been considered annoying and even offensive to others, both categories of speech remain protected speech. While Cox’s Facebook post might have been characterized as “cyberbullying,” there remains no well-defined exception for First Amendment protections for such expression. Therefore, in a situation like this, Cox might have challenged the constitutionality of the harassment statute under which she was convicted. It is clear the statute was content-based, since it prohibited the actual expressive content of her posting.<sup>244</sup> As such, it would have to pass the strict scrutiny test. Further, even if the prosecution could have persuaded a court that the statute served “a compelling state interest,” Cox might have been acquitted under the defense of overbreadth or vagueness or by asserting that the statute was unconstitutional as it applied to her. As much as one might dislike it, it doesn’t follow that an individual should have a legal right to stop such offensive speech, even if it is gossip or criticism, much less impose criminal liability.<sup>245</sup>

As both these cases illustrate, a different result might have been reached had either defendant raised a First Amendment defense or had the courts addressed the clear First Amendment issues regarding their contentious social media speech. Since the *Holcomb* court discussed the postings as threats and the *Cox* court convicted the defendant under a content-based regulation for an allegedly lewd and obscene comment, both cases involved issues that clearly implicated First Amendment considerations. However, because the courts failed to directly address the online speech within this particular constitutional framework, the two convictions based on social media activity likely violated both defendants’ First Amendment freedom of speech. Moving forward from these cases, if courts more actively recognize and undertake a more thorough constitutional analysis of social media speech as these expressions become

increasingly ubiquitous within our society, they will avoid the risk of censoring and chilling individualized speech in a way that would deteriorate the foundation of a free, autonomous and informed democracy.

## Conclusion

With the rapid emergence of social networking sites, it is not surprising that their reach and impact have become immediate and widespread. Users share anything and everything on online networking sites, sometimes without thinking who might be monitoring their conduct. Yet, whether one is “liking” a photo on Facebook, tweeting about a recent life happening or uploading a self-created music video on Myspace, the deliberate communications on social media sites should be considered speech.

As with the development of any new medium of communication, social media activity must also be considered within the framework of the First Amendment in order to maintain and protect the freedom of speech as an inalienable right. Specifically, in the area of criminal law, a defendant should not be convicted for what he communicates on a social networking site until the expressions have been given proper constitutional consideration. To accomplish this, a defendant should raise appropriate First Amendment defenses and the courts should address potentially applicable First Amendment implications. Especially for published content that appears to be violent, threatening, obscene, harassing or just plain repugnant, if the courts do not even acknowledge First Amendment issues and simply impose criminal liability, they are sacrificing the exercise of a potentially protected right that lies at the foundation of our free and pluralistic society. The courts must remain cautious before criminalizing social media activity, for it is these controversial ideas and provocative expressions that communicate ideas and stimulate social interest, which are vital in fostering a thriving democracy.

## NOTES

1. This account was created using a compilation of facts from several recent news articles, regarding a pending action in the District Court of Texas, Comal County. See Robby Soave, *Texas Teen Makes Violent Joke During Video Game, Is Jailed for Months*, DAILY CALLER (June 27, 2013, 8:02 PM), <http://dailycaller.com/2013/06/27/texas-teen-makes-violent-joke-during-video-game-is-jailed-for-months/>; Brandon Griggs, *Teen Jailed For Facebook ‘Joke’ Is Released*, CNN (Jul. 12, 2013, 12:56 PM), <http://www.cnn.com/2013/07/12/tech/social-media/facebook-jailed-teen/>; Craig Malisow, *The Facebook Comment That Ruined a Life*, DALLAS OBSERVER (Feb. 13, 2014), <http://www.dallasobserver.com/2014-02-13/news/the-facebook-comment-that-ruined-a-life/full/>.
2. See Soave, *supra* note 1; see also Zeke MacCormack, *Facebook Suspect: Police Altered Remarks*, SAN ANTONIO EXPRESS-NEWS, (Aug. 12, 2013), <http://www.mysanantonio.com/news/local/article/Man-accused-of-Facebook-threat-says-cops-altered-4726878.php>.
3. See Register of Actions, State of Texas v. Justin River Carter, No. CR2013-159 (207th Dist. Ct. of Tex. filed Apr. 10, 2013), available at <http://24.153.188.245/CaseDetail.aspx?CaseID=747883>.
4. See MacCormack, *supra* note 2.

5. See Griggs, *supra* note 1.
6. See *Commonwealth v. Cox*, 72 A.3d 719 (Pa. Super. Ct. 2013).
7. See *Holcomb v. Commonwealth*, 709 S.E.2d 711 (Va. Ct. App. 2011).
8. See *U.S. v. Jeffries*, 692 F.3d 473 (6th Cir. 2012).
9. See *id.* at 478 (undergoing a “true threat” evaluation).
10. However, in the upcoming 2014 October Term, the Supreme Court has agreed to hear a case that will consider the free speech rights of individuals who post violent or threatening language on Internet forums, specifically social media sites such as Facebook.
11. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))).
12. See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013); *R.S. ex. rel. S.S. v. Minnewaska Area School Dist.*, 894 F. Supp. 2d 1128, (D. Minn. 2012); *Mattingly v. Milligan*, No. 4:11CV00215, 2011 WL 5184283, (E.D. Ark. Nov. 1, 2011); *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012); *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).
13. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, J. OF COMPUTER-MEDIATED COMM’N 13(1), art. 11 (2007), <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2007.00393.x/pdf>.
14. Monique C.M. Leahy, *Pretrial Involving Facebook, Myspace, LinkedIn, Twitter, and Other Social Networking Tools*, 121 AM. JUR. PROOF OF FACTS 3d 1 (2011).
15. *Social Networking Statistics*, STATISTIC BRAIN (July 9, 2014), <http://www.statisticbrain.com/social-networking-statistics/> (This study reveals that Facebook alone has a total number of 1.4 billion users worldwide.).
16. See Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RESEARCH CENTER, 2 (Aug. 5, 2013), [http://pewinternet.org/~media/Files/Reports/2013/PIP\\_Social\\_networking\\_sites\\_update\\_PDF.pdf](http://pewinternet.org/~media/Files/Reports/2013/PIP_Social_networking_sites_update_PDF.pdf).
17. See Mary Madden et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CENTER 19 (May 21, 2013), [http://www.pewinternet.org/files/2013/05/PIP\\_TeensSocialMediaandPrivacy\\_PDF.pdf](http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf) (reporting that 95 percent of those between the ages of 12-17 use the Internet. Of those, eight in ten online teens use some kind of social media).
18. Brenner & Smith, *supra* note 16.
19. See, e.g., *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643/> (last visited Oct. 17, 2013); *Download YouTube Videos*, YOUTUBE, <https://support.google.com/youtube/answer/56100?hl=en> (last visited Oct. 17, 2013); *Uploading Photos & Profile Pictures*, FACEBOOK, <https://www.facebook.com/help/118731871603814/> (last visited Oct. 17, 2013); *Adding Friends & Friend Requests*, FACEBOOK, <https://www.facebook.com/help/360212094049906/> (last visited Oct. 17, 2013); *Finding People on Twitter*, TWITTER, <https://support.twitter.com/articles/14022> (last visited Oct. 17, 2013).
20. See *How Do I Remove Something Posted on My Timeline?*, FACEBOOK, <http://www.facebook.com/help/261211860580476?sr=11&sid=0AUMVejqKXhmI19Ac> (last visited Oct. 17, 2013).
21. See *How to Report Things*, FACEBOOK, <http://www.facebook.com/help/181495968648557/> (last visited Oct. 17, 2013).
22. See *About Myspace*, MYSPACE, <https://myspace.com/pressroom> (last visited Oct. 17, 2013); See *FAQ*, FACEBOOK, <http://investor.fb.com/faq.cfm> (last visited Aug. 12, 2014); *About Twitter*, TWITTER, <https://twitter.com/about> (last visited Aug. 12, 2014); *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/index.html> (last visited Aug. 12, 2014).
23. See *FAQ*, INSTAGRAM, <http://instagram.com/about/faq/> (last visited Oct. 17, 2013).
24. BLACK’S LAW DICTIONARY 1349-50 (9th ed. 2009).
25. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

26. See *FAQ*, FACEBOOK, <http://investor.fb.com/faq.cfm> (last visited on Oct. 17, 2013); *About Twitter*, TWITTER, <https://twitter.com/about> (last visited Oct. 17, 2013); *About Myspace*, MYSPACE, <https://myspace.com/pressroom> (last visited Oct. 17, 2013); *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/index.html> (last visited Oct. 17, 2013).
27. See Leahy, *supra* note 14.
28. John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 467 (2011).
29. See *B.M. v. D.M.*, 927 N.Y.S.2d 814, at \*5 (N.Y. App. Div. 2011) (The court allowed social media evidence about the wife’s belly dancing in a divorce proceeding.); *Dexter v. Dexter*, No. 2006-p-0051, 2007 WL 1532084, at \*6 & n.4 (Ohio Ct. App. 2007) (The trial court allowed evidence from a mother’s Myspace, where she had written about her sado-masochism, bisexuality, and paganism and concluded from these postings that such personal choices would have an effect on her child.).
30. See *Three D, LLC*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Jan. 3, 2012) (Employees were inappropriately fired under the “concerted activity” protection of the National Labor Relations Act for their Facebook activity, which included “liking” a Facebook post that was critical of the employer.); *Rodriguez v. Wal-Mart Stores, Inc.*, No. 13-10154, 2013 WL 5274468 (5th Cir. 2013) (The court permitted the termination of a Sam’s Club employee on the basis of her Facebook comment to another’s Facebook photo that was in violation of the company’s social media policy.); *Shepherd v. McGee*, 986 F. Supp. 2d 1211 (D. Or. 2013). (The court determined that a DHS employee’s individual First Amendment interests in her widely distributed Facebook comments did not outweigh the Government’s interest of preventing potential disruption.).
31. See *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 654 (N.Y. App. Div. 2010) (The court held that the information sought by the defendant regarding the plaintiff’s Facebook and Myspace accounts was both material and necessary to the company’s defense of the action and could lead to admissible evidence in order to disprove the plaintiff’s claim that she had sustained permanent injuries and was largely confined to her house and bed.).
32. See Madden et al., *supra* note 17 and accompanying text.
33. See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013) (holding that school officials did not violate the student’s First Amendment rights. His Myspace messages, which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities.); *J.S. ex. rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (concluding that the School District violated J.S.’s First Amendment free speech rights when it suspended her for a Myspace parody of her principal that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school); *R.S. ex. rel. S.S. v. Minnewaska Area School Dist.*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012) (holding that a student’s Facebook comments were protected under the First Amendment and not punishable by school authorities unless they were “true threats” or were reasonably calculated to reach the school environment and were so egregious as to pose a serious safety risk or other substantial disruption in that environment).
34. See Lauren Russell, *When Oversharing Online Can Get You Arrested*, CNN (Apr. 24, 2013, 8:59 AM), <http://www.cnn.com/2013/04/18/tech/social-media/online-oversharing-arrests/index.html>.
35. See *id.* See also Gabe Acevedo, *World’s Dumbest Criminal Would Like to Add You as a ‘Friend,’ ABOVE THE LAW* (Mar. 11, 2011, 2:04 PM), <http://abovethelaw.com/2011/03/worlds-dumbest-criminal-would-like-to-add-you-as-a-friend/>.
36. See Iris Carreras, *NYPD Gun Bust: Instagram Post Leads to Largest Gun Bust in NYC History*, CBSNEWS.COM (Aug. 20, 2013, 4:30 PM), [http://www.cbsnews.com/8301-504083\\_162-57599390-504083/nypd-gun-bust-instagram-post-leads-to-largest-gun-bust-in-nyc-history/](http://www.cbsnews.com/8301-504083_162-57599390-504083/nypd-gun-bust-instagram-post-leads-to-largest-gun-bust-in-nyc-history/).
37. See Russell, *supra* note 34.

38. See Daniel Findlay, Note, *Tag! Now You're Really "It" What Photographs on Social Networking Sites Mean for the Fourth Amendment*, 10 N.C. J. L. & TECH. 171, 177-78 (2008).
39. See Browning, *supra* note 28, at 485.
40. While it might be important to acknowledge briefly other viable constitutional issues with using social media activity as evidence for the basis of a conviction, an in-depth discussion of the Fourth Amendment and other relevant issues is beyond the scope of this article.
41. See Browning, *supra* note 28, at 491 (footnote omitted).
42. See Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech,"* 1993 WIS. L. REV. 1525, 1528 (2013) ("[T]he speech/conduct issue remains fundamental to the threshold question of whether the First Amendment applies at all.").
43. See Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622 (1994).
44. See N.Y. Times Co. v. United States, 403 U.S. 713 (1971).
45. See Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367 (1969).
46. RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 287 (4th ed. 2012).
47. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)) (internal quotation marks omitted).
48. DOUGLAS W. KMIEC, ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 962 (3d ed. 2009).
49. U.S. CONST. amend. I.
50. See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 953 (4th ed. 2011).
51. Schneider v. State, 308 U.S. 147, 161 (1939).
52. *Id.*
53. See CHEREMINSKY, *supra* note 50, at 954.
54. See CHEREMINSKY, *supra* note 50, at 954.
55. See Tiersma, *supra* note 42 and accompanying text.
56. BLACK'S LAW DICTIONARY 1529 (9th ed. 2009).
57. See Bartnicki v. Vopper, 532 U.S. 514 (2001). The Court here explained that while "the delivery of a tape recording might be regarded as conduct . . . given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of 'speech' that the First Amendment protects . . . [I]f the acts of 'disclosing' and 'publishing' information do not constitute [pure] speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Id.* at 527 (footnote, citations, and internal quotation marks omitted). See also Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").
58. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).
59. See Texas v. Johnson, 491 U.S. 397, 406 (1989).
60. See Spence v. Washington, 418 U.S. 405, 411-15 (1974).
61. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).
62. Brown v. Louisiana, 383 U.S. 131, 142 (1966).
63. *Id.*
64. United States v. Zenni, 492 F. Supp. 464, 468 (E.D. Ky. 1980).
65. 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT 11-4 (3d ed. 1996).
66. *Id.* at 11-5.
67. *Id.*
68. See Spence, 418 U.S. at 410-11.

69. *Id.* at 405-06.
70. *Id.* at 410-11.
71. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).
72. See Tiersma, *supra* note 42 and accompanying text.
73. Ryan J. Walsh, Comment, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1069-70 (2011). The author discusses that, by this time, the Court could comfortably declare that "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Id.* at 1070 n.55 (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)). The author also examines the notion that the Supreme Court protects speech even if the speech does not convey a particularized message. See *id.* at 1070 & n.59.
74. See Miller v. California, 413 U.S. 15, 24 (1973). The Court used this as one basic guideline to discern obscenity, which would not be protected speech under the First Amendment.
75. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602-03 (1998) (Souter, J., dissenting) (footnote omitted) (quoting Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994)).
76. See Mills v. Alabama, 384 U.S. 214, 218 (1966).
77. *Id.* at 218-19.
78. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).
79. *Id.* at 340.
80. See *id.*
81. See, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989).
82. See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510-11 (1969).
83. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).
84. See, e.g., Brown v. Louisiana, 383 U.S. 131, 140-42 (1966).
85. See, e.g., Thornhill v. Alabama, 310 U.S. 88, 104 (1940).
86. See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568-69 (1995).
87. See Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).
88. See, e.g., U.S. v. O'Brien, 391 U.S. 367, 376 (1968) (while the Court held that the act of burning his draft card was not protected "symbolic speech," the communicative element in O'Brien's conduct was "sufficient to bring into play the First Amendment." *Id.*)
89. See *id.* at 376-77.
90. See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).
91. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U.L. REV. 731, 788-89 (2013) (citing Synder v. Phelps, 131 S. Ct. 1207, 1215 (2011) and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-52 (1988)).
92. *Id.* at 789.
93. *Id.* at 790 (quoting People v. Bethea, No. 2003BX036814, 2004 WL 190054, at \*1 (N.Y. Crim. Ct. Jan. 13, 2004)).
94. People v. Cohen, 1 Cal. App. 3d 94, 99 (1969).
95. Cohen v. California, 403 U.S. 15, 26 (1971).
96. *Id.*
97. *Id.* (emphasis added) (citation omitted).
98. WEAVER & LIVELY, *supra* note 46, at 67. See *Cohen*, 403 U.S. at 25 (recognizing that, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

99. WEAVER & LIVELY, *supra* note 46, at 67 (citing *Cohen*, 403 U.S. at 26).
100. WEAVER & LIVELY, *supra* note 46, at 67. *See Cohen*, 403 U.S. at 19 (The Court concluded that the statute under which Cohen was convicted failed to put him on notice that his conduct was not permissible.).
101. WEAVER & LIVELY, *supra* note 46, at 83. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).
102. *Brown*, 131 S. Ct. at 2733.
103. *Id.* (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000)).
104. *Id.*
105. *Id.* at 2735.
106. *Id.* at 2736 (footnote omitted) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)) (internal quotation marks omitted).
107. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737-38 (2011).
108. *Id.* at 2738.
109. *Id.*
110. *Id.* at 2733.
111. *Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in the judgment).
112. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).
113. *See id.* at 868-69. In this case, the plaintiffs filed a suit challenging the constitutionality of provisions of the Communications Decency Act, which sought to protect minors from harmful material on the Internet. *Id.* at 868. The Court concluded that the provisions did abridge the Freedom of Speech Clause and struck down the statute as facially overbroad. *Id.* at 874-76.
114. *Id.* at 868 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).
115. *Id.*
116. *See id.* at 885.
117. *See id.*
118. *See* John B. Major, Note, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 132 (2012).
119. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating that the Free Speech clause does not confer an absolute right that protects all uses of language and does not prevent the punishment of those who abuse this freedom); *see also* CHEMERINSKY, *supra* note 50, at 953.
120. 1 SMOLLA & NIMMER, *supra* note 65, at 10-42.2. The authors further cite the Supreme Court's holding that "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).
121. WEAVER & LIVELY, *supra* note 46, at 32 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).
122. WEAVER & LIVELY, *supra* note 46, at 32.
123. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (stating that the First Amendment permits "restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).
124. *See Virginia v. Black*, 538 U.S. 343, 359 (2003).
125. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).
126. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
127. *See Roth v. United States*, 354 U.S. 476, 485 (1957).

128. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).
129. *Id.* While this article does not focus on the public forum doctrine and its intricacies, it will briefly examine when the government can regulate speech within a traditional public forum in order to make the comparison of when speech can be regulated on social media sites.
130. *See* Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 226-28 (2000).
131. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995)(citation omitted).
132. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and internal quotation marks omitted).
133. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).
134. *Id.* at 612.
135. *Id.* at 613.
136. Major, *supra* note 118, at 133 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).
137. O'Neill, *supra* note 130, at 232.
138. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).
139. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").
140. *Id.* at 358-59 (citations and internal quotation marks omitted).
141. *See supra* notes 124-27.
142. *See Virginia v. Black*, 538 U.S. 343, 359 (2003).
143. *See id.* at 360.
144. 394 U.S. 705 (1969) (holding for the first time that true threats are an exception to the freedom of speech, where "a threat must be distinguished from what is constitutionally protected speech" *Id.* at 707).
145. *Id.* at 705.
146. *See id.* at 707-08.
147. 1 SMOLLA & NIMMER, *supra* note 65, at 10-28.8. *See Watts*, 394 U.S. at 708.
148. 1 SMOLLA & NIMMER, *supra* note 65 at 10-28.8-28.9. *See Watts*, 394 U.S. at 708.
149. 538 U.S. 343, 347-48 (2003).
150. *Id.* at 359-60 (citations omitted).
151. *Id.* at 360.
152. 1 SMOLLA & NIMMER, *supra* note 65, at 10-28.10 (citing *State v. DeLoreto*, 265 Conn. 145, 156 (2003)).
153. *State v. DeLoreto*, 265 Conn. 145, 156 (2003) (quoting *U.S. v. Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)).
154. *Id.* at 157. In attempting to determine if the defendant's statements about kicking "the ass" of two officers were true threats, the Court examined the defendant's history of confrontational behavior with a particular police officer, the fact that the officer was off duty, unarmed, and on foot, while the defendant was in his car, the defendant's erratic driving, and one instance where the defendant jumped out of his car and ran towards the office with pumped fists. The court concluded that under these circumstances, a reasonable person would recognize that the threatening statements could be interpreted by the officer as a serious expression of the defendant's intent to harm or assault him and not just hyperbole or jokes. Thus, the defendant's statements were unprotected speech. *Id.*
155. *See* Dahlia Lithwick, *Are Facebook Threats Real?*, SLATE (Jun. 16, 2014, 5:35 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/06/elonis\\_v\\_united\\_states\\_supreme\\_court\\_will\\_hear\\_the\\_facebook\\_speech\\_case.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/elonis_v_united_states_supreme_court_will_hear_the_facebook_speech_case.html).



156. *See* *Elonis v. United States*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/elonis-v-united-states/> (last visited Jul. 22, 2014).
157. *See* *Lithwick*, *supra* note 155.
158. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).
159. *See* 1 SMOLLA & NIMMER, *supra* note 65, at 10-28.25.
160. *Brandenburg*, 395 U.S. at 445-47.
161. *Id.* at 447 (emphasis added) (footnote omitted).
162. 1 SMOLLA & NIMMER, *supra* note 65, at 10-28.25.
163. 1 SMOLLA & NIMMER, *supra* note 65, at 10-30. *See* *Hess v. Indiana*, 414 U.S. 105, 106-09 (1973) (where the Court held that the defendant's alleged statement of "[w]e'll take the fucking street later" at an anti-Vietnam War demonstration was not enough to constitute a present threat of imminent disorder since his statement did not reflect imminence and could be taken as advocacy of illegal action at some indefinite future time); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982) (where the Court ruled that though the defendant's statements might have sounded like exhortations to violence, his remarks were mere advocacy of the use of force or violence that did not remove his speech from the protection of the First Amendment).
164. 315 U.S. 568, 571-72 (1942).
165. *Id.* at 569.
166. *See id.* at 572-73.
167. *Id.* at 573.
168. *WEAVER & LIVELY*, *supra* note 46, at 35.
169. *WEAVER & LIVELY*, *supra* note 46, at 35. *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518 (1972). The defendant was convicted under a Georgia law that provided that if any person used "opprobrious" or "abusive" language, tending to cause a breach of peace, he would be guilty of a misdemeanor. Despite the evidence showing that the defendant stated, unprovoked, to a police officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," the Court concluded that the terms "opprobrious" and "abusive" were vague and broader than the term "fighting" words and did not meet the "requisite narrow specificity" to uphold the defendant's conviction under the GA statute. *Id.* at 525-27.
170. 2 SMOLLA & NIMMER, *supra* note 65, at 14-3,14-8.
171. 413 U.S. 15 (1973)
172. *Roth v. United States*, 354 U.S. 476, 485 (1957).
173. *Id.* at 484.
174. *Id.* at 489 (footnote omitted).
175. *Id.* at 486 n.20.
176. *Id.* at 487.
177. *WEAVER & LIVELY*, *supra* note 46, at 57 (noting that the term's problematic elusiveness can be observed in Justice Stewart's concurring opinion in *Jacobellis v. Ohio*, when he attempted to identify obscenity by famously declaring, "I know it when I see it." 378 U.S. 184, 197 (1964) (Stewart J., concurring)).
178. *Miller*, 413 U.S. at 24.
179. *Id.*
180. *See id.* (stating that "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value") (citations omitted).
181. *See supra* note 12.
182. *See* *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013) (The court held that school officials did not violate the student's First Amendment rights. His Myspace messages,

- which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities.); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 925 (3d Cir. 2011) (The court concluded that the School District violated J.S.'s First Amendment free speech rights when it suspended her for Myspace parody of her principal that caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school.); *R.S. ex rel. S.S. v. Minnewaska Area School Dist.*, 894 F. Supp. 2d 1128, 1140 (D. Minn. 2012) (The court held that a student's Facebook comments were protected under the First Amendment and not punishable by school authorities unless they were true threats or were reasonably calculated to reach the school environment and were so egregious as to pose a serious safety risk or other substantial disruption in that environment.).
183. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (held that a student's speech can be regulated if the speech would materially and substantially disrupt the work and discipline of the school).
  184. *See Wynar*, 728 F.3d at 1072.
  185. *R.S. ex rel. S.S.*, 894 F. Supp. 2d at 1140.
  186. *Rosario v. Clark County School District*, No. 2:13-CV-362, 2013 WL 3679375, at \*1 (D. Nev. July 3, 2013). *See also* Rachel Paxton-Gillilan, *Student's Angry Tweets May be Constitutionally Protected in Cyberbullying Case*, IT-LEX TECHNOLOGY LAW (July 29, 2013), at <http://it-lex.org/students-angry-tweets-may-be-constitutionally-protected-in-cyberbullying-case/>.
  187. *Rosario*, No. 2:13-CV-362, 2013 WL 3679375, at \*3-5.
  188. *See supra* note 30.
  189. *Mattingly v. Milligan*, No. 4:11CV00215, 2011 WL 5184283, at \*2-4 (E.D. Ark. Nov. 1, 2011).
  190. *See* *Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1220-22 (D. Or. 2013).
  191. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 777 (N.D. Ind. 2011).
  192. *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).
  193. *Id.* at 372-73.
  194. *Id.*
  195. *Bland v. Roberts*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012) (concluding that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection").
  196. *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).
  197. *See supra* note 57 and accompanying text.
  198. *See supra* notes 58-65.
  199. *See* *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).
  200. *See supra* note 64.
  201. *See supra* notes 19-21.
  202. *See supra* notes 19-21. *See also* 1 SMOLLA & NIMMER, *supra* note 65, at 11-5.
  203. *See* *Spence*, 418 U.S. at 410-11.
  204. *Hurley*, 515 U.S. at 569.
  205. *See* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).
  206. 1 SMOLLA & NIMMER, *supra* note 65, at 10-42.2.
  207. *See* *U.S. v. Jeffries*, 692 F.3d 473 (6th Cir. 2012); *U.S. v. Elonis*, 730 F.3d 321 (3d Cir. 2013); *U.S. v. Amaya*, 949 F. Supp. 2d 895 (N.D. Iowa 2013); *U.S. v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011).
  208. *See* *U.S. v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012); *U.S. v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013); *U.S. v. Amaya*, 949 F. Supp. 2d 895, 909-11 (N.D. Iowa 2013); *U.S. v. Cassidy*, 814 F. Supp. 2d 574, 582-83 (D. Md. 2011).
  209. *U.S. v. Jeffries*, 692 F.3d 473, 475-77 (6th Cir. 2012).
  210. *Id.* at 482.

211. *Id.* at 481-82.
212. *U.S. v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013). This case is currently set to be heard in the Supreme Court's October Term of 2014. The issue before the Court will address the split between the lower courts on whether the subjective intent of the speaker or the objective interpretation of the listener is controlling when it comes to discerning a "true threat," specifically over social media sites.
213. *U.S. v. Amaya*, 949 F. Supp. 2d 895, 910-11 (N.D. Iowa 2013).
214. *Id.* at 907-08.
215. *Id.* at 911.
216. *Id.*
217. *U.S. v. Cassidy*, 814 F. Supp. 2d 574, 581 (D. Md. 2011).
218. *Id.*
219. *See id.* at 584-85 (The court reasoned that the aggrieved party had the ability to protect her "own sensibilities simply by averting" her eyes or by blocking Cassidy's tweets.).
220. *Id.* at 587.
221. *Holcomb v. Commonwealth*, 709 S.E.2d 711 (Va. Ct. App. 2011).
222. *Commonwealth v. Cox*, 72 A.3d 719 (Pa. Super. Ct. 2013).
223. *Holcomb*, 709 S.E.2d at 712.
224. *Id.* at 712-13.
225. *Id.* at 713.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Holcomb*, 709 S.E.2d at 713-14.
230. *Id.* at 714.
231. *Id.* at 716-17.
232. *Id.* at 712.
233. *See id.* at 716-17.
234. *Commonwealth v. Cox*, 72 A.3d 719, 720-21 (Pa. Super. Ct. 2013).
235. *Id.* at 721.
236. *Id.*
237. *Id.* at 720.
238. *Id.* at 721.
239. *Id.*
240. *Commonwealth v. Cox*, 72 A.3d 719, 721-22 (Pa. Super. Ct. 2013).
241. *Id.* at 723.
242. *See Facebook Post That Someone Has Herpes Leads To Criminal Conviction*, IT-LEX TECHNOLOGY LAW (Aug. 13, 2013), at <http://it-lex.org/facebook-post-that-someone-has-herpes-leads-to-criminal-conviction/> (observing a number of commentators that have declared this to be a "problematic verdict" or even a "ridiculous verdict").
243. *Id.*
244. *See* 18 PA. CONS. STAT. ANN. § 2709(a)(4) (West 2003).
245. Volokh, *supra* note 91, at 790.



## Arthur Heitzer

### STEPHEN KIMBER'S *WHAT LIES ACROSS THE WATER* —THE DEFINITIVE STUDY OF THE CUBAN FIVE

It is difficult to overstate the central role that a small group of violent anti-communist Cuban expatriates have played in the pivotal threats to U.S. democracy during the past five decades. The list includes the Watergate criminal break-in and scandal that eventually brought down President Nixon in 1974; the murderous Iran-Contra conspiracy in 1985–1986, when President Reagan violated explicit U.S. legislation as well as international law, by secretly providing weapons for hostages to Iran in order to continue to arm and fund an illegal war in Nicaragua; and the unprecedented "Assassination on Embassy Row" in Washington, D.C. of both the former Chilean Foreign Minister and a U.S. citizen in 1976.<sup>1</sup> The list also includes the selection of George W. Bush to become President following the suspension by local Miami officials of their efforts to examine the 2000 Presidential ballots, when they were besieged by a threatening crowd of Cuban exiles and GOP staff, pounding on the door and successfully demanding that the officials cease their review.<sup>2</sup> And clouded in controversy but at least as troubling are the multiple links of anti-Castro paramilitary operatives in New Orleans and Dallas to the November 1963 assassination of President Kennedy, quite possibly in league with the Mafia and CIA (an unholy alliance that we do know had cooperated in failed attempts to kill Fidel Castro).<sup>3</sup>

Add to that the unparalleled fifty years or more of restrictions on our right to travel to a small neighbor which poses no military threat to the U.S. How many Americans know that this was accompanied by bombings of tour operators and travelers, some of them fatal, from at least 1976 through 1997, and most recently in 2012?<sup>4</sup> Or that U.S.-based terrorism has killed some 3,500 Cuban citizens and permanently maimed another 2,000?<sup>5</sup> Or that industrial and other sabotage were part of a campaign once fostered by the U.S. government in Operation Mongoose, but still tolerated thereafter?<sup>6</sup>

True, U. S. media occasionally mention failed CIA attempts to "Kill Fidel," a topic that is often presented in a joking manner.<sup>7</sup>

The October 1976 bombing of Cubana civilian Flight 455, killing all 73 people on board is barely known in the U.S., and even less known is the fact that the widely acknowledged perpetrators were given safe haven here, includ-

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ing Luis Posada Carriles, who lives freely in Miami today. This saga is key to the general significance of the Cuban Five.

Since 2001, the central rationale of U.S. policy has been the “war on terrorism.” This has been used to justify the aggressive “shock and awe” attack on Iraq, as well as the earlier invasion of Afghanistan. It has justified a companion attack on civil liberties at home, marked by the US Patriot Act, enhanced surveillance and a series of entrapment-like prosecutions of might-be “terrorists.” It has also been used to justify “enhanced interrogation” torture and international kidnaping of mere suspects, held without charges for over a decade, most notoriously on Cuban territory that has been occupied by the U.S. for over a century as a supposed naval base at Guantanamo Bay. And the wholesale U.S. spying on international communications and the warrantless drone executions have continued and even escalated under Bush’s successor.

President Bush stated clearly in a nationally televised address on September 11, 2001: “We will make no distinction between those who committed these acts and those who harbor them.”<sup>8</sup>

And in announcing the U.S. attack on Afghanistan on October 7, 2001, our forty-third President stated unequivocally the U.S. justification for what has become the longest war in our history:

The United States of America is an enemy of those who aid terrorists . . . . This military action is a part of our campaign against terrorism . . . . Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.<sup>9</sup>

Indeed, every nation does have a choice to make on the issue of terrorism. Is the U.S. treatment of the Cuban Five explainable under these standards or does it place U.S. leaders perilously close to the “lonely path” occupied by “outlaws and murderers”?

Stephen Kimber’s book, *What Lies Across the Water: The Real Story of the Cuban Five*, is about Cuba’s attempt to monitor the sources of these plots and deter further death and destruction. It is certainly not the whole story of those efforts, but is a carefully researched review of the most publicized aspect, a case in which five Cubans were convicted in Miami based on their intelligence activities for Cuba, directed primarily at Cuban exiles with terrorist histories.

It is important to know that Kimber was not selected or vetted by the Cubans in advance of his project. He achieved access to many, but not all, of the players whom he wanted to interview, after many persistent attempts during some three years of research. As a well-established Canadian author, he was able to undertake the massive research he devoted to this book with academic and cultural underwriting from Canadian institutions—not from the U.S., and not from Cuba.

Known as the Cuban Five, the five men were arrested on September 12, 1998, convicted by a Miami jury of every charge presented against them, and then sentenced to prison terms ranging from 15 years to double life plus 15 years. Most of the charges were conspiracy claims, which do not require actually committing the underlying crime, but merely that there was an agreement to do so in the future and that at least one concrete action was taken to effectuate the agreement—even if it was an otherwise legal act such as renting an apartment or buying a cellphone, computer or camera. All five were convicted of charges based on working for Cuba as unregistered agents of a foreign power. There were no more serious charges for two of the five, who were recently released. One of them, Fernando Gonzalez, also had charges based on using false identification for his alias in his undercover work.

The three still imprisoned were all originally sentenced to life in prison for “conspiracy to commit espionage” in a case where no classified U.S. information was even allegedly involved. Ramon Labanino and Antonio Guerrero had their sentences reduced to 30 years and to 21 years, 10 months, respectively, pursuant to their appeal. Gerardo Hernandez, viewed as leader of the operation and also convicted of “conspiracy to commit murder” based on Cuba’s shoot-down of two planes which illegally flew from Florida to near Havana, still has two life sentences plus 15 years. Regarding the other two, Rene Gonzalez was allowed to return to Cuba in June, 2013, after serving nearly 15 years, and upon renouncing his (dual) U.S. citizenship; and Fernando Gonzalez was released from prison on February 27, 2014, and promptly repatriated to Cuba on completion of his full sentence (minus a credit for “good time”).

The author of eight previous books, Canadian journalism professor Stephen Kimber planned to write his second novel based on a love story taking place in Cuba and Halifax, but then came across “the truth-is-stranger-but-way-more-interesting story of the Cuban Five.” Kimber’s expertise is in making nonfiction read like a novel, a technique he has fully applied here to the complex facts and interwoven plots from Miami and Havana. After he was told by his guide in Cuba that unless this case is resolved, any hope that President Barack Obama would move to significantly improve relations with Cuba was a pipe dream, Kimber decided to delve into this story. He not only found a legal case in which some eleven Nobel prize recipients called for the release of the Five, but a tale of intrigue which directly involves yet another Nobel laureate, Gabriel García Márquez, as an intermediary between his friend Fidel Castro and his admirer Bill Clinton, in a triangle of failed opportunities and even betrayal.

Kimber had not previously focused on either U.S. or Latin American politics, a weakness he turned into a strength, especially given the hyperbolic exchanges within the U.S. and its Cuban American community about anything related to Cuba. (As an example, recall the furor over a simple on-camera Presidential



handshake between Barack Obama and Raul Castro at Nelson Mandela's memorial on December 11, 2013.<sup>10</sup> The same act of civility between Bill Clinton and Fidel Castro at the UN in 2000 took place off camera, allowing the White House to promptly deny it, and only to grudgingly acknowledge it later on.<sup>11</sup>

Now a career journalist has taken a fresh look at the situation. Kimber is no leftist. Judging the credibility of the various players, he occasionally notes whether they “drank the kool aid” of the Revolution. Is this a backhanded put-down of committed revolutionaries, an attempt at dispassionate analysis, or perhaps both? Perhaps it doesn't matter.

What does matter is whether this book, clearly the most detailed and definitive study of this case, can help the U.S. and Cuba to move beyond the current stalemate of holding on to each other's citizens until their own “hostage” (as the U.S. calls Alan Gross) or “heroes” (as the Cubans describe the Five) can be released.

Kimber's book was initially received rather guardedly in Cuba—until former National Assembly President Ricardo Alarcon strongly embraced it. (Now a Spanish translation is in process in Cuba, with international publishing rights to be negotiated.) Like the case of the Cuban Five itself, the book has entered the U.S. below the radar of major U.S. news and literary media.<sup>12</sup>

Alan Gross, a U.S. citizen, was arrested in Cuba in December 2009, at age 60 on his fifth trip there. He was working covertly as a contractor for the U.S. Agency for International Development (AID), whose mission is to promote democracy outside of the U.S. In the Cuban context this clearly means to try to encourage an opposition to fulfill the official U.S. commitment to “regime change.” Specifically, Gross was paid some \$500,000 in U.S. AID funds to set up satellite communications networks in Cuba which could not easily be traced, supposedly to aid Cuba's Jewish communities.<sup>13</sup>

In the larger picture, the Cuban position is objectively quite different than that of the U.S. Cuba has no sanctions or embargo against the U.S. to lift, and has long favored normal relations without imposing preconditions based on demanding changes in the internal policies of the other nation. But Cuba does want the prompt return of the remaining members of the Five in U.S. prisons. The Gross case has been linked to their fate—even more so since the Obama administration achieved the release of U.S. prisoner of war Bowe Bergdahl from Afghanistan, while allowing five Taliban leaders to leave Guantanamo for at least a year's custody in Qatar.<sup>14</sup>

The U.S. has long pursued a policy of regime change in Cuba. Since 1960, the official U.S. assessment was that since “[t]he majority of Cubans support Castro . . . [t]he only foreseeable means of alienating internal support is through disenchantment and disaffection based on economic dissatisfaction and hardship,” justifying a U.S. policy seeking “to bring about hunger, desperation

and overthrow of government.”<sup>15</sup> This is not just an old abandoned policy. According to a release from the National Securities Archive on January 18, 2013, based on court papers filed that week in a U.S. lawsuit brought by Alan Gross against the agencies that sent him to Cuba, the U.S. government has “between five to seven different transition plans” for Cuba, and the USAID-sponsored “Democracy” program aimed at the Castro government, which funded Gross's actions in Cuba, is “an operational activity” that demands “continuous discretion,” rather than open disclosure.<sup>16</sup>

### **Miami and its media: The perfect place for these convictions**

Kimber was scheduled to be interviewed on Southern Florida's major NPR outlet, WRLN-FM, in September, 2013, but then the invitation was withdrawn because, according to the Station Manager's September 18, 2013 “Open Letter on Cuba to Our Community and Partners,” Kimber's findings had been “deemed too ‘incendiary’ for this community to hear.” (In response to criticisms, another show on the same station agreed to include him, but only after the Station Manager issued his defensive statement, promising its listeners and donors that it would confront Kimber with “hard questions,” and then follow up with “an expert to rebut these claims.”)<sup>17</sup>

Kimber quite reasonably viewed this latest example of paranoia and censorship as further proof that the trial of the Five should never have been held in Miami, where the jury in what has been described as the longest criminal trial in U.S. history convicted all five defendants on all charges after five days of deliberation.

The dust-up over Kimber's few minutes on public radio in Miami—and on almost no other broadbased U.S. media so far—is reflective of our media's coverage of the case to date. One notable exception was the *Washington Post's* decision to publish Kimber's 2,000-word article on the case prominently in its Sunday October 6, 2013 edition, entitled “The Cuban Five were fighting terrorism. Why did we put them in jail?”<sup>18</sup>

Despite the unique aspects of this trial, the treatment of the case by the U.S. mass media has generally been deplorable. Outside of southern Florida, the case was virtually ignored, even though it is the only domestic trial in U.S. history cited as being unfair by both Amnesty International and the relevant body of the United Nations (the Working Group on Arbitrary Detention, established as an arm of the former UN Commission on Human Rights).<sup>19</sup>

When mentioned at all, most U.S. media, have consistently but inaccurately referred to the Five as “convicted spies.” In fact, only three were convicted even of *conspiracy* to commit espionage—meaning that the jury in Miami accepted that they *would* have spied on the U.S., not that they actually had *done* so. In reporting the release of Rene Gonzalez to Cuba on May 3, 2013, the *New York Times* described him as “a convicted spy” despite the fact that he

was never charged with nor convicted of of *conspiracy* to commit espionage, let alone of *actual* espionage.<sup>20</sup>

In Miami however the story was different. The media covered their case heavily, even hysterically, and not very accurately even regarding the basic facts such as the Five's actual charges and convictions.<sup>21</sup> Kimber recounts "a frenzy of hostility and hysteria against the accused Cuban spies," right after they were charged, including an *El Nuevo Herald* story by Pablo Alfonso, who asserted, without offering any evidence, that their arrests "may be an action aimed at preventing a possible collaboration between the Cuban government and countries involved in terrorist actions against the United States." Another story by Alfonso asserted that sending "Cuban spies en masse to Miami" was essentially a Soviet plot. And another by Ariel Remos added that their arrest "could be" connected not only to spies but also "drug traffickers," since it was "obvious" that Castro "has been significantly involved in drug trafficking," again without any evidence.<sup>22</sup>

Kimber reported that after the attacks on New York's Twin Towers on September 11, 2001, Fidel Castro for the Cuban government was among the first foreign leaders to express condolences, but he also claimed a right to speak on behalf of the many Cubans who had been hurt, killed or terrorized by bombs targeting Cuba. "On a day like today, we have a right to ask, what will be done about Luis Posada Carriles and Orlando Bosch, the perpetrators of that monstrous, terrorist act?" He was referring to the October 1976 bombing of the Cubana airliner, killing all 73 on board, as well as to the more recent hotel bombings in Havana.<sup>23</sup>

Kimber notes that "the response from Washington was a deafening silence," but in Florida, as the Five were awaiting sentencing, it "was anything but silence." *El Nuevo Herald*, the Spanish language sister to the *Miami Herald*, "attempted to hike the hostility level," by running a baseless story on November 14 linking Mohammed Atta with Cuba, under the headline "They Affirm that Atta Met in Miami with Cuban Agent." Kimber describes the decision to run this "unsourced, unconfirmed possibility" as being journalistically irresponsible. The story's publication allowed Congressman Lincoln Diaz-Balart to issue a statement the next day, treating it as the Gospel that "Al Qaeda terrorists have been linked to Cuban intelligence operatives."<sup>24</sup>

Of course the Five were all admitted agents of the Cuban government, and less than a month later they received a series of maximum sentences.

Well after the trial, it came out that reporters creating these stories were at the same time being paid thousands of dollars by the U.S. government to prepare anti-Cuba propaganda, including Pablo Alfonso and Ariel Remos. Alfonso received over \$58,000 and Remos \$11,750.<sup>25</sup> This was material for the U.S. government's Radio and TV Marti, beamed to Cuba to try to undermine

the revolution, but meanwhile subsidizing with our tax dollars the unique industry in Miami planning the future for the people of Cuba, and seemingly also violating the Smith Mundt Act of 1948 which prohibited U.S. government propaganda that is beamed to a domestic audience in the U.S., as Kimber notes.<sup>26</sup> (TV Marti can be seen on cable television in Miami, and has virtually no audience in Cuba.)

Even without knowledge of these government payments, a unanimous three judge Federal Court of Appeals panel ruled in August 2005 that holding the trial of the Five in Miami was unfair, due to a "perfect storm" of anti-Castro hostility and prosecutorial misconduct.

Referencing a community where even suggesting dialogue with the Cuban government had resulted in bombings and maiming, not to mention boycotts, ostracism and loss of business, the unanimous panel added:

On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building. Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during the deliberations and that footage was televised. Some of the jurors indicated that they felt pressured....

During the deliberations, members of the jury were filmed entering and leaving the courthouse, and the media requested the names of the jurors. Jurors expressed concern that they were filmed 'all the way to their cars and [that] their license plates had been filmed.'<sup>27</sup>

The original three judge panel decision was hailed as high mark in judicial recognition of venue concerns, but was short-lived. Despite the unanimous decision, the Bush administration filed a request for its reconsideration by the entire 11th Circuit *en banc*. Although this maneuver is generally disfavored and such requests are rarely granted, it was granted in this case,<sup>28</sup> resulting in a contrary conclusion which upheld the original venue.<sup>29</sup>

### **If the Cuban Five were nonviolent, why a murder conspiracy charge?**

The most controversial and problematic count is the conviction of Gerardo Hernandez for "conspiracy to commit murder," which resulted in one of his life sentences, and also directly contributed to maintaining his other life sentence (for "conspiracy to commit espionage"), not to mention his additional 15 years on related charges, which were all upheld on appeal.<sup>30</sup> This charge was added much later to the original complaint, and differs from the other charges. It is based on the February 24, 1996 shoot-down of two planes that had flown from Florida to Cuba illegally as part of a campaign of harassment, overflying Havana, dropping anti-Castro flyers over the city. On that date, after a series of warnings from Cuba to the U.S. that further incursions would not be tolerated, Cuban MiGs shot down two of the three planes in the area. The Cubans claimed they had been in Cuban airspace. The U.S. claimed otherwise. The "conspiracy

to commit murder” charge was based on the theory that Hernandez was “in” on a plan to shoot down and kill the pilots.<sup>31</sup>

This charge is problematic for the Five. Aside from their ultimately unavailing change-of-venue argument (challenging the trial court’s insistence on holding the trial in Miami), the defense’s greatest hope on appeal was to get this conviction knocked out.

In what may be the final appellate ruling in this case, one judge from the original panel (Phyllis Kravitch, a Carter appointee) held that the evidence presented did not support the conviction. But joining a Bush II appointee (Judge William Pryor) who replaced one of the original judges, was Judge Stanley Birch (a Bush I appointee) who cast the deciding vote on what he called “a very close case.” Judge Birch ultimately agreed to let the conviction stand, despite the fact that this conclusion was based on a high degree of deference to the jury’s verdict, and this same judge reiterated in his same special concurrence that the case should not have gone to that Miami jury because “[t]he defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed.” Judge Birch then respectfully suggested “that this case provides a timely and appropriate opportunity for the [Supreme] Court to address the issue of change of venue in this internet and media permeated century.”<sup>32</sup> The U.S. Supreme Court declined the invitation to take the case on appeal, on June 15, 2009, despite amicus briefs filed by ten Nobel prize laureates and many others.<sup>33</sup>

Aside from the humanitarian aspect of this judicial decision that Gerardo should die in prison, that count is also politically the most troublesome for the defense. It not only muddies explanation of the case with a complicated tangent, but also allows for “real victims” (the widows of the four slain pilots) to be presented publicly, whereas the other charges appear to be “victimless crimes.”

Kimber makes the salient point that Hernandez was tried and targeted as a proxy for charging Raul Castro with murder as head of the Cuban military at the time of the February 1996 shoot-downs, which obviously raised the stakes in his case.<sup>34</sup> Kimber also notes that the “conspiracy to commit murder” conviction led to calls that Fidel Castro be indicted for the same “murder,” including a letter delivered by Jeb Bush to his brother, then President George W. Bush.<sup>35</sup> And the *Miami Herald* reported that this “murder” case was still open 10 years later, with the comment that “turning” Gerardo Hernandez was the “best hope” to bring charges against Raul Castro. Hernandez characterized this as “their wild dream, the true reason behind their psychological torture [of me].” In a letter to Kimber in 2010, he added that “it explains why they haven’t let me see my wife for 12 years like every other prisoner, why they haven’t let me write an email to her like every other prisoner, etc., etc.”<sup>36</sup>

Kimber concludes that the evidence that led to Hernandez’ conviction for “conspiracy to commit murder” is not convincing, given the extreme com-

partmentalization of Cuban intelligence—with information only supplied on a “need to know” basis, which certainly would not include sharing any special plans by Cuban military defense forces with an intelligence agent in Miami. Kimber also notes that Hernandez did not testify in his own defense at trial, allowing the jury to run away with inferences from circumstantial evidence at best. But Kimber conceded that, regardless of that decision, it was very unlikely that there would have been a different outcome in a Miami trial against an admitted Cuban government agent.

### Kimber’s book exposes U.S. terrorist contacts at the highest level

Without a doubt, this is the most definitive study of the Cuban Five case. It is based on exhaustive research, including Kimber’s study of the full 20,000 page trial transcript, the trial exhibits, and other documents that were not introduced (including materials that the Cuban government says it provided to the FBI in June 1998). Kimber also interviewed the numerous participants in person or by correspondence, chiefly in Florida and Cuba, but wherever he could find them. He compared these to the contemporary intelligence reports and exchanges, and to available court records from related cases. His research included study of the mass media and alternative press coverage in southern Florida and in Cuba.

It would be wrong to view this as a book only on the case of the Cuban Five, as important as that case is. *What Lies Across the Water* also describes a number of the plots and attacks against Cuba, much as the initial Eleventh Circuit decision did in 2005. But that court record, sobering as it is, was incomplete since the trial judge limited the evidence to acts against Cuba perpetrated from 1994 to 1998, while Kimber includes major acts of terror before, during, and after the alleged actions for which the Five were tried.

Kimber documents many sabotage and assassination plots (some successful, but most prevented or otherwise failed), virtually all hatched in greater Miami. These continued well past the 1960s and ’70s, during which mass murder and assassinations took place, including the aforementioned killing of 73 civilians on board Cubana Flight 455. Indeed, he documents an assassination attempt that took place in the midst of the Cuban Five’s trial:

Ironically, some of those same exile terrorists continued to make the Cubans’ argument for them. In April 2001—in the middle of the trial—three more Miami exiles were arrested trying to sneak into Cuba aboard a vessel filled with weapons. Cuban television even broadcast a telephone call the Cubans had recorded between one of those arrested and Santiago Alvarez, a prominent Miami exile with close ties to Luis Posada. Alvarez had mused about going ahead ...with the scheme to set off a bomb at the Tropicana [nightclub – A.H.].<sup>37</sup>

But much more sobering is Kimber’s clear documentation that the politically powerful lobby, the Cuban American National Foundation (CANF) was also involved in terrorism. This had been Cuba’s repeated claim, either ignored or

dismissed as wild propaganda by the U.S. media. These Cuban claims were accurate, as he demonstrates, relying not just on Cuban sources, but on Miami press and court records, as well as some arrests in the U.S. (which generally lacked any followup prosecutions).

Kimber cites the Coast Guard's 1997 interception of a boat off of Puerto Rico, with a hidden compartment containing "an assassin's treasure trove" including two semi-automatic, armor piercing 50-caliber assault rifles equipped with night scopes, boxes of ammunition, military fatigues, and so on. One of the men on board announced to the Coast Guard inspectors: "They are weapons for the purpose of assassinating Fidel Castro." The owner of the boat was a member of CANF's board, Jose Antonio Llama, one of the assault rifles was owned by the CANF President, and the destination set on the boat's computer was where Fidel Castro was scheduled to meet at a summit of Latin American leaders on the Venezuelan island of Margarita.<sup>38</sup>

Kimber also includes the 2006 announcement of a lawsuit in Miami by this same former CANF Director, Jose Antonio Llama, asserting that he had helped finance the CANF's "often denied paramilitary wing."<sup>39</sup> This was consistent with the testimony of Percy Alvarez, who infiltrated the CANF and then testified in Cuba regarding CANF's funding and sponsorship of paramilitary, terrorist operations—a story that the New York Times was given but never printed.<sup>40</sup>

Kimber finds that the Cuban communist "state-controlled" media was more forthcoming and accurate on these issues of illegality, terrorism and political influence in the U.S., than was our much-heralded "free press."

These issues are not a matter of merely local or regional importance. Apart from the pivotal role that Florida has played in U.S. presidential elections, CANF has virtually dictated our nation's policies concerning Cuba, often down to the details. And it was not just conservatives such as Ronald Reagan (whose national security team encouraged the founding of CANF, modeled explicitly on the Israeli lobby, AIPAC) and the two Bush Presidents, but also Barack Obama, who most recently appeared at a fundraiser at the home of the current CANF president on November 8, 2013, as Bill Clinton had done earlier.<sup>41</sup>

Is it newsworthy that our presidents consort at home with terrorists and have relied directly on a group that, if the U.S. terrorist list had any credibility, should be on it? Only in South Florida apparently—where such links are considered to be a political asset.

Kimber is at his best in treating the nuanced "yellow light" law enforcement approach to illegal terrorist plots directed against Cuba and their representatives. On page 208 he relies on a report by Juan Tamayo in the Miami Herald, "Anti-Castro Plots Seldom Lead to Jail in U.S." (July 23, 1998, less than two months before the Cuban Five were arrested):

Anti-Castro militant Tony Bryant still chuckles when he recalls the FBI agents who interviewed him after a 14-foot boat, loaded with high explosives and

registered in his name, turned up near Havana. They said, 'You could hurt someone. Don't do it again,' said Bryant, a former member of the Commando L paramilitary group. 'I promised not to do it again, and they went away.'

Tamayo went on to quote unnamed current and former prosecutors who told him there was an "unspoken policy . . . to gather intelligence and demobilize these people, to disrupt rather than arrest." That "yellow light" approach to law enforcement, they said, had "given comfort to people who should otherwise feel insecure about engaging in illegal activities."<sup>42</sup>

This forgiving approach to terrorism contrasts with how the FBI and prosecutors have treated discontented African Americans and Haitians in Miami who may have been willing to consider using violence to express their grievances. For example, on June 22, 2006, in what became known as the case of the "Liberty City Seven" or "The Plot to Bomb the Sears Tower in Chicago" the FBI conducted a series of raids, arresting and putting seven men through three trials before they were able to achieve any convictions, in what "law enforcement officials" initially described as "plotting in its early stages, . . . no weapons or explosives had been seized from the searched locations.... FBI Special Agent Richard J. Kolko in Washington said in a statement that the Miami operation was a 'terrorist-related matter' but that 'the individuals arrested posed no immediate threat to the U.S.'"<sup>43</sup>

This "aspirational" plot was the topic of press conferences and speeches by both the U.S. Attorney General and the head of the FBI, with widespread press coverage internationally.<sup>44</sup> Yet it was on the same day that the former director of the CANF, Jose Antonio Llama, announced his plan to file a lawsuit alleging essentially a "failure to perform" promised terrorism against Cuba despite his having invested over a million dollars to fund it. This was reported in the Miami Herald, with no prosecutions or notable publicity beyond that. (He also admitted then that the 1997 incident in which Coast Guard inspection of his boat off of Puerto Rico yielded hidden assault rifles, was in fact an attempt assassinate Fidel Castro, as one of the perpetrators had admitted during the inspection, but this was excluded from evidence at trial. Those who were involved were acquitted after they claimed they merely wanted to demonstrate peacefully against Castro's presence.)<sup>45</sup>

### **Kimber and the Five on the U.S. legal system**

Kimber is a journalist and not a lawyer. He is obviously a keen and detailed investigator as well. So his comments on journalistic aspects of this case perhaps should carry more weight than his analysis of legal issues, though both are thoughtful and revealing.

On the legal front Kimber notes that separate trials for each of the Five would have been advisable based on the generally presumed goal of trying to minimize risk of convictions. But the Five all stood together as one, both at trial and since. This may or may not turn out to be politically wise in the

long run, but it surely showed solidarity. As a matter of legal strategy, it also allowed evidence against each one of them to be presented to the jury in their consideration of the charges against the others.

His discussion of the jury contains enough detail to clearly understand why a change of venue should have been granted, even to an adjacent county, if a fair trial was really the objective. The case went to trial in the immediate wake of the armed seizure of six-year-old Elian Gonzalez from his relatives who refused to obey orders to allow him to be returned to his father, residing in Cuba. Elian had miraculously survived a failed rafting journey from Cuba to Florida on Thanksgiving Day, 1999 when his mother and all the others drowned. Passions were inflamed to the point of open violence and defiance, centered in Miami's Cuban American community, against anyone who supported his father's right to raise his son, in Cuba.<sup>46</sup>

While the jury in the trial of the Five did not include any Cuban Americans, a study based on a survey and other data, developed by a Cuban-American sociologist at Florida International University, indicated that "the possibility of selecting 12 citizens of Miami-Dade county who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero...even if the jury were composed entirely of non-Cubans." The person who became the jury's foreperson proudly described himself as being "anti-communist," and the August 2005 11th Circuit decision shows this was not an atypical response. Fully 10 percent of the original jury pool said they personally knew the dead pilots shot down by Cuba or proposed trial witnesses of the shoot-down.<sup>47</sup> In sum, as Kimber quoted attorney Leonard Weinglass in petitioning the Supreme Court to review this case, jurors had ample reason "to fear for their (and their families') safety, livelihoods and community standing, if they acquitted."<sup>48</sup>

The analysis of the trial itself is written clearly, for easy understanding by a lay reader, summarizing the main points of the extensive trial, and awarding "points" for each side as he does so.

On my initial read, the book was at its weakest when Kimber reported rather briefly the legal perspective of the late Roberto Gonzalez,<sup>49</sup> a defense lawyer in Cuba who was born in Chicago, and the brother of Cuban Five defendant Rene Gonzalez. Gonzalez, through Kimber, compared the legal systems of Cuba and the U.S.: "The objective in each system is the same," Gonzalez told Kimber, "but the procedures are very different." Yet most of what Kimber then attributes to Gonzalez seems to call his initial observation into question.

While any detailed analysis is beyond the scope of this review, I will note that the systems are indeed different. Ours is based on an adversarial model, in which neither side necessarily has the truth as its goal. Instead the primary goal is to win the case. The discovery of truth is the object of the judge or jury, so the theory goes. Cuba relies on a much stronger procurator/investigator model, to determine the facts before trial, while the final trial is much less

adversarial. Kimber quoted Roberto Gonzalez as saying that U.S. trials go on at such length (he personally observed the seven-month trial of the Five) because "the discovery goes on at trial."

Initially I believed that conclusion was not entirely accurate, since the U. S. Supreme Court established a defendant's right to pretrial discovery, in *Jencks v. United States*,<sup>50</sup> a prosecution of a union official who was alleged to be a member of the Communist Party, where the Court held that the prosecution may withhold prior statements of witnesses it relies on only at the cost of dismissing the case against the defendant, even where national security interests are asserted; and *Brady v. Maryland*,<sup>51</sup> which held that due process requires that a defendant's request for exculpatory evidence be complied with prior to trial.

In discussing this critique with Fernando Gonzalez in February 2014, Gonzalez pointed out that this right was severely curtailed since the passage of the Classified Information Procedures Act (CIPA) in 1980. The primary purpose justifying CIPA was to limit the practice of graymail by criminal defendants in possession of sensitive government secrets. "Graymail" refers to the threat by a criminal defendant to disclose classified information during the course of a trial. The graymailing defendant essentially presents the government with a dilemma: to either allow disclosure of the classified information or to dismiss the indictment.<sup>52</sup> CIPA thus appears to limit the holdings in *Jencks* and *Brady*, though it is claimed to be merely procedural and that it "neither adds to nor detracts from the substantive rights of the defendant or the discovery obligations of the government. Rather, the procedure for making these determinations is different in that it balances the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security."<sup>53</sup>

However, as Fernando Gonzalez pointed out in the case of the Five, the defendants did not possess classified information, and no such evidence was claimed nor produced by the prosecution at trial. Tens of thousands of pages of defendants' own documents were seized, including the full hard drives of their computers, and defense counsel were only given limited access to them. Security clearances were required of all attorneys, the documents were kept under lock and key in the courthouse basement, they could only be accessed during certain hours by advance appointment, and neither copies nor notes were allowed to be taken out. Further, the defense had to give the prosecution advance notice of its intent to use any of these documents at trial. Thus as a practical matter at least, such discovery was made very difficult, and the application of CIPA also gave tactical advantage to the prosecution.

Fernando Gonzalez stated he could understand this in a case where the defendants had classified documents which the government could not risk being made public, but here these restrictions were applied to a case where defendants had no such documents.

Kimber also includes Roberto Gonzalez' cogent observation regarding U.S. trials that "what is important in that sort of trial is not truth or facts, but theatre. The outcome has to do with the acting capacity of the lawyers, the personality of the witnesses."<sup>54</sup> There is certainly much truth in that.

### Kimber reveals some dirty laundry on both sides

Kimber's balanced and nuanced approach includes topics and observations that some Cuba supporters may not appreciate. Did the FBI arrest the Five (and others who subsequently made deals) in September 1998, based on the information Cuba gave to the FBI in June 1998, as some supporters have implied? Not likely, as the FBI was monitoring at least some of the Five already. Also potentially discomfiting to U.S. activists is the question of whether there is any truth to the claim of Cuban expatriates, and echoed loudly by the mass media in Miami, that any outrageous acts in that community are the result of Cuban agent provocateurs seeking to make trouble? No doubt an exaggerated perception, but Kimber does show that Cuban agents have successfully penetrated elements in that community, and their presence was not always linked to imminent acts of terrorism. Of course one may not know in advance what a group or its members were really planning.

Kimber also documents at least one situation where one of the Cuban Five defendants acted to calm down and help reconcile Castro opponents who were feuding with each other. One effect of this was to increase his credibility and acceptance, and thus further his work.

Kimber acknowledges that some of the Five monitored U.S. military preparations (without focusing on or obtaining any U.S. classified information), but excuses that as being reasonable given U.S. invasions and violent covert actions in other nations south of its border, like Haiti, Grenada, Chile, and Nicaragua to name a few, and the ongoing commitment of U.S. government to "regime change" in Cuba. This history is factually irrefutable, but it is more obvious to a Canadian than to a consumer of mainstream U.S. media and political dialogue.

Kimber concludes that "The truth is—everybody lies," citing first the example of the initial Cuban official denials of any connection to the Five, who thereafter were openly acknowledged to be agents working for Cuba.<sup>55</sup> U.S. authorities lied, claiming that the Cubans gave them no significant intelligence in June 1998; Kimber has seen those extensive records (provided by the Cubans as part of his research), but these were not admitted for the jury to review. The FBI lied, denying that they have any documents related to those disclosures. And finally terrorists such as Posada lied, who admitted in a recorded interview for the New York Times that he ran the 1997 bombing campaign which killed the Canadian Italian businessman Fabio Di Celma, and that he was funded by CANF. Later he denied both admissions.<sup>56</sup>

Kimber is careful and detailed when explaining which versions he chose to credit. He concludes that the narrations of the Cuban Five and their supporters

in Cuba was corroborated by available records, with a single exception, which he indicates may be understandable under the circumstances.<sup>57</sup>

Despite the venom and at least attempted overt censorship directed at his work in Miami—which may be inconsequential compared to the "benign neglect" so far shown by most national media in the U.S.—it is clear that Kimber did not drink anybody's Kool-Aid. He has however, spent three years doing the most exhaustive research and writing project to date on this case, and his conclusions seem both well reasoned and convincing. This is a very readable, fact-filled story of intrigue.

*What Lies Across the Water* deserves to be widely read. It should be on the shelves in every library. It is a detailed revelation of how distorted the U.S. justice system can become when extreme ideological battles influence decisions such as whom to arrest, ignore, or warn, and what sentences to impose.

### NOTES

1. In all three cases, the direct perpetrators of the Watergate break-in, the illegal funneling of arms, and the assassinations in Washington were anti-Castro Cuban operatives. This includes three of the Watergate "plumbers" (burglars) who were veterans of the 1961 Bay of Pigs invasion of Cuba; see JANE FRANKLIN, *CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY* 100-101 (1997).  
During the Iran-Contra operation, Cuban American Felix Rodriguez was a close liaison to then-Vice President (and former head of the CIA) George H. W. Bush; Rodriguez had been a Paramilitary Operations Officer from the CIA's Special Activities Division, and a key asset during the Bay of Pigs operation, who was also involved in the assassination of Che Guevara. See Robert Parry, *Memoirs of the Man the White House Said Didn't Exist*, WASH. MONTHLY, Nov. 1, 1989; see also Michael Ratner & Michael Steven Smith, *WHO KILLED CHE?* (2011). Cuban Americans Max Gomez and Ramon Medina were among those identified as having helped arrange clandestine arms shipments to anti-government rebels in Nicaragua in a period when the CIA was legally banned from assisting in such operations. *Hasenfus tempers comments on CIA*, N.Y. TIMES, Nov. 3, 1986.  
Former Chilean Foreign Minister Orlando Letelier and U.S. citizen Ronni Moffitt were killed in Washington at the apparent behest of Chilean intelligence under Augusto Pinochet. The action involved at least five Cuban American operatives, Guillermo Novo Sampol, Ignacio Novo Sampol, Virgilio Paz, Jose Dionisio Suarez Esquivel, and Alvin Ross Diaz, based on a report of the original 1979 trial court findings, at <http://www.latinamericanstudies.org/belligerence/78-cr-367-aer.htm>. Two of them were acquitted of the most serious charges in a re-trial two years later; see *Two Acquitted of Murder in Letelier Case*, WASH. POST, May 31, 1981, available at <http://www.latinamericanstudies.org/chile/letelier-acquital.htm>. See also JOHN DINGES & SAUL LANDAU, *ASSASSINATION ON EMBASSY ROW* (1980).
2. See Posting of Felix Martinez et al. to Afro Cuba Web, *The Miami Machine: Cuban American Terrorists Triumph in Election 2000*, Dec. 13, 2000, at <http://afrocubaweb.com/miamimachine.htm>; but see John Lantigua, *Miami's rent-a-riot*, SALON.COM, Nov. 28, 2000, [http://www.salon.com/2000/11/28/miami\\_8/](http://www.salon.com/2000/11/28/miami_8/).
3. See, e.g. *Who Was Lee Harvey Oswald?*, PBS FRONTLINE, Nov. 19, 2013, at <http://www.pbs.org/wgbh/pages/frontline/biographies/oswald/transcript-52/index.html#neworleans>. Ocean Press has published Cuba's own report on the Kennedy assassination by Fabián Escalante, Cuba's former head of intelligence, who directed Cuba's investigation. *FABIÁN ESCALANTE, JFK: THE CUBA FILES: THE UNTOLD STORY OF THE PLOT TO KILL KENNEDY* (2006); also *FABIÁN ESCALANTE, EXECUTIVE ACTION: 634 WAYS TO KILL FIDEL CASTRO* (2006) (hereinafter *ESCALANTE, EXECUTIVE ACTION*).

4. See Bob Guild, Venceremos Brigade, National Lawyers Guild International Committee, Cuba Travel Fact Sheet, at <http://www.nlginternational.org/news/article.php?nid=585>; [http://www.nlginternational.org/report/Cuba\\_Travel\\_Fact\\_Sheet\[1\].pdf](http://www.nlginternational.org/report/Cuba_Travel_Fact_Sheet[1].pdf). This goes through the the Venceremos Brigade's 40th Anniversary in 2009. Much more recently a Florida travel agency which booked 700 people to visit Cuba at the time of Pope Benedict's 2012 pilgrimage was firebombed and destroyed shortly thereafter, on April 27, 2012; *Travel agent finds forgiveness following arson*, ARCHDIOCESE OF MIAMI (website), Jul. 3, 2012, [http://www.miamiarch.org/ip.asp?op=Article\\_1273163942243](http://www.miamiarch.org/ip.asp?op=Article_1273163942243).
5. By official count of the Cuban government, "3,478 Cubans . . . have died and . . . 2,099 . . . have become permanently disabled due to terrorist acts carried out against our homeland during half a century that add[s] up 5,577 victims." Army General Raul Castro Ruz, President of the Council of State and of Ministers, Remarks at the Ceremony Commemorating the Victims of State Terrorism Day, Oct. 6, 2010, available at <http://www.cuba.cu/gobierno/rauldiscursos/2010/ing/r061010i.html> (last visited Mar. 23, 2014).
6. See KEITH BOLANDER, VOICES FROM THE OTHER SIDE: AN ORAL HISTORY OF TERRORISM AGAINST CUBA (2010); JANE FRANKLIN, CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY (1997), (check index for Operation Mongoose); available at <http://www.janefranklin.info/>; see also FABIAN ESCALANTE, THE CUBA PROJECT: CIA COVERT OPERATIONS 1959-62 (2004).
7. See, Stacy Conradt, *10 Ways the CIA Tried to Kill Castro*, MENTAL FLOSS, Feb. 16, 2012, <http://mentalfloss.com/article/30010/10-ways-cia-tried-kill-castro>. See also the British documentary *638 Ways to Kill Castro* (DVD: Silver River Productions, 2007) with related resources and interviews on the DVD; and in book form the Cuban account by its former head of intelligence, Fabián Escalante. ESCALANTE, EXECUTIVE ACTION, *supra* note 3.
8. *Bush: No Distinction Between Attackers and Those Who Harbor Them*, AMERICAN FORCES PRESS SERVICE (Sep. 11, 2001), available at <http://www.defense.gov/news/newsarticle.aspx?id=44910>.
9. George W. Bush, President of the United States, Address to the Nation, Oct. 7, 2001, available at <http://www.johnstonsarchive.net/terrorism/bush911d.html>. On March 24, 2006, George W. Bush stated, "If you harbor a terrorist, if you feed a terrorist, if you house a terrorist, you're as equally guilty as the terrorist." And Dick Cheney, Mar. 7, 2006: "[S]ince the day our country was attacked, we have applied the Bush Doctrine: Any person or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and will be held to account." Robert Parry, *Bush's Hypocrisy: Cuban Terrorists*, CONSORTIUM NEWS, available at <http://www.consortiumnews.com/2006/042606.html>.
10. Uri Friedman, *Just how big a deal is the Obama-Castro handshake?*, THE ATLANTIC, Dec. 10, 2013, available at <http://www.theatlantic.com/international/archive/2013/12/just-how-big-a-deal-is-the-obama-castro-handshake/282200/>.
11. *Clinton shook Castro's hand*, BBC, Sep. 8, 2000, at <http://news.bbc.co.uk/2/hi/americas/915415.stm> (last accessed Mar. 27, 2014).
12. The print version has been available from Amazon.com in the U.S. irregularly (except for Kindle and from re-sellers, often at exorbitant prices), but it remains available from amazon.ca, which ships to the U.S.; or directly from the publisher, at <http://fernwoodpublishing.ca/What-Lies-Across-the-Water/>. The NLG Cuba Subcommittee, 633 W. Wisconsin Ave., Suite 1410, Milwaukee, WI 53203 (414 273-1040), also has copies available for the post paid discounted total price of \$25.
13. See Salim Lamrani & Wayne S. Smith, *The Cases of Alan Phillip Gross and the Cuban 5*, HUFF. POST, Feb. 2, 2012, [http://www.huffingtonpost.com/salim-lamrani/the-cases-of-alan-gross-a\\_b\\_1224817.html](http://www.huffingtonpost.com/salim-lamrani/the-cases-of-alan-gross-a_b_1224817.html); see also Desmond Butler, *AP Impact: USAID contractor work in Cuba detailed*, BLOOMBERG BUSINESSWEEK (Feb. 13, 2012).
14. The Cuban government may see its hold on Gross as a bargaining chip for their release, as well as a deterrent against continuation of the U.S. policy of destabilization. Indeed, the Associated Press documented in April 2014 that shortly after Gross's arrest in Cuba, USAID

launched a "fake twitter" project aimed at secretly identifying to the U.S. government the political inclinations of tens of thousands of unsuspecting Cuban cell phone users, with the goal to promote dissension in Cuba. See Desmond Butler, Jack Gillum & Alberto Arce, *US secretly created 'Cuban Twitter' to stir unrest*, THE BIG STORY, <http://bigstory.ap.org/article/us-secretly-created-cuban-twitter-stir-unrest>.

The week after that revelation, Gross himself began a brief hunger strike to protest this provocative action by USAID, and the lack of progress for his release by both the U.S. and Cuban governments. *Former USAID worker Alan Gross goes on hunger strike in Cuban prison*, GUARDIAN, <http://www.theguardian.com/world/2014/apr/08/usaaid-worker-alan-gross-cuba-hunger-strike>. And then in August, 2014, the AP revealed USAID Program Used Young Latin Americans to Incite Cuba Rebellion, which also operated after Gross's arrest in Cuba for his USAID work; *USAID Program Used Young Latin Americans to Incite Cuba Rebellion*, GUARDIAN, <http://www.theguardian.com/world/2014/aug/04/usaaid-latin-americans-cuba-rebellion-hiv-workshops>.

Before either revelation, an editorial in the *Washington Post* demanded that until Alan Gross is released, there be no improvement in "relations between Cuba and the United States ... they ought to get worse." And it dismissed as unjustified Cuba's commitment to secure the return of their agents. See, *U.S. shouldn't hand Cuba an Alan Gross-for-spies deal*, WASH. POST (editorial) (Dec. 5, 2012) available at [http://www.washingtonpost.com/opinions/no-alan-gross-for-spies-swap/2012/12/05/fee0314-3f0e-11e2-ae43-cf491b837f7b\\_story.html](http://www.washingtonpost.com/opinions/no-alan-gross-for-spies-swap/2012/12/05/fee0314-3f0e-11e2-ae43-cf491b837f7b_story.html).

Despite the fact that the Bergdahl release generated much criticism, a number of commentators suggested that releasing the remaining three Cubans in order to free Mr. Gross would be a much better U.S. achievement, as there is no basis to believe these Cubans would pose a threat to the U.S. See Ruth Marcus, *After Bowe Bergdahl, what about Alan Gross?* WASH. POST (May 3, 2014), at [http://www.washingtonpost.com/opinions/ruth-marcus-after-bowe-bergdahl-what-about-alan-gross/2014/06/03/e5c1b4c6-eb39-11e3-9f5c-9075d5508f0a\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-after-bowe-bergdahl-what-about-alan-gross/2014/06/03/e5c1b4c6-eb39-11e3-9f5c-9075d5508f0a_story.html); and William McGurn, *The other captive Americans—will Obama trade for them?* N.Y. POST (Jun. 13, 2014), available at <http://nypost.com/2014/06/13/the-other-captive-americans-will-obama-trade-for-them/>.

15. Memorandum from Lester B. Mallory, Deputy Asst. Secretary of State for Inter-American Affairs, Apr. 6, 1960, *quoted in* SALIM LAMRANI, THE ECONOMIC WAR AGAINST CUBA, 72-73 (2013).
16. ALAN GROSS CASE LIFTS VEIL OF SECRECY U.S. DEMOCRACY PROGRAMS IN CUBA, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 411, Jan. 18, 2013, available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB411/> also posted at <http://nlginternational.org/news/article.php?nid=510>.
17. John Labonia, *An Open Letter To Our Community And Partners On Cuba*, <http://wlrn.org/post/open-letter-our-community-and-partners-cuba>. See also Juan Tamayo, *WLRN cancels interview with author of book that questions conviction of Cuban spies*, MIAMI HERALD, Sept. 17, 2013, available at <http://www.miamiherald.com/2013/09/17/3633553/wlrn-cancels-interview-with-author.html#storylink=cpy>.
18. This can be found at [http://www.washingtonpost.com/opinions/the-cuban-five-were-fighting-terrorism-why-did-we-put-them-in-jail/2013/10/04/37c556a6-1fca-11e3-b7d1-7153ad47b549\\_story.html](http://www.washingtonpost.com/opinions/the-cuban-five-were-fighting-terrorism-why-did-we-put-them-in-jail/2013/10/04/37c556a6-1fca-11e3-b7d1-7153ad47b549_story.html). Kimber's essay generated not only dozens of posted comments, primarily critical of U.S. Cuban policy, but also a critique by a lobbyist for groups seeking to maintain U.S. sanctions against Cuba. Kimber responded to that, and both make interesting reading, accessible at <http://cubanfive.ca/2013/10/capitol-hill-cubans-let-us-compare-facts>.
19. After indicating that it had studied the case for a number of years Amnesty International (AI) issued a statement on January 17, 2007 criticizing the denial of family visitation as "unnecessarily punitive," <http://www.thecuban5.org/wordpress/voices-of-support/amnesty-international/>, (last accessed Mar. 25, 2014). An AI Press Release of October 13, 2010 and a 22-page report on the case asked the Obama administration to release the Five, <http://www.amnestyusa.org/document.php?id=ENGUSA20101013001&lang=e>, and <http://www.amnesty.org/en/library/asset/AMR51/093/2010/en/9911673a-a171-49db-b757-581f2bdfef11/amr510932010en.pdf>.

- The UN finding from April 8, 2004, OPINION NO. 19/2005 (UNITED STATES OF AMERICA), can be found at <http://thecuban5.org/wordpress/voices-of-support/united-nations>.
20. Damien Cave, *Judge Allows René González, One of ‘Cuban Five’ Spies, to Stay in Cuba*, N.Y. TIMES, May 3, 2013, <http://www.nytimes.com/2013/05/04/world/americas/judge-allows-rene-gonzalez-one-of-cuban-five-spies-to-stay-in-cuba.html?emc=tnt&tntemail=y>. When promptly asked by the writer of this review to correct this clear mis-statement of fact, the *Times* took 26 days to decline, without defending the accuracy of their report, since it said “these men were all part of what has been *widely described as a spy ring*.” (Emphasis added); May 30, 2013 email from Zach Johnk, Assistant to the Senior Editor, Standards to Arthur Heitzer. Johnk added that this was also based on the opinion of “our foreign editors” that “the activity they were found to have engaged in was spying, even though the specific charges varied.” This email exchange is available at <http://nlginternational.org/news/article.php?nid=586>.
  21. See, e.g., *WLRN cancels interview with author of book that questions conviction of Cuban spies* MIAMI HERALD, Sept. 17, 2013, *supra* note 17, indicating that all five were convicted of conspiracy to commit espionage.
  22. STEPHEN KIMBER, *WHAT LIES ACROSS THE WATER: THE REAL STORY OF THE CUBAN FIVE* 235-236 (2013).
  23. *Id.* at 246.
  24. *Id.*
  25. *Id.* at 236 & n. 14.
  26. *Id.* at 236.
  27. 419 F.3d 1219, at 1256-1257.
  28. *United States v. Ruben Campa, et. al*, 429 F.3d 1011 (11th Cir., 2005). The National Lawyers Guild filed one of the several amicus briefs in this case.
  29. *United States v. Ruben Campa, et. al*, 459 F.3d 1121 (11th Cir. en banc, 2006). The National Lawyers Guild filed one of the several amicus briefs in this case.
  30. *United States v. Ruben Campa, et. al*, 529 F.3d 980, 1018 (11th Cir., 2008). By the time the case was returned to the original three judge panel and decided almost three years after its first decision, one of the original panel members was replaced by Judge William Pryor a controversial 2002 appointee of George W. Bush who had been filibustered before being narrowly approved by the U.S. Senate; he then wrote the decision of the court, upholding the conviction on this count and all others. The National Lawyers Guild filed one of the several amicus briefs in this case.
  31. Ironically, the prosecution had sought an emergency appeal, so that it could withdraw that charge from the jury because it said, with reference to the Court’s jury instruction (that the prosecution had to prove that there was a plan in advance to shoot down the planes over international waters), that “in light of the evidence presented in this trial,” this “presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution.” Well not to worry: the jury proceeded to convict on this as well as on all of the other charges. KIMBER, *supra* note 21 at 232-233.
- A powerful summary of the defense argument re this murder conspiracy claim is contained in Atty. Peter Schey’s “Letter to Obama,” dated March 5, 2013, posted at <http://www.thecuban5.org/wordpress/2013/03/04/us-lawyer-peter-schey-sends-a-letter-to-obama>.
32. 529 F.3d at 1018-1019.
  33. KIMBER, *supra* note 21 at 248.
  34. *Id.* at 242.
  35. *Id.* at 242, 243.
  36. *Id.* at 242.
  37. *Id.* at 241.
  38. *Id.* at 164-65.
  39. *Id.* at 243, n. 25.

40. *Id.* at 213-214.
41. *Obama Tells Dissidents He’s Begun To See ‘Changes’ In Cuba*, EFE, Nov. 9, 2013, at <http://latino.foxnews.com/latino/politics/2013/11/09/obama-tells-dissidents-begun-to-see-changes-in-cuba/> (last accessed Mar. 25, 2014).
42. KIMBER, *supra* note 21 at 208.
43. Peter Whoriskey & Dan Eggen, *7 Held in Miami in Terror Plot Targeting Sears Tower*, WASH. POST, Jun. 23, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/22/AR2006062201546.html>. Deputy Director of the Federal Bureau of Investigation John S. Pistole described the group’s plot as more “aspirational than operational”; the group did not have the means to carry out attacks on such targets. The group had no weapons and did not seek weapons when they were offered. The group had no communication with any actual al-Qaeda or other terrorist operatives. Julianne Gage, *2nd mistrial in ‘Liberty 7’ case*, WASH. POST, Apr. 17, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR2008041603607.html>).
44. Whoriskey & Eggen, *supra* note 42.
45. *Scandal among Miami Terrorists: Cuban emigre admits anti-Cuba terror plots*, CUBA SOLIDARITY CAMPAIGN (June 23, 2006), <http://www.cuba-solidarity.org/news.asp?index=1516>,
46. KIMBER, *supra* note 21 at 235.
47. *Id.* at 237 & N. 16.
48. *Id.* at 248.
49. Roberto Gonzalez was a strong advocate for the Five throughout. He spoke on the case at an NLG Convention (as a dual U.S. citizen, he could travel to the U.S. without needing a U.S. visa), and the NLG also granted him honorary membership on March 12, 2012, shortly before he died.
50. 353 U.S. 657 (1957). Jencks was an organizer in New Mexico for the progressive International Union of Mine, Mill and Smelter Workers. Later he played himself in the internationally acclaimed but domestically blacklisted film classic, *Salt of the Earth*, set in Silver City, New Mexico.
51. 373 U.S. 83 (1963).
52. See [http://en.wikipedia.org/wiki/Classified\\_Information\\_Procedures\\_Act](http://en.wikipedia.org/wiki/Classified_Information_Procedures_Act).
53. U.S. DEPT. OF JUSTICE UNITED STATES ATTORNEYS MANUAL, TITLE 9, CRIMINAL RESOURCE MANUAL 2054.
54. KIMBER, *supra* note 21 at 244.
55. Kimber regards them as trained agents, not amateurs, functioning under false narratives and some under false names.
56. KIMBER, *supra* note 21 at 263.
57. *Id.* at 264.





Traci Yoder

**BOOK REVIEW:  
SPYING ON DEMOCRACY**

**Heidi Boghosian, *Spying on Democracy: Government Surveillance, Corporate Power, and Public Resistance*, City Lights: 2013. 349 pp.**

“From the minute you wake up, your everyday activities are routinely subject to surveillance.”<sup>1</sup> Heidi Boghosian, Executive Director of the National Lawyers Guild and long-time advocate for civil rights, explores the implications of this statement in *Spying on Democracy: Government Surveillance, Corporate Power, and Public Resistance*. While the book went to press before Edward Snowden’s leaks about massive NSA surveillance came to light in June 2013, much of Boghosian’s analysis already anticipated the extent of current surveillance programs and the dangers to our privacy and civil liberties.

Written as an accessible, yet detailed account of government and corporate intelligence gathering, *Spying on Democracy* is filled with concrete examples of the kinds of monitoring to which we are constantly subjected. Boghosian’s situates her account of contemporary surveillance practices in a much longer history of government and private companies spying on individuals, organizations, and movements that challenged the status quo. Throughout the book, she describes the continuities between past and present through an overview of the Palmer Raids in 1919–1920; the Cold War; the FBI’s Counter Intelligence Program (COINTELPRO) investigations of the 1970s; the ongoing effects of post-9/11 policies; and the roles of the Reagan, Bush, and Obama Administrations in shaping today’s surveillance landscape.

Boghosian deftly demonstrates how government agencies, data aggregators, telecommunications companies, corporations, private intelligence firms, state and local police, and social media companies all collect and use information about individuals and their habits. She also highlights the ways that techniques and equipment used in warfare—drones, surveillance cameras, identification technology—are being adapted for domestic use with increasing frequency. Boghosian argues that “relentless surveillance” has left people less free, and possibly less safe (22). Despite growing evidence that Americans live under a constant state of monitoring by government and corporate interests, most people were not concerned until recently: in 2009, a survey indicated that 96 percent of people approve of surveillance cameras in public places. And the pervasiveness of social media has seen many of us willingly turn over per-

sonal information while shopping online or posting on sites like Facebook and Twitter.

While recent attention to the NSA has brought scrutiny to government surveillance methods, Boghosian’s account focuses on the crossovers and collaborations between public and private intelligence gathering. She details the government’s role in the harassment and infiltration of political groups, the creation of fusion centers (which bring together police and private corporations), the allocation of public funding for local police departments to increase surveillance, and the cooperation of all levels of government in planning security for National Special Security Events. Yet she also highlights the many ways that the private sector has employed surveillance practices and technologies. Chapter 2, “A Whopper, A Coke, and an Order of Spies,” uses the examples of Burger King and Coca-Cola to show how businesses spy on individuals and infiltrate organizations that attempt to challenge and expose questionable financial, labor, and environmental activities. Furthermore, because the private sector is not accountable to the public, federal agencies have actively sought out partnerships with corporations and private intelligence firms. However, when improper data gathering by corporations is revealed, the penalties have thus far been relatively light, as we have seen with examples such as Google’s Streetview. On the other hand, whistleblowers and journalists who expose the illegal practices of government and corporations are subjected to the harshest consequences, including jail time or exile.

*Spying on Democracy* covers the use of private contractors in government intelligence gathering and policing, the consequences of computer matching and data aggregation, the legal implications of location tracking technologies like GPS and Radio Frequency Identification (RFID) chips, and the monitoring and disruption of activist movements such as Critical Mass and Occupy Wall Street. Individual chapters explore the consequences of the government and corporate spying for different demographics.

One chapter focuses on the insidious ways that corporations use surveillance and intelligence gathering technologies to better market to children through computer games, family theme parks, and schools. Another describes examples of government and corporate surveillance, and disruption of the animal rights and environmental movements. Boghosian also discusses the implications of spying on the media, with a fascinating overview of the ways that the press has been monitored by the government, including wiretapping journalists, pressuring reporters to divulge their sources, back-tracking their calls, and attempting to restrict news coverage of national security issues.

The chapter “Listening in on Lawyers,” will particularly interest members of the legal profession. It provides an overview of the storied history of government spying on progressive lawyers and legal organizations such as the NLG and the People’s Law Office in Chicago as well as a discussion of violations of

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attorney-client privilege in the name of security. According to Boghosian, the monitoring of the legal profession chills lawyering and threatens democracy: “In the surveillance of attorneys, core principles of privacy, legal representation, due process, and assumptions of innocence—once cornerstones that set the United States apart from totalitarian societies—are imperiled by the very institutions mandated to protect them.”<sup>3</sup>

*Spying on Democracy* shows that surveillance does not make us safer; instead an enormous amount of time and resources is spent largely on monitoring of groups with specific religious or political views, rather than toward improving public safety. By way of a conclusion, Boghosian urges readers to find ways to succinctly explain to others how individuals can reclaim their rights, citing the brave examples of resistance in recent history. She also encourages those interested in combating these trends to support the efforts of numerous organizations working to protect civil liberties, including Electronic Frontier Foundation (EFF), Electronic Privacy Information Center (EPIC), and the People’s Law Office.

These possibilities of resistance are crucial, she argues, for “as the assault by an alignment of consumer marketing and militarized policing grows, each single act of individual expression or resistance assumes greater importance.”<sup>4</sup> Those who resist the power of the surveillance apparatus by exercising their rights are truly the “custodians of democracy.”<sup>5</sup> Boghosian’s call to resist is not merely academic; through her own work as Executive Director of the NLG and as a co-host on the radio show *Law and Disorder*, she exposes and challenges abuses of privacy, civil liberties, and democracy on a daily basis.

In an era when technological innovations continue to increase the capacity of governments and corporations to conduct mass surveillance of whole groups of people, *Spying on Democracy* is a timely and critically important intervention. This book will be of interest to scholars, journalists, activists, and legal practitioners interested in government and corporate surveillance, policing, war, technology, and the law. But really, it should be read by anyone who wants to better understand the implications of an increasingly coordinated government-corporate surveillance apparatus, the depth and scope of which are only now starting to become visible.

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NOTES

1. HEIDI BOGHOSIAN, *SPYING ON DEMOCRACY* 21 (2013).
2. *Id.* at 22.
3. *Id.* at 171.
4. *Id.* at 23.
5. *Id.* at 289.



depended, is in an advanced stage of decomposition. In the 1950s more than 1.8 million people lived in Detroit.<sup>1</sup> That number has since plummeted to around 681,000.<sup>2</sup> Last year the city formally filed for bankruptcy, the largest U.S. city ever to do so. A city bursting with self-congratulation 30 years ago when its beloved Tigers won the World Series is now awash in half-destroyed buildings, windswept litter, overgrown lawns, and spider-webbing sidewalks. I exaggerate only slightly when I say that parts of the idealized city of my youth look like they’ve been evacuated and bombed.

Thankfully, John Philo and his colleagues at the Sugar Law Center in Detroit are challenging the constitutionality of the new Emergency Manager Law in the courts. “Local Government in Michigan: Democracy for the Fortunate Few” explains how and why they’re doing so. Philo shows that there is a difference between policies that have undemocratic effects and those that aggressively attack democracy. Emergency managers aren’t popular among the people living under them. The popular will is being countermanded in these communities, as is, in at least one extraordinary instance, the will of the majority of voters across the state. In a 2012 referendum Michigan voters repealed the law authorizing the appointment of Emergency Managers. Two months later the governor signed a bill that effectively repealed the repeal. Emergency managers remain. For justice the people must now turn to the courts.

What Rousseau said about human beings is at least a little true about the internet—it was, to a large and bracing extent, “born free, yet . . . everywhere is in chains.” While originally conceived to aid in military operations, the popularization of the internet as a communications tool led to exciting possibilities for human solidarity and liberation. So, from the outset, governments around the world have sought to police the World Wide Web for dangerous or subversive ideas that might disrupt powerful economic and political institutions. Thanks in part to Edward Snowden, it’s now common knowledge that no government goes to greater lengths to do so than our own.

Now that the internet is becoming the dominant means of communication in the West—displacing newspapers, books, television, even schools and universities—U.S. law enforcement and intelligence agencies have raced to keep this potential dynamo of human freedom and interconnectedness under control. In “‘Anything You Post Online Can and Will be Used against you in a Court of Law’: Criminal Liability and First Amendment Implications of Social Media,” Kathryn R. Taylor provides an overview of the Supreme Court’s current jurisprudence involving content-based limitations on free expression generally, then examines the extent to which this jurisprudence applies to the greatest innovation in human communication since the internet itself—social networking websites.

Two hundred seventy-one million people worldwide have active Twitter accounts<sup>3</sup> and 1.23 billion are on Facebook.<sup>4</sup> The Court has yet to rule on the

extent to which the First Amendment shields expression on social media. Posting a threat, a pornographic image, or otherwise expressing yourself in a way that draws law enforcement's attention can be a radically different act on a Facebook page, for instance, with radically different types of audiences, meanings and implications, than painting that same content on a wall, blaring it through a megaphone, or publishing it in a magazine. We're in uncharted territory here. Lower courts lack guidance and are split on the extent to which expression on social media can be regulated. Taylor makes a strong case that speech on social media must be afforded the same protection afforded speech broadcast using more traditional methods.

The issue ends with two book reviews. Arthur Heitzer, chair of the Guild's International Committee's Subcommittee on Cuba, provides a detailed analysis of Stephen Kimber's *What Lies across the Water: The Real Story of the Cuban 5*, a book that, as Heitzer explains, has aroused a healthy dose of discontentment in south Florida. Finally, Traci Yoder reviews *Spying on Democracy*, a chilling account of the enormity and ubiquity of mass surveillance in contemporary U.S. society written by the Guild's longtime executive director, Heidi Boghosian, now director of the A.J. Muste Memorial Institute.

—Nathan Goetting, *editor-in-chief*

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#### Notes

1. SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS, POPULATION AND HOUSEHOLD ESTIMATES FOR SOUTHEAST MICHIGAN (2013), *available at* [http://www.semco.org/uploadedFiles/Population\\_and\\_Household\\_Estimates\\_for\\_July\\_2013.pdf](http://www.semco.org/uploadedFiles/Population_and_Household_Estimates_for_July_2013.pdf).
2. *Id.*
3. Number of monthly active Twitter users as of 2nd quarter 2014, [statista.com](http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/), <http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (last viewed August 22, 2014).
4. *Facebook: 10 years of social networking, in numbers*, GUARDIAN, [theguardian.com](http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics), <http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics> (last viewed August 22, 2014).

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