Preface to Volume 36, 2020 Edition

I wrote my first draft of this Preface in October. We have seen some changes as of the middle of November. These continue to be the most challenging political times of my lifetime (I was born in 1948) although once Joe Biden is sworn in as president, our struggles may become more positive. First, we will have to fight the dishonest and unlawful attacks on the will of the voters.

Nevertheless, recently, much has changed. An obvious positive is the election of Joe Biden and Kamala Harris. However, an obvious negative is that Amy Coney Barrett has been confirmed to replace Ruth Bader Ginsburg less than a month before a presidential election despite the hypocrisy of Senators McConnell and Graham, who previously had stated that they would not allow that to happen in the year that a presidential election was to occur. The moment that was most ironical and predictive of who she will be as a Supreme Court justice was her swearing in on the night of her Senate confirmation at the White House in a "ceremony" in which everyone was maskless despite the new Supreme Court Justice's "commitment to the sanctity of life." Who did she have swear her in? Justice Clarence Thomas, who as a Black lawyer and judge, has done the most harm to Black people in the last 80 years. Who had he replaced on the Supreme Court? Thurgood Marshall, who, as a Black lawyer and judge, had done the most to help Black people in the last 150 years. Justice Barrett is posed to be the woman Supreme Court justice, who, as a Supreme Court justice, will do the most harm to women in the last 100 years. She will be succeeding the woman, Justice Ginsburg, who as a lawyer and judge, did the most to help women in this country in the last 100 years.

Given what soon to be ex-President Trump and the Senate have already done to the federal judiciary, the confirmation of Justice Barrett, confirms what is likely to be the

hostility of the federal judiciary to civil rights cases in the future. Therefore, for those of us who practice in states in which the state court judges are open to civil rights claims and fair to civil rights plaintiffs, we may need to say goodbye to federal court.

Police targeting of Black people in this country continues with people like Breonna Taylor and George Floyd being brutally killed by local police. On a positive front, there remains an ongoing incredible resistance by women, people of color and others determined to live in a society committed to justice, democracy and equality.

The last Supreme Court term was less problematic than the two that had proceeded it even with Justices Gorsuch and Kavanaugh on the Court.[1]However, there were some problematic decisions.[2]

There are significant civil rights cases that the Court will be considering this term. Among them are *Carney v. Adams*[3] in which the Court will decide whether "the First Amendment invalidates a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a 'bare majority' on the state's three highest courts, with the other seats reserved for judges affiliated

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[1] *See* Preface to Volume 34 at p. iv and Preface to Volume 35 at p. iv. *See e.g. Bostock v. Clayton County, Georgia*, ___ U.S. ___, 140 S.Ct. 1731 (2020) and Chapter 11; *June Medical Services LLC v. Russo*, ___ U.S. ___, 207 L.Ed.2d 566 (2020) and Chapter 9; *Department of Homeland Security v. Regents of the University of California*, ___ U.S. ___, 140 S.Ct. 1891 (2020) (holding that Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals program was arbitrary and capricious under the Administrative Procedure Act).

[2] *See e.g. Hernandez v. Mesa*, ___ U.S. ___, 140 S.Ct. 735 (2020) and Chapter 7; *Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, ___ U.S. ___, 140 S.Ct. 2367 (2020) (holding that the Departments of Health and Human Services, Labor and the Treasury had authority under the Affordable Care Act to promulgate rules exempting employers with religious or moral objections from providing contraceptive coverage to their employees) and *Our Lady of Guadalupe School v. Morrissey-Berru*, ___ U.S. ___, 140 S.Ct. 2049 (2020) (holding that ministerial exception, grounded in First Amendment's Religion Clauses, barred the teachers' employment discrimination claims because they taught some religious doctrine in their classes).

[3] No. 19-309.

with the 'other major political party' "; *Torres v. Madrid*[4] in which the Court will resolve a Circuit split by deciding "whether an unsuccessful attempt to detain a suspect by use of physical force is a 'seizure' within the meaning of the Fourth Amendment" or whether the physical force must actually result in a seizure to create a 14th Amendment claim; and *Brownback v. King*[5], in which the Court will decide whether a final judgment under a section of the Federal Torts Claims Act in favor of the United States bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[6] against the individual federal employees whose actions were challenged in the Federal Torts Claim Act count of the complaint in a case.

This year is the 36th volume of this book, originally started by two NLG activists and lawyers (and in Jules' case, law professor), Jules Lobel and Barbara Wolvovitz. I have been editing it for only about 29 years. In the Introduction section of the book, Chapter 1 is a reprint of a law review article by Professor Catharine A. MacKinnon and Professor Kimberlé W. Crenshaw, entitled, "Reconstituting the Future: An Equality Amendment." In this article they present an equality amendment and explain why a new amendment is needed today. They state:

> The Equality Amendment has been needed all along. But it is needed now as much or more than ever. Without equality, democracy is in peril: real equality provides the voting power to break the glass ceiling, guaranteed rights that raise the floor for all citizens, and recognition of the reality that inequalities intersect and overlap, making it impossible to rectify one alone. All Americans deserve equality guarantees that cannot be taken away or disregarded. And in a true democracy, each citizen should have an equal right to vote and have their vote count equally. Only the Constitution can provide this power and protection. But no constitutional amendment alone can guarantee these results. History shows that law is subject to retrenchment as well as advance, particularly when emerging from and overlaid upon a nonintersectional power grid. This is

[4] No. 19-292.

[5] No. 19-546.

[6] 403 U.S. 388, 91 S.Ct. 1999 (1971).

> not a reason to succumb, but a challenge to create the conditions for change.[7]

The articles in Section II of the this volume are a series of original and reprinted articles regarding Section 1983, *Bivens*, other Constitutional Litigation and Police Misconduct.

In Chapter 2, Professor Nirej S. Sekhon underscores what we have heard so much this year with the title of his article, "Police and the Limit of Law." He introduces his analysis by stating:

> For more than fifty years, the problems endemic to municipal policing in the United States—brutality, racial discrimination, corruption, and opacity—have remained remarkably constant. This has occurred notwithstanding the advent of modern constitutional criminal procedure and countless judicial opinions applying it to the police. The municipal police can evade criminal procedure's legality-based paradigm through formal and informal means. That paradigm presupposes that the police's primary role is fighting crime, the zealous pursuit of which leads them to violate civil rights. The history and sociology of American policing, however, suggest that courts and law scholars have misconceived the municipal police. They are not, in the main, fighters of crime. They are guarantors of a social order that benefits dominant groups.[8]

In Chapter 3, "The Role of Fault in § 1983 Municipal Liability," Professor Michael Wells "focuses on indirect-effect cases, in which policymakers do not violate constitutional rights. Rather, a street-level officer, or some other subordinate, makes the key decision that involves a constitutional violation".[9]

He proposes a rule for those cases as follows:

> Adoption of a municipal duty of reasonable care, under which cities would be held liable for unreasonable policymaker failings in overseeing subordinates' work, would serve the accommodation principle by vindicating constitutional rights and deterring violations more effectively than current law, all

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[7] Chapter 1, *infra* at p. 1.

[8] Chapter 2, *infra* at p. 27.

[9] Chapter 3, *infra* at p. 105.

> without incurring the heavy costs that would attend across-the-board adoption of the respondeat superior approach.[10]

Professor Ayesha Bell Hardaway's article, "Time is Not On Our Side: Why Specious Claims of Collective Bargaining Rights Should Be Allowed to Delay Police Reform Efforts" is Chapter 4 of this year's book. In it, she states:

> The Article proposes that both state and federal courts should apply the managerial-function standard, which removes policy and public interest issues from collective bargaining, when considering whether unions have a right to oppose settlement agreements in structural police reform litigation. The Article also recommends that state and local governments promulgate ordinances clarifying the scope of public employee collective bargaining rights and the authority of local officials to make management and policy decisions for police departments.[11]

In Chapter 5, civil rights lawyers Hugh Eastwood and W. Bevis Schock use a case they litigated to show civil rights lawyers that in cases against city employees and municipalities, it is very important to fully understand the municipality's insurance policies because the language in a policy may well impact how claims are pled and when they are brought.

In Chapter 6, "The Myth of Personal Liability: Who Pays When *Bivens* Claims Succeed," Professors James E. Pfander, Alexander A. Reinhart and Joanna Schwartz study "the financial threat that successful *Bivens* claims pose to federal officers and their employing federal agency. Information supplied by the Federal Bureau of Prisons in response to a Freedom of Information Act request identified successful *Bivens* actions over a ten-year period; in the vast majority of cases (over 95%), individual defendants contributed no personal resources to the resolution of the claims. Nor did the responsible federal agency pay the claims through indemnification. The data suggest, in short, that recent hostility to *Bivens* litigation rests on a perceived threat of personal liability that is much more theoretical than real."[12]

"Murder, Impunity, and the Rule of Law" is the title of Chapter 7. In that article, longtime law school friend,

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[10] *Id.* at p. 105.

[11] Chapter 4, *infra* at p. 171.

[12] Chapter 6, *infra* at p. 279.

frequent contributor and law professor, Irwin Stotzky first discusses the Detroit Rebellion of 1967 (Irwin grew up in Detroit), an uprising in response to a specific incident but was really rooted in the systematic racism of all facets of government, particularly the police, that caused tremendous harm to Blacks in Detroit in the 1960s and 1970s—harm that continues to this day.[13] Next, he analyzes the Supreme Court's horrific decision in *Hernandez v. Mesa*,[14] in which the Court held there the killing of a young Mexican national playing in a culvert that separates El Paso, Texas and Juarez, Mexico by a border patrol agent on U.S. soil did not give the boy's parents a cause of action under the Fourth and Fifth Amendments to the U.S. Constitution or *Bivens*[15] because the boy was on Mexican soil when the bullets struck and killed him.[16]

In Chapter 8, Professor Jules Lobel, a friend and the founder of this book and its initial editor only 36 years ago, and Professor Huda Akil discuss how "expert neuroscience evidence is being mustered to support claims of extreme and long-lasting, if not permanent, mental harm in constitutional challenges to prolonged solitary confinement, a disciplinary practice used in many state and federal prisons."[17]

Section III has articles about anti-discrimination litigation. It begins with Chapter 9, an original article by Illinois ACLU director Colleen Connell, a frequent contributor to this book, and Ameri Klafeta, the Director of the Women's and Reproductive Rights Project for the ACLU of Illinois. Their article discusses *June Medical Services LLC v. Russo*,[18] the case last term where the Court with Chief Justice Roberts joining the progressive bloc, including the now deceased Justice Ginsburg, in striking down a "Louisiana law requiring abortion providers to have admitting privileges at hospitals within 30 miles of where the abortion is performed. Such laws generally provide no benefit in terms

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[13] Chapter 7, *infra* at p. 373.

[14] ___ U.S. ___, 140 S.Ct. 735 (2020).

[15] 403 U.S. 388, 91 S.Ct. 1999 (1971).

[16] Chapter 7, *infra* at p. 380.

[17] Chapter 8, *infra* at p. 433.

[18] ___ U.S. ___, 207 L.Ed.2d 566 (2020).

of patient health or safety, and serve only to push abortion out of reach for women." Ultimately, the Court held that the Louisiana law was unconstitutional, following the holding in *Whole Woman's Health v. Hellerstedt*, a nearly identical case in which a similar Texas statute was struck down just four years earlier due in part to Justice Kennedy's vote."[19] The article then goes on to discuss future possible attacks on reproductive rights.[20]

The important discussion about reproductive rights continues in Chapter 10 with an article by another frequent contributor to this book, Professor Leah Litman. Her article, written before Justice Ginsburg's death, reviews and analyzes:

> Melissa Murray, Katherine Shaw, and Reva Siegel's 13 edited collection of essays, Reproductive Rights and Justice Stories. The collection could not be timelier. Their volume contains a series of essays that "bring[ ] together important cases involving the state regulation of sex, childbearing, and parenting".[21] The two goals of the collection are to expand the contours of the field of reproductive rights and justice and to de-center the role of courts in that field.
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> The editors' pathbreaking volume cements a definition of reproductive rights and justice that is both more coherent and more nuanced than many earlier definitions, which often limited discussions of reproductive rights and justice to contraception and abortion. The volume makes significant headway in illustrating the many different ways that law affects reproductive rights and justice.[22]

In Chapter 11, 2020-2021 George N. Lindsay Fellow at the Lawyers Committee for Civil Rights in Washington, D.C., Bryanna A. Jenkins, and People's Law Office attorney and Chicago NPAP co-chair, Janine L. Hoft discuss the Supreme Court's decision in *Bostock v. Clayton County, Georgia*[23], stating that "the Supreme Court announced the inclusion of gays, lesbians and transgender individuals within the protec-

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[19] Chapter 9, *infra* at p. 455.

[20] *Id.* at p. 456.

[21] Chapter 10, *infra* at p. 482 quoting the authors of the essays.

[22] Chapter 10, *infra* at p. 482.

[23] ___ U.S. ___, 140 S.Ct. 1731 (2020).

tions of Title VII and the prohibition of sex discrimination."[24] The article then proceeds to analyze the decision, raising and discussing issues that the Court did not adequately address.[25]

Professor Reva Segal discusses the 19th Amendment in Chapter 12, stating:

> The Nineteenth Amendment changed the shape of our constitutional community. As the Reconstruction Amendments illustrate, the nation's understanding of transformative amendments may evolve with the constitutional community they help reshape. The Nineteenth Amendment transformed We the People—not simply by adding voters, but by democratizing the family so that women could represent themselves in government. Yet we interpret the Constitution in ways that take no account of these institutional dimensions of the suffrage debate. We have forgotten the family-related equal-citizenship claims that began in the decades before the Nineteenth Amendment's ratification, and continued for decades after. This Essay considers how these family-related equal-citizenship claims could be more fully incorporated into our constitutional tradition. A century after its ratification, we can read the Nineteenth Amendment together with the Reconstruction Amendments, informed by the voices and concerns of the disenfranchised as well as the enfranchised, as we enforce the Constitution in a wide variety of contexts. (footnotes omitted).[26]

In Chapter 13, clinical professors Sheila A. Bedi and Vanessa del Valle discuss their path breaking work in successfully representing transgender women, who were subjected to absolute horrors because they were housed in male prisons and in fact put in cells with male inmates.[27]

Professor Julie Goldscheid discusses sexual harassment in Chapter 14. She writes:

> While much attention has focused on high profile individuals accused of harassment, less attention has been paid to sexual assaults of more vulnerable and marginalized people, includ-

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[24] Chapter 11, *infra* at p. 523.

[25] *Id.* at p. 524.

[26] Chapter 12, *infra* at p. 543.

[27] Chapter 13, *infra* at p. 595.

> ing low wage workers, lesbian, gay, bisexual, transgender and gender non-conforming people, and immigrants. In addition, at the same time that calls for accountability have targeted Hollywood, employers, universities, and even the Catholic church, relatively little outcry has focused on the longstanding and under-recognized problem of sexual assaults by government actors. This Article focuses on sexual assault by federal officials and considers, in particular, sexual assault of immigrants, including people living in or traveling to the United States to seek asylum.[28]

Co-Faculty Director of the Center on Race, Inequality, and the Law at NYU School of Law, Deborah N. Archer starts off Chapter 15 by stating:

> Crime-free housing ordinances are one of the most salient examples of the role law plays in producing and sustaining racial segregation today. They are, in this respect, a critical mechanism for effectuating the new housing segregation.
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> Crime-free housing ordinances are local laws that either encourage or require private landlords to evict or exclude tenants who have had varying levels of contact with the criminal legal system. Though formally race neutral, these laws facilitate racial segregation in a number of significant ways. This is the first article to explain precisely how they do so. The Article contends that crime-free housing ordinances enable racial segregation by importing the racial biases, racial logics, and racial disparities of the criminal legal system into private housing markets. While scholars have examined the important role local laws played in effectuating racial inequality, they have not paid attention to crime-free housing ordinances.[29]

In Section IV, which addresses Damages and Injunctive Relief, Climenko Fellow and Lecturer in Law at Harvard Law School, Carly Zubrzycki, starts Chapter 16 by stating:

> Punitive damages are back in the news, and the Supreme Court's jurisprudence surrounding them is a mess. The Court's decisions do, however, reveal one striking and unifying theme: the Court does not trust others to assess punitive damages fairly. Instead, at every turn, the Court has adopted rules that move the locus of power over punitive damages away from

[28] Chapter 14, *infra* at p. 617.

[29] Chapter 15, *infra* at p. 687.

> juries, factfinders, states, and communities, and toward appellate judges (including the Court itself). The result is that the amounts of punitive damages—historically, firmly within the power of juries—are now subject to an unprecedented level of centralized control, a phenomenon I call judicial centralization. This Article traces the rather remarkable narrative of the Court's punitive damages jurisprudence through the lens of judicial centralization and considers whether it is desirable, concluding that it is not. The primary justifications for judicial centralization are uniformity and predictability, but the flip sides—particularity and variability—serve similarly important functions. Institutional competence also does not provide a compelling explanation, as both judges and juries have real claims to the type of moral expertise that punitive damages implicate. Ultimately, the deciding factor in this inquiry is democratic values. In an age where power is increasingly consolidated in large corporations and the ability of the "little guy" to affect the world is ever-diminishing, punitive damages can serve as an important opportunity for voice, and judicial centralization undermines this important value.[30]

Volume 36 ends as this publication has ended for so many years, with an article about civil rights attorney fees by Madison attorney, Jeff Scott Olson. This year, Chapter 17 focuses on something that many civil rights attorneys fear—will taking a potentially small damages case in which the attorney will get paid by statutory fees mean that the attorney may wind up working for free? Olson first lays out a framework for using the lodestar method, which has been established in a long history of case law. Then he gives examples of cases in which the damages obtained were small but the court nevertheless awarded fees that were often much more than the damages. For a civil rights lawyer, who is being asked to take on a case in which s/he will have to spend a lot of time but the recoverable damages could well be small, this is a must read.

Jeff is the author who has been the most prolific past contributor with an attorney fees chapter each year, following in the tradition set by his mentor and partner, the late Percy Julian. We all should be very grateful for Jeff's ongoing and outstanding contributions.

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[30] Chapter 16, *infra* at p. 765.

The editor thanks the members of the National Police Accountability Project of the National Lawyers Guild who participate in the NPAP email list discussions nationally and in Chicago. The participants' creativity, knowledge and analysis of civil rights issues provides a wealth of ideas from which to draw upon in deciding upon articles for this Handbook. I am also inspired by a whole new generation of dynamic Next Gen members of the National Lawyers Guild, particularly here in Chicago, and by all of the great activists who are fighting for justice, democracy and equality here and around the world in these very challenging times.

Putting this book together each year is a challenge. As always, I have been aided this year by our terrific editors at Thomson/Reuters, Laurie Weaver and Molly Hunter. Laurie has learned a lesson all of my past editors have learned over many years and Molly has learned in her second year: how difficult it is to get a book to print that reviews recent decisions of the Supreme Court within six months of the end of the Supreme Court term.

The editor also continues to cherish his friends, many of them long time members of the National Lawyers Guild and some new ones, who are Next Gen activists in the Guild, for continuing an 83 year tradition of supporting and representing people seeking to enforce their constitutional rights and build a just and democratic in this country and indeed the world.

I love my wonderful adult children, Josh, co-owner of Ivy & Coney, a bar dedicated to the Chicago Cubs and Detroit Tigers in the Shaw neighborhood in D.C. and Epic Curing, a new business providing quality pastrami, corned beef, bacon and cured hams; Josh's spouse Naomi, who does much good in this world and also loves baseball and my daughter Laura, who also does much good in this world, loves baseball, and comes to her dad's home to watch the WNBA Chicago Sky games while socially distancing. Of course, the women of the WNBA have taken on very progressive struggles and are leading by example.

Josh and Naomi have been living in Tanzania, since the presidential election, but now have returned to D.C. Josh,

Naomi and Laura have been the joys of his life, at least in part because of all they have done for him, their devotion to making this a better world and their ongoing love of baseball despite another difficult end of the season for the Cubs.

Finally, the editor continues to be inspired by those who oppose and fight oppression and seek justice and also by the wonders of jazz and the musicians who create it.

Steven Saltzman
Chicago, Illinois
December, 2020