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## FOREWORD

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## WESTERN NEW ENGLAND LAW REVIEW

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### FOREWORD

*Sudha Setty\**

As dean of Western New England University School of Law, I thank the editors and staff of Volume 41 of the *Western New England Law Review* for inviting me to contribute the foreword to this issue, which offers an engaging, insightful, and thought-provoking set of articles and notes that encourage law reform in different contexts. When considering legal academic scholarship, the hope is that each article we read and consider is a piece of the larger mosaic of knowledge and argument that informs the nature, shortcomings, and potential of the law. Of course, law reviews have been valued over many decades for their key function of providing reference material for practitioners, judges, and policy makers,<sup>1</sup> and, at times, for pushing those same individuals to consider reforming the law to make it better, fairer, and more efficacious.<sup>2</sup> As Sherrilyn Ifill, now president of the NAACP Legal Defense Fund, opined, “law review articles offer muscular critiques on [sic] contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decisionmaking on how law develops in the courtroom.”<sup>3</sup> The set of articles in Issue 1 reflects the best of what Ifill describes.

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1. See Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 563–64 (2007).

2. Consider the stated ambition of the founding editors of the *Harvard Civil Rights-Civil Liberties Law Review*: “[T]o be a review of revolutionary law.” Editors, *Preface*, 1 HARV. CIV. RTS.-CIV. LIB. L. REV., at iii (1966).

3. See *Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship*, AM. CONST. SOC’Y: ACSBLOG (Jul. 5, 2011), available at <https://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship/> [<https://perma.cc/FSW9-LB8E>] (quoting Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS (July 1, 2011), <https://concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html> [<https://perma.cc/Z6H8-2QQM>]).

This foreword also provides an opportunity for me to reflect briefly on legal education more generally, and the role of law reviews in particular. This is particularly apt in 2019, the centennial year of Western New England University, which included legal education at its inception in September 1919.<sup>4</sup> One hundred years ago, our law teaching was not focused on the “muscular critiques” we value in law reviews today, or on law reviews at all. Instead, the institutional mission reflected the needs of the greater Springfield community, providing an opportunity for legal education that was available to the working public, with night classes offered at the YMCA building in downtown Springfield.<sup>5</sup> In 1919, one full-time professor was hired to run what was then the Springfield division of Northeastern College, and he worked with a cohort of part-time teachers to start teaching law.<sup>6</sup> As the bulletin in the Springfield Daily News said in August 1919, “there will be offered during the evening hours, at reasonable rates, course of study on the highest plane and leading to marked efficiency.”<sup>7</sup> It was, apparently, a good sales pitch, since twenty-three students enrolled that fall to study law.<sup>8</sup>

We have come a long way as a university, just as legal education has changed markedly over the course of a century. Yet some things remain the same. We still offer a course of study that engages students on the highest plane while also developing their practical skills through a deep institutional commitment to experiential learning. Our faculty prioritizes working with our students as they grow into thoughtful, ethical, and engaged lawyers. This emphasis comes naturally to Western New England, which has, for its one hundred years, been student-centered and focused on providing educational experiences that build skills and prepare students for real-world lawyering. The *Law Review* is a part of that endeavor, as it has been for the forty-one years of its existence. The 1992 American Bar Association (ABA) MacCrate Report<sup>9</sup> and the 2007

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4. *University History*, W. NEW ENG. UNIV., <https://www1.wne.edu/about/history.cfm> [<https://perma.cc/XAA8-DWQA>].

5. ROSEMARY K. O'DONOGHUE, *WESTERN NEW ENGLAND: FROM COLLEGE TO UNIVERSITY* viii (2012), [https://www1.wne.edu/university-archives/doc/WNE\\_History.pdf](https://www1.wne.edu/university-archives/doc/WNE_History.pdf) [<https://perma.cc/3RXB-LZfZ>].

6. *Id.*

7. BEAUMONT A. HERMAN, *W. NEW ENGLAND COLLEGE: A CALLING TO FULFILL* 4 (1980).

8. *See id.* at 5.

9. *See generally* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, *THE REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992) (outlining the needs of the U.S. legal profession and recommending increases in skills- and values-based education in law schools).

Carnegie Report<sup>10</sup> emphasized the need for skills-based learning in law schools. In 2004, the ABA adopted standards which required that “student[s] receive substantial instruction in . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; . . .”<sup>11</sup> Working on law review builds these skills; as such, it is part of our core educational purpose,<sup>12</sup> as practical lawyering and skill-building continue to lie at the heart of Western New England’s institutional mission.

Yet, the *Law Review* serves as much more than an educational opportunity. In this issue, the authors, many of them practitioners with decades of experience and expertise to draw upon, offer potential legal reforms to help legal scholars, practitioners, and the public understand possible shortcomings of the current state of the law and help law and policy makers contemplate potential improvements. This service is arguably more important now than any time in the last one hundred years, as we are inundated with information from a seemingly endless variety of news sources, blog posts, tweets, opinion columns, and other online media. Such sources may inform, update, and provide contemporaneous analysis; however, we must proceed knowing that this kind of information supplements deep thinking and learning but does not supplant it. To mistake the two carries enormous risk. As Malcolm Gladwell observed, “I have sensed . . . an enormous frustration with the unexpected costs of knowing too much, of being inundated with information. We have come to confuse information with understanding.”<sup>13</sup> The articles in this issue reflect the deep thinking and learning that characterizes the best in legal scholarship. They help us increase our understanding of complex issues in the fields of criminal, tort, and constitutional law, and to encourage us to consider how the law may be developing, or how the law should be developed.

The issue begins with two thoughtful pieces that draw upon their authors’ decades of experience as prosecutors in the federal and state justice systems. In *Mirroring the Trial: Making Sense of the Law of*

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10. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (recommending an integrated approach to legal education that incorporated legal theory, ethics, and practical skills).

11. See STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 2004, Standard 302(a)(4) (AM. BAR ASS’N 2004).

12. See Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y.L. SCH. L. REV. 349, 360 (2007–2008).

13. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 264 (Back Bay Books 2007) (“We live in a world saturated with information. We have virtually unlimited amounts of [information] at our fingertips at all times, and we’re well versed in the arguments about the dangers of not knowing enough and not doing our homework.”).

*Closing Argument in Criminal Cases*,<sup>14</sup> Alex J. Grant, an Assistant United States Attorney, provides a detailed consideration of the role of closing arguments in federal criminal trials, and the significant limitations placed upon prosecutors in that context. Grant argues for reform predicated on the need for basic fairness in trials. Specifically, Grant advocates for prosecutors to be granted more leeway during closing arguments to voice their opinions regarding the credibility of the defendant and various witnesses and to address and argue against potential jury nullification. Grant argues that this greater flexibility would not only place prosecutors and defense attorneys on a more even and—in Grant’s view—fairer footing but would also create more consistency in the way in which courts run trials.

The need to increase fairness in the criminal justice system is framed in a different context in *Article 26 of the Massachusetts Declaration of Rights: The Supreme Judicial Court’s “Cruel” and “Unusual” Neglect of Its Longevity Component*,<sup>15</sup> by Thomas H. Townsend, Chief of the Appellate Division of the Northwestern District Attorney’s Office in Massachusetts. Townsend considers the Massachusetts Declaration of Rights—which predates and serves as a model for the United States Constitution—and its prohibition against cruel or unusual punishment. Townsend encourages the Massachusetts Supreme Judicial Court (SJC) to exercise more power in discharging its duty to protect its citizens by interpreting Article 26 as grounds for convicted defendants to challenge the length of their sentences. Townsend notes that the SJC has previously interpreted Article 26 in ways that are more protective of a defendant’s rights under the United States Constitution. As such, Townsend advocates for the SJC to rely upon Article 26 to develop a better framework for determining fair and proportional sentences for crimes, such as statutory rape, in which sentencing is currently—in Townsend’s view—incredibly unfair and problematic.

The next two articles in Issue 1 come from practitioners with deep experience in civil litigation and reflect their thoughtful approach to important issues faced by real lawyers on an ongoing basis. In *The Wrongful Demise of But For Causation*,<sup>16</sup> Tory A. Weigand, drawing on extensive experience and expertise in his field, advocates for reform to the

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14. Alex J. Grant, *Mirroring the Trial: Making Sense of the Law of Closing Argument in Criminal Cases*, 41 W. NEW ENG. L. REV. 7 (2019).

15. Thomas H. Townsend, *Article 26 of the Massachusetts Declaration of Rights: The Supreme Judicial Court’s “Cruel” and “Unusual” Neglect of Its Longevity Component*, 41 W. NEW ENG. L. REV. 55 (2019).

16. Tory A. Weigand, *The Wrongful Demise of But For Causation*, 41 W. NEW ENG. L. REV. 75 (2019).

way in which tort claims are litigated, beginning with an analysis of the current framework for considering causation. He looks closely at situations in which multiple potential causes for a tort exist and considers the difficulty that courts and advocates have had in applying a *substantial factor* test instead of relying on *but for* causation. Weigand makes the case for reinstating the primacy of but for causation through a careful analysis of Massachusetts case law and the cautionary language in the Restatement (Third) of Torts with regard to the use (and potential overuse) of the substantial factor test.

In *Opt-Out and the Fourth Era of Workers' Compensation: Has Industry Left the Bargaining Table?*,<sup>17</sup> Daniel E. Walker takes a careful look at the history of workers' compensation to consider the feasibility and constitutionality of efforts to use alternative benefit plans to manage compensation for injured employees. Walker examines recent cases, such as one in which an ERISA-governed alternative benefit plan was struck down on constitutional grounds, to consider what lessons can be learned by those seeking to craft similar plans in the future that might retain tort immunity for employers while also limiting state oversight of the administration of such plans. Walker's careful analysis is contextualized in his larger consideration of how industry lobbying has eroded older models of workers' compensation, and the likelihood that a new era of workers' compensation may be upon us.

The final two pieces in Issue 1 are student notes that take on important constitutional matters that resonate strongly given current political hot-button topics and the content and tenor of societal discourse. The subjects considered in these notes implicate conversations covered widely in the news, yet these authors do important work with their extensive, in-depth and thoughtful scholarly analysis, making significant contributions to the literature in their respective areas. In "*See Ya in Boston, Bruh*": *Making the Link Between the Right of Petition, Activism, and the Massachusetts Anti-SLAPP Statute*,<sup>18</sup> Heidi K. Waugh considers the protections provided by the Massachusetts Anti-SLAPP statute to those defending themselves against defamation suits by claiming status as "petitioners" to the government. Waugh notes that the statutory right to seek dismissal is one way in which those who have legitimate, but controversial, government petitions can have their First Amendment rights protected without getting

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17. Daniel E. Walker, *Opt-Out and the Fourth Era of Workers' Compensation: Has Industry Left the Bargaining Table?*, 41 W. NEW ENG. L. REV. 111 (2019).

18. Heidi K. Waugh, Note, "*See Ya in Boston, Bruh*": *Making the Link Between the Right of Petition, Activism, and the Massachusetts Anti-SLAPP Statute*, 41 W. NEW ENG. L. REV. 141 (2019).

bogged down in lengthy and costly litigation. Waugh observes that modern political engagement and government petitioning take numerous forms, and that Massachusetts courts must apply the state's anti-SLAPP statute consistently in order to preserve its purpose. Waugh considers approaches used in other jurisdictions to suggest an assessment framework for Massachusetts courts that would provide more consistency and improve fairness.

In *I Beg Your Pardon: Ex parte Garland Overruled; the Presidential Pardon is No Longer Unlimited*,<sup>19</sup> Zachary J. Broughton takes a close look at the current hot-topic of the scope of the president's pardon power. Broughton considers the broad pardon power supported by the United States Supreme Court in *Ex parte Garland* in the context of limitations of the pardon power articulated by the Supreme Court in more recent decades. Through a careful parsing of pre-constitutional pardon powers and the United States Supreme Court cases that have considered the pardon power, Broughton argues that the expansive reading of the pardon power in *Ex parte Garland* no longer holds, and that the Supreme Court ought to make clear that the pardon power is limited and subject to judicial review.

Justice Cardozo once famously cautioned against the "tendency of a principle to expand itself to the limit of its logic."<sup>20</sup> The six authors in this issue take up that cause, challenging us to consider the history, logic, and justice of various principles in criminal, civil, and constitutional law. In doing so, they ask all readers, including policy and law makers, to reconsider the principles undergirding these disparate areas of law with the benefit of their deep thinking and careful research on these subjects. As we mark one hundred years at Western New England University, I can think of nothing better to exemplify the thoughtful and engaging work that the School of Law seeks to inspire than these articles; they encourage us to follow Justice Cardozo's guidance and to determine for ourselves whether the laws examined here, and how those laws are implemented, have reached the limits of their logic.

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19. Zachary J. Broughton, Note, *I Beg Your Pardon: Ex parte Garland Overruled; the Presidential Pardon is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183 (2019).

20. Benjamin N. Cardozo, *Lecture II: The Methods of History, Tradition and Sociology*, in *THE NATURE OF THE JUDICIAL PROCESS* 51, 51 (Yale Univ. Press 1921).