Foreword

Standing on the Shoulders of Giants: Celebrating 100 Volumes of the *Minnesota Law Review*

*Rajin S. Olson**

Legal scholarship in the United States serves many purposes. It educates us, it shapes our discussions, it influences our legislation, and it impacts our court decisions. The *Minnesota Law Review* has been a part of this broader current of legal scholarship for one hundred volumes now. Accordingly, our 100th Volume Symposium for the *Minnesota Law Review* reflected on four of the *Law Review*'s most influential pieces.

Reasonable minds may disagree about what makes a piece influential, but perhaps the most quantifiable measure is a citation count. Accordingly, the *Law Review* selected three of the four most influential pieces based on the number of citations each piece has accrued. This methodology is reflected in this Symposium Issue, which begins with a meticulously constructed catalogue of the *Minnesota Law Review*'s most-cited pieces by Yale Law Librarian Fred Shapiro.[1] The remaining influen-

* Symposium Articles Editor, Volume 100, *Minnesota Law Review*. I am incredibly grateful to the esteemed speakers, panelists, and moderators who helped us in celebrating our historic 100th Volume with an intellectual, thought-provoking bang. I owe a great deal of thanks as well to the faculty, staff, and administration at the University of Minnesota Law School, particularly to Dean David Wippman and to Dinah Zebot in the Office of Advancement, for their support in making this Symposium actually happen. Professors Robert Stein and Kristin Hickman were invaluable in vetting the overall Symposium direction, while Professors Mark Kappelhoff, Alexandra Klass, Richard Frase, and Perry Moriearty provided essential substantive expertise for each of our four panels; accordingly, they also deserve my heartfelt thanks. Special thanks to Anne Dutton, Ian Jackson, Barbara Marchevsky, Mary Scott, and Leah Tabbert for their work during the early stages of Symposium development. Lastly, I owe an extra-special thanks to Lead Articles Editor Nick Bednar and Editor-in-Chief Emily Scholtes, without whom I could never have survived the grueling and thrilling Symposium preparations. Thanks to you both for your endless friendship, leadership, advice, and encouragement over these past few years.

tial piece is based on a full Symposium Issue rather than a single article, represented by its Foreword by Justice William O. Douglas, on the right to counsel.[2] We accord it meaning not because of its citation count, but because of its timeliness when published. Each of the four panels functioned somewhat like a mini-symposium, tackling its source article head-on and applying the article's teachings to today's legal landscape.

Before diving into the substantive panels, the Symposium began with a keynote speech by Daniel Farber, Professor of Law at the UC Berkeley School of Law and former Professor of Law at the University of Minnesota, titled *A Century of Legal Scholarship*. The speech presented the origins of the *Law Review* through the lens of its first Issue. Professor Farber's historical analysis provided insight into what has changed since Issue 1 and what remains true to legal scholarship today, highlighting the influence of current events on legal scholarship and the *Minnesota Law Review*'s early emphasis on practical scholarship.[3] Professor Farber's talk provided an overarching context for each of the Symposium's four panels.

The Symposium's first panel, based on a 1961 Symposium Issue of the *Law Review* with a foreword by Justice Douglas titled *The Right to Counsel*,[4] considered the right to counsel for indigent criminal defendants eventually established in *Gideon v. Wainwright* in 1963, just two years after the 1961 Symposium Issue.[5] Though that foreword was a mere three pages, no less than thirteen distinct pieces followed.[6] Those articles discussed a broader variety of right to counsel issues, including the right to counsel before arraignment, before congressional committees, and in appellate, juvenile, and immigration proceedings.[7] Former Vice President Walter Mondale, a member of the *Law Review*'s 39th Volume, opened the panel by dis-

1. Fred R. Shapiro, *The Most Cited Articles from the* Minnesota Law Review, 100 MINN. L. REV. 1735 (2016).

2. Credit is due to Professor Robert Stein for suggesting the Right to Counsel Symposium as a basis for one of our panels.

3. Professor Farber's piece associated with the Symposium was published as the Lead Piece for Volume 100. *See* Daniel A. Farber, *Back to the Future? Legal Scholarship in the Progressive Era and Today*, 100 MINN. L. REV. 1 (2015). In its original place in this Issue is the aforementioned citation piece by Fred Shapiro.

4. Justice William O. Douglas, *The Right to Counsel*, 45 MINN. L. REV. 693 (1961).

5. 372 U.S. 335 (1963).

6. *See generally* 45 MINN. L. REV 697–1018 (1961).

7. *Id.*

cussing his involvement as Minnesota's Attorney General in initiating an amicus brief supporting Clarence Earl Gideon's constitutional right to a criminal defense attorney provided by the states under the Fourteenth Amendment.

Professor Eve Brensike Primus of the University of Michigan Law School, continued the panel with a presentation on *Culture as a Structural Problem in Indigent Defense*. Professor Primus first explained how the lofty ideals held by *Gideon*'s proponents changed in practice with the war on drugs and expanding criminal dockets. In particular, she highlighted the poor training and funding, excessive caseloads, and external pressures to process rather than defend clients moving through the criminal justice system as factors contributing to a cultural, systemic problem in public defense. Ultimately, Professor Primus argued that change should focus on improving the culture of indigent defense delivery to be more effective and efficient.

Professor Paul Marcus of the William & Mary Law School completed the panel by examining the standards for evaluating ineffective assistance of counsel, in a talk titled *The Supreme Court and Ineffective Assistance of Counsel*. Professor Marcus called for a more stringent application of the *Strickland* standard to encompass a broader range of criminal cases.[8] He noted that *Strickland* has been primarily utilized in capital cases and in matters involving collateral consequences, such as immigration issues. Minnesota Law School Professor Mark Kappelhoff moderated the discussion between Vice President Mondale and Professors Primus and Marcus.

The second panel shifted to a topic based on a 1966 piece by Professor William Prosser, a former Professor and alumnus at the University of Minnesota Law School, titled *The Fall of the Citadel (Strict Liability to the Consumer)*,[9] and explored the development and maintenance of strict liability in tort. Professor Prosser's article analyzed the rise of strict liability for product-based injuries—which he had predicted and advocated for years earlier—through a careful examination of then-recent cases. Professor Kenneth Abraham of the University of Virginia School of Law introduced the panel by considering the broader impact of the article and Prosser's apparent failure to define what makes a product "defective." Professor Abraham's presentation was titled *Prosser's* The Fall of the Citadel.

8. Strickland v. Washington, 466 U.S. 668 (1984).

9. William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

Professor Catherine Sharkey from the New York University School of Law then explained the role of the economic loss rule in products liability cases as the last holdout to Prosser's concept of strict liability, in a talk titled *The Remains of the Citadel (Economic Loss Rule in Products Cases)*. Professor Sharkey discussed the fall of the requirement of contractual privity for most tort recovery against manufacturers. She went on to note the maintenance of the contractual privity requirement for economic loss claims in tort. Professor Sharkey concluded by evaluating the competing rationales for not imposing financial-based tort liabilities absent contractual relationships.

Minnesota Law School alumnus Fred Pritzker, a food safety and personal injury litigator at PritzkerOlsen, P.A., completed the panel with a practice-centric presentation. Mr. Pritzker described the modern-day use of strict liability in practice and the principles that remain unfulfilled from Prosser's vision, honing in on the proliferation of negligence-based claims over strict liability claims. Professor Abraham, Professor Sharkey, and Mr. Pritzker then participated in a discussion moderated by Minnesota Law School Professor Alexandra Klass.

The third panel focused on a 1974 article memorializing lectures on the Fourth Amendment by Professor Anthony Amsterdam, titled *Perspectives on the Fourth Amendment*.[10] In a detailed analysis of the Fourth Amendment's complexities, Professor Amsterdam questioned the application of the Fourth Amendment in practice—an analysis that shaped Fourth Amendment jurisprudence for years to come. Professor Donald Dripps of the University of San Diego School of Law, a former Minnesota Law School professor, began by looking at the Supreme Court's habitual failure to resolve Professor Amsterdam's questions. Professor Dripps titled his presentation *Perspectives on the Fourth Amendment Forty Years Later: Might there be Light at the End of the Tunnel-Vision?* He noted Professor Amsterdam's preference for a broad, normative approach to the Fourth Amendment bolstered by categorical rules rather than finely grained standards grounded in historical interpretation. Professor Dripps concluded by predicting that technological change will instigate a shift in Fourth Amendment jurisprudence to map on to Professor Amsterdam's original vision.

Professor Tracey Maclin of the Boston University School of Law then highlighted Professor Amsterdam's concerns with

10. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

discretionary police power and their relevance in light of recent Supreme Court cases in a talk titled *Anthony Amsterdam's* Perspectives on the Fourth Amendment *and What It Teaches About the Good and Bad in* United States v. Rodriguez. Professor Maclin analyzed the application of two of Professor Amsterdam's perspectives—concern for discretionary police power and the influence of the Framers' Fourth Amendment intentions—and applied them to present-day traffic stops by police. Professor Maclin concluded that the expansive scope of traffic stops is beyond the bounds of Professor Amsterdam's perspectives.

Finally, Professor Andrew Crespo of Harvard Law School explained the viability of public and democratic forces as a workable means to police reform, in a discussion he titled *Prescient Perspectives, Mounting Vexations, and Seeds of Popular Criminalism*. Professor Crespo first noted the accuracy and foresight in Professor Amsterdam's piece as applied to today. He then explained the systemic, institutional impediments blocking the Supreme Court from producing a workable Fourth Amendment doctrine before suggesting police- and legislature-led initiatives for Fourth Amendment reform. Minnesota Law School Professor Richard Frase then moderated a conversation between Professors Dripps, Maclin, and Crespo.

The fourth and final panel recalled a 1978 article by Professor Alan David Freeman, titled *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, which contributed to the growth of the eventual Critical Race Theory Movement.[11] Professor Freeman argued that the Supreme Court's antidiscrimination decisions of his time actually had a counterintuitive role in passively enabling discrimination. By propelling individual-based remedies, the Court was able to ignore systemic disparity. Professor Mario Barnes from the UC Irvine School of Law started the panel by examining the ways through which society has sought to declare itself a post-race world and courts have avoided the challenge of lasting institutional reform, in a presentation titled *"The More Things Change . . .:" New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*. Professor Barnes concluded that courts' preoccupation with violation over remedy and formal over substantive equality leads to an unproductive focus on individual rather than structural means behind

11. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

discriminatory disadvantages.

Professor Robert Chang of the Seattle University School of Law then compared recent LGBT antidiscrimination jurisprudence in light of past racial antidiscrimination jurisprudence in his talk titled *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?* Professor Chang mapped the trajectory of race antidiscrimination law and the more recent trajectory of LGBT antidiscrimination law as led on the Supreme Court by Justice Kennedy. Professor Chang cautioned that history may repeat itself, with modern LGBT antidiscrimination law operating in effect to legitimize the very discrimination it aims to counter. He recommended directing reform efforts to non-judicial political institutions, with a particular emphasis on generating antidiscrimination frameworks.

Professor Nancy Leong of the University of Denver Sturm College of Law rounded out the panel by considering antidiscrimination law's failure to reach private actors, honing in on newer service-sharing companies like Uber and Airbnb in a discussion titled *Why Antidiscrimination Law Must Reach Private Actors*. Professor Leong described the Supreme Court's efforts to preserve private actors' permission to discriminate in the marketplace. She then highlighted the role of service-sharing companies in exacerbating this problem thanks to certain characteristics inherent in the service-sharing economic model. Professor Leong proposed that courts reinterpret various legal mechanisms to address private actors' expanding discrimination in the sharing economy. Professors Barnes, Chang, and Leong then participated in a moderated discussion led by Minnesota Law School Professor Perry Moriearty.

The 2015 *Minnesota Law Review* Symposium generated thoughtful reflection on the *Minnesota Law Review*'s contribution to developments in the areas of the right to counsel, strict liability, the Fourth Amendment, and critical race theory. The overarching theme of justice and contemplation throughout this Symposium was complemented by practical, workable solutions from each panelist. The pieces that follow dig deeper into the Symposium's discussions on each of these four topics. Through analysis of past influences, we hope that the Symposium and associated articles in this Issue continue to shape positive improvements in each field, cementing the role of legal scholarship in building a better society. Similarly, we hope that the next hundred volumes provide an even greater benefit than the last hundred volumes to the ever-changing concept of law itself.