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The Rhode Island General Assembly in the Defense of Civil Liberties

Steven Brown*

I. INTRODUCTION

“This country has come to feel the same when Congress is in session as we do when the baby gets hold of the hammer. It’s just a question of how much damage he can do with it before you can take it away from him.”¹ This Will Rogers barb may have been aimed at Congress, but many people would probably consider it just as applicable to the work of the Rhode Island General Assembly.

Particularly for individuals and organizations concerned about the protection of civil rights and civil liberties, it is the federal courts, not state legislatures, that have often been considered the bulwark of protection for individual rights. In that regard, there is little question that the Rhode Island General Assembly has enacted more than its fair share of constitutionally questionable legislation requiring court intercession.² Yet any historian of civil liberties knows that the view of the federal judiciary as a consistently aggressive guardian of individual rights

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1. BRYAN STERLING, *THE BEST OF WILL ROGERS* 33-34 (1979).

2. A cursory review of the RIACLU’s legal docket in the past thirty years turns up no fewer than twenty-five court decisions striking down Rhode Island statutes. *See, e.g.*, *RIACLU v. Begin*, 431 F. Supp. 2d 227 (D.R.I. 2006) (finding unconstitutional various provisions of state campaign finance statute); *Rhode Island Med. Soc’y v. Whitehouse*, 66 F. Supp. 2d 288 (D.R.I. 1999) (striking down a law banning so-called “partial birth abortions”).

does not hold up to much scrutiny.³ It has thus become important to look to the states – at both the judicial and legislative levels – for civil rights protections. To the benefit of the state’s residents, the Rhode Island General Assembly has, on a number of occasions, taken the lead in countering court decisions that were *adverse* to individual rights.⁴

This Article will first briefly examine two recent high-profile issues addressed by the General Assembly to show the positive role it can take in protecting civil liberties and civil rights. Though national in scope, these two issues – racial profiling and “homeland security” – have played out in important ways at the state level. On the issue of racial profiling, this Article examines both the outcome of a recent federal court case in Rhode Island that challenged “racial profiling” by local police and the General Assembly’s response to it. In the second instance, this Article describes how the General Assembly took an aggressive pro-active stance in response to gubernatorial “homeland security” legislation that had an enormous negative impact on the exercise of First Amendment freedoms. This examination attempts to

3. Almost thirty years ago, U.S. Supreme Court Justice William Brennan, Jr. issued a call for reinvigoration of enforcement of state constitutional guarantees, describing how “[u]nder the banner of the vague, undefined notions of equity, comity and federalism the [U.S. Supreme] Court has condoned both isolated and systematic violations of civil liberties.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1990) (citations omitted).

4. For example, Rhode Island was one of the first states to enact legislation responding to the U.S. Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), significantly reducing the protection of the First Amendment’s Free Exercise Clause. See R.I. GEN. LAWS § 42-80.1-1 et seq., the “Religious Freedom Restoration Act.” The General Assembly strengthened the state’s protections for people with disabilities in the Fair Employment Practices Act (FEPA), R.I. GEN. LAWS § 28-5-6(4) (2003), after the U.S. Supreme Court held, in *Sutton v. United Airlines*, 527 U.S. 471 (1999), that the federal law on which FEPA was based did not protect people whose disabilities could be controlled with mitigating measures. 2000 R.I. Pub. Laws 2479. Rhode Island remains in the distinct minority of states to enact legislation prohibiting discrimination in employment on the basis of sexual orientation or “gender identity or expression.” R.I. GEN. LAWS § 28-5-5 (2003). Of course, the General Assembly’s record in regards to anti-discrimination protection is not spotless. See, e.g., *Melendez v. Town of North Smithfield*, No. 03-372 (D.R.I. 2003) (challenging, *inter alia*, P.L. 2003, Chapter 276, allowing the Town of North Smithfield to acquire (an all-white, all-male) private fire and rescue service and exempting the acquisition from any challenge under FEPA).

demonstrate that the state legislature sometimes plays a role as important as the judiciary in safeguarding individual freedoms.

II. RACIAL PROFILING

The belief that our criminal justice system is color-blind is cherished in our society, but it is a belief difficult to reconcile with the facts. Rather, from arrest to prosecution to conviction to sentencing, the presence of race (and class) discrimination in the criminal justice system is difficult to ignore.⁵ For a variety of reasons, the inequitable enforcement, prosecution and implementation of the criminal laws remains a troubling reminder of the difficulties faced by racial minorities in seeking to use the courts to vindicate their right to be free from discriminatory law enforcement practices.⁶

At the front end of the criminal justice system, for example, the U.S. Supreme Court has upheld the use of "pretext stops" by police, which has a significant impact on the problem of racial profiling.⁷ The Court's notions of how a "reasonable person" should be able to "just say no" to police in the context of "consent" searches sometimes seem to border on the surreal, and give enormous discretion to police to engage in dragnet searches that can have a racially discriminatory impact.⁸ To top it off, the Court has set a very high burden for defendants to meet to be entitled to discovery on a claim that they have been singled out for

5. For an excellent examination of the disturbing and prevalent role of race throughout the criminal justice system, see DAVID COLE, *NO EQUAL JUSTICE* (1999).

6. For example, the U.S. Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies only to intentional discrimination, not to laws or actions that have a disparate impact on the basis of race. See *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976). Among the many other judicially-created barriers are broad limits on plaintiff standing to enjoin questionable police practices and the judicially-created doctrine of "qualified immunity" that has been expansively interpreted in the law enforcement context to protect from damages actions "all but the plainly incompetent or those who knowingly violate the law." See *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

7. *Whren v. United States*, 517 U.S. 806 (1996). See also COLE, *supra* note 5, at 34-41.

8. See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991).

prosecution on the basis of race.⁹

At the back end of the criminal justice system, studies documenting the discriminatory impact of various sentencing policies and practices are legion. For example, despite significant statistical evidence of the racially discriminatory administration of capital punishment, the U.S. Supreme Court has refused to find the racially charged evidence sufficient to invalidate a defendant's death sentence.¹⁰ Additionally, the federal penalty scheme markedly differentiates between crack and powder cocaine to the detriment of racial minorities, and has been the subject of enormous commentary and criticism.¹¹ The U.S. Supreme Court has indirectly acknowledged the discriminatory impact,¹² but legal challenges to the sentencing disparity have been uniformly unsuccessful.¹³ Indeed, even after the U.S. Supreme Court eliminated the mandatory nature of the Sentencing Commission Guidelines that housed the discriminatory crack and powder

9. *United States v. Armstrong*, 517 U.S. 456 (1990).

10. *McCleskey*, 481 U.S. 279.

11. The statutory situation was summarized as follows in a recent decision by Judge Smith:

The central pillars of the 1986 [Anti-Drug Abuse] Act are its schedule of mandatory minimum sentences for weight-based possession with intent to distribute, and the upward ratchet for recidivist offenders. Mandatory minimums under the statute begin at 5 and 10 years, respectively, depending on drug quantity, double for a second offense, and, in certain cases, mandate life imprisonment for a third. See 28 U.S.C. § 841(b)(1)(A)-(B). The quantity-based penalty scheme under the statute employs a 100:1 ratio for cocaine base to powder cocaine, which means that the amount of powder cocaine necessary to trigger the statutory mandatory minimum is 100 times the amount of cocaine base necessary to trigger the same minimum sentence. Thus, it takes 500 grams or more of powder cocaine to trigger a 5-year mandatory minimum penalty whereas only 5 grams of cocaine base triggers the 5-year minimum; it takes 5,000 grams (5 kilograms) of powder cocaine to trigger a 10-year mandatory minimum penalty under the statute, whereas 50 grams or more of cocaine base will trigger this same penalty.

United States v. Perry, 389 F. Supp. 2d 278, 289 (D.R.I. 2005).

12. In *United States v. Armstrong*, the Court cited the fact that "more than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black." Ironically, the reference appears in a court decision that made it more difficult for defendants to mount challenges to allegedly racially discriminatory charging decisions. 517 U.S. 456, 469 (1996).

13. See, e.g., *United States v. Singleterry*, 29 F.3d 733 (1st Cir. 1994).

cocaine disparity,¹⁴ judges, including those in the federal court in Rhode Island, found themselves stymied in trying to reduce the racial injustice inherent in those sentencing standards.¹⁵

Even favorable court rulings can amount to promises unfulfilled. In 1986, the U.S. Supreme Court overruled a nineteen-year-old precedent to ease the evidentiary burden on defendants seeking to challenge a prosecutor's use of peremptory challenges to exclude individuals from petit juries on the basis of their race.¹⁶ However, under the three-tier burden-shifting scheme adopted by the Court, prosecutors can rebut a defendant's prima facie case and force the defendant to prove purposeful discrimination, merely by offering a race-neutral explanation for a juror strike that need not be "persuasive, or even plausible."¹⁷

14. *Booker v. United States*, 543 U.S. 220 (2005).

15. *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006).

16. *Batson v. Kentucky*, 476 U.S. 79 (1986).

17. *See Purkett v. Elem*, 514 U.S. 765, 767-768 (1995):

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

(citations omitted).

That the *Batson* standard can be rather toothless is perhaps best exemplified by a Fifth Circuit case in which the government used six of its peremptory challenges to strike Mexican-Americans from the jury of a Latino defendant facing drug charges. *See United States v. Romero-Reyna*, 867 F.2d 834 (5th Cir. 1989). The prosecutor's explanation for dismissing one of the jurors was that he had "a P rule. I never accept anyone whose occupation begins with a P. He is a pipeline operator." *Id.* at 837. The appellate court remanded the case because the district court failed to make any findings of race-neutrality under *Batson's* second step. At an evidentiary hearing on remand, the prosecutor repeated his adherence to the "P" rule, but added for the first time that he also rejected that particular juror because the prosecutor "had been informed that the use of marijuana by pipeline operators was somewhat prevalent." *United States v. Romero-Reyna*, 889 F.2d 559, 561 (5th Cir. 1989). As the appellate court noted, the district court rejected the "P" rule explanation, pointing out that the prosecutor had accepted three Anglos whose occupations began with the letter "P."

It is therefore worth examining how one particular well-known racial justice issue has played out in the courtrooms and in the halls of the General Assembly in Rhode Island. That issue is the practice of "racial profiling" on the state's roads and highways.¹⁸ Concerns about inappropriate stops and searches of blacks and Hispanics, in particular, go back more than a decade and are generally traced to increased efforts at drug interdiction by police.¹⁹ In Rhode Island, when State Police created a drug interdiction squad in 1990, records showed that of the first 28 people arrested, 22 of them were Hispanic.²⁰ When the State Police voluntarily collected data about traffic stops in 1999, the statistics showed that 26% of motorists stopped during a three-month period were non-white, even though they made up only 8% of the state's population.²¹ Not surprisingly, police officials vigorously rejected the implications of the statistics.²²

However, in 2000, in light of both the troubling nature of those statistics and the tragic death of Cornel Young, Jr., an off-duty African-American Providence police officer shot to death by a

Nonetheless, the district court found that the revised explanation passed muster under *Batson*, and the appellate court then upheld the revised finding. *Id.*

18. State law defines racial profiling as

the detention, interdiction or other disparate treatment of an individual on the basis, in whole or in part, of the racial or ethnic status of such individual, except when such status is used in combination with other identifying factors seeking to apprehend a specific suspect whose racial or ethnic status is part of the description of the suspect, which description is timely and reliable.

R.I. GEN. LAWS § 31-21.2-3.

19. The government's use of "drug courier profiles" has been particularly prominent in promoting racial discrimination. According to author David Cole, "a Lexis review of all federal court decisions from January 1, 1990, to August 2, 1995, in which drug-courier profiles were used and the race of the suspect was discernible revealed that of sixty-three such cases, all but three suspects were minorities: thirty-four were black, twenty-five were Hispanic, one was Asian, and three were white." See COLE, *supra* note 5, at 50; see also *United States v. Hooper*, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting) (calling the drug courier profile "laughable, because it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose").

20. Dan Barry, *Hispanic Arrests Irk ACLU*, PROVIDENCE J., May 12, 1990.

21. Bruce Landis, *State Police Records Support Charges of Bias in Traffic Stops*, PROVIDENCE J., Sept. 5, 1999, at 1A.

22. *Id.*

fellow officer,²³ the General Assembly passed a groundbreaking law requiring all police departments in the state to collect detailed traffic stop statistical data for two years.²⁴ The statute further required the Attorney General to

procure the services of an organization, company, person or other entity with sufficient expertise in the field of statistics to assist with . . . the design of the methodology for gathering statistics pursuant to this chapter, monitor compliance with the act throughout the study, and conduct a statistical analysis at the conclusion of the study to determine the extent to which racial profiling exists within the state.²⁵

Northeastern University's Institute on Race and Justice was the entity hired to perform this independent analysis. The results of the Institute's study, released in 2003, provided clear evidence of widespread racial disparities in traffic stop practices across the state.²⁶ The study showed that blacks and Hispanics were both disproportionately stopped and searched by police, but they were actually less likely than whites to be found with contraband, and that the disparities held true when other relevant variables were controlled.²⁷

At the same time that this legislatively-mandated study was being conducted, a federal lawsuit alleging racial profiling was proceeding in Rhode Island.²⁸ The lawsuit's failure is a cautionary tale, for it exposes the difficulties faced by individuals seeking to use the legal system to redress incidents of racial profiling and

23. The circumstances of the shooting are summarized in the court opinions addressing civil rights claims brought against the city by the decedent's family. *Young v. City of Providence*, 301 F. Supp. 2d 163 (D.R.I. 2004), *vacated*, 404 F.3d 4 (1st Cir. 2005).

24. R.I. GEN. LAWS §§ 31-21.1-1 *et seq.* (The Racial Profiling Prevention Act of 2004).

25. R.I. GEN. LAWS § 31-21.1-4(f).

26. Dr. Amy Farrell, Dean Jack McDevitt, Shea Cronin and Erica Pierce, "Rhode Island Traffic Stops Statistics Act Final Report – Executive Summary," Northeastern University Institute on Race and Justice, June 30, 2003, *available at* http://www.racialprofilinganalysis.neu.edu/IRJ_docs/RIFinalReportExecSummary.pdf.

27. *Id.*

28. *Flowers v. Fiore*, 239 F. Supp. 2d 173 (D.R.I. 2003) ("*Flowers I*"); *aff'd*, 359 F.3d 24 (1st Cir. 2004) ("*Flowers II*").

highlights the need for other responses, such as legislative action, to address this critical issue.

On September 24th, 2000,²⁹ Bernard Flowers, a 50-year old African-American schoolteacher,³⁰ was subjected to a “high risk” or “felony” car stop by Westerly police.³¹ With three police weapons, including a shotgun, pointed directly at him, Flowers was directed by the lead officer at the scene to first “extend his arms out the window and then open the car door and exit the vehicle,” then to “turn around with his hands in the air and walk backwards towards the officers,” and “to kneel on the road beside his car and lace his fingers behind his head,” whereupon he was “handcuffed, frisked, and placed in the back of [an officer’s] cruiser.”³²

This “traumatic event” where “any citizen would be understandably upset”³³ was precipitated by a report to Westerly police at 11:55 AM that day from a town resident, Nuncio Gaccione, who said he had “got[ten] word that [a person he knew] was sending two colored people over here to start some trouble.”³⁴ When police officer Darren Fiore arrived at Gaccione’s house about five minutes later, Gaccione “related that he received a call from Maurice O’Rourke, who stated that another individual, Michael Corbin, was sending two African-American men to Gaccione’s home with a gun. Gaccione said that he believed this was because his grandson, Jason Bolduc, ‘works with a guy that Corbin knows and they had some type of falling out.’”³⁵

Following up on this “second-hand and somewhat disjointed”

29. Both the district court and First Circuit opinions mistakenly cite the date of the incident as “September 24, 2001,” not 2000. The suit was actually filed May 15, 2001. *See, e.g., Andrew Goldsmith, A Question of Race, PROVIDENCE J.*, May 16, 2001, at 1B.

30. Although an opinion concurring in the judgment in the First Circuit mentions that Flowers was of “middle age,” his exact age and occupation come from news reports, not the published opinions. *Flowers II*, 359 F.3d at 35. *See also* Goldsmith, *supra* note 29.

31. *Flowers II*, 359 F.3d at 27.

32. *Id.*

33. *Flowers I*, 239 F. Supp. 2d at 179. The plaintiff publicly summarized the stop as follows: “I saw what I called a firing squad . . . I could see the guns just pointed at me. . . . If I were to move at any rate I would be shot. It was time for me to make peace for my death.” Goldsmith, *supra* note 29.

34. *Flowers II*, 359 F.3d at 26.

35. *Id.*

narrative,³⁶ Gaccione told officer Fiore that “he had seen two African-American men in a small gray or black vehicle drive by his home about five minutes prior to Fiore’s arrival” and that “these men may have been the ones to whom O’Rourke referred.”³⁷ A few minutes later, “Fiore alerted on his radio that police should be looking for a small gray or black vehicle with two black men, possibly armed. He further stated that he was ‘not too sure what it is’” and added (erroneously) that “they made threats over here at the Gaccione complex.”³⁸

Fiore then took a post about half a mile from the residence, along Route 3, a major thoroughfare in Westerly. Approximately half an hour later,³⁹ Flowers’ “small gray car” passed by, and Fiore decided to follow it.⁴⁰ Although he noticed Flowers was alone in the car, Fiore later explained that he believed that the other suspect either could have been dropped off at another location or was hiding in the vehicle.⁴¹ He pulled Flowers over after approximately one mile.⁴² Back-up arrived, and the previously-described “felony car stop” ensued. After a search of Flowers and the car turned up nothing criminal, Flowers was ordered back to his car and allowed to leave.⁴³

Fiore described his “probable cause” for stopping the vehicle as being that “the description of the vehicle fit the description by Mr. Gaccione, there was a black male that was operating the vehicle . . . the close proximity of the time of the call and the fact that it was heading toward Mr. Gaccione’s residence.”⁴⁴

Flowers filed a §1983⁴⁵ civil rights suit against Fiore, the two officers who assisted in the felony stop, and the Town of Westerly, alleging violations, *inter alia*, of his right to be free from unreasonable searches and seizures under the Fourth Amendment, and of his right to be free from racial discrimination under the Fourteenth Amendment’s Equal Protection Clause. The

36. *Id.* at 35 (Boudin, C.J., concurring).

37. *Id.* at 26.

38. *Id.*

39. *Id.* at 26, 33.

40. *Id.* at 26-27.

41. *Id.* at 27.

42. *Id.*

43. *Id.* at 27-28.

44. *Id.* at 27.

45. 42 U.S.C. §1983.

key issue in the case was whether the police had proper grounds to stop Flowers' car.

A police officer may, in appropriate circumstances, stop a person for the purpose of investigating possible criminal behavior even though there is no probable cause to arrest.⁴⁶ The U.S. Supreme Court has held that to justify such a stop, known as a *Terry* stop, the officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁴⁷ While reasonable suspicion is a less demanding standard than probable cause, the officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.⁴⁸

In determining whether officers have a reasonable suspicion, courts examine the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.⁴⁹ Whether a stop remains related in scope to the circumstances justifying the interference is judged by a standard of objective reasonableness. The court considers the circumstances as a whole, and balances the nature of the intrusion with the governmental interests that are served.⁵⁰

Although, as discussed *infra*, the police appeared to have failed this test miserably in Flowers' case, both the district court and the court of appeals found otherwise. The district court granted the defendants' motion for summary judgment, finding that the officers "had ample reason to detain Flowers."⁵¹ In explaining the "ample reason" for dismissing Flowers' claim that he had been unlawfully stopped, the court stated:

Gaccione reported receiving a threat that two black men with guns were coming to his home to cause trouble and,

46. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

47. *Id.* at 21.

48. *Id.* at 27.

49. *United States v. Arvizu*, 534 U.S. 266, 273 (2002), *United States v. Golab*, 325 F.3d 63, 66 (1st Cir. 2003).

50. *United States v. Moore*, 235 F.3d 700, 703 (1st Cir. 2000); *United States v. Cruz*, 156 F.3d 22, 26 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1781 (1999).

51. *Flowers I*, 239 F. Supp. 2d at 177.

shortly thereafter, he told Fiore that two black men in a gray or black car had driven slowly by his home. A few minutes later, Fiore observed Flowers, a black man, driving toward Gaccione's home in a car fitting the description provided by Gaccione and bearing license plates not issued to that vehicle. Consequently, it was reasonable for Fiore to believe that Flowers was one of the armed men coming to Gaccione's home to cause trouble.⁵²

Most striking about this recitation of the incident – which occurred in the context of the defendants' summary judgment motion, and so in a context where the facts were to be construed in the light most favorable to Flowers – is that it contains three factual errors, all of which undermine Fiore's alleged "probable cause" for stopping the vehicle.⁵³ First, Flowers was not observed by Fiore "a few minutes" after leaving Gaccione's home – instead, the record, substantiated by police logs, indicated that approximately half an hour had elapsed.⁵⁴ Second, although the district court relied on a statement by Fiore that he had observed Flowers "driving toward Gaccione's home,"⁵⁵ the evidence showed, and the appellate court acknowledged, that Flowers had already passed Gaccione's residence along Route 3 when he was stopped.⁵⁶ Finally, despite references to Fiore's discovery of an apparent discrepancy between the license plate on Flowers' car and the vehicle's registration,⁵⁷ Fiore conceded that the alleged discrepancy "never figured into his decision to follow and stop Flowers."⁵⁸

When stripped of these errors, the "probable cause" for the stop of Flowers amounted to the following: Fiore was looking for two black men in a "small gray or black vehicle," and Flowers, a

52. *Id.*

53. These "apparent" errors were acknowledged by the appeals court. See *Flowers II*, 359 F.3d at 33.

54. *Id.* at 26, 33.

55. *Flowers I*, 239 F. Supp. 2d at 177.

56. *Flowers II*, 359 F.3d at 33, 36 (Boudin, C.J.).

57. There was a factual dispute as to when Fiore discovered this "discrepancy," but the appellate court ultimately deemed it irrelevant in light of Fiore's concession that it was not a factor in his decision to stop Flowers. See *Flowers II*, 359 F.3d at 27 n.1.

58. *Id.* at 33.

middle-aged African-American man, had the misfortune to drive along Route 3, alone, a half hour later in a gray car. Despite acknowledging the district court's "apparent" factual errors and the need to "constru[e] the facts in a light most favorable to Flowers,"⁵⁹ the First Circuit nonetheless upheld the lower court's grant of summary judgment, finding that the police had engaged in a reasonable *Terry* stop under the circumstances. The court's core reasoning was as follows:

*Equipped with a description confirmed by Gaccione's firsthand observation, it was reasonable for Fiore to follow the first African-American male in a black or gray car he observed in the immediate area of the Gaccione residence. That as long as half an hour may have elapsed after he left the Gaccione residence (as opposed to twenty minutes) arguably attenuates the reasonableness of Fiore's suspicion that Flowers was indeed the suspect. However, we do not believe that a matter of ten minutes disposes of suspicion altogether, especially when a car and driver substantially matching the given description eventually appear. That Fiore did not see a second African-American male in the car is adequately countered by Fiore's explanation that he thought a second man either could have been dropped off or was hiding in the car. Against the immediacy and gravity of the reported threat, Fiore was justified in following through on his initial observation.*⁶⁰

Though calling it "a close case," the court concluded "that the officers possessed sufficient and reasonable suspicion to stop Flowers."⁶¹

In a brief opinion concurring in the judgment, Chief Judge Boudin examined the evidence supporting the court's opinion and noted its weaknesses. He pointed out, *inter alia*, that the initial tip about the "two black men" was "second-hand and somewhat disjointed"; that "[g]ray cars are not uncommon; and the one stopped contained *one* black man – of middle age – rather than the two predicted, both of whom would likely have been younger if

59. *Id.*

60. *Id.* (emphasis added).

61. *Id.* at 34.

the story were true”; that “the car was stopped 20 to 30 minutes *after* the one allegedly driven by the house”; and that there was no “clear indication that the plaintiff was driving to the informant’s house at the time he was stopped.”⁶² Notwithstanding all these concerns, Chief Judge Boudin concluded that even if the *Terry* stop had been improper, the police were still protected by qualified immunity.⁶³

The *Flowers* decision gave force to prescient comments made by Professor David Cole a year before Bernard Flowers was stopped at gunpoint by Westerly police: “The Supreme Court’s removal of meaningful Fourth Amendment review allows the police to rely on unparticularized discretion, unsubstantiated hunches, and nonindividualized suspicion. Racial prejudice and stereotypes linking racial minorities to crime rush to fill the void.”⁶⁴

The *Flowers* case acutely demonstrates the difficulties faced by alleged victims of racial profiling in obtaining judicial relief and, perhaps not coincidentally, helps explain why racial profiling remains such a prevalent problem in Rhode Island.⁶⁵ The difficulties are perhaps best summed up by the First Circuit’s incredible claim that the car and driver “substantially match[ed] the given description.” If a generalized description of two black men driving in a gray or black car is sufficient to justify the stop and search of a gray car with one black male in it some thirty minutes later, Fourth Amendment protections would appear to mean very little.⁶⁶

62. *Id.* at 35-36.

63. *Id.* at 36.

64. COLE, *supra* note 5, at 53.

65. Dr. Amy Farrell & Dean Jack McDevitt, “Rhode Island Traffic Stops Statistics Data Collection Study 2004-2005 – Final Report,” Northeastern University Institute on Race and Justice, Apr. 2006, *available at* <http://www.rijustice.state.ri.us/sac/Final%20Report%202004-2005.pdf>. *See also* *The Persistence of Racial Profiling in Rhode Island: A Nine-Month Review*, Rhode Island Affiliate, American Civil Liberties Union, November 2005, *available at* <http://www.riaclu.org/documents/Racialprofiling3rdqtrreport.pdf>.

66. The Appellant’s brief summed it up this way:

At best, [an impermissible hunch] was all Officer Fiore had when he chose to stop Mr. Flowers’ car and subject him to the terror that inevitably accompanies a “high risk” stop. The description of the automobile was vague. The source of the complaint was

Indeed, calling this a “substantial match” shows how vulnerable racial minorities are to being stopped and searched. It is difficult to imagine similar police action if Flowers’ race and the race of the “two colored people” mentioned by the town resident were changed. If a person had been told that “two white males” were going to his house with a gun, and he then saw a “gray or black car” with two white men drive by his house, would police have relied on such an open-ended and virtually useless description to pull over the first gray or black car they saw that had only one white occupant in it? Would a court have called the match “substantial”?

Having fresh in its mind both the First Circuit’s decision in *Flowers* and Northeastern University’s documentation of racial disparities in traffic stops in Rhode Island from the data collected in 2001-2002,⁶⁷ the General Assembly enacted “The Racial Profiling Prevention Act of 2004,” landmark legislation that took some important first steps to try to at least partially address a problem that the *Flowers* case illustrates may not always be fruitfully resolved by litigation. The 2004 statute explicitly banned racial profiling⁶⁸ and authorized the award of damages, attorneys’ fees and other appropriate relief for its victims.⁶⁹ It required the continued collection of traffic stops data by police departments for another year and obligated police agencies to “review the data on a regular basis in an effort to determine whether any racial disparities in the agency’s traffic stops enforcement exists, and to appropriately respond to any such disparities.”⁷⁰

The law also directly addressed certain police procedures thought to have an impact on racial profiling. In the absence of reasonable suspicion or probable cause of criminal activity, the 2004 law barred police from engaging in so-called “consent”

questionable. Thirty minutes had passed since Fiore had taken his “post,” and nearly 50 minutes had passed since Gaccione had called the police. The first – and only – person that Fiore stopped was the first black man to drive by. As hunches go, this one was shamefully weak. It should not provide a basis for stopping an innocent man.

Brief of Appellant at 24-25, *Flowers v. Fiore*, 359 F.3d 24 (1st Cir. 2004) (No. 03-1170, 03-1533).

67. Farrell et al, *supra* note 26.

68. R.I. GEN. LAWS § 31-21.2-3 (2004).

69. R.I. GEN. LAWS § 31-21.2-4 (2004).

70. R.I. GEN. LAWS § 31-21.2-6(k) (2004).

searches (i.e., requesting the driver's permission to search)⁷¹ or from detaining a motor vehicle "beyond the time needed" to address the traffic violation prompting the stop.⁷² To encourage compliance with these restrictions, the statute further established an exclusionary rule, barring the judicial use of any evidence obtained in a search that violated these prohibitions.⁷³

It is still too early to know the impact of the legislation on police practices, and no one would claim that its passage will, by itself, solve the problem of racial profiling. On the positive side, Northeastern University's statistical analysis of the latest year's worth of traffic stop data did show a reduction in the total number of searches conducted by police – perhaps due to the new statutory ban on consent searches – as well as a slight reduction in the racial disparity in police stops and searches.⁷⁴ Nonetheless, the racial disparities in terms of both stops and searches remained quite significant and hardly cause for celebration.⁷⁵ The latest study prompted the introduction of additional legislation in the 2006 General Assembly session to further address the problem.⁷⁶

Litigation will still remain a necessary, if not sufficient, tool to address racial profiling.⁷⁷ However, it is useful to contrast the outcome of Bernard Flowers' case with the pro-active measures taken by the General Assembly, to show that the courts alone cannot be depended upon to protect racial minorities from the indignity, humiliation and terror that flow from a traffic stop generated by the color of the driver's skin. Action by other branches of government is essential if this serious issue is to be

71. R.I. GEN. LAWS § 31-21.2-5(b) (2004).

72. R.I. GEN. LAWS § 31-21.2-5(a) (2004).

73. R.I. GEN. LAWS § 31-21.2-5(c) (2004).

74. Farrell & McDevitt, *supra* note 65.

75. As was true in the first study, racial minorities remained more than twice as likely as whites to be stopped and searched, though less likely to be found with contraband once searched. *Id.*

76. "An Act Relating to Motor Vehicles," H 7590 (Feb. 16, 2006), available at <http://www.rilin.state.ri.us/Billtext/BillText06/HouseText06/H7590.pdf>. Among other things, the bill would bar police from engaging in pretext stops. No action was taken on the bill.

77. See, e.g., <http://www.aclu.org/racialjustice/racialprofiling/26363prs20060803.html>, announcing the filing of a detailed settlement agreement in a racial profiling suit against the Arizona Department of Public Safety. As this article suggests, even the *Flowers* case itself helped spur the legislature into taking action.

addressed in a comprehensive manner.

III. "HOMELAND SECURITY"

It is no secret that the criminal laws – at the federal, state and municipal level – are replete with silly, archaic and antiquated prohibitions.⁷⁸ Rhode Island's statutes are no exception. In establishing fines against individuals who "falsely assume or pretend to be a . . . corder of wood, or fence viewer,"⁷⁹ who "erect, locate or run any windmill within twenty-five (25) rods of any traveled street or road,"⁸⁰ or who "maliciously fire a musket [or] blunderbuss . . . within eighty (80) rods of any baiting place . . . actually used in the proper season for the baiting and netting of wild pigeons,"⁸¹ Rhode Island's General Laws are filled with quaint prohibitions of other long-bygone eras.

As amusing as these laws might seem, the consequences are potentially severe when slumbering criminal statutes are awakened especially when they can be used to infringe on fundamental freedoms, including First Amendment rights. The dangers are particularly heightened by the fact that prudential issues of standing can often bar the courts from considering constitutional challenges to such antiquated statutes until harm has befallen a hapless defendant.⁸²

In 2004, Rhode Islanders witnessed firsthand the awakening of a few such slumbering statutes. That year, Governor Donald Carcieri proposed an 18-page "Act Relating to Homeland

78. Indeed, there has been a mini-cottage industry in the writing of books about those laws. *See, e.g.*, JEFF KOON, ANDY POWELL & WARD SCHUMAKER, *YOU MAY NOT TIE AN ALLIGATOR TO A FIRE HYDRANT: 101 REAL DUMB LAWS*, (2002); LANCE S. DAVIDSON, *LUDICROUS LAWS AND MINDLESS MISDEMEANORS* (1998); ROBERT WAYNE PELTON, *LOONY LAWS: THAT YOU NEVER KNEW YOU WERE BREAKING* (1990); SHERYL LINDSELL-ROBERTS, K.R. HOBBIE, TED LEVALLIANT AND MARCEL THEROUX, *WACKY LAWS, WEIRD DECISIONS, AND STRANGE STATUTES* (2004); LELAND H. GREGORY III, *GREAT GOVERNMENT GOOFS: OVER 350 LOOPY LAWS, HILARIOUS SCREW-UPS AND ACTS-IDENTS OF CONGRESS* (1997).

79. R.I. GEN. LAWS § 11-14-2 (2002).

80. R.I. GEN. LAWS § 11-22-5 (2002).

81. R.I. GEN. LAWS § 11-44-9 (2002).

82. For a thorough analysis of standing in the context of a pre-enforcement challenge to a statute on First Amendment grounds, see *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 29-33 (1st Cir. 1999).

Security.”⁸³ In a news release announcing its submission, the Governor described the draft legislation as “designed to strengthen Rhode Island’s homeland security by sanctioning the possession, manufacture, use or threatened use of chemical, biological, nuclear, or radiological weapons, as well as the intentional use or threatened use of industrial or commercial chemicals as weapons.”⁸⁴ In fact, this wide-ranging bill had enormous ramifications for political protest, freedom of association, academic freedom and the public’s right to know.

Taking its cue from the controversial USA PATRIOT Act, the proposed legislation broadly defined “terrorism,” which carried a sentence of life imprisonment, to cover any activity that (1) was intended to “intimidate or coerce a civilian population” or “influence the policy of a unit of government by intimidation or coercion”⁸⁵ and (2) involved “a violent act” or “an act dangerous to human life” that violates the law.⁸⁶

Political protest is, almost by definition, designed to “influence the policy of a unit of government,” and effective protests will often have the goal of trying to “intimidate” or “coerce” change in governmental policies. Under the legislation, the commission of “a violent act” in the context of a protest could turn the activity into a capital crime. The Governor’s bill did not define what constituted “a violent act,” but the rest of the proposed definition made clear that it did not have to be an act “dangerous to human life.”⁸⁷ Thus, committing a misdemeanor assault, throwing a rock through a window or even engaging in certain non-physical activity could turn a political protester into a criminal facing life imprisonment.⁸⁸

83. A copy of the draft bill is available on-line at <http://www.projo.com/news/pdf/securitybill.pdf>. As a result of the storm of criticism that greeted the bill, it was never formally introduced into the General Assembly.

84. http://www.projo.com/news/pdf/20040212_legislativeagenda.pdf.

85. The definition included a third alternative more in keeping with most people’s notion of terrorism: an act intended to “affect the conduct of a unit of government by murder, assassination, kidnapping or aircraft piracy.”

86. “An Act Relating to Homeland Security,” §1, at <http://www.projo.com/news/pdf/securitybill.pdf>. The USA Patriot Act’s similar definition of terrorism is codified at 18 U.S.C. §2331 (2001).

87. *Id.*

88. While defining violence as “unjust or unwarranted use of force,” Black’s Law Dictionary goes on to note that some courts “have held that

Of particular note here, was the Governor's attempt to explicitly ban *speech* related to "terrorism." He sought to do so by resurrecting two long-dormant World War I-era statutes aimed at criminalizing political dissent, and by expanding them to apply to his new definition of terrorism. One such statute was enacted in 1919 that made it a felony, punishable by ten years in prison, to, *inter alia*, "teach or advocate anarchy or the overthrow by force or violence of the government," or to be "affiliated with any organization teaching and advocating disbelief in or opposition to organized government."⁸⁹ A companion statute referenced in the Governor's legislation, and enacted in 1918, made it a felony to "willfully speak, utter, print, write or publish any language" intended to "incite, provoke or encourage" a "defiance or disregard of the constitution or laws of Rhode Island or of the United States."⁹⁰ The Governor's legislation sought to expand both

violence in labor disputes is not limited to physical contact or injury, but may include picketing conducted with misleading signs, false statements, erroneous publicity, and veiled threats by words or acts." BLACK'S LAW DICTIONARY 1564 (7th ed. 1999).

89. R.I. GEN. LAWS § 11-43-12 (2002), *repealed by* P.L. 2004, ch. 336, §5. The unamended statute read in full:

§ 11-43-12 Advocating anarchy or unlawful destruction of property. – Any person who shall willfully teach or advocate anarchy or the overthrow by force or violence of the government of the state of Rhode Island or of the United States, or of all forms of law, or opposition to organized government, or any person who shall willfully become a member of or affiliated with any organization teaching and advocating disbelief in or opposition to organized government, or advocating or teaching the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally of the government of the state of Rhode Island or of the United States, or of any organized government because of his, her, or their official character, or advocating or teaching the unlawful destruction of property, shall be guilty of a felony and, upon conviction, shall be punished by a fine of not more than ten thousand dollars (\$10,000), or imprisonment not exceeding ten (10) years, or both.

90. R.I. GEN. LAWS § 11-43-11 (2002), *repealed by* P.L. 2004, ch. 336, §5. The unamended statute read in full:

§ 11-43-11 Advocating forcible overthrow of government. – Any person who shall willfully speak, utter, print, write, or publish any language intended to incite, provoke, or encourage forceful resistance to the state of Rhode Island or to the United States of America, or a defiance or disregard of the constitution or laws of Rhode Island or of the United States, or shall advocate any change, alteration, or

statutes by also making it a felony merely to teach or advocate “acts of terrorism” as defined by the bill.⁹¹ Thus, the college professor who enthusiastically assigned her students to read *The Autobiography of Emma Goldman* could have faced ten years in prison for that deed.

Both statutes were archaic remnants of an era when a person could constitutionally be sent to jail for urging people to oppose the draft,⁹² and when the First Amendment had not yet even been deemed applicable to the states.⁹³ But well before the Governor’s attempt to broaden the scope of these two statutes, their unconstitutionality had become patent. Recognizing the vital importance of free speech in a democratic society, the U.S. Supreme Court has held for decades that mere advocacy of illegal activity – even advocacy of violence – is entitled to the protection of the First Amendment. As the Court noted in the seminal case of *Brandenburg v. Ohio*, “the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe

modification in the form of government of Rhode Island or of the United States except in the manner provided by the constitution or the laws of the state of Rhode Island or by the Constitution or the laws of the United States, or shall advocate any change in the form of government of the state of Rhode Island or of the United States by means of revolution or violence, or shall advocate the assassination of persons occupying public positions or offices created by the constitution and laws of the state of Rhode Island or of the United States, or shall advocate, incite, provoke, or encourage the destruction, burning, blowing up, or damaging of any public or private property as a part or incident of a program of force, violence, or revolution, having for its purpose the overthrow of the form of government of the state of Rhode Island or of the United States, or shall willfully publicly display any flag or emblem, except the flag of the United States, as symbolic or emblematic of the government of the United States or of a form of government proposed by its adherents or supporters as superior or preferable to the form of government of the United States as prescribed by the Constitution of the United States, shall be guilty of a felony and, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000), or imprisonment not exceeding ten (10) years, or both.

91. “An Act Relating to Homeland Security,” §§ 2 and 4, at <http://www.projo.com/news/pdf/securitybill.pdf>.

92. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919).

93. It was not until 1925, in dictum, that the Court “assumed” that freedom of speech was “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states.” *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

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*.⁹⁴ The Governor's bill ignored this fundamental principle, and in doing so, severely undermined freedom of speech in the name of fighting terrorism, just as the original statutes did in the name of fighting anarchy.⁹⁵

The proposal's impact on academic freedom, political discourse and public debate generally was enormous. Fortunately, announcement of the Governor's legislation met with immediate and uniform denunciation by academics, scholars and other professionals.⁹⁶ In response, the Governor initially sought to explain away his expansion of the two statutes by noting that he was simply building upon already-existing laws.⁹⁷ At the same time, he acknowledged that he had not read his legislation in its entirety before announcing its introduction.⁹⁸ Faced with a continued drumbeat of criticism, he quickly announced that he was withdrawing the proposal for re-working.⁹⁹ Another version never saw the light of day.

To its credit, the General Assembly was not content to let the issue die. Learning a lesson from the Governor's revival of these repressive laws, the legislature took the offensive and passed a bill formally repealing the two statutes so they could never again be used.¹⁰⁰

In the same bill, the General Assembly repealed more than a dozen other antiquated criminal statutes that had similarly

94. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

95. Other troubling provisions in the bill – severely undercutting the public's right to know and significantly expanding the reach of the criminal laws when broadly-defined "terrorist" conduct at issue – were analyzed in a report prepared by the Rhode Island Affiliate, American Civil Liberties Union. The report is available on-line at http://www.riaclu.org/misc/2004hs_bill_analysis.pdf.

96. Tom Mooney, *Carciere's Bill Shocks Constitutional Scholars*, PROVIDENCE J., Feb. 19, 2004, available at http://www.projo.com/news/content/projo_20040219_first19.23dedc.html.

97. Jim Baron, *Carciere Backs Off Legislation*, PAWTUCKET TIMES, Feb. 20, 2004, available at http://www.zwire.com/site/news.cfm?newsid=10998298&BRD=1713&PAG=461&dept_id=24491&rft=6.

98. *Id.*

99. *Id.*

100. 2004 R.I. Pub. Laws, ch. 336.

troubling implications for the exercise of First Amendment freedoms.¹⁰¹ At a time of a continuing “war on terrorism” and a growing unpopular war in Iraq, it was hardly a stretch for legislators to believe that threatened enforcement of these archaic statutes – just as the Governor had threatened to enforce the two “advocacy of anarchy” statutes – could also take place.

For example, the bill repealed statutes designed to “protect” the United States flag. One of those statutes had banned, *inter alia*, the public display of any flag “opposed to organized government or which may be derogatory to morals.”¹⁰² This statute was enacted in 1909, and last amended in 1914 but had been clearly unconstitutional since at least 1931, when the U.S. Supreme Court struck down a very similar law.¹⁰³

Another “flag protection” statute, enacted in 1902, made it a crime, with certain limited exceptions, to place “any word, figure, mark, picture, design, drawing or advertisement of any nature” upon any flag of the United States, to sell or give away any merchandise containing a representation of the U.S. flag in order “to advertise, call attention to, mark, or distinguish the article or substance on which so placed,” or to “cast contempt, either by words or act, upon any such flag.”¹⁰⁴

These far-reaching prohibitions placed not just political protesters, but literally hundreds of vendors and advertisers in Rhode Island in violation of the law. In a series of rulings commencing in 1969, when the U.S. Supreme Court reversed the conviction of a man for speaking “contemptuous words about the American flag,”¹⁰⁵ the Court had routinely struck down similar statutes, including congressional efforts in the 1980’s to ban flag

101. The sixteen criminal statutes that were the subject of the repeal bill had certain things in common. Many of the laws dated back to 1896 (the first codification of the Rhode Island General Laws), and the most *recent* of the statutes was enacted in 1919. It appears that none of these statutes had been enforced in modern history, and there were no reported court decisions interpreting or applying any of these statutes since 1896. See 2004 R.I. Pub. Laws ch. 336.

102. R.I. GEN. LAWS § 11-15-6 (2002), *repealed by* 2004 R.I. Pub. Laws ch. 336.

103. *Stromberg v. California*, 283 U.S. 359 (1931).

104. R.I. GEN. LAWS § 11-15-2 (2002), *repealed by* 2004 R.I. Pub. Laws, ch. 336.

105. *Street v. New York*, 394 U.S. 576 (1969).

desecration.¹⁰⁶ Notwithstanding those rulings, overzealous prosecutors across the country have continued to charge political protesters with violations of “flag desecration” laws.¹⁰⁷

Yet another of the repealed statutes made it a crime for any non-military personnel “to appear in public wearing the distinctive uniform, or any distinctive part of a uniform, of any branch of service,” but gave the secretary of state unfettered discretion to grant an exemption to “any reputable place of public amusement or entertainment” in order to allow “members performing in that place” to don such uniforms.¹⁰⁸ The statute was first codified in 1896, and had not been amended since 1908.

Fortunately for the state’s thriving artistic community (not to mention young Halloween trick-or-treaters), neither the ban nor the exemption had been enforced in modern times. Any attempt to enforce the statute would have been futile, as giving a state officer unbridled discretion to decide who could be exempt from the ban for “entertainment” purposes raised fundamental First Amendment problems.¹⁰⁹ In fact, over thirty years previously, at the height of the Vietnam War, the U.S. Supreme Court struck down a similar federal ban’s exemption for actors to wear uniforms “if the portrayal does not tend to discredit that armed force.”¹¹⁰

If it had not been for the Governor’s misguided “homeland security” legislation, efforts by the General Assembly to repeal these laws might have seemed overly cautious, if not somewhat paranoid. Even without the Governor’s actions, however, it is worth emphasizing that the resurrection of archaic statutes by the government to target speech is not as rare as one might think.

106. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Smith v. Goguen*, 415 U.S. 566 (1974); *Spence v. Washington*, 418 U.S. 405 (1974).

107. As recently as July, 2006, a protester in Iowa who planted an upside down flag in his front yard was charged with violating that state’s flag desecration statute. See <http://www.commondreams.org/views06/0713-26.htm>.

108. R.I. GEN. LAWS § 11-14-3 (2002).

109. The general unconstitutionality of statutes providing unbridled discretion to government officials to decide whether to grant permits for speech activity has been clear since at least 1938. See *Lovell v. Griffin*, 303 U.S. 444 (1938). See also, e.g., *Fratiello v. Mancuso*, 653 F. Supp. 775, 789 (D.R.I. 1987).

110. *Schacht v. United States*, 398 U.S. 58 (1970).

For example, in 2003, the environmental organization Greenpeace was indicted by the U.S. government for allegedly violating an 1872 law banning “sailor mongering,”¹¹¹ and for engaging in conspiracy to violate that statute in violation of 18 U.S.C. §371.

The indictment arose from an incident where some members of Greenpeace,

several miles outside the Port of Miami, boarded the M/V APL Jade, a cargo vessel which was believed to be bringing illegally logged mahogany from Brazil into the United States. The Greenpeace members, once on board, intended to unfurl a banner which urged President Bush to stop illegal logging, but they were taken into custody before they could do so.¹¹²

The arrested individuals pled guilty or no contest and were sentenced to time served and required to pay fines ranging from \$100 to \$500.¹¹³ Not content with this resolution, however, the Government obtained an indictment against Greenpeace itself. Although raising serious questions about the viability of the charges, a federal district court in Miami initially refused to dismiss the indictment against the environmental organization, but did grant Greenpeace’s request for a jury trial.¹¹⁴ In its opinion, the court began by noting that there were only two reported cases, both more than 100 years old, that cited the statute or its predecessor under which Greenpeace had been indicted.¹¹⁵ One of those cases discussed the statute’s purpose, which seemed far afield from the alleged actions of Greenpeace and its members:

111. 18 U.S.C. 2279 (2002). The law in pertinent part reads:

Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival and before she has been completely moored, shall be fined under this title or imprisoned not more than six months, or both.

Id.

112. *United States v. Greenpeace*, 314 F. Supp. 2d 1252 (S.D.Fla. 2004).

113. *Id.*

114. *Id.*

115. *Id.* at 1256 (citing *United States v. Sullivan*, 43 F. 602 (D. Or. 1890); *United States v. Anderson*, 24 F. Cas. 812 (S.D. N.Y. 1872)).

The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons, in the interest or employ of what may be called 'sailor-mongers,' get on board vessels bound for Portland as soon as they get in the Columbia river, and by the help of intoxicants, and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding-house for the necessaries of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price.¹¹⁶

In granting Greenpeace's request for a jury trial, the court pointedly noted that the indictment was a "rare – and maybe unprecedented – prosecution of an advocacy organization for conduct having to do with the exposition of the organization's message," and highlighted the allegations made by others that the indictment was "politically motivated due to the organization's criticism of President Bush's environmental policies."¹¹⁷

In a slightly less serious vein, but still worthy of note, was a recent criminal case from Michigan, dubbed the "case of the cussing canoeist,"¹¹⁸ that received a fair amount of national attention. The case involved Timothy Boomer, who in 1998 was charged with violating a 99-year-old Michigan statute when he "uttered a stream of profanities" after he fell out of his canoe on the Rifle River.¹¹⁹ The law at issue made it a misdemeanor to use "any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child."¹²⁰ It was not until 2002, three and a half years after Boomer's initial conviction of the charge and only after two lower courts had upheld the constitutionality of the statute, that the Michigan Court of

116. *Greenpeace*, 314 F. Supp. 2d at 1256-57 (quoting *Sullivan*, 43 F. at 604-05).

117. *Id.* at 1264. One month later, the Court did throw out the charges, pointing to vague language in the statute that it had referenced in its earlier opinion. See <http://www.firstamendmentcenter.org/%5Cnews.aspx?id=13383>.

118. See, e.g., Associated Press, *Cussing Canoeist's Conviction Thrown Out Along With 105 Year Old Law*, Apr. 2, 2002, available at <http://www.freedomforum.org/templates/document.asp?documentID=15992>.

119. *People v. Boomer*, 655 N.W.2d 255 (Mich. App. 2002).

120. MICH. COMP. LAWS ANN. §750.337 (2006).

Appeals let the cussing canoeist off the hook by declaring the 1897 statute unconstitutional.¹²¹

As these examples show, a true danger exists when antiquated laws are allowed to remain on the books. Under well-recognized rules of standing, a statute's legality generally cannot be challenged until a person is either charged under the law or faces a credible threat of prosecution.¹²² Sometimes, as these cases demonstrate all too well, that will be too late. These situations present a classic opportunity for legislative, rather than judicial, action. The Rhode Island General Assembly took important steps in repealing statutes that were, at best, outdated, and at worst dangerous. It would do well to regularly review the General Laws and remove similar archaic statutes.

121. *Boomer*, 655 N.W.2d at 255.

122. *See, e.g.*, *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 29-33 (1st Cir. 1999).