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PERSPECTIVE

Justice Brown and the old ACLU

By Mitchell Keiter

As a former chambers attorney for California Supreme Court Justice Janice Rogers Brown, I was surprised to read about her consideration for attorney general, but stunned when the ACLU deemed her civil liberties record "disturbing." ("California jurist's name in pot as Sessions replacement," Nov. 8.) Brown championed a process-based liberalism that used to define the ACLU, but which it is now abandoning in favor of an outcome-based progressivism. The processes of fair hearings, objective evaluations, and free speech, the old ACLU's priorities, are now seen as impeding the new ACLU's goals. In rejecting Brown, the ACLU rejects its own storied legacy.

New York Times News Service

Justice Janice Rogers Brown of the California Supreme Court is pictured on Capitol Hill in this May 17, 2005 file photo.

Due Process

Brown demanded fair process in *Hagberg v. California Federal Bank* (2004), where a bank accused a Hispanic woman of fraud, and then invoked the litigation privilege to prevent her from proving she had been racially profiled. Brown objected, not because all Hispanic women, or all plaintiffs, must be believed, but because "such falsely accused individuals will have no opportunity to clear their name" if they cannot examine the evidence.

Universities nationwide have denied students accused of sexual misconduct such opportunity. They lack counsel, notice of charges against them, access to evidence, an opportunity to examine witnesses or present live testimony, or even have a neutral factfinder decide the case. As Justice Arthur Gilbert recently lamented, "It is ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy." *Regents v. Doe* (2018).

The old ACLU, which protected the right to counsel (*Powell v. Alabama* (1932)), even for defendants too poor to afford one (*Gideon v. Wainwright* (1963)), the right to notice of charges and access to transcripts (*In re Gault* (1969)), and expanded cross-examination rights (*Lilly v. Virginia* (1999)), would have agreed. But the new ACLU criticizes Title IX reforms that might affect outcomes: "[S]chools will likely investigate far fewer complaints" and become "less safe for survivors." Due process protections have long resulted in fewer convictions than possible in Star Chamber proceedings, but that is the price we pay to protect the innocent. The old ACLU knew that.

And it would not have presumed guilt. "Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning [of one] tilted to favor a particular outcome." *Doe v. Brandeis Univ.* (D. Mass. 2016). Due process demands more than Lewis Carroll's "Sentence first, verdict afterwards." Fortunately, the ACLU has rescinded some of its earlier objections.

Equal Justice

As an African-American child in the 1950s Deep South, Justice Brown saw police enforce segregation, and so developed a healthy skepticism of "standardless and unconstrained police discretion." *People v. McKay* (2002). Justice Brown dissented in *People v. Robles* (2000) against the rule letting officers retroactively justify searches when the suspect was on probation (subject to random search) *even if the officer did not know that*. After all, criminal suspects are judged on the facts as they perceived them (e.g. whether the substance possessed was cocaine or flour), not the unperceived reality. The Supreme Court later adopted her position in *In re Jaime P.* (2006).

Brown opposed "discriminatory enforcement" against people "because they are black, brown, or poor" when police arrested Conrad McKay for bicycling the wrong way on a residential street. She empathized with profiling victims, who could not obtain redress. "[M]ost victims of pre-textual stops will barely have enough money to pay the traffic citation."

The root problem was the state's treating people according to not *what they did* but *what they looked like*. "I do not know Mr. McKay's ethnic background. One thing I would bet on: he was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes — places where no resident would be arrested for riding the 'wrong way' on a bicycle. ... unless he looked like he did not belong in the neighborhood."

She distrusted governmental disregard of fair process, no matter who benefitted. In *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000), she cited colleague Stanley Mosk's observation that "the principle that the Constitution sanctions racial discrimination against a race — any race — is a dangerous concept fraught with potential for misuse." Mosk, who joined her opinion, was one of the leading civil libertarians in California history, and one of the first judges nationwide to strike down racially restrictive covenants. Then he refused to "us[e]

'race' as the measure of [one's] worth as a citizen and neighbor," and the *Hi-Voltage* court forbade using race or sex as a measure of a company's worth as a state contractor.

All seven justices agreed the *Hi-Voltage* program was unconstitutional, though some reasonably feared Brown added too much dicta, unnecessary to decide the case. With California now *requiring* set-asides like those struck down in *Hi-Voltage* (Corp. Code, Section 301.3), perhaps she did not add enough.

As racial status could not measure one's worth as a neighbor, Mosk denied it could measure fitness for any benefit; these must be earned by "merit," "objective qualification," and "competitive achievement." *Price v. Civil Service Commission* (1980). By contrast, New York City's using an objective, competitive examination to determine school admissions enables "apartheid," according to the director of the New York Civil Liberties Union, because schools admit a disproportionate share of Asian-Americans.

Nothing more concisely trivializes the horror of state-enforced hatred than conflating it with a group's academic success on a race-neutral exam. "Apartheid" occurs not when groups score differently on a test but when a group is barred from taking the test and attending the school altogether.

The old ACLU knew that. Barred from white schools as a child due to her race — not test scores — Justice Brown did too.

"Sentence first, verdict afterwards," describes not just college disciplinary proceedings but admissions too. Discovered evidence shows Harvard determines its desired demographic mix, and then works backwards, creating a process to produce it. Weighing objective qualifications like grades, standardized tests, and even extracurriculars generates a class with "too many" Asian-Americans, so Harvard scores them on "personal" characteristics, and conveniently ranks them much lower than everyone else, much as it ranked Jews low on "character" almost a century ago to reduce their admission numbers.

The contrast between process and outcome shapes economic and foreign policy too. FDR's New Deal promised *employment*, whereas AOC's Green New Deal guarantees *income*. Process-focused liberals note how Israel protects its children in bombshelters while Hamas endangers its own as human shields and suicide bombers, but outcome-focused progressives see only the disparate body count.

Free Speech

Free speech is a fundamental procedural priority, and the old ACLU's signature issue. One Justice Brown dissent opened by citing precedents still celebrated on the ACLU website, *Terminiello v. Chicago* (1949), *Brandenburg v. Ohio* (1969), and *National Socialist Party v. Skokie* (1977). *Terminiello*, especially relevant today, established the critical principle that hecklers may not suppress speech through force and intimidation.

But the ACLU has reduced its commitment to speech, not just racists' and anti-Semites' but even its own. A Virginia ACLU director tried to speak to William & Mary students in 2017 on "Students and the First Amendment" but Black Lives Matter forcibly took the stage and silenced her. The old ACLU spoke up, insisting the university "has an obligation to protect the freedom of the speaker to speak and not to allow one group to ... intimidate other speakers or members of the audience who wish to hear the speaker .... Actions that bully, intimidate or disrupt must not be without consequences."

But the new ACLU provided "internal feedback" and forced a retraction, as that speech-protective statement "no longer reflected the Virginia ACLU's current position." What matters now is the speech's outcome — whether it advances or "impede[s] progress toward equality," so the ACLU now considers whether speech "reflects our values" in deciding whether to represent the speaker. Inverting Voltaire, the ACLU will defend to the death one's right to speak — if it agrees with her. Like judicial proceedings and objective examinations, the process of speech is superfluous if the correct outcome is already known.

Justice Brown experienced hate firsthand. But she also saw speech's transformative capacity to confront and expose it. As Justices Alito, Kennedy, and Sotomayor recently observed, "Limiting speech ... favors those who do not want to disturb the status quo." *Reed v. Town of Gilbert* (2015). Social change needs free speech.

There is a natural temptation to seek protection from ugly ideas. But who should decide which speech to allow? As Judge Learned Hand observed, "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press* (S.D.N.Y. 1943). In other words, we benefit more from an open exchange of ideas where all may participate than a closed forum where government officials (or tech oligarchs) tell us which speech is permitted and which is forbidden.

And the old ACLU knew that.

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