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ADVANCE SHEET- September 3, 2021

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President's Letter

In this issue, we present several materials on law enforcement issues.

The first is a summary of the career of William Bratton, former police commissioner in New York and Los Angeles by Alan Ehrenhalt, former editor of *Governing Magazine*, with a reference to Bratton's instructive recent book.

We present excerpts from Baltimore's police consent decree, which few lawyers have read, circumscribing arrest powers, together with the definition of 'quality of life' offenses referenced therein.

As our judicial opinion, we present a recent opinion of Mr. Justice Thomas in *Standing Akimbo, LLC v. United States*, urging reconsideration of the *Gonzales v. Raich* case (2005) upholding, by a margin of 6 to 3, federal marijuana enforcement.

Finally, we present Baltimore's historical and current homicide statistics from the Baltimore Sun's website.

George W. Liebmann



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Change Will Do You Good - But Not Always

According to Ecclesiastes "To every thing there is a season, and a time to every purpose under the heaven." The words were made into a song in the late fifties by Pete Seeger appearing on his album "The Bitter and the Sweet" in 1962. It would become an international hit three years later with a cover version by the Byrds.

While the young are busy asking whether everything in fact changes, and the old lamenting that it does, time, in the words of Steve Miller "keeps slippin into the future." I suppose there is nothing we can do about change or the accelerating nature of the passage of time, save to embrace the former and accept the latter. Still, I suppose we can put up a fight, hold on to those things that are worth preserving and in the process preserve a little bit of our youth. Might I suggest, I bet none of you saw this coming, the Bar Library.


Founded in 1840, the Bar Library has spent the totality of its existence attempting to provide the bench and bar the finest services and legal collections possible. There have been changes to be sure, including the addition to its constituent base of pro se litigants with the establishment of the Honorable Harry A. Cole Self-Help Center. Expansive Westlaw databases, circulating collections, a lecture series, a movie series, an M.V.A. search service, are just some of the changes that have come to the Library over the years. The delivery methods, almost none of which were in existence in 1840, cannot hide the fact that the philosophy, the very reason for the Library's existence has changed little if at all in the past 181 years.

I ask that you help to preserve this amazing place. When you look at the physical Library described by Judge James F. Schneider in his history of the Library: "The showplace of the Courthouse, the Main Reading Room is thirty-five feet wide by one hundred and twenty-five feet long and is elegantly crowned with a barrel vault ceiling. A rich oak wainscot rises to a height of fifteen feet and extends entirely around the room. The woodwork of the shelves and wall paneling is lustrous English oak, trimmed with a classic carved border of rosettes, laurel and egg-and-dart embellishment," you are going to be impressed. When you get to know its history, when you realize the enormity of what it has to offer its members in the way of services and collections, and how it has the potential to save those members, whether they be a solo practitioner or a large firm substantial amounts of money, your initial favorable impression, I believe, will grow exponentially.

Please help preserve this special place through your financial support by way of a membership or a contribution. The Library is a qualified 501©(3) tax-exempt organization and is eligible to receive tax-deductible gifts under I.R.S. regulations. As with many others, the pandemic has brought financial challenges to the Library. With your support we shall overcome these challenging times as we have the Civil War, the Pandemic of 1918 and the Great Depression. Any help would be appreciated.


Take care and I look forward to seeing you soon.

Joe Bennett




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THE PROFESSION

By Alan Ehrenhalt

June 8, 2021

A Memoir of Community, Race, and the Arc of Policing in America

By Bill Bratton and Peter Knobler

On Dec. 20, 2014, two New York City police officers, Rafael Ramos and Wenjian Liu, were assassinated while they sat in their squad car in Brooklyn. Police Commissioner William Bratton, then 67 years old and in his second tour in the job, flew back from a holiday in Boston and raced to the scene.

His behavior then and in the succeeding days was a lesson in moderation. He delivered a moving speech to the families of the deceased that called for tolerance on all sides. He denounced the angry police officers who turned their back on the mayor at a public meeting. Then he forcefully refused to discipline the rebellious officers. "To take action against those cops, to go punitive," he said, "would have been counterproductive."

It was classic Bratton. Over a 50-year career in which he has headed three big-city police departments, he has walked a political and ideological tightrope that has maintained his credibility on all sides. "There are parts of any argument," he insists in his new book, "The Profession," "where both sides can be right."

Succeeding as a centrist in public life these days can be an almost impossible task. But centrism in law enforcement may be the most delicate challenge of all. Bratton's ability to practice it was a startling phenomenon. Some may call it disingenuousness, or even duplicity. But some would use another word for it. The word is brilliance.

"The Profession" is a sometimes dense but consistently engaging account, expanding on his earlier memoir, "Turnaround." Like that book, also co-written with Peter Knobler, it is a remarkably candid account of one man's journey, but it is also a veritable encyclopedia of police tactics and culture. It is jarringly self-promotional at times, as when Bratton reports that he went into Los Angeles as "the only person in America who would turn the department around." But equally often it is appealingly self-deprecating, as when he says he was less than outstanding as a street-level detective and clumsy even at firing a gun. Managing other people was the one thing he could really do well.

"The Profession" begins in Boston, where Bratton joins the police force out of high school as a highly ambitious but also highly cerebral cop, one who liked computers, geography and demographics. He absorbed Sir Robert Peel's 19th-century dictum that "the test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it."

Bratton rose fast, but he displayed a little too much of his ambition in telling a reporter that he wanted to become the city's police commissioner within four years. That declaration was not well received in higher echelons, Bratton was demoted, and he was soon looking for a new job (though he eventually returned as commissioner in 1993). He found a good one in New York.

Bratton took over the city's transit police in 1990, at a time when the transit system was at a low point. Crime was rampant on the subways; the cars were covered with graffiti; riders were sneaking through turnstiles. Bratton implemented a strategy of "quality of life" policing, derived in large part from the "broken windows" theory advanced by the social scientists George Kelling and James Q. Wilson. Controlling minor offenses, they argued, restored a sense of security, and identified petty criminals likely to graduate to more serious crimes. The strategy seemed to work better than even Bratton could have predicted. In less than two years, robberies on the transit network were down 40 percent and crime as a whole was down 22 percent. It was such a striking - and unexpected - success that when the job of New York police commissioner opened up in 1994, when Bratton was back in Boston, there really was no other logical choice for it.

In two years as commissioner, Bratton went on to produce results similar to those he had achieved in the transit system. Bratton implemented an accountability system that focused on numbers of offenses precinct by precinct and held commanders responsible for reducing them.

His achievements were bound to attract national attention, and they ended up getting him in trouble. When he made it to the cover of Time magazine, he alienated Mayor Rudolph Giuliani, who had been his ally. One reads through this section of Bratton's book seeking a more complex reason for their feud than sheer jealousy on Giuliani's part, but there is none to be found, in the pages of "The Profession" or elsewhere. New York's triumphant police commissioner had to find another city. It turned out to be Los Angeles, where he became police chief.

Bratton moved west at a moment of crisis. The Los Angeles Police Department had not really recovered from disclosures of brutality, and its racial antagonisms had been worsened by labor disputes and divisions over the previous Black chief, Bernard Parks.

Bratton reiterated his conviction that "we could not only reduce crime but at the same time improve relations with the minority community." He surprised an antibrutality demonstration by telling the crowd that "I'll control my cops if you control your kids!" He also offered his cops the three-day, 12-hour workweek they had been lobbying for. Once again violent crime declined sharply; once again there were debates over whether the improvement was a result of Bratton's quality of life law enforcement or a demographic phenomenon largely unrelated to police strategies.

Bratton retired as Los Angeles chief in 2009, and spent the next four years as a consultant. Then Bill de Blasio won election as mayor of New York in 2013, and decided to bring Bratton back.

He returned to confront a raging controversy over the stop-and-frisk tactics that he had done a great deal to instigate. His message was genuinely Brattonesque: Stop-and-frisk had been instrumental in cleaning up crime in the 1990s, but by 2013 the streets were demonstrably safer - the tactic was being overused. "The numbers," Bratton writes, "ceased to be a means to an end

and became an end in and of themselves." During his second tenure as commissioner, stop-and-frisk policing became much less frequent. There had been nearly 700,000 stops in 2011 under Bratton's predecessor, Ray Kelly. In the first year of Bratton's return, he reports, there were 22,939. Still, he defends the fundamental idea of quality of life policing. "We were accused of targeting minorities, instructing the N.Y.P.D. to go after Black and brown people," he writes. "That's nonsense. We targeted criminals."

Whatever the complex of factors involved, the reality was that crime continued to decline. From a high of more than 2,000 murders a year in the city in the 1990s, the total was down to less than 300 in 2019, three years after Bratton retired as New York's police commissioner. He is dismissive of any explanations that play down police responsibility for the improvement. "It's not economics ... it's not jailing half the population. It's us."

In the last chapter of "The Profession," Bratton takes aim at the many restraints on law enforcement that have been put into place since his departure. He challenges the loosening of cash bail requirements, the downgrading of petty crimes into barely punished misdemeanors and in particular the notion of defunding police budgets. "The results have been disastrous," he writes. He attributes the sharp increase in violent crime in New York City in 2020 to "the ill-conceived and ill-instituted efforts of the Legislature in Albany and the City Council" to appease antipolice activists.

He goes further than that. At dark moments, he fears that "all of our gains have been erased." He says he fights that pessimism every day.

But the pessimism is not really warranted. The reality is that Bratton's balanced approach, his crime prevention initiatives, his willingness to listen to both sides in the most incendiary disputes promise to be part of law enforcement in American communities for a long time to come.

It may be true, as Yeats chillingly reminded us, that the center cannot hold. It doesn't seem to be holding in public life at the moment. But at certain times, in the right hands and circumstances, it does come forward.

Alan Ehrenhalt is a senior editor at Governing Magazine, and the author of "The Lost City" and "The Great Inversion."

THE PROFESSION

A Memoir of Community, Race, and the Arc of Policing in America

By Bill Bratton and Peter Knobler

512 pp. Penguin Press. \$30.

A version of this article appears in print on July 4, 2021, Page 16 of the Sunday Book Review with the headline: True Blue.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, Plaintiff;

v.

POLICE DEPARTMENT OF BALTIMORE CITY, et. al., Defendants.

CONSENT DECREE

F. Arrests

60. BPD will ensure that officers issue a Citation or make a custodial Arrest only where they have probable cause to believe a person has committed, is committing, or is about to commit a criminal infraction or citable offense. Officers will not rely on information known at the time of receipt of information to be materially false or incorrect in effectuating an Arrest.

61. For any of the following offenses, BPD will require that an officer seek permission from a permanent rank supervisor prior to effectuating an Arrest, unless not practicable under the circumstances, in which case officers must notify a permanent rank supervisor as soon as practicable after effectuating an Arrest:

- a. Obstructing, Hindering, or Resisting an Officer;
- b. Disorderly Conduct;
- c. Failure to Obey an Officer;
- d. Gambling;
- e. Making a False Statement to an Officer; and
- f. Misdemeanor Trespassing Offenses.

62. BPD will enforce its policy instructing officers that, for Quality of Life Offenses, that the appropriate response is the least intrusive response appropriate under the circumstances as reasonably understood by the officer at the time. In other words, a verbal warning and counseling is preferable to a Citation, and a Citation is preferable to a custodial Arrest. BPD will develop a system for tracking all Citations given for Quality of Life Offenses or for any of the offenses listed above in Paragraph 61(a) through (f). The tracking system will be provided to the Monitor and DOJ in advance for their approval on a timeline established in the Monitoring Plan. BPD will report this Citation

data to the Monitor on a quarterly basis. In addition, BPD will analyze Citation data using Peer Group Analysis on at least an annual basis to assess how officers are enforcing Quality of Life Offenses and to identify officers who may benefit from additional guidance or counseling.

63. BPD will require that a permanent rank supervisor approve or disapprove the officer's request to make an Arrest for Quality of Life Offenses and BPD will ensure that its supervisors ensure that any Arrest is based on the existence of probable cause and that the officer adhered to BPD policy when determining when to verbally warn and counsel, issue Citations, or Arrest individuals for Quality of Life Offenses.

64. BPD will require that supervisors take appropriate action to address violations or deficiencies in officers' Arrest requests and recommendations, including releasing the subject, recommending non-disciplinary corrective action for the involved officer, and/or referring the incident for administrative or criminal investigation. Such action will be documented by the permanent rank supervisor.

65. BPD will require that officers complete all Arrest reports properly documenting the probable cause for the Arrest by the end of the officers' shifts.

66. BPD will ensure that it obtains and tracks all data provided by Central Booking about arrestees at the time of presentment at Central Booking, including any evaluations of the arrestee's injuries and the results of any searches of the detainee for contraband. If emergency treatment is necessary, officers will ensure that the detainee or arrestee receives medical attention from an appropriate medical provider. BPD will require officers to advise the duty Supervisor as soon as practicable of all situations in which emergency treatment is sought or provided and shall include a description of the circumstances necessitating such treatment. The above-referenced notification of a supervisor by an officer should not exceed 24 hours from presentment of the detainee to a medical treatment facility.

"Quality of Life Offenses." Certain infractions of statutes and ordinances enumerated in the Baltimore City Code and the Maryland Annotated Code: Loitering, Trespassing, Public Urination/Defecation, Disorderly Conduct, Failure to Obey, Disturbing the Peace, Hindering, Open Container, Littering, and any other offense added to BPD's Quality of Life Offense policy.

141 S. Ct. 2236

Supreme Court of the United States.

STANDING AKIMBO, LLC, et al.,

v.

UNITED STATES

No. 20-645

Decided June 28, 2021

Case below, 955 F.3d 1146.

Opinion

The petition for a writ of certiorari is denied.

Statement of Justice THOMAS respecting the denial of certiorari.

Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales v. Raich*, 545 U.S. 1, 5, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22-29, 125 S.Ct. 2195. The Court stressed that Congress had decided "to prohibit *entirely* the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for *any* purpose." *Id.*, at 24-27, 125 S.Ct. 2195 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, " 'necessary and proper' " to avoid a "gaping hole" in Congress' "closed regulatory system." *Id.*, at 13, 22, 125 S.Ct. 2195 (citing U. S. Const., Art. I, § 8). Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

This case is a prime example. Petitioners operate a medical-marijuana dispensary in Colorado, as state law permits. And, though federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, 84 Stat. 1242, 1247, 1260, 1264, 21 U.S.C. §§ 802(22), 812(c), 841(a), 844(a),¹ the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law.² In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance.³ Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws." *United States v. McIntosh*, 833

F.3d 1163, 1168, 1175-1177 (CA9 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law).⁴ That policy has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use.⁵

Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, e.g., Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014. One can also perhaps understand why business owners in Colorado, like petitioners, may think that their intrastate marijuana operations will be treated like any other enterprise that is legal under state law.

Yet, as petitioners recently discovered, legality under state law and the absence of federal criminal enforcement do not ensure equal treatment. At issue here is a provision of the Tax Code that allows most businesses to calculate their taxable income by subtracting from their gross revenue the cost of goods sold *and* other ordinary and necessary business expenses, such as rent and employee salaries. See 26 U.S.C. § 162(a); 26 C.F.R. 1.61-3(a) (2020). But because of a public-policy provision in the Tax Code, companies that deal in controlled substances prohibited by federal law may subtract only the cost of goods sold, not the other ordinary and necessary business expenses. See 26 U.S.C. § 280E. Under this rule, a business that is still in the red after it pays its workers and keeps the lights on might nonetheless owe substantial federal income tax.

As things currently stand, the Internal Revenue Service is investigating whether petitioners deducted business expenses in violation of § 280E, and petitioners are trying to prevent disclosure of relevant records held by the State.⁶ In other words, petitioners have found that the Government's willingness to often look the other way on marijuana is more episodic than coherent.

This disjuncture between the Government's recent laissez-faire policies on marijuana and the actual operation of specific laws is not limited to the tax context. Many marijuana-related businesses operate entirely in cash because federal law prohibits certain financial institutions from knowingly accepting deposits from or providing other bank services to businesses that violate federal law. Black & Galeazzi, Cannabis Banking: Proceed With Caution, American Bar Assn., Feb. 6, 2020. Cash-based operations are understandably enticing to burglars and robbers. But, if marijuana-related businesses, in recognition of this, hire armed guards for protection, the owners and the guards might run afoul of a federal law that imposes harsh penalties for using a firearm in furtherance of a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A marijuana user similarly can find himself a federal felon if he just possesses a firearm. § 922(g)(3). Or petitioners and similar businesses may find themselves on the wrong side of a civil suit under the Racketeer Influenced and Corrupt Organizations Act. See, e.g., *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 876-877 (CA10 2017) (permitting such a suit to proceed).

I could go on. Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "and try novel social and economic experiments," " *Raich*, 545 U.S. at 42, 125 S.Ct. 2195 (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers ... to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid*. A prohibition on intrastate use or cultivation of marijuana may no longer be necessary *or* proper to support the Federal Government's piecemeal approach.

All Citations

141 S.Ct. 2236 (Mem), 21 Cal. Daily Op. Serv. 6309, 2021 Daily Journal D.A.R. 6454, 28 Fla. L. Weekly Fed. S 1086

Footnotes

1

A narrow exception to federal law exists for Government-approved research projects, but that exception does not apply here. 84 Stat. 1271, 21 U.S.C. § 872(e).

2

See Memorandum from Dep. Atty. Gen. to Selected U. S. Attys., Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from Dep. Atty. Gen. to All U. S. Attys., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013). In 2018, however, the Department of Justice rescinded those and three other memorandums related to federal marijuana laws. Memorandum from U. S. Atty. Gen. to All U. S. Attys., Marijuana Enforcement (Jan. 4, 2018). Despite that rescission, in 2019 the Attorney General stated that he was " 'accepting the [2013] Memorandum for now.' " Somerset, Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition, *Forbes*, Apr. 15, 2019.

3

See Congress Lifts Ban on Medical Marijuana for Nation's Capitol, *Americans for Safe Access*, Dec. 13, 2009.

4

Despite the Federal Government's recent pro-marijuana actions, the Attorney General has declined to use his authority to reschedule marijuana to permit legal, medicinal use. *E.g.*, *Krumm v. Holder*, 594 Fed.Appx. 497, 498-499 (CA10 2014) (citing § 811(a)); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688 (2016).

5

Hartman, Cannabis Overview, Nat. Conference of State Legislatures (June 22, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>. The

state recreational use number does not include South Dakota, where a state court overturned a ballot measure legalizing marijuana. *Ibid.*

6

In their petition for a writ of certiorari, petitioners contend that the lack of a deduction for ordinary business expenses causes the tax to fall outside the Sixteenth Amendment's authorization of "taxes on incomes." Therefore, they contend the tax is unconstitutional. That argument implicates several difficult questions, including the differences between "direct" and "indirect" taxes and how to interpret the Sixteenth Amendment. Cf. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570-571, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012); *Taft v. Bowers*, 278 U.S. 470, 481-482, 49 S.Ct. 199, 73 L.Ed. 460 (1929). In light of the still-developing nature of the dispute below, I agree with the Court's decision not to delve into these questions.

Baltimore Homicides

Time frame:
All of 2021

District:
All

ZIP code:
All

Cause of death:
All

Age:
All

Gender:
All

Race:
All

Name

202 reported homicides fit the search criteria.
+
-

HOMICIDES THIS MONTH

Date & time	Victim name	Address	Age	Gender	Race
08/08/2021 8:40 a.m.	<Unreleased>	3500 Spaulding Ave	Male	Unknown	
08/05/2021 8:19 p.m.	<Unreleased>	4300 Flowerton Rd	Male	Unknown	
08/05/2021 8:19 p.m.	<Unreleased>	4300 Flowerton Rd	Male	Unknown	
08/04/2021	Raynard Booker	3200 Wylie Ave	44	Male	Unknown
08/04/2021 9:53 p.m.	James Bennett III	3800 W Franklin St	43	Male	Unknown
08/02/2021	Jaquan Purvis	1400 W Fayette St	37	Male	Unknown

YEARLY DATA

2021, 2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012

Cumulative homicide trends

2021: 202 victims
 2020: 335 victims
 2019: 348 victims
 2018: 309 victims
 2017: 342 victims
 2016: 318 victims

Homicides per month in 2021

January
 27
 February
 16
 March
 29
 April
 28
 May
 38
 June
 28
 July
 30
 August
 6

Homicides per police district in 2021

CD
 15
 ED
 24
 ND
 10
 NE
 15

NW
30
SD
28
SE
14
SW
30
WD
35

Data current as of August 8, 2021.

<https://homicides.news.baltimoresun.com/recent/>