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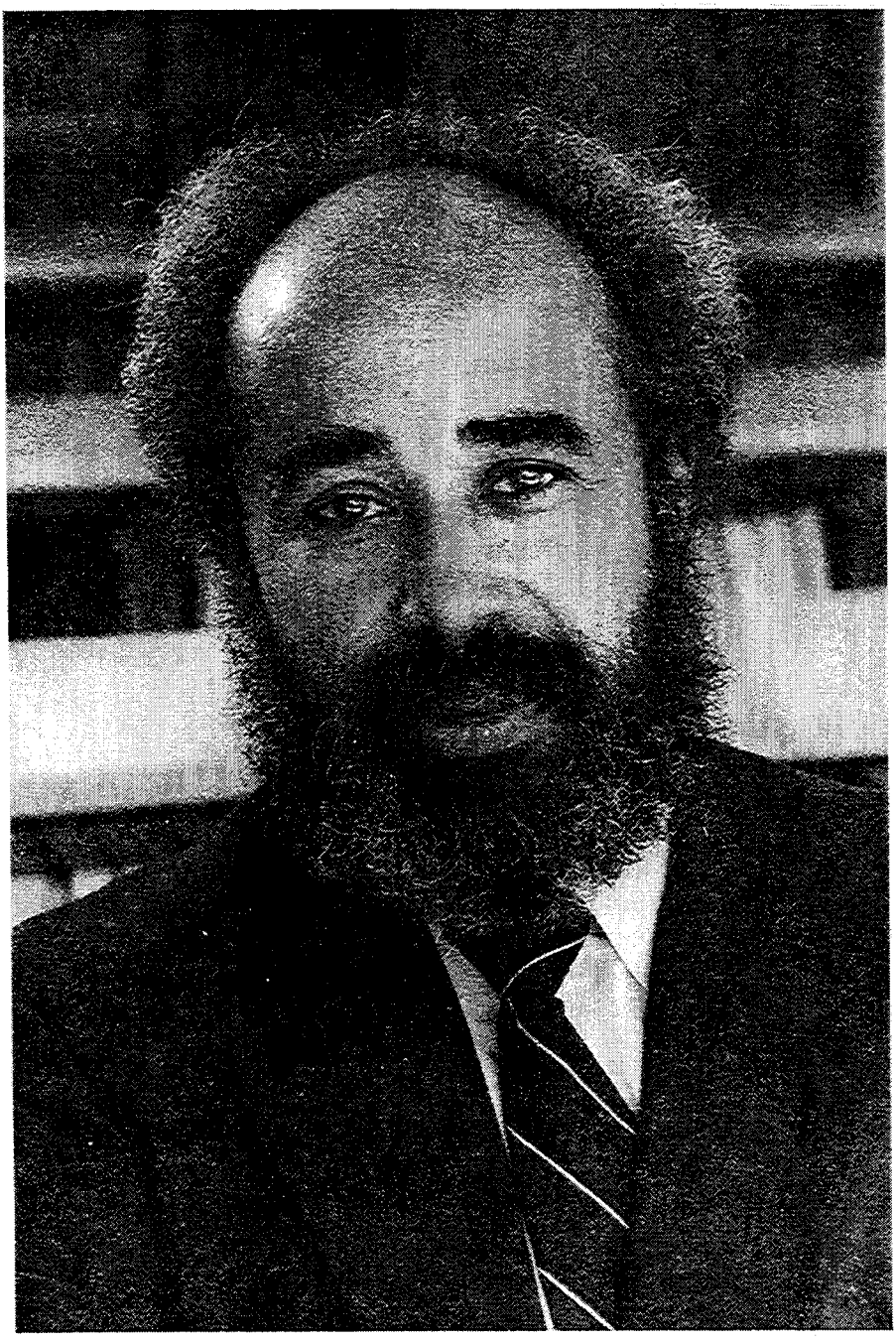

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GEORGE E. PATAKI
GOVERNOR

April 11, 1996

Dear Friends,

It is with great pleasure that I congratulate all those involved in the publication of the New York City Law Review's inaugural issue. As an independent student organization of the City University of New York School of Law, you have established the only legal journal for public law school students in the City of New York. This endeavor most certainly dominated the time and efforts of all students involved and required remarkable perseverance, dedication and vision.

Law reviews and journals are a vital means for faculty and students to explore various legal issues and to present their findings to the legal community as well as the public at large. A publication such as the New York City Law Review, with its unique focus on public interest law, is an important contribution which will benefit all faculty and students throughout the State of New York.

Once again, my best wishes to the New York City Law Review, and continued success in all future endeavors.

Very truly yours,

George E. Pataki

NEW YORK CITY LAW REVIEW

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INTRODUCTION: A JOURNAL OF LAW IN THE SERVICE OF HUMAN NEEDS

Jonathan D. Libby
Todd David Muhlstock
Emily Barnes Cole
Anthony H. Mansfield

On behalf of the editors and staff of the *New York City Law Review*, we would like to extend a warm welcome to our readers. The development of a new law journal is a huge undertaking — and one which the students at the City University of New York (CUNY) School of Law have not taken lightly. While this law review has not been welcomed, shall we say, with open arms, by many of the faculty and administration at this school, the support we have received from the student body has been tremendous. Thus, perhaps a bit of background on CUNY School of Law and the *New York City Law Review* would be appropriate.

> [CUNY School of Law], which opened in 1983, was created to fill a void in the legal community. CUNY's central purpose is to create an educational program that honors students' aspirations toward a legal career built on a commitment to justice, fairness, and equality. These principles form the basis of the Law School's motto, *Law in the Service of Human Needs.* As a result, CUNY's curriculum combines the strengths of traditional methods of legal teaching with an emphasis on clinical training.[1]
>
> CUNY is committed to educating lawyers who will serve communities which have been historically under-represented by the legal profession. One way this commitment is manifested is by insuring that the student body reflects a true cross section of urban society. As a result, CUNY is recognized as a national leader in the diversity of its student body and faculty. Since the school was established, CUNY graduates have overwhelmingly chosen to serve in public interest areas of the law.[2]

As for this journal, suffice it to say that it has been a long time coming. The CUNY Law Review Steering Committee first made an attempt to publish what they hoped would be the *CUNY Law Review*, a general-focus law review, beginning in the Spring of 1993. While lay-

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1 16 ILSA J. INT'L L. (1993).

2 *Id.*

ing significant groundwork for the project, *CUNY Law Review* was still just a dream.

The primary objections to a law journal at CUNY seemed to be: (1) there are already too many law journals and another one is unnecessary; and (2) that having a law journal would be inconsistent with the school's non-competitive philosophy.[3]

A Law Review Steering Committee was once again formed in the Summer of 1994. After developing an organizational structure, and meeting with law school officials, we were blessed with a faculty advisor — Ruthann Robson — who gave us significant input on law review procedure. The Steering Committee selected the initial editors and staff members through a student-judged writing competition. All the students who participated in the production of this law review were selected based on their writing and organizational skills.

However, we were still faced with significant obstacles. The Law Review was denied funding by the body which allocates student fees. The then-acting dean of the Law School informed us that, pursuant to City University regulations, the journal could not use "CUNY" in its name. Although the Law Review disagreed with his interpretation of the regulations, we had no choice but to change our name.

So, we changed our name. *New York City Law Review* sounded good and seemed an appropriate title for a journal published by students at the only public law school in New York City. We emphasized that our law review would be different — as different as our law school. And we received funding. And then we found sponsors. And then subscriptions started selling. And we even had publication agreements with authors. In the Spring of 1995, *New York City Law Review* became a reality.

While *New York City Law Review* is not an official publication of the City University of New York, we are proud of what we are: the first and only student-run, student-edited law journal in the history of this school. We believe that a "traditional" student-edited law review significantly enhances, rather than impedes, all the efforts being made to improve the quality and reputation of the legal education at the City University of New York School of Law.

But make no mistake, this law review is different. Our law school's motto is "Law in the Service of Human Needs." We hope this law review will serve that mission. While trying to remain a quality,

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[3] CUNY School of Law grades all courses Pass/Fail and does not rank its students. Although the faculty is preparing to change the grading system to provide better indicators of success in a course, there are no plans at this time to begin ranking students.

general-focus legal publication, the Editorial Board will publish only those articles it deems to fall within that mission, or is of significant interest to the New York City legal community. We hope the articles you read will have a slightly different, more public interest-oriented focus. With your readership, and the submission of articles from legal scholars and practitioners — particularly those working in public interest law — this law review will succeed.

The students of The City University of New York School of Law now have something which is both vital to their own legal education, as well as a much needed addition to the legal community: A Journal of Law in the Service of Human Needs.

Executive Committee
New York City Law Review
Winter 1996

LAW AS A FOREIGN LANGUAGE: UNDERSTANDING LAW SCHOOL

Ken Vinson†

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† Professor of Law, Florida State University College of Law, LL.B., 1959, University of Texas; LL.M., 1964, Yale University. Thanks go to Linda Griffiths for helping edit this work, and to Tracy Adams for research assistance. Research for this article was supported by grants from the FSU College of Law. To the editors of The New York City Law Review, for their interest in this project, their editorial suggestions, and their willingness to include this article in this inaugural issue, I will be forever grateful.

Law As A Foreign Language: Understanding Law School

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[1]

It might help if you were to compare the process of learning law . . . [to] learning a language. One must of course know the rules of grammar and the meanings of terms, but to know those things is not to know how to speak the language; that knowledge comes only with use. The real difficulties and pleasures lie not in knowing the rules of French or law, but in knowing how to speak the language, how to make sense of it, how to use it to serve your purposes in life.[2]

What do you think the law is, that's all it is, language. . . . Every profession . . . protects itself with a language of its own. . . . Language confronted by language turning language itself into theory till it's not about what it's about it's only about itself turned into a mere plaything.[3]

I. Cracking the Law School Code

A. *Rite Of Passage*

This article undertakes, in only a single injection, to implant in readers new to legal culture a viewpoint otherwise acquired by months of painful law school inoculations. I'm talking about an appreciation of why the maxims and rules fluttering around legal haunts so stubbornly refuse to stand still long enough for beginning law students to take aim and fire. Of course this article's stab at describing the elusive nature of the legalist beast doesn't a legal education make. Yet what follows gives novices a leg up on ridding themselves of unlawyerly illusions about captive rules stored away in little black boxes that law teachers, for the price of tuition, will unlock.

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1 Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465-66 (1897).

2 James B. White, Talk to Entering Students, Occasional Papers, The Law School, The University of Chicago 2-4 (1977) (on file with author).

3 William Gaddis, A Frolic Of His Own 284-85 (Poseidon Press, New York 1994).

This short course in the wily ways of legal language teaches that legal study is in the main something quite different from the cartoon showing the professor pouring true rules straight into the student's vacant brain. The legal mind, in other words, is noteworthy not as a warehouse for storing legal principles; rather it's a mind uniquely equipped to do language exercises in a setting in which rules are mere background music. Learning how to *do* (not memorize) what legal people do with language means putting aside little black boxes stuffed with principled gospel. Learning to *do* law requires — and here's the hard part — shifting the mind's eye to see legal training as a foreign language lab, and to view lawyering as mainly *management* of a grab bag of alien-sounding formulas and doctrines. This lay-to-legal shift in perspective is what law school's harrowing first year is all about, a year for loosening up untutored minds for implantation of legalist seeds. Law school business is mainly, then, the cultivation of a *legalist point of view.*

Law schools, in their snail-like way so frustrating to beginners obsessed with bagging big fat rules, eventually coax students into shucking off the unsophisticated notion that the vaunted rule of law is to be taken at face value. This weeding out from first-year minds of the simplistic, blackletter view of things legal, to make room for the legalist's more flexible mind-set, is painful. This is so whether the blackletter weeding is done by the slow poison of law school's first year, or by the somewhat quicker fix of "Law As A Foreign Language."

First-year students, because of the way they were brought up, very reluctantly give up the idea that law study is mostly information-gathering. Yet, to undergo the transformation necessary to developing a legal mind, a first-year law student must adjust to a legal regime dedicated to taking legal concepts apart and, in ways akin to the novelist's art, putting them back together in altered form. This is a legal regime in which the judges' maxims have lost their luster as stone-tablet depositories of structured official truth. In the wordy new world that freshly-hatched lawyers enter, the coded insider jargon is verbal clay with which to mold, willy-nilly, foreign-sounding motions, arguments, briefs, contracts, pleadings, statutes, jury instructions, constitutions, corporate charters, wills, treaties, ordinances, deeds, and appellate opinions.

Even the worldliest of newcomers to legaldom is shocked to discover that much law talk, which at first seems to convey weighty messages, proves to be alarmingly empty of meaning. Words in the legal realm, in other words, sometimes add up to no more than

ritualistic noises merely demonstrating good will, or concealing thought, or (sorry to say) avoiding the necessity of thinking. It's no wonder that legal innocents find it a bit of a bother — and sometimes a calamity — adjusting to the uncertain realities of a legal education bottomed on stiff-necked, courthouse language masking what legal people are about, albeit usually with worthy intentions.

To safeguard legal society's good name, law schools only grudgingly and belatedly yield up to first-year recruits the knowledge that legal discourse, although resembling English, is a code language, a language made of straw shaped to look like brick. It's no wonder, then, that the law faculty's first-year game of casebook hide-and-seek becomes for many students a confusing, off-putting experience. When facing casebook legalisms that seem to promise firm answers to legal disputes, students find themselves grabbing handfuls of unedifying smoke. Unaware that casebook language conceals as well as reveals, novices stumble amidst the legal code's irreconcilable conflicts, and wonder if they may be victims of a conspiracy to exclude outsiders from judicial secrets.

Law school casebooks and lectures, in short, fail to lay out an orderly, fact-filled academic "subject" for the lawyer-to-be to commit to memory, that is, to "learn." The truth is that the judicial "truth" that law schools teach can never be learned in the same way that history or math is learned. Students new to law study, given this absence of a familiar "subject" that can be readily preserved in class notes, are therefore understandably out of sync when first confronting that dark stranger called The Law. Judges preach, in their archaic second tongue, a rule of law, urging principle as an escape from politics. But legal innocents can't help but see the gap between what courts say and what courts do.

During law school orientation, first-year novitiates are assured that The Law's body of rules is the social cement binding the body politic, and that legal principles are part of the inner consciousness of the race, and so on. But novitiates also receive clues that The Law is a lot of other, even fuzzier, things unmentioned in high school civics books. It's grasping these other things, matters far more intricate and subtle than memorizing lists of legal prescriptions lifted from casebook opinions, that make the path to The Law a harrowing rite of passage. The good news is that while merely memorizing rules would be as dull as dishwater, seeing and understanding what lawyers do is a fascinating study of government in action. If law study was merely rule-gathering, then the law school's casebook method would be silly and wasteful, and would

have long since been replaced by computer software called Truerule.

Legal tradition's simplistic picture of courtroom affairs, produced for appeasement of laypersons, features evenhanded judges disinterestedly calming litigious waters with neutral-sounding slogans that identify lawsuit winners. These slogans dispensed by passive judicial servants are part of a self-contained, self-steering, omniscient body of nonpartisan rules. A public ever fearful of raw government power naturally finds comfort in this pretty picture of nonpartisan passivity. The legal priesthood's rule of law, blessfully untouched by political hands, is not only emotionally appealing, but also explains how judges and legislators supposedly play very different roles. The Law's champions claim that judges produce common law decisions that collectively spell justice; legislators, on the other hand, produce legislation prey to unprincipled partisan politics.

So long as first-year students are burdened with this postcard picture of detached judges watching the rules do all the work, so long will learning how to think like a lawyer prove elusive. Although casebook opinions feature self-serving testimony about how detached and rule-oriented judges are, the obvious falsity in such advertising forces realists to scratch beneath the courts' rule-of-law posturings for firmer answers. In the end, persistent scratching will reveal that the similarities between what courts and legislatures do far outstrip the differences. Hugo Black's government service, as both legislator and judge, is a case in point.

U.S. Supreme Court Justice Hugo Black was, before his 1939 appointment to the high court, a U.S. Senator. During Black's long service on the Court and in the Senate, this New Dealer from Alabama cast votes, as both Senator and Justice, decidedly liberal. Senator Black's liberal votes were derived without a doubt from his progressive political soul. On the other hand, Black's later, but equally liberal Court votes derived, or so the Senator-turned-Justice claimed, not from his earlier New Deal politics, but from the seamless and ever so neutral web of The Law. As a final token of his professed belief in The Law's political neutrality, Justice Black went to his grave with his dog-eared, pocket-size copy of the U.S. Constitution placed squarely over his stilled heart.[4]

Hugo Black was, to a great many, a great American. As for

[4] Hugo Black Room, Law Library, University of Alabama Law School, Tuscaloosa, Alabama (Mar. 1993).

Black's overt worship of blindfolded justice,[5] such public rituals help make the decisions of lawyers who wear Supreme Court robes emotionally acceptable. But serious students of The Law eventually recognize that Justice Black's display of legal purity is, even though high-minded, a bit of a sham. Justice Black at rest with the Constitution over his rule-of-law heart smacks of a romance novel. Justice Black's public devotion to the rule-of-law myth reminds us of something long noted: we Americans have a curious capacity for believing absolutely in the absolutely untrue. The lay public only imperfectly realizes that, as with statistics, so with (especially legal) words, wordsmiths can make the untrue believable. The make-believe inherent in The Law, by which judges claim a neutrality they can only aspire to, is a state of affairs long a part of the American way of life. And it's this counterfeit component in legalism that is the root of the confusion that law students encounter on entering the domain of lawyers.

This confusion, so perilous to the peace of mind of law students, is rooted in casebook opinions: the judges' rationales for their decisions, closely read, exhibit a political spin of their own that spawns layers of meaning. For readers new to the rhetoric of law school subjects such as torts and contracts, there's the opinion's surface meaning refracted (for public consumption) through the prism of legalism. This surface meaning reflects the judicial author's professional allegiance to a courtroom where doctrine confronted with naked case facts is supposed to mechanistically produce neutrally-principled decisions. Then there's the deeper, not-so-neutral meaning accessible to legal sophisticates attuned to the rule of law's mechanical shortcomings and to the politics inherent in courthouse government.

The key to understanding our judicial governors is learning to extract, from high court rhetorical extravaganzas, the tangled messages. Opinion writers strive to prove that The Law, rather than judicial discretion, dictates decision. In thus trying to prove the impossible, appellate legalists overstate their case. The trick is to strip away legalism's outer shell of half-empty words. The successful student plumbs The Law's facile assumptions. The pretense that rules sponsored by appellate litigants are made of sturdy enough material to relieve judges from making hard choices must be seen for the wishful thinking it is. The real significance of an opinion appears only when the reader isolates the passage where

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[5] GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 413 (1977). *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

the soft fuzzy core of the court's proffered principle emits its fog; this is the core of ambiguity that plagues every opinion, and where judicial discretion must furtively take up the slack and carry on to decision. Historically, this split between rule-based decision and discretion-based decision relates to divergent views about the nature of legalism.

B. Formalism And Realism

Legal formalism says rules (formulas that, by capturing history's lessons, thereby inform tomorrow's decisions), even in hotly contested appellate cases, are the touchstone of decision.[6] *Legal realism* says, to the contrary, that judges decide cases in part by reasoning from fuzzy formulas, but also by reacting emotionally and politically to case facts.[7] The modern lawyer's intellectual makeup contains threads of both *formalism* and *realism*, something of an unholy mixture. Therefore, students keen on acquiring a legal mind must for this reason prepare for a legal landscape marked by considerable contradiction and fluidity.

Acquiring a legal mind necessitates stepping partially away from Hugo Black's rule-fetishism, and inching in the direction of the slightly scandalous notion of a judiciary that judges by feelings — by judicial hunches that are tied to political values. Law students, once weaned from the blackletter posturings of The Law, will view casebook doctrine as a text considerably short of gospel, as the voice of master legalists playing elaborate word games. The Law of the lawyers is of course a serious game, full of significance and import, heartbreak and joy. But still it's a game of gathering and ordering catch words into stylized lawyerly arguments. It's a game, from the judges' perspective, of fitting judicial hunches into formal legal niches as "proof" that the rule of law, after a fashion, lives. It's a game, but one playable only by seasoned initiates.

In the fall, uninitiated first-year law students read that their first case is, for example, an appeal from an order, relating to a count in trespass on the case, of the general term of the first court of appeals of the fourth judicial department, reversing a judgment entered on the decision of the court at special term — and, drawing a blank, for the first but not the last time suspect that as would-be lawyers they must lack the right stuff. In time, however, law students discover that the shortfall is not necessarily theirs, but rather that it is The Law that's askew, made unnecessarily complex, and

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6 GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 152 (2d ed. 1991).
7 *Id.*

even a bit of a lie — even if only a little white lie. As law students begin to get some control over the appellate language that has so befuddled them, they realize they've been looking up the wrong tree: the opinions, no matter how tightly squeezed, just won't yield surefire gems of legal truth for predicting future cases. Instead of an orderly blueprint for government, students sooner or later, except those who wear self-imposed blindfolds, see the casebook's mountain of words for the disorderly arrangement it really is.

Note along these lines the following complaints, all too typical, from legal writers about the rule of law's refusal to march in orderly lines: "Constitutional jurisprudence concerning religion has been described as 'a maze,' 'in significant disarray,' 'a conceptual disaster area,' 'inconsistent and unprincipled,' and resembling in several respects the more surreal portions of 'Alice in Wonderland.' ";[8] "The current situation with respect to joint and several liability in the United States is one of confusion and chaos . . . .";[9] "The state of the law [of the right to privacy] is still that of a haystack in a hurricane . . . .";[10] "The law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind.";[11] "So long as everybody understands that nothing more than a word game is being played, there is nothing inherently wrong in defining strict liability . . . in negligence terms. . . . Thus, although mixing negligence and strict liability concepts is often a game of semantics, the game has more than semantic impact — it breeds confusion . . . ."[12]

The lesson here is that when Oliver Wendell Holmes reminds that life is hardly a science, that reminder applies as well when life is wrapped in a skin of words and tagged, ambitiously, The Law. Legal method and scientific method, despite all efforts of the bar to link the two, belong to different planets. Removed as lawyers are from the physical world of the hard sciences, lawyers in the end must live and breathe *words*. And legal words are far too flimsy to do the heavy lifting that would-be legal scientists, too taken with orderliness and predictability, try to assign to mere language. A

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8 Steven G. Gey, *Why Is Religion Special?: Reconsidering The Accommodation Of Religion Under The Religion Clauses Of The First Amendment*, 52 U. PITT. L. REV. 75, 75 (1990).

9 Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 81 (1992).

10 Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir. 1956).

11 Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1519 (1987).

12 James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 277-78 (1990).

word is not a *thing*; only if *words* always represented *things*, the stuff of scientific reports, could lawyers be scientists.[13]

C. *Ambiguity In Language*

But *words* are not *things*. They are not solid objects, but merely *symbols* representing — pointing in the general direction of — *things*. Furthermore, these verbal symbols we call words don't always even point to things. A word such as "fox" points to, among other things, a furry creature living in the verifiable world that can be weighed, inspected, and dissected. A lawyer's "negligence," on the other hand, points to no solid matter, to no measurable object subject to scientific analysis. "Negligence" concerns not what *is*, but what *ought* to be, a word that unlike the (usually) politically neutral "fox," conveys a normative message. The Law is full of indefinite, abstract, general words containing ample empty spaces for sending and receiving normative (ought) messages. And the challenge for law students is catching on to how lawyers and judges control the normative content that flows in and out of The Law's abstract line-up of "negligence," "due process," "consideration," "foreseeable," "malice aforethought," and all the rest.

Legal amateurs, unlike linguists and word-conscious lawyers, make no big deal out of mentally separating those three letters on a printed page that spell "fox" from that real flesh-and-blood creature that roams the woods. The amateur in words tends too readily to merge the word with the most likely object the word represents, forgetting the other objects that may be candidates for what the writer of "fox" had in mind. This tendency to avoid ambiguity and to see only beastly images when the word "fox" appears on the page causes the amateur to overlook the nuances in language that engage the legal mind. The reader of "fox" who sees a wild beast, instead of the clever burglar that on this occasion appeared in the mind's eye of the writer, is in trouble. The professional wordsmith stays alert to the fact that writers may use "fox" to point to one of several different objects.[14] These objects all exist outside the letters f-o-x. It's the sophisticated reader's job to recognize that ambiguity in language is common as dirt, and to make an educated guess as to which object occupied the mind of the writer of "fox."

Now of course "fox" is a pretty simple sort of word. "Fox" may refer to some crafty old Republican, or it may be the name of a pet

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13 S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 28-30, 39-40 (2d ed. 1964).

14 *See generally id.* (discussing the relation between language and reality, between words and what they stand for in the speaker's or the hearer's thoughts).

cat. Still, the choices among the various objects on the planet are fairly limited. "Negligence" is, however, found around the globe and in all manner of situations smacking of carelessness — hence, the ambiguity surrounding legal "negligence." In legal circles, moreover, where speaking in code is *de rigueur*, even a relatively unambiguous word such as "fox" may tomorrow mean anything the legal community wishes "fox" to mean. Such, for example, is the case today with the perverse twist we lawyers put on words such as "intentionally" (which includes accidentally) or "person" (which includes a corporation) or "fact" (which for most English-speakers refers to a slice of the real world, but for lawyers refers to such obviously nonfactual, normative matters as a question of legal "negligence").

To most people, words appear as orderly soldiers marching by in dictionary-approved uniforms, lined up in rows of sentences disciplined by the strict logic of grammar. These are the orderly soldiers of verbal fortune that guard our history, our religion, our justice. We're trained to revere the written word. To read with skepticism goes against the grain, especially with law students confronted with grandiose high court text. Given this general worship of the word, it's no wonder that most of us naked apes, both lawyers and laypersons alike, cling to a faith in the magic of language. Yet, even if in the beginning was the almighty Word, legal principles, nevertheless, are too fragile to subsist on faith alone. A word is but, said Holmes, the "skin of a living thought."[15]

Just as words are not things, so likewise putting a name on something doesn't guarantee that the something actually exists. Too many of us foolishly believe that whatever has a name—The Law, for example—must therefore be real-world stuff, something that exists out there; and if no real entity answering to the name readily turns up, the common reaction, instead of assuming that the name covers up an empty hole, is to conclude that the name must stand for a particularly mysterious something. Language is so tricky a business that the modern era has spawned the language expert.

Language experts talk about a sender of messages who chooses a word, which is a symbol for a thing or an idea that the sender has in mind. The word chosen by the sender, if the message is to be received, must trigger in the receiver's mind the

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15 Towne v. Eisner, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.").

same symbol.[16] A legal writer sends a message: she writes "free speech" on a piece of paper and invites all manner of strangers, her receiver-readers, to figure out the message. Think for a moment of those radio signals the government transmits into outer space on the off chance that extra-terrestrials are tuning in. What will E. T.'s[17] out-in-space descendants think about when they hear the beep-beep equivalent of "fox"? Beginning law students are similarly faced with trying to figure out what messages, among all the many possibilities, are being sent into space by pieces of The Law such as Reasonable Care, Proximate Cause, and Fee Simple Absolute.

When linguists talk about a ladder of verbal abstraction,[18] they reserve a top rung for key pieces of the legal code such as Proximate Cause or Insufficient Evidence. A ladder of abstraction lines up words and phrases according to degree of ambiguity. The greater the number of objects or ideas that a word or phrase can possibly encompass, the higher the rung it occupies on the ladder of abstraction.[19]

The ladder's bottom rung is reserved for the most concrete item: fox named Reggie wearing fish and game band number 07863. Rung two begins the ascent into generality: silver Maine fox. Rung three: red fox. Rung four: member of the dog family. Rung five: animal. Rung six: living thing. And so on. The Law, needless to say, is perched on a top rung, high up in a haze where it's often hard to tell whether the living thing on rung six is a silver fox or a lawyer doing legal research.

This article's introduction into casebook learning urges law students not to be overly concerned when at first the judges' fancy ratiocinations make little sense. It's natural for first-year students, the first few times they dive into convoluted casebook dissertations on The Law, to draw repeated blanks. "Law As A Foreign Language" advises that legal stuff reads like Greek because it is Greek. So relax. Adapt to the leisurely pace of learning a new language. Learning how lawyers think and talk takes months or even years. Reading "Foreign Language" in the meantime, although no sure cure for legal awkwardness, can help quiet first-year headaches.

This guide toward legal understanding is admittedly unkind to legal orthodoxy, written as it is to take The Law down a peg for

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16 HAYAKAWA, *supra* note 13, at 26-30.

17 E.T. (Amblin Co. 1982).

18 HAYAKAWA, *supra* note 13, at 177-80.

19 HAYAKAWA, *supra* note 13, at 177-80.

easier viewing. Yet, this critique of legalism is offered out of neither disrespect for the work of the courts, nor to engender disrespect for legal actors. The Law can't help it if the public prefers the comforting rule-of-law myth over the notion that judicial robes conceal furtive creators of The Law. First-year students, who although by nature are drawn to the rule of law's prettified, apolitical description of itself, can only get a clear focus on The Law by bringing into alignment the public *and* private faces of legalism. This article, therefore, takes a pretty good sock at prettified jurisprudence in order to draw the reader's attention to legalism's split personality. This means I've foregone that unrelenting politeness toward legal affairs that accounts for the semi-religious tone common to court opinions and bar association speeches — and for this boorishness I ask forgiveness of a profession boasting members the likes of Mahatma Gandhi, Sir Thomas Moore, Abraham Lincoln, Hugo Black, and Nelson Mandela.

For law student readers unwilling or unable to give up illusions about an apolitical, omniscient body of rules, this peek beneath the judicial robes may be distasteful. Although law school classes in time, likewise, lay bare the partially mythical nature of The Law, the classroom disrobing is usually done in a manner more genteel, less confrontational than "Foreign Language's" decoding of legal talk. So it's for students unafraid to face an early, if brusque, confrontation with legal reality that I offer this look at law school. But with a warning.

Some few students, when they see The Law minus powder and rouge, tend to turn nasty. Once the opinion's religious trappings are removed, these newly born-again cynics see judges as conspirators manipulating The Law with all the idealism squeezed out. The trick, I think, is to find a happy medium in which the fledgling legalist appreciates the gamesmanship in legal maneuvering, but manages as well to see The Law in aspirational terms as a laudable attempt at displacing anarchy and tyranny with fair, democratic government. It's not only we lawyers, after all, who in various ways take cues from myths in an effort to enhance life. We are dreamers all.

This work, in sum, does several things. It takes a no-nonsense look at that staple in the law student's diet, the appellate opinion. It traces the history behind the law school's long love affair with the casebook form of instruction. This article also explores why the prose style of law-trained people is so often wretched. "Foreign Language" contains two sections translating casebook prose into

plain English, an exercise that fits in with my view on legal training as a language lab. Sections are assigned to critiques of legal science and legal reasoning, and to surveys of first-year law courses in torts and constitutional law.

"Foreign Language" should enable newcomers to legal discourse who are disenchanted with their law dictionary's inability to dispel the fog to grasp more quickly the knack of truly *seeing* The Law. Mark Twain wrote, in a similar vein, about his ignorance of the true nature of the Mississippi River until he trained as a river boat pilot.[20] As a novice pilot, Samuel Clemens acquired a professional eye; meanwhile, his earlier romantic picture of the mighty river underwent revision. Clemens eventually saw, alongside the river's beauty, the river's treachery: faint ripples suggesting hidden rocks or wrecks, a bright sun forecasting wind tomorrow, a floating log signaling a rising river, a slanting mark on the water pointing to a bluff reef that is apt to doom somebody's steamboat.[21]

To see The Law through legally tinted lenses is to see things unseen by the untrained eye — to see both the dream and the reality, the beauty and the beast. Law-trained people see in legal prose the idealism that runs through judicial government, as well as the artifice inherent in lawspeak. The law school casebook's sampling of the folklore of legalism, in short, is best understood if approached not with the attitude of the worshiper fawning over church doctrine, but with the attitude of the anthropologist exploring the rituals of native people.

II. Introduction to Legalism

A. *So Many Words, So Few Answers*

The common law, that loose, ill-defined, ethereal, judge-crafted code of courtroom custom, exists in a nether world that, like a dream, is subject to capture only fleetingly. Statutory and constitutional law are likewise part of a wordy, judge-made wilderness into which law students are sent with very little in the way of map or compass. The path to The Law, paved as it is with the appellate courts' juiceless prose, is heavy going. High-toned, abstract, vague, indefinite legal language, like the witches that impeded Dorothy's trip down the yellow brick road, serves to block student entry into legal Oz.[22]

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20 *See* Mark Twain, Life on the Mississippi (Harper & Row 1917).

21 *Id.*

22 The Wizard of Oz (Metro — Goldwyn — Mayer 1939).

Fledgling legalists profit by understanding early in The Law game why heavy-handed casebook prose is so unlike plain English. To hear lawyers tell it, the reason why legal language is so foreign and inaccessible is that legal affairs, like the rare squiggles under the microscope at which scientists peer, belong to a world beyond the ken of ordinary folk. To communicate about esoteric legal happenings, lawyers argue, demands a special language at which only the legally learned are masters.

This "rare squiggles" excuse for cloudy legalese is one that lawyers understandably favor; after all, law school graduates have invested three long, expensive years in replacing plain English with the legal tongue. Yet, whether the professional tasks we lawyers perform warrant the violence we inflict upon the Queen's English is doubtful. In any event, to novices, law school casebooks written in lawyer English appear designed to disorient and mystify. And it's these cloudy appellate rationalizations for judicial votes that is the prism through which first-year apprentices must view the legal landscape. Beginning students, thus, are at the mercy of Law-speaking judges who, even if they wished to forthrightly state why appeals are won or lost, are handicapped by a professional language allergic to candor and clarity.

First-year students struggling with the mysteries of criminal law and contracts are at some point — when the casebooks' endless puzzles threaten to overwhelm — likely to begin scouring library stacks for a readable guide as to what The Law is really all about. Perplexed novices hope to find, preferably in one slender volume, a narrative that will quickly dispel, in language plain and simple, the confusion surrounding first-year casebooks. But unfortunately, no such single volume panacea exists; the genius who might in a single work capsule all of law school has yet to appear.

The best the law library can offer is a selection of student-guides, composed by law professors and practitioners, that discuss study habits and outline certain formal attributes of legalism. But these conventional introduction-to-law-school manuals suffer, like casebooks, from an addiction to fuzzy legal concepts and from an inability to present The Law in any other way but in the sanitized form endorsed by The Law's image-conscious keepers. What's needed for first-year woes is some plain talk about legal discourse.

The lawyers' professional vocabulary, perhaps out of self-defense, lacks the words appropriate for describing to outsiders the odd ways of legalists. Practitioners of the legal arts are a secretive society. The legal tribe's failure to develop an easily understood

language for looking at itself squares with the profession's belief that exposing legaldom's inner sanctum to public viewing would threaten all legaldom. Bewildered law students in search of a quick library fix must therefore be content with here and there the shedding of, as "Foreign Language" attempts, a faint ray or two of light.

Of course, beginning students in large part must learn to handle legal language the way one learns to ride a bicycle, by crashing numerous times. Falling down and getting up, again and again, is how our legal forebears have acquired legal minds. Still, an early introduction into the secret code aspects of legal language can save the novice needless falls and more quickly put The Law into focus.

This article's attempt at explaining the tangle that is casebook prose asks readers, for the moment, to divorce themselves from the reverence and awe with which many people approach the work of judges. Pure gems of timeless truth may on occasion come down from the appellate courts, but for students keen on picking up the nuances of judicial literature, it's wise to assume that most opinions, like political stump speeches, contain some portion of humbuggery.

Looking skeptically at casebook rhetoric helps to get underneath the lofty language and to better appreciate the precise nature of the work that lawyers and judges do. The Law is a valuable instrument of government, but even so The Law, to be properly understood, first requires a clearing of the air. Dispelling legal myths creates the space needed to produce a more finely-tuned picture of the legal business.

B. Acquiring A Legal Mind

The entrenched pre-law school way of looking at The Law as holy writ obscures how much our government is no government of laws, but rather a government of lawyers. The first-year search for true rules reflects the conventional wisdom that The Law is a near-supernatural collection of sturdy principles offering reasonably clear answers to knotty disputes. Under this scenario, law schools collect and pass on tried-and-true rules of natural law so that law graduates can oversee the ordering of a just society. This version of The Law puts lawyers in the position once occupied by native medicine men and ancient oracles — that of messengers delivering God's (or at least nature's) sanctified prescriptions.

This notion of a fixed and eternal natural law, "higher" than the ephemeral enactment of kings and legislators, is central to Roman jurisprudence and to canon law. English jurists preached this

"higher" law, echoes of which filtered into the American constitution. Thomas Jefferson looked to a higher principle inherent in nature to justify his revolution. From this "higher" law developed the secular religion that today is labeled The Law.[23]

Underlying natural law theory is the premise that order generally governs the universe.[24] The Law is part of this universal order; and being inevitable, The Law is thus not made, but rather is to be discovered. This conventional theology sees the legal order as emerging not from the community's needs and expectations, but from the precepts of an *a priori* logic. Law, as thus conventionally viewed, is seen as an abstraction, not as malleable material. This natural law underpinning gives The Law its conservative complexion, safeguarding fixed and eternal rules from the fluctuations of human passion. Eternal verities, not temporary prejudices, is the touchstone of the venerable laws of nature that tie humans to their past.

At the furthest extreme from such holy writ thinking is the attitude of the jailhouse lawyer. The jailhouse lawyer, impatient to shed his prison stripes, reads prison library law books, searching for the overlooked loophole that will open his prison cell. The jailhouse lawyer cares not a whit for lofty principles. He searches instead for a crack in The Law that the crafty can slip through. The untutored jailhouse lawyer with the unholy loophole focus is, however, in one sense like the student of holy writ: they both have faith that *the answer* is in The Law. The trained legal mind, on the other hand, examines legal text unencumbered by preoccupation with *the answer.* The legal eagle conjures up various interpretations of the legal text and supplies supporting arguments for each interpretation; instead of *the answer,* here's three answers — take your pick.

One way to avoid unlawyerly preoccupation with *the answer* would be to approach legal studies the way political scientists do. Political scientists readily pierce the appellate courts' holy writ facade, viewing legal precepts and principles as ritual and symbol, as dry bones to be rattled and shaken by modern medicine men prior to learned announcement. For political scientists, skeptical of legal doctrine's claim to other-worldly authority and certitude, judicial power is either an instrument of the politically dominant to control wealth and power, an instrument for countering the majoritarian impulses of runaway legislatures, or perhaps an instru-

23 FRED RODELL, WOE UNTO YOU, LAWYERS! 22, 27, 30 (2d ed. 1957).
24 ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 215-16 (1991).

ment for providing the poor and the powerless a voice in democratic government. Give the political scientist more legal vocabulary and a penchant for arguing either side, and he or she would be almost a lawyer.

Yet, I go too far if I am read to banish all vestiges of holy writ from the legal mind. The worshipful attitude toward The Law which is natural to first-year law students is, in modified form, present as well in the fully developed legal mind. Government, especially judicial government, is partly grounded on a faith in our governor's ability to govern in the general interest. The legal mind can't completely discount the faith in the rule of law. That's what is so tricky about the legal mind: lawyers see holy writ — *and* the irreverent loopholes. This is why law teachers mentally combine a reverent outlook toward legal doctrine with considerable skepticism about the integrity of legal reasoning. No wonder law students stumble when introduced to such contradiction. Yet, out of such contradiction comes that odd mixture of faith and disbelief peculiar to the legal mind. To see The Law in lawyerly fashion is, in sum, a unique vision, unique in the way that a throat doctor sees the batman logo, not as a black bat against a field of yellow, but as a yellow pair of tonsils.

C. The Ideal And The Real

Law school's perverse mixture of devotion to and skepticism about legal religiosity breeds something akin to Orwellian doublethink. Law students on the one hand are led to think that judicial opinions are minor gospels and then on the other hand encouraged to play unholy word games with The Law, manipulating doctrine as if lawyering were a sort of lawyer-Scrabble.

Law professors, it must be remembered, are key parts of a legal society which purposefully casts The Law in a romantic light. This romantic theory of a neutral rule of law, even though flawed, is too comforting to give up completely. Law professors are partners in a legal enterprise understandably reluctant to broadcast too publicly the gap between the ideal and the real. The now-you-see-it-now-you-don't way that law professors present The Law comes from a desire to reveal The Law's will-o'-the-wisp nature, but at the same time nurture the symbolic value of The Law in promoting stable government. First-year novices, therefore, are to some extent left to figure out for themselves the meaning of the doublethink atmosphere to which legal minds must adapt.

Insecure neophytes confused in the early weeks of law school,

and tempted to think themselves candidates for some legal trash heap, should take note that the hocus-pocus element in opinions takes considerable getting used to. Despite the early discomfort in learning to manage judicial reasoning, law school is really pretty easy stuff once you get the hang of it. Legal culture may seem foreign and inaccessible in the beginning, but for second and third-year law students, speaking the legal tongue becomes second nature.

Law school, of course, doesn't just teach a foreign tongue. Law school offers a splendid glimpse at how government operates, especially the part behind the scenes. Law school may be, as critic Ralph Nader says, "a three-year excursus through legal minutiae . . . [which develops] corridor thinking and largely non-normative evaluation."[25] Yet it's also a training ground for citizens like Ralph Nader to develop legal language skills useful in monitoring government in a country where legalese is government's principal language.

Law school's first year, then, is a year to slough off, like a snake does with its dead skin, the unlawyerly habits of an untutored mind. Yet transformation into the legal mode of thinking is no skin-deep matter. In an intellectual sense, to enter into the legal realm is to be born again, so that thereafter, with the mind's legal eye, a rule is no longer just a rule. The legal mind looks at the rule and sees two ways to ease around the rule, or else a way, if the rule is inconvenient, to change the question.

The legal mind is in a sense the antidote to the lay notion of The Law as a non-elastic body of rules flush with prepackaged answers. It's the elastic legal mind that is privy to the secret that "The Law is . . . " in the words of W.S. Gilbert, "the true embodiment of everything that's excellent . . . [with] no kind of fault or flaw,"[26] as well as, in the words of Lord Tennyson, a "lawless science . . . [t]hat codeless myriad of precedent . . . [and] wilderness of single instances."[27]

As first-year students gradually give up the idea that legal learning is principally stuffing one's self with doctrinal formulas, law school becomes instead a language lab. Ability to give voice to and to manipulate the open-ended concepts prevalent in legal doc-

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25 Ralph Nader, *Law Schools and Law Firms*, NEW REPUBLIC, Oct. 11, 1969, at 20.

26 W. S. Gilbert *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 226 (3d ed. 1979).

27 Alfred Lord Tennyson, *Aylmer's Field* (1864), *in* A NEW DICTIONARY OF QUOTATIONS 661 (H. L. Mencken, ed., 1987).

trine takes precedence over giving any enduring meaning to casebook doctrine. The key to law school is learning to fashion willy-nilly arguments couched in legal terms as to why this or that piece of doctrine is a good or bad fit to the facts of the case at hand. Law school, then, is where one lives for three years to master a special form of debate. Few legal debaters mistake the judges' formulas, with rare exceptions, as food for the eternal soul.

This language-lab view of law school classes admittedly suggests a pretty narrow scope for legal training. It's the case, unfortunately, that the larger world of values is generally excluded from law study. Legal training, because the rule-of-law focus forces political values under the table, smacks more of the technocrat than of the social engineer. (Of course, the law school experience can lead after graduation to bigger world-of-value things. After all, if there is a political elite in this country, the label goes by default to the community of law-trained people who run our governments, our businesses, and even our private lives.)

Now, again, all this talk about language labs and verbal manipulation games might suggest, erroneously, that courthouse government is less than serious business. But serious business it is, although as with war and politics, legal battles take the form of adversarial combat. To learn to play the lawyers' game requires, in addition to partially removing The Law from its pedestal of pure reason, expanding one's capacity for recognizing and tolerating rampant ambiguity in legal language. First-year students seeking *the answer* complain that instructors hold back the answers to riddles posed by casebook doctrine. Law teachers, on the other hand, must somehow make excuses for the dearth of answers, and promote student tolerance for vague formulas adverse to yielding up firm answers. This training in tolerating ambiguity is hardest to take for those students who, tending to see the world in shades of black and white, are allergic to gray.

Students suffering from a low tolerance for ambiguity should take their cue from novelist Thomas Hardy's experience in "living in a world where nothing bears out in practice what it promises . . . ." and who therefore "troubled [himself] very little about theories . . . [being] content with tentativeness from day to day."[28] The

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[28] THOMAS HARDY, DIARY (1882), *quoted in* JOHN IRVING, A PRAYER FOR OWEN MEANY 519 (Ballantine Books 1989). *See generally* JEROME FRANK, LAW AND MODERN MIND (1930) (discussing psychological desire for orderly legal world, symptomatic of an unconscious need to regain the security of the mother's womb; thus The Law becomes the surrogate womb offering protection from the politicized outside world).

fact that legalism in practice is more a debating game than a science offering certitude is no cause for despair. Yet each school year a few true-believer, low-tolerance legal novices react to casebook smoke-and-mirrors by becoming disenchanted and withdrawing from law school either in body or in spirit.

Such was the experience of a famous literary figure from nineteenth-century Boston who gave his name to an even more famous lawyer-judge son. The senior Oliver Wendell Holmes, before becoming a Boston physician and noted author, read The Law in a relative's private library and attended Harvard Law School. But the senior Holmes cut short his legal studies. He became "sick at heart" with The Law: "I know not what the temple of the law may be to those who have entered it, but to me it seems very cold and cheerless about the threshold."[29]

Of course, if beginners who sample The Law consistently become sick at heart, it may be time to try something else. The lawyers' temple is not for everybody. Disenchanted students should always reserve for themselves the option of withdrawing as did the senior Holmes. But there is no cause for the tenderfoot to become unglued just because the opinions often do. The judges' excuses for decisions serve a purpose, even though it's a purpose that catches beginning law students by surprise. Thousands of novices each year learn that, after eventually giving up the struggle to tie opinions up together with strings of blackletter rules, how much fun it can be to play legal games, and how ambiguity in The Law, like a blessing in disguise, can be a virtue. Obscure legal texts not only trigger the need for lawyer (for a fee) translators, but rampant ambiguity also provides spring in The Law's joints. Elasticity in The Law gives the lawyer-judge room to roam. Doctrinal elasticity allows for change and growth in the legal system.

Even the junior (and future justice of the U.S. Supreme Court) Oliver Wendell Holmes had reservations as a law student: "Truth sifts so slowly from the dust of the law."[30] Yet at Harvard Law, this future legal giant ultimately thought well of his legal training, concluding that "my first year at law satisfies me. Certainly it far exceeds my expectations both as gymnastics and for its intrinsic interest."[31]

Oliver Wendell Holmes, Jr., like the modern law student,

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29 Letter from Oliver Wendell Holmes, Sr. to Phineas Barnes (Jan. 13, 1830), *in* 1 LIFE AND LETTERS OF OLIVER WENDELL HOMES at 65 (John T. Morse, Jr. ed., 1896).

30 GARY J. AICHELE, OLIVER WENDELL HOMES, JR., 74 (1989).

31 *Id.*

faced his first year of law school with unclear expectations about what he was getting into. Professional legal studies, from the Civil War period to now, remain somewhat suspect as a legitimate academic field. Law faculties, full of half-lawyer-half-scholar types, fits uneasily into a university setting dedicated to teaching the myth-free truth and setting minds free from cant. The Law is a wonderful creation, but Shakespeare it is not. Law students, moreover, tend to have more in common with business than with liberal arts graduate students.

Only a minority of law students share the traditional scholar's passion for learning for the sake of learning. Legal recruits, knowing little or nothing about what to expect from law school, sign up for law classes for all sorts of reasons. Some recruits hope to prep for politics, law practice, government, or corporate work; others turn to The Law because a law degree is a family tradition, or, as is frequently the case, because there is at the time nothing better to do, and law school seems such a cool idea, despite all the lawyer-bashing one hears. In any event, those who enroll for professional legal training tend to prefer practical over philosophical learning, skills training over jurisprudential inquiry, poker over bridge.

Speaking of lawyer-bashing, beginning students might well sample the literature that names lawyers as the enemy. Prospective lawyers should not close their ears to what critics of The Law have said through the ages.[32] Law school may be a cool idea, but it's

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[32] *E.g.*, *Luke* 11:52 ("Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.") Less ancient than the Bible, but often reprinted, is Yale law professor FRED RODELL'S classic WOE UNTO YOU, LAWYERS! *supra* note 23, which thoroughly trashes all legaldom. Rodell belongs to a long string of critics who, through the ages, have bad-mouthed The Law. WOE, easy to read, offers a witty review of what the iconoclastic Rodell calls the "legal racket." RODELL, *supra* note 23, at 16. Besides sticking pins into legal balloons, Rodell describes "The Way It Works," a plain-English introduction to first-year contracts' doctrinal lineup of Offer, Acceptance, Consideration, and Performance. RODELL, *supra* note 23, at 31-44. "The Way It Works" is the story of ditchdigger Tony, a partially dug fifty-dollar ditch, and legal Acceptance. A legal Acceptance of a legal Offer adds up almost to an enforceable contract, as the case of Tony v. Boss illustrates. Tony's boss says a fifty-dollar bill will be his if he digs a ditch out to the hen house three feet deep and two feet wide (an Offer); Tony says nothing. When his boss leaves, Tony digs the ditch half-way to the hen house. Whether Tony's digging of half a ditch is a legal Acceptance of his boss's fifty-dollar contract Offer cannot be answered, WOE teaches, by looking at legal definitions of Acceptance. Rather, if the judges choose finally to call the Tony-boss deal a "contract," then ergo, there springs into being an Acceptance of Tony's boss's fifty-dollar Offer. The point is that the crux of the matter is deciding not whether an Offer was Accepted, but whether Tony's boss should be held to his promise. Tony's half-dug ditch becomes, it seems, an Acceptance only *after* the court stamps "contract" on Tony's ditch-digging. Thus the concept of Acceptance has meaning only *after the fact of the decision* to enforce

good for beginners to hear from all sides what they're getting into. Lawyer-bashing authors such as Charles Dickens, who for example in his novel *Bleak House*[33] does a legal burlesque that puts lawyers in the worst possible light (or rather fog), shows how The Law's pretentions toward infallibility can be made laughable. Law students who've seen the English legal system in *Bleak House's* depiction of *Jarndyce v. Jarndyce* (a probate of a will case), will be better able to treat opinions realistically as a literature halfway between gospel and farce.

Jarndyce v. Jarndyce is a probate dispute of such interminable length and complexity "that no man alive knows what it means."[34] In Dickens's fictional critique, the annual fees extracted from the Jarndyce estate have become, for the English bar, veritable mother's milk. Whole generations of lawyers and judges die out of and are born into the Jarndyce case. So long has *Jarndyce v. Jarndyce* droned on that the case produces in *Bleak House's* pages a metaphorical fog covering all London — all this by way of fair warning to prospective law students of the weather surrounding the English common law.

Fiction indeed knows no thicker pea-soup than that issuing from *Bleak House.* And where in *Bleak House* "the dense fog is densest," there sits Temple Bar, next to which, "at the very heart of the fog, sits the Lord High Chancellor."[35] The nineteen barristers in attendance on Dickens's Lord High Chancellor, who himself sits amidst crimson cloth and curtains "with a foggy glory round his head,"[36] manage with their legal nit-picking to further complicate

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the boss's promise. Until *decision,* then, the so-called concept of Acceptance sits vacant waiting for an infusion of enough meaning to cover the case of Tony v. Boss. All this by way of Rodell's showing that Acceptance — not to mention Offer, Consideration, and Performance — is simply a lawyerly word that, even when stuffed with the details of all the past contracts cases explaining Acceptance, doesn't tell us for certain whether Tony's half-dug ditch is *bona fide* Acceptance. By the way, adds Rodell, digging half a ditch may be not only Tony's sweaty Acceptance, but also his Consideration and his Performance — all legal prerequisites of a fifty-dollar "contract." RODELL, *supra* note 23, at 36. Here is WOE's opening paragraph for readers too faint of heart to brave the whole book: "In tribal times, there were the medicine men. In the Middle Ages, there were the priests. Today, there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade for the uninitiated, and running, after its own pattern, the civilization of its day." RODELL, *supra* note 23, at 7.

33 CHARLES DICKENS, BLEAK HOUSE (Doubleday & Co., Inc., 1953) (1853).

34 *Id.* at 3.

35 *Id.* at 1.

36 *Id.*

the obscure points of the Jarndyce probate. As the legal knots tying up the diminishing resources of the Jarndyce estate grow ever tighter, and the slippery arguments of the bewigged barristers become ever more opaque, the fog enveloping the English legal establishment becomes thicker and thicker.

D. What Is A "Chicken"?

Legal language, if rescued from Dickens's fog and placed under some sort of linguistic microscope, would remind one of a battle between red ants and black ants. The red ants, representing the army of weasel words in the legal lexicon, are guerrilla warriors hard to see lurking in the shadows of trees. This red army fights under the flag of *flexibility*. The black opposition troops on the other hand march stiffly across open fields in straight lines, bayonets drawn, eyes front; these conventional soldiers represent legaldom's rigidity by the stiff-necked rule; this black army flies the flag of *stability*. This continuous battle between red flexibility and black rigidity itself resembles nothing so much as the annual struggle in first-year contracts classes to give meaning to the open-ended legal concepts of Offer and Acceptance, a tug-of-war between the forces of *flexibility* and *stability*.

Another piece of contracts talk that bedevils law students looking for solid ground is something lawyers call Consideration. My flea-bitten dog, if I promise to give it to you in exchange for your mangy cat, is probably legal Consideration. Your cat, if you agree to this deal, is likewise plausible Consideration in the eye of The Law (The Law may have two faces, but by tradition is assigned but a single eye). Lawyers refuse to call a deal a contract unless both sides cough up Consideration, flea-bitten or otherwise, to back up their promises.

The law dictionary defines Consideration as "something of value,"[37] which is fair enough, but there's a catch. This isn't just any old "something of value." It's "something of value" in the "eye of the law," which is "something" that refuses the efforts of all lawyerdom to pin down. Which brings us back in a circle, as often happens in Law talk, to what's meant by Consideration. One could say, in exasperation, that Consideration is merely whatever at the moment The Law wants it to be. But such a definition begs yet another question, which is what's meant by The Law, which this

[37] 1 BOUVIER'S LAW DICTIONARY 612 (8th ed. 1914).

article is at some pains to suggest is either an unfair question, or else something almost too slippery to catch in a net of words.

Begging the question, as lawyers are apt to do, by explaining one weasel word in terms of another weasel word, is a routine which first-year students must learn to live with, much like people who fish a lot get comfortable with fishy smells. Being told that Consideration is defined as "something of value" is, however, a relatively minor begging of the question. Though "value" is a fairly vague, red-ant sort of word, still "value" is made of firmer stuff than "the eye of the law." To define Consideration in terms of first "value" and then "the eye of the law" is to beg the question twice. Definitions, in Law, please take note, count for little. Legal definitions are created by judges to mystify juries and to decorate court opinions, and are like the plastic markers golfers use to spot the place on the green for their putting ball: the markers serve only a brief secondary purpose and then are pocketed and forgotten.

Not that "the eye of the law" is void of all content. Among legal insiders up to snuff on contracts lore, Consideration has some, albeit faint, boundaries. Legal beginners remain beginners, though, as long as they fret overmuch about the paucity of clear boundary lines. Lawgiver Moses used up, alas, the last of the stone tablets. The judge-made, customary law of contracts and property and all the rest is written in the dust on a windy day.

Law school features words detached from conventional dictionary moorings and aimed in legal argument like darts thrown at a game board. Legal argument is a means of scoring legal points. Law school teaches how to score legal points. The capacity for argument, after law school, seems almost to have been bred into the *Juris Doctor's* bones. When, as happened in one case,[38] a chicken farmer offers "chickens" as Consideration for a contract, and then later delivers "hens" instead of the young "fryers" the buyer wants, any lawyer worth chicken feed stands ready to argue that a "hen" is (or is not) a "chicken."

The Law, like the president of the United States, has a diverse audience to try to please. The lawyer's rule-studded arguments are like the politician's parade of crowd-pleasing slogans in that The Law is a big tent accommodating diverse and often inconsistent ideas. The Law, with its overlapping principles and parallel rules flowing off in divergent directions, is like a river spreading out over the marsh as it nears the sea, confined to no predictable, single

[38] Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) ("The issue is, what is a chicken?") (opinion of Judge Friendly).

channel. Legalists preach that "a judge must determine, not to the incertain and crooked cord of discretion, [but] by the golden and straight mete-wand of the law,"[39] but in the end we lawyers, robed and otherwise, in practice run the legal business pretty much the way we please. The Law, like the novelist George P. Elliott said of art, is first and last a defiant gesture in the face of the world's disorder. It's a defiant gesture, moreover, that leans awfully hard on the magical qualities of language. To master legalism is to become expert at managing a metaphysical language that gestures defiantly at a disorder it can never completely control.

Legal writing almost always, according to Yale law teacher Fred Rodell, contains two flaws: "One is its style. The other is its content. That, [Rodell concluded], about covers the ground."[40] Jeremy Bentham, another harsh critic of the legal scene, summed up almost two centuries ago the lawyer's debt to his linguistic heritage: "[T]he power of the lawyer is in the uncertainty of the law. . . . His wish was to see all waters troubled: — why? [Because he feels], in so superior a degree, a master of the art of fishing in them."[41]

Much of the blame for the vague verbiage complicating the first year of law school can be traced to the political (in the broadest and most laudable sense of the term) element inherent in things legal. Just as war is said to be politics by another name, so is The Law a form of politics thinly veiled. Appellate decisions are, since judges cannot escape making value judgments, political decisions. Such political-judicial choices must be made in order to fill in the gaps in The Law that legal word-magic papers over.

Beneath the politically neutral veneer of legal culture, judges (and juries) therefore face the same inescapable policy-making chores that confront legislators. Unlike legislators, however, judges are guardians of an important social symbol of political neutrality. Judges, therefore, must make like the puppeteer who pulls strings from behind the stage. Because of the felt social need to preserve the rule-of-law symbol, the judge must be an especially sophisticated breed of politician. And as close observers of government know, the higher the post a politician (or judge) attains, the more numerous are the inconsistent postures that must be smoothed over by a rhetoric tending ever toward the metaphysical.

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39 LORD EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (1642), *quoted in* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 168 (1960).

40 Fred Rodell, *Goodbye to Law Reviews — Revisited*, 48 VA. L. REV. 279, 279 (1962).

41 Letter from Jeremy Bentham to Sir Jas. Mackintosh (1808), *in* 10 THE WORKS OF JEREMY BENTHAM 429 (J. Bowring ed., 1962).

Professional legal life involves mixing and swallowing two opposing ideas. Law students, in coping with casebook legalism, must learn to live with the straight-jacket idea that rules relieve judges from having to *make* The Law afresh each day, as well as the idea of half-empty formulas into which judges have no choice but to feed political preferences. Given this double-jointed situation, judges necessarily must lead shadowy intellectual lives, and first-year law students must come to terms with the insincerity in how The Law presents itself to the outside world.

This double aspect in things legal may be why a Harvard law teacher once defined a legal mind as a mind that can think of something tied to something else, without thinking of the something else to which the something is tied.[42] Learning to live a professional life bottomed on such mental incoherence can, for novices, cause anxiety. This article's attempt at distilling something of the essence of the legal frame of mind — at describing the "something" as well as the hard-to-discern "something else" — is aimed at making The Law's incoherence tolerable.

Trying to boil down legalism by thoroughly decoding casebook prose is something law teachers commonly don't do. Many law teachers shy from revealing legalism's split personality. The comforting picture of The Law as an *a priori*, transcendental world of rules external to human passions is a "truth," even if only a truth by convention, which most legal people by training and by inclination are apt to defend against overly fierce skeptical fire.

The legal profession's official story line about judicial neutrality is easily swallowed, if only in aspirational terms. To question openly the possibility of a pristine rule of law is, at best, a breach of good legal manners, and at worst, an act of disloyalty to the body politic. So if casebook preaching is to be taken with a grain of salt, as I believe it must be, the salt must often be smuggled in.

The law school casebook, by the way, is a lawyer-training device developed toward the end of the previous century.[43] Before the practice of training lawyers in a formal academic setting took root following the Civil War, hatching out young lawyers was, for the most part, accomplished through law office apprenticeships. And although when the twentieth century opened, law schools were challenging the apprenticeship system for dominance, not

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[42] Thomas Reed Powell, *quoted in* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 101 (1935).

[43] ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 54-56 (1983).

until much later did the American Bar Association complete its campaign to make lawyering a class act by phasing out apprenticeships and giving law schools their monopoly.[44] The result is that sometime early in the twenty-first century the law-office-trained attorney will finally reach extinction, and the academic law degree will be the universal legal credential.

Professional legal training, once full-time law professors a century ago began to create their near-monopoly, has stuck pretty much to a single pedagogical track. This academic path to legal learning — a bookish and supposedly scientific path — was cleared and marked in the late 1800s at the Harvard Law School.[45] The Harvard faculty decided that law students learn best how to think legally, not by imbibing a steady diet of blackletter rules, but rather by reading and dissecting the opinions in which judicial elites explain, sort of, their appellate votes.

When Harvard Law scrapped the legal textbook's rule-focused commentaries on historical judicial practices in favor of collections of opinions, other law schools soon copied Harvard's casebook form of instruction. So much so that today law classes around the country look much alike. Sharp-tongued Professor Kingsfield of *The Paper Chase*[46] could have given his casebook-geared lectures in contracts anytime between the Spanish-American and Persian Gulf Wars, and they would have fit easily into the mainstream of legal education. Certainly law school has changed little since the 1950s when my classmates and I opened our first-year property casebook to the tale of a fox pursued by hunters with the aid of, not hounds, but lawyers.[47] With that opening casebook chase we commenced pursuit, the same as beginning law students do today, of that will-o'-the-wisp called The Law that, for the lawyer, lasts a lifetime.

Wherever the truth lies between the idealist's rule of law and the skeptic's rule of lawyers, The Law in its temple is an awesome concoction: a blend of common, statutory, and constitutional law into a grand legal trinity. So intricate is this jurisprudential triumvirate that the novice student's transmogrification into a *Juris Doctor* graduate requires a three-year immersion into the casebook's endless chase of the rule that will not be pinned down. Learning early

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[44] *Id.* at 172-80.

[45] *Id.* at 52-53.

[46] THE PAPER CHASE (Twentieth Century Fox 1973).

[47] Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). This old case is a favorite of casebook editors. *See, e.g.*, PROPERTY (Jesse Dukeminier & James E. Krier eds., 2d ed. 1988).

on in law school that the casebook's messages are coded, and therefore in need of deciphering, is lesson number one.

III. Pursuit of Deathless Rules and Wily Foxes

A. *Chasing After The Law*

The struggle, during an anxious first year of law school to translate into something sensible the casebook's coded communiques, is for many lawyers not soon forgotten. The first-year effort to pin down the elusive principles imbedded in the opinions was for me like the blindfolded attempt at a party game to pin the tail on the donkey. Then, halfway through the first-year casebooks, it dawned on me that the impeccably correct cache of legal gems that I imagined lay imprisoned inside the judges' rationalizations was an illusion.

Something else about legal talk became, in that rookie year, increasingly obvious: the legal lexicon, like magicians' hats, can yield a surprising variety of rabbits. A *Juris Doctor* is one learned in a respectable form of word-magic. In the legal beginning was the legal word, and the legal word, when put in the pressure cooker of a lawsuit, often turns into a can of worms. Opposing lawyers each grab a worm, and each lawyer's wiggly prize is transformed into a different interpretation of The Law.

As neophytes at legal wordplay, legal novices become entangled in airy abstractions, in contradictory axioms, in verbal gymnastics, in arguments and counter arguments ad nauseam: in words galore. One such classic 1805 battle of wiggly worms involved the fox hunt mentioned earlier, in which adversaries armed with legal learning followed their wily prey all the way into a New York appellate court. *Pierson v. Post*,[48] as this famous fox hunt is known to lawyers, illustrates how the legal mind can transform a simple sporting event into a lawyerly tangle.

The opinion in *Pierson*, long a staple of first-year instruction in The Law of property, tells of fox hunter Post who, with his pack of hounds, gives lengthy chase over public lands.[49] At hunt's end, Lodowick Post believes himself to be the rightful owner of the fox he has chased down.[50] Post fancies himself the fox's owner even though the fox in question was killed by another hunter named Pierson who, seeing the fox run into a corner by Post's hounds,

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48 3 Cai. R. 175.
49 *Id.*
50 *Id.* at 175.

joins the hunt tardily and minus an invitation.[51] Post insists that the last remains of poor Reynard belong solely to him (Post) because, as Post's lawyer legally reasons, Post's close pursuit of the wild beast is what primarily leads to its capture.[52]

Casebooks are full of chases in which competitors get detoured into court. For example, divorcing spouses chasing the leasing rights to the couple's rent-controlled apartment; corporate takeover artists chasing a target company's preferred stock; wily investors running down a capital gains tax deduction in the Internal Revenue Code; auto accident victims seeking compensation under the other drivers' liability insurance coverage. Casebook opinions are, in this sense, post-chase essays "proving" in doctrinal terms why some pursuers deserve, and some don't, their prey.

In the classroom, law professors supplement casebook cases with hypothetical cases (by turning a harassed fox into, say, a pet rabbit), and ask students to extract from legal doctrine a solution for pet rabbit cases. First-year students, until disabused of their faith in The Law's ability to pull "true rule" rabbits out of a hat, strain to figure out which of the casebook's formulas contain the name of the true legal owner of a contested rabbit. The following discussion, which concerns a hypothetical version of Pierson against Post, assumes, however, that ordinarily no rule fits snugly these kind of disputes, which is why disputes get litigated. What follows is intended as an antidote to overwrought student submission to the tyranny of rules.

A translation into plain English of the original opinion in *Pierson v. Post* is, by the way, set out in a later section. For the moment, though, I've altered *Pierson's* facts. Note in what follows how the legal system wraps itself around the bare facts of a dispute so as to complicate an otherwise simple matter — how, that is, judge and jury, hunters and foxes, and those rules, maxims, axioms, doctrines, principles, standards, canons, tests, formulas, precepts, and guidelines that lawyers spin into contentious briefs, come together in a tangle in court.

In this fictitious chase of Br'er Fox, assume a hunter named Pierce jumps late into the chase and corners the coveted beast. Pierce fires a poorly-aimed shot that grazes the fox's head, stunning the animal. The other hunter, whose name is Peg, had with his hounds jumped the fox and, until Pierce's intervention, had been in close pursuit. Peg arrives immediately after the shooting

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51 *Id.*

52 *Id.* at 177.

to claim legal title to the fox (a claim rejected in *Pierson v. Post* on the theory that actual capture, not mere close pursuit, is the key to legal ownership). Peg, in this fictitious case, harangues Pierce, insisting *Pierson's* capture-not-close-pursuit ruling was a misreading of The Law. Pierce, exasperated with Peg's legal lecture, picks up the (apparently) dead fox by its tail, and tosses the beast at Peg.

At this moment the stunned fox, its sleep disturbed by the bickering over title, revives. In mid-air, the oft-chased beast becomes what the lawyer for a badly-bitten Peg would later refer to in court as a lethal weapon. Peg's formal complaint in the damage suit files tells the rest: "Defendant Pierce's wrongful release of the wrathful beast proximately caused plaintiff Peg to suffer severe bites and multiple lacerations; said personal injuries have led to plaintiff's damages, by way of medical expenses, lost income, and grievous pain and suffering, in the amount of $50,000."

"Query," as a teacher of fox-bite law might say to a first-year torts class, "what does The Law say to us about liability for fox bite in this hypothetical Peg against Pierce?" A rank beginner might rashly conjecture that plaintiff Peg loses his damage suit because of the old property rule that close pursuit falls short of establishing ownership of a wild fox. But this overlooks the fact that Peg, in this hypothetical lawsuit, isn't claiming ownership or asking for damages for property taken; Peg instead asks that Pierce, because Pierce tossed a lethal fox, be made to pay damages to cover Peg's fox-bite injuries. So the capture-not-close-pursuit rule of property is irrelevant to the personal injury tort issue.

A beginner might next suppose that there must exist some other legal principle settling the question whether plaintiff Peg can recoup his personal injury losses from Pierce. Yet as time (in first-year law classes) will tell, not even the cocksure professor of fox-bite law has firmly in hand a principle that will yield *the answer.* Airtight answers are such rare items that frequently the only answers proposed in law classes are those extracted from student victims by professors posed to gun down first-year efforts to achieve certitude. After such target practice at student expense, an exasperating Professor Kingsfield then poses another unanswerable question, and the classroom game of hide-and-seek begins afresh.

This law school regime in which there are no firm answers, no clear right and wrong, is one reason why law students who begin first-year study as idealists risk ending up as legal guns for hire. After a while, what is right and wrong tends to get lost in the legalistic shuffle. Law students must be wary, as they learn to think like

lawyers, of losing their pre-law personalities, their friends and spouses, their politics, and even their souls.

H.L. Mencken once observed that the legal profession "sucks in and wastes almost as many [good men] as the monastic life consumed in the Middle Ages."[53] Mencken as usual fudges, but echoes of Mencken's complaint linger. Crack the law school code if you will — but beware lest dry legal doctrine smothers all emotion. Juiceless doctrine purports, falsely, to explain everything. The Law, intolerant of inexplicability, insists that each decision is driven by a rule. Feelings, doubts, and hesitation are by convention out of legal bounds. The law student sucked unknowingly into all this forced and inhuman certitude can end up confined to a narrowly structured cosmology, and lose all sense of a freewheeling, unindoctrined imagination.

Now before analyzing further Peg's fox-bite case, think about why The Law of the appellate-focused law school is nowhere nailed to the wall for easy viewing. The reason is that The Law, so far as easy viewing goes, is an ambitious failure. This is why the experienced lawyer worries less about what The Law says than who the judge is. The unstated rationale for the law professor's classroom routine of questions-but-no-answers is to show that the rules lawyers deal in have soft centers. The judge, or rather her debate-concluding *decision*, it turns out, is The Law; the doctrines paraded in briefs, arguments, and opinions are background music.

Disputes serious enough to wind up in court are there because ambiguity in legal discourse forestalls settlement. Turning doctrinal ambiguity into decision calls for judge and jury to make choices, to choose, under cover of rule-of-law ritual, winners and losers. Yet in shifting the focus of study from doctrine to *decision*, students must appreciate that doctrine, though it cannot dictate, does influence judicial choices. Doctrine first of all affects the way legal issues are phrased; and doctrine captures the lessons of past judicial experience. Doctrine may not yield predictable results, but it reduces the scope of discretionary choices judge and jury must make. Judge and jury in the end make the hard choices for which The Law's general propositions alone are too blunt an instrument. In a changing world, history's lessons wrapped in doctrinal dress will never be the sole standard for judging what's right for today. The lawyers' body of rules, like a dead battery, needs a jump-start from a judge and jury in tune with current demands and expectations.

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[53] H.L. Mencken, *Editorial*, AMERICAN MERCURY, Jan. 1928, at 35.

The ideal of a rule of law, meanwhile, comforts those who crave a legal universe of certainty and predictability. (Law students, facing law exams amid casebook disorder, likewise crave a solid framework to hang their cases on.) But students of judicial theology must resist the lure of a rhetoric promising more orderliness than life's complications permit. The messy truth is that the cases students read are decided, despite the casebook's air of doctrinal inevitability, amid surprising disorder and human fallibility.

Were students assigned to read the competing lawyers' briefs filed in appellate cases, this general doctrinal disorder would be far more apparent. Appellate briefs are elaborate exercises in stretching legal axioms to their breaking points. The following fox-bite discussion illustrates this doctrinal disorder. First though, a few words about procedure. The way lawyers see it, everything that goes on in the courtroom is either a matter of procedure or substance. Procedure concerns how and when a case proceeds through trial and appeal, and how responsibility for decision is divided between judge and jury. Substance concerns the formulas for socially desirable conduct, formulas that in theory spell out to judges and jurors directions for doing the right thing — you know, The Law.

The following comments on Peg's hypothetical fox-bite suit illustrate that when substantive doctrine proves to be, as it so often is, pliable, what remains is to see how procedure takes over. By this is meant that the typical indeterminate rule is fleshed out with the policy preferences of judge and jury according to legally blessed procedures for standardizing the roles played by judge and jury. Understanding the precise nature of what judge and jury do, however, is complicated. Conventional legal textbooks repeat, for example, the old saw about juries deciding only fact questions and judges deciding only law questions. And perhaps in centuries past this description fit the way judge and jury split the job of judging. But no more.

You, dear reader, are here again asked to entertain a description of the legal (law-fact) process that is at odds with conventional legal thought. Such stepping outside of The Law's official description of itself to take an unvarnished look at legaldom is difficult for the novice, but, for a clear picture, necessary. In the law-fact area, legal language is woefully inadequate as an indicator of what judges and juries do. With respect to the division of functions between judge and jury, the legal textbook picture of the jury as sole factfinder and judge as sole lawgiver is belied by the reality that

judges regularly intervene in factfinding, and juries are heavily involved in deciding legal (policy) questions. This means judge and jury collectively choose among any conflicting factual versions of exactly what happened, say, on the day Pierce unleashed his foxy weapon at poor Peg; and judge and jury likewise cooperate in the question-of-law job of deciding, on the basis of the earlier what-happened determination, whether Peg *ought* under such circumstances to be awarded compensation.[54]

Learning the procedure for this judge-and-jury partnership in factfinding and lawmaking would be a hairy business even if the textbook description of the law-fact division weren't so cockeyed. When you add textbook confusion about the role of judge and jury to the confusion about how much rules contribute to decision-making, you see why The Law is a maze. The casebook's rationalizations are, after all, with all the nuances of procedure and subtleties of legal lore, legal puzzles that even veteran lawyers strain to decipher.

Lawyers earn their fees by being able to maneuver in such troubled waters. Lawyers for a Peg or a Pierce can stuff briefcases full of principles and maxims "proving" either side of the fox-bite argument. Parallel sets of rules (and precedent cases) pointing vaguely in different directions is a key feature of the appellate world. Rules, as a close reading of opinions shows, tend to travel in complementary pairs, each pair containing generalities out of which opposing lawyers draw divergent arguments. After a few months of indoctrination in casebook sophistry, the incoherence in a system that both worships rules and at the same time avoids capture by those rules becomes the norm—and that's when, from the student egg, a lawyer is hatched.

Now for a closer look at how *Peg v. Pierce* touches on common law (unwritten, but hinted at in opinions), statutory law (written, but in legalese), and constitutional law (written, but not in stone). Our primary concern is dividing up *Peg v. Pierce* into legal issues for judge and jury to chew on. And this raises the matter of what kind of questions do trial judges actually send to juries, and what kind of questions do judges keep, as it were, under their robes.

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54 The law-fact distinction in legal discourse is noteworthy for the artificiality of the distinction. *See* Jerome Frank, *What Courts do in Fact*, 26 ILL. L. REV. 645, 652-53 (1932) ("The formal law description of the judicial process is false where juries are involved."); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

B. Judge And Jury

To speak lawyerly about title to a captive fox (property) or about fox-bite damage liability (tort), the affair must be transposed into the terms in which lawyers at work think and speak. Ordinary English is out, the vernacular of legalism is in. The dispute about who, in fairness, should bear the costs of Peg's fox bite, instead of a straightforward matter of moral choice, becomes in lawspeak a legal issue. Legal issues revolve around legal concepts such as Negligence and Battery, two pieces of tort law of interest to the lawyers in *Peg*.

Tort is an overarching legal category covering the whole personal injury area. It includes sub-categories such as Negligence and Battery. Negligence and Battery are examples of a dozen or more theories for recovering tort damages. A tort, by the way, may involve either unintentional or intentional (defendant) conduct. Negligence is an unintentional variety of tort; Battery is an intentional tort. Revolving around Negligence and Battery, moreover, is an array of even more subordinate pieces of The Law.

In *Peg*, Negligence and Battery are legal labels that Mr. Peg attaches to his fox-bite complaint so that he qualifies for entry into tort court. Whether Peg's suit for fox-bite fits more easily into the Negligence or Battery pigeonhole will depend on discovering at trial further particulars about why Pierce aimed the fox at Peg. Law students, by reading a variety of tort cases, develop a feel for which claims for wrongful personal injury fit into which categories of tort.

Placing *Peg* tentatively into the Negligence category means one trial issue likely to be raised is this: did defendant Pierce use Reasonable Care to avoid injury when he threw the fox at Peg (Negligence doctrine says that if Pierce failed to use Reasonable Care, he is Negligent and therefore liable for personal injury damages)? Now that this Reasonable Care issue has been isolated, who decides it, judge or jury? Whether the Reasonable Care issue is for the jury depends ultimately on judicial *custom*.[55] Lawyers call Reasonable Care issues "Fact" issues for juries. The circumstance that Reasonable Care calls for a value judgment about "reasonableness" — about who *ought* to pay for the biting accident — and is in no sense an issue of empirical fact, is of no moment. Conventional judicial rhetoric about the jury being limited to factfinding is misleading;

55 *See* BASIC CONTRACT LAW (Lon L. Fuller & Melvin Aron Eisenberg eds., 4th ed. 1981).

Reasonable Care issues go to juries despite the circumstance that "reasonableness" begs an *ought* answer, and involves no dispute whatsoever about what, as a matter of plain English, happened factually.

In the courtroom, where all issues are either Fact or Law, many observers are so used to textbook platitudes about jury "factfinding" that they never stop to think about the intellectual chore that juries are actually asked to perform. Although juries do help solve factual disputes about what witnesses saw, touched, tasted, smelt, and felt, juries also help solve nonfactual disputes calling for policy choices. The lawyers' Fact therefore may or may not be plain English fact. Only in legal antiquity did juries decide only factual matters of what happened; yet, the factfinder label borne by the jury remains in place despite later expansions of the jury's role into issues that at bottom are about who *ought* to pay. This is why distinguishing between questions for the judge and questions for the jury is a matter finally of courtroom custom — with the legal labels of Law and Fact applied after the fact.[56]

The lawyers' Law-Fact distinction is, in short, unrelated to the lay speaker's "law" and "fact." When the judge says issues given to the jury are Fact, what the judge is really saying is that *any issue*, once passed to the jury, by legal definition becomes an issue of Fact. So, for instance, if in the unlikely event jurors are formally asked their opinion on socialized medicine, then in the eyes of The Law even such a political judgment becomes, inexorably, a finding of jury Fact. Common English words from off the street like "fact" are in this way adapted for legal use by draining them of lay meaning and filling them with new legal meaning. Legal language for this reason bears more than a passing resemblance to that kind of secret writing in which the content of words has been rearranged to fit clandestine convenience.

Compare for a moment the common, garden variety law-fact distinction as it's used among the planet's non-lawyer English-speaking peoples. For the most part, separating the factual from the nonfactual requires no intellectual gymnastics. Putting aside for now the lawyer's twist on the Queen's English, the details of *what happened* at the scene of the hunt the day the fox attacked Peg

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56 *See* Nathan Isaacs, *The Law and The Facts*, 22 COLUM. L. REV. 1, 11-12 (1922) ("Whether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law."). *See also* Willard H. Pedrick, *Causation, The "Who Done It" Issue, and Arno Becht*, 1978 WASH. U. L.Q. 645, 647.

are, if disputed, clearly factual disputes, a clear-cut inquiry into pure history (did Pierce see the fox open its eyes and so have reason to suspect that the fox he tossed at Peg was playing possum?). On the other hand, once some version of what actually transpired that day is adopted for courtroom purposes, whether Peg, on the basis of such a historical event, *ought* to collect money from Pierce is, for plain English proponents, clearly a nonfactual moral-policy-political-legal question.

What precisely happened on the day Br'er awoke and attacked Peg is, like the old question about the precise New World spot where Columbus first landed, a (plain English) factual issue because these are events found in the empirical world — events objectively verifiable. Peg's and Columbus's stories are pieces of the past tied to evidence of what witnesses heard, saw, tasted, felt, and smelled. A factual matter is an event or object ordinary citizens point to by using words of description such as "furry red tail." The beach where Columbus landed may never be identified with complete certitude; but whatever, the inquiry remains a factual one, a matter of finding enough empirical evidence to permit a description of that lost Caribbean strip of sand. This plain English "fact" is physical, not metaphysical.

Suppose now that whatever factual dispute that exists about what happened in the woods the day Peg was bitten is settled. No descriptive issue remains. What remains is metaphysical, the policy issue of whether Pierce ought to bear the costs of Peg's injuries. A comparable (and non-empirical) question, to revert to Columbus, is whether that great navigator should be judged blameworthy for driving his sailors so hard that their health was impaired. Such questions about Pierce's and Columbus's blameworthiness prompt words not of description but of judgment such as "ought" and "fault" and "reasonableness." Words of judgment signal a policy evaluation of Pierson's or Columbus's conduct, the sort of intellectual task we associate with legislators (or maybe judges) when they're shaping the nation's politics. This is the kind of evaluation into policy that only lawyers wedded to legal cant would label, as they often do, an inquiry into Fact.

Deciding whether defendant Pierce failed to use Reasonable Care, whether decided by judge or by jury, and whether given the lawyers' label of Law or Fact, is in any event no mere empirical job of describing a past real world event. Evaluating the merits of forcing Pierce to pay damages is (in the broad sense) undeniably political. What's called for is an *ought* judgment involving moral,

economic, and social factors. In sum, if plain English suddenly came into vogue among the legal crowd, what Pierce *did* to Peg would be a matter of fact; and what the courts *should do* about what Pierce *did* would be, on the other hand, a matter of legal policy or law.

The terms Law and Fact are therefore, to trial lawyers, nothing more than a sort of legal shorthand for designating how lawsuit issues are split between judge and jury.[57] Law and Fact labels in legal language camouflage the true nature of the roles of judge and jury. To intone that the Reasonable Care issue in a Negligence lawsuit is for the jury (which is customary legal procedure) marks this matter a Fact issue. Yet the Fact label by itself fails to reveal whether the jury's job is in reality that of historian, or policymaker, or both. Since juries decide what-happened issues as well as who-should-pay questions of policy, careful lawyers look behind the Fact label and tailor trial strategy to fit the jury's actual role in the particular case, be it historian or policymaker.

Suppose, at the fictitious trial of *Peg v. Pierce*, the testimony differs about whether Pierce knew, when he threw the fox at Peg, whether the fox was dead or alive. Peg says Pierce saw the fox wake up; Pierce claims he saw no movement, and thought the fox was deceased. This issue about what happened (in plain English, a fact question) would be passed to the jury as a preliminary part of the Reasonable Care (Negligence) issue. Once the jury settles on a preferred version of what Pierce knew and when did Pierce know it, still the jury must — in judging whether Pierce used Reasonable Care — in essence, judge whether Pierce's conduct merits making Pierce pay damages.

So here is what the Reasonable Care inquiry boils down to: a job for the jury as historian to reproduce the scene in the woods; and a second Law-making job for the jury in judging whether Pierce under these circumstances deserves being labeled Negligent and saddled with Peg's fox-bite costs. Simply calling the jury's inquiry into Negligence a matter of Fact, as legal custom dictates, obscures the broad waterfront which the jury is given to patrol. Nor is the Law-Fact shell game limited to passing the pea between judge and jury.

Appellate judges also use the Law-Fact distinction to justify examining certain appeals from lower courts and agencies more rigorously than others. Legal theory says appellate judges are to

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57 *See* LEON GREEN, JUDGE AND JURY 279 (1930).

scrutinize thoroughly a lower tribunal's conclusions of Law; findings of Fact, on the other hand, merit a weaker, relatively cursory check.[58] The fact that legaldom's Law and Fact overlap so as to be flip sides of the same coin makes it awfully convenient for appellate judges to vary the intensity of judicial review to suit the moment. High court judges artfully manage the situation by attaching the Law label when opting for a vigorous review, and the interchangeable Fact label when preferring a passive, once-over-lightly review.

Behind all this judicial power-playing with the elusive Law-Fact distinction, there are laudable reasons for subterfuge. When judges pass policy (Negligence) issues to juries unfettered by concrete guidelines (Reasonable Care) for decision, jurors have the flexibility needed to shape grass-roots decisions to fit the current community mood.[59] On the other hand, judges can control, with subtle Law-Fact maneuvers, runaway juries that need reining in — and at the same time keep alive the tradition of using juries to promote grass-roots democracy.

Understanding the legal process requires persistence in digging beneath the legalisms to see what's going on, in refusing to assume, in other words, that Fact means fact. The judiciary's song and dance about Law and Fact, moreover, doesn't begin to lay bare the complicated way in which judges share the courtroom workload with jurors. So, given this briar patch of procedure and doctrine, let's look more closely at The Law of Negligence and Battery and at Peg's fox bite claim.

C. Negligence Or Battery

The torts casebook, no big surprise, offers no final solution to cases like Peg against Pierce. No law book anywhere can or does spell out who must, in Law, pay the costs of accidental injuries. What casebook study illustrates, instead, are the terms of legal debate, the courtroom procedure for structuring argument, and the method by which judges divide chores between judge and jury. The code language in which lawyers and judges carry on this wordy business includes, besides Law and Fact, such legalisms as Offer and Acceptance from contract law, Manslaughter and Malice Aforethought from criminal law, Fee Simple Title and Covenant

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58 *See* ADMINISTRATIVE LAW 75 (Kenneth Culp Davis ed., 6th ed. 1977).

59 As Judge Learned Hand said *in* CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY: THE REPORT ON THE ARDEN HOUSE CONFERENCE, Dec. 16-19, 1958, at 118 ("We say to [juries in negligence cases]: 'What do you think is fair? What do you think is reasonable?' We call it a question of fact, but we have to close our eyes when we say it, for obviously it isn't.").

Running With The Land from real property, and of course those two heavyweights championed by Peg's personal injury lawyer, Negligence and Battery.

To suggest that Negligence and Battery have exotic legal meanings misses the mark. More to the point is a reminder that the Negligence and Battery concepts are to a large degree empty of any meaning, exotic or otherwise. The trick in adjusting to legalspeak is understanding how these code terms sit back and wait for judge and jury, with the prompting of imaginative lawyers, to fill up their empty interiors with shifting meanings on a case-by-case basis.

Suppose, for example, that a *Peg v. Pierce* jury, after agreeing on a version of the factual circumstances surrounding the fox bite, concludes that Pierce in fairness should pay Peg's losses. The jury expresses its pro-Peg sympathies by labeling Pierce deficient in Reasonable Care, which is a roundabout way of saying that Pierce was Negligent, which is a roundabout way of saying that fairness demands that Pierce pay. Until the jury injects its notion of fairness into quiescent Negligence and Reasonable Care, these legal labels are like mute actors in search of a playwright.

Thus, the jury by its judgment gives meaning to open-ended Negligence. But it's a tentative meaning. Slightly different circumstances surrounding the tossing of a lethal fox, or the seating of a different set of jurors, will alter in the next case the meaning of Negligence. The legal system begins its work afresh with each new case. Negligence, when the *Peg v. Pierce* hearing ends, becomes again a half-empty vessel. In the next case, judge and jury will again flesh out with intuitive notions of justice The Law's skeletal doctrines.

Legal beginners, awash with casebook rhetoric that is hard to shape into a manageable package of principle, may think, as I once did, that the legal scene is hopelessly short of rhyme and reason. But over time the malleable, question-begging aspect of legal doctrine begins to make sense. It all adds up to a system in which a surface appearance of neutral rules satisfies the human craving for equitable order, and yet The Law's formulas are loose enough to permit discreet adjustment to meet current demands and expectations. Fuzzy doctrine in the end accommodates the changing attitudes of judge and jury about public policy.

Tort law provides a semblance of structure in the form of a rule. The rule says that if someone like Pierce is Negligent, and is the Proximate Cause of injury to another, he must pay damages. Negligence, defined in terms of (less than) Reasonable Care, is the

trigger for liability. Yet the indeterminacy of Reasonableness obviously begs the question of whether Pierce ought to have to pay. It is with reference to such question-begging doctrines that first-year students, bombarded with novel fact situations, are asked to spot the all-important legal issues.

So, although we cannot confidently predict whether Pierce in court can collect fox-bite damages, we can practice at this point at least what students of casebook opinions are asked to do. Students are asked to spot, from among a stream of facts and the relevant legal doctrines, what law teachers call the "issues raised." Note, therefore, in our stream of fox-bite facts, the presence of an issue other than the Negligence issue. A practiced casebook reader such as Peg's lawyer, in reviewing the raw facts about Pierce's fanciful fling of a fox might well consider, as an alternative to the Negligence theory of suit, a Battery theory. This in turn raises the question of how a complex of Battery doctrines translates into formal issues of Law and Fact for judge and jury.

It would be neater of course if fox-bite (or auto crash or defective lawn mower) cases all fit into a single tort pigeonhole. But the legal process, to the consternation of neat-nics, often tolerates overlapping categories such that Negligence and Battery concepts may each cover the same fox bite. Practiced legal minds adjust easily to the possibility that an angry fox can stir up a legal flap by way of Battery, and at the same time start an argument on a Negligence theme. Such fluidity in reasoning is one reason why law schools produce so many politicians.

So, tort lawyers scanning Peg's fox-bite claim would give thought to both Negligence and Battery (and perhaps even a third tort theory of liability, Intentional Infliction Of Mental Distress) and stand ready to argue for or against all such theories. Lawyers can do this because their legal minds are full of casebook techniques for debating Battery or Negligence. The casebook formulas may be somewhat removed from a fox-bite scene, but yet are close enough to serve as raw material for composing briefs for either Peg or Pierce.

The fact that Battery is an intentional tort, and Negligence is wrongdoing of an unintentional sort, doesn't necessarily mean Pierce's throwing the fox at Peg fits under one of these tort theories and not the other. Although Pierson's conduct, to the lay mind, could hardly be deemed intentional and unintentional at the same time, the legal mind glides over such illogic. "Intentional," as every law student soon learns, is one of those words so

fuzzy around the edges that it slides imperceptibly into the equally fuzzy edges of "unintentional."

As for the Battery theory of damage-suit recovery, here again casebook formulas are loose as a goose. The Battery rule, in fox-bite terms, says that if Pierce's ungentlemanly transfer of the fox to Peg amounted to an intentional Hostile Touching, then Pierce indeed Battered plaintiff Peg, and must pay for his tort. Other equally abstract statements of the Battery rule, by the way, are to be found in appellate opinions; all, however, like the Hostile Touching formulation, fall short of settling for good our hypothetical *Peg v. Pierce* issue of whether legal Battery with a furry fox occurred. Peg's alternative claim of Hostile Touching thus raises another full-blown issue of the kind law professors expect casebook-wise students to recognize and articulate: did Pierson commit, by a Hostile (and therefore intentional) Touching, a Battery?

The Battery-Hostile Touching issue, like the Reasonable Care issue under the Negligence tort, is by judicial custom called a Fact issue. So here again, the jury must try to reconstruct the fox-bite scene, and then in effect judge, by attaching or refusing to attach the Hostile Touching label, whether Pierson as a policy matter should pay. In this way Battery, like its cousin Negligence, adapts, by the jury's input, its coloration to its immediate surroundings.

D. Brooding Omnipresence In The Sky[60]

Negligence and Battery theories, alternative game plans for hunter Peg's civil damage suit, are part of that common law nowhere written down in official, authoritative, stone-tablet fashion. The reason there's no stone-tablet rendering of the common law is that the common law of the judiciary is not like a stone, to be passed from law teacher to student; the common law is like a river, constantly on the move, constantly being refreshed.

Nor are judicial opinions, in legal theory, the official depositories of the common law. First-year seekers wonder where then, if not in the judges' opinions, is the judge-made common law hiding? Legal theorists say the judges' written reasons for decision merely reflect (offer evidence of) the common law; the solid stuff of the common law resides, law students are warned, elsewhere.

During the early weeks at law school, first-year minds, trying to pin down concrete rules, grow curious about the bedrock source of

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[60] This is Justice Oliver Wendell Holmes's famous characterization of what The Law is not. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

the common law. Yet at downtown law offices veteran lawyers selling The Law to a mystified public give little thought to where The Law comes from. By the same token, advanced law students worry little about legalism's philosophical underpinnings; law school by the third year has turned into a game of spotting issues and manipulating legal generalities, and the earlier search for bedrock sources abandoned.

Oliver Wendell Holmes, that skeptical man of The Law who on occasion did think about original sources, narrowed the search by reporting that The Law is no "brooding omnipresence in the sky."[61] Holmes concluded that The Law is less than godlike and, moreover, impossible to capture in phrases such as Reasonable Care and Hostile Touching. For the handful of student-scholars determined to track, along with Holmes and others, The Law to its lair, law school offers an esoteric third-year seminar in jurisprudence. For those, however, who prefer to skip jurisprudence and to have the matter boiled down to the nub, perhaps the best solution is to say that Law is simply *decision*, it's what judges *do*, not what they *say*.

Whatever the origins of The Law, whether an inhuman force of nature or simply courtroom decision, the law school's penchant for focusing on the cutting appellate edge of litigation forestalls certainty and predictability in casebook legalism. The casebook's tracking of appellate proceedings often appears to be a wilderness of single instances relieved only here and there by faint connecting threads of doctrine. Because appellate cases involve the courts' most elaborate machinery for resolving the most esoteric of issues, it is little wonder that opinions are such an unholy mix of a wilderness-of-single-instances and of a body-of-rules.

Complicating further the job of learning to think legally is the practice among legal people of splitting into opposing camps over how to depict and analyze The Law. Economic analysis, for example, is currently in favor as a yardstick for measuring the worth of certain facets of courtroom government. In addition, there are moral, political, social, and psychological standards for appraising the legal process. Law teachers, although by definition expert at viewing human affairs through a hierarchy of legal rules, nevertheless exhibit a wide range of attitudes about what makes the hierarchy of rules tick. Law students never know from class to class what version of The Law they're going to hear.

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61 *Id.*

Although law professors collectively endorse the idea of a legal system primarily rule-driven, this is like saying Episcopalians are wedded to scripture: we're talking lip-service here. Law professors and Episcopalians respectively pledge allegiance to The Law and to God, but otherwise, they both bring little intensity to the worship service.

First-year students at some point give up trying to make complete sense out of casebook reasoning, and turn to diluting their rules with realism about what judges *do* with the rules. All lawyers today, although subject to the pull of rule-of-law gravity, realize to one degree or another that the search for the blackletter rule is an important, but partly ceremonial rite. Between the lines of opinions, savvy readers can't help but see the round holes into which judges can't begin to insert square pegs. The casebook's juxtaposition of vague rules with ill-fitting case facts inevitably breeds rule-skepticism. The rule of law, however important as a social icon, fails finally as a description of the legal system. The rule of law is not a seamless web of doctrine as "beautifully abstract," as novelist Joyce Carol Oates ironically puts it, "as the rising and falling of the tides, the clockwork orbiting of planets, the ghostly trajectory of starlight across the void."[62]

For further evidence of the complexity in decision-making, and of the pitfalls in staring too fixedly at bloodless doctrine, we look now at the impact on our fictitious fox-bite lawsuit of statutory law. Statutory law and common law intersect constantly, and often ambiguously. The latter is the case when we come to consider the effect on hunter Peg's damage suit of his having chased Br'er Fox in violation of a state statute barring fox hunting on Sunday.

E. Never On Sunday

State criminal codes outlawing retail sales and outdoor recreation are out of fashion today, although pockets of day-of-rest legislation remain.[63] So it's possible that a latter-day Sunday transgressor such as plaintiff Peg could face a fine or jail. These criminal statutes are called blue laws. Blue laws originated at a time when church morality found its way more readily into criminal legislation. Surviving Sunday blue laws manage to escape condemnation as an unconstitutional joinder of church and state on the judicial theory, and I do mean theory, that Sunday day-of-rest statutes merely promote a secular day of peace and quiet; Sunday

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[62] JOYCE CAROL OATES, AMERICAN APPETITES 189 (Harper & Row 1989).

[63] *E.g.*, 2 MD. ANN. CODE art. 27, §§ 493-500 (1992).

just happens to be the day, or so judges claim, that legislators chose to paint a restful blue.[64]

So how might a criminal ban on Sunday fox hunting connect to a civil damage suit for a fox bite? In truth, a Sunday blue law violation most likely wouldn't dampen Peg's lawsuit prospects. Yet for the reasons that follow it's nevertheless unclear whether Peg and his lawyer can dismiss out of hand an argument by defendant Pierce that blue law violators such as plaintiff Peg should be dismissed empty-handed from tort court.

Conceivably the legislature, in banning Sunday hunts, might have added a punishment clause to its blue statute disqualifying hunters injured on Sunday from filing civil tort actions. Rarely, however, do legislatures drafting criminal codes add to a violator's punishment by purposefully foreclosing tort award possibilities.[65] Yet the fact that legislators draft criminal statutes with no thought to affecting civil tort outcomes doesn't end the matter. Judges in tort cases often take it upon themselves to punish civil damage-suit litigants who incidental to an accidental injury violate some penal statute.

The problem for tort students is guessing when a litigant's criminal violation might produce negative tort results. Should a jury in *Peg v. Pierce* label Pierce negligent for throwing the fox at Peg? Pierce's defense lawyer may have no other defense to Peg's lawsuit than to remind the court that on the Lord's day, Peg belonged legally at home, or in church. All of which brings us to the edge of the extremely gray legal area, that of legislative intent. Pierce's never-on-Sunday defense will likely trigger debate on what exactly the legislature long ago intended to accomplish by outlawing Sunday fox hunts.

On only one condition does Peg's hunting violation bar his personal injury claim: defendant Pierce must prove that the legislature's Sunday ban was *intended* to protect people such as Peg against the risk of hunting injuries. And this is where the fog thickens. What goes on in the collective mind of a two-house legislature is often harder to pin down than the meaning of Law.

Statutory interpretation — the ostensible devining of legislative intent — is a complicated subject taking up much law school time. Lawyers concoct imaginative theories for discovering legislative intent. The reason legislative intent produces so much lawy-

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64 *See* McGowan v. Maryland, 366 U.S. 420, 426, 447-49 (1961).

65 *See* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 75 (5th ed. 1992).

erly thumbsucking is that, in a sense, there's often no such thing as legislative intent. A legislature may pass a bill with general goals collectively in mind, but when it comes to litigation over the particulars, the idea of a specific legislative intent frequently dissolves. Legislative intent becomes, at this point, just another legal fiction. Legislators, due to the frailties of language, the shortness of foresight, and the compromises inherent in the democratic process, have no choice but to legislate in broad, open-ended terms. At the litigation stage, therefore, the idea of a relevant legislative intent is frequently wishful thinking on the part of a judiciary looking for a hook to hang their statutory interpretation hats on. Judges asked to interpret empty or vague statutory terms often are reduced to reading their policy preferences into a statute and then palming the result off as "legislative intent." Judges use this "legislative intent" ploy because, the rule of law dictates that the "legislative intent" fiction be maintained so as to keep The Law free of the horribles of judicial legislation.

This pretense about "legislative intent" is tied, if loosely, to bedrock principle. Bedrock principle here says that judges in a democratic society bend to the legislative will. Judges, in a "government of laws and not of men,"[66] are therefore in no position to point out that the emperor wears no clothes — that lawsuits enter unforeseen areas no legislature could have made allowances for. Bedrock principle aside, the reality is that statutory codes work only because judges in practice join in a lawmaking partnership with legislators in creating The Law that dribbles out case by case in the name of statutory interpretation.

The fact that "legislative intent" has much in common with fake storefronts in western movies embarrasses modern-day exponents of legal science. Rule-of-law apologists work mightily to make "legislative intent" appear more than cardboard. Judges squeeze statutory language (and legislative history) dry trying to extract a drop of "intent." The history of a bill's passage through the legislature is ransacked for evidence that some legislator may have foreseen the danger in waking a sleeping fox. Statutory interpretation opinions are full of talk about judicial aids for extracting meaning from legislative text. These aids, which courts call canons of statutory construction, illustrate how legal rules tend to travel in

66 *E.g.*, MASS. CONST. pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

contradictory pairs.[67] For instance, one canon says statutes that alter common law should be narrowly construed. The idea here is that judge-made common law is so splendid a work that legislators presumably will tinker only reluctantly with such near-perfection. Yet on the other side of the canonical coin is the contradictory canon that says statutes designed to remedy social ills (and in the process displace common law) are to be, get this, broadly interpreted.[68] You see why lawyers argue a lot.

Occasionally legislatures spell out the particulars of what they intend to accomplish by passing a bill. But hardly would this be the case in instances such as a never-on-Sunday statute. A legislature wary of constitutional separation-of-church-and-state restraints would hardly wish to confess in statutory print to pandering to a religious lobby keen on keeping hunters in their Sunday pews. For this reason, defendant Pierce would more likely point to judicial precedent endorsing a secular day-of-rest rationale for blue laws — and from this day-of-rest "intent" argue that the never-on-Sunday command should be seen as including a legislative wish to reduce hunting accidents. If judges can buy into this secular day-of-rest fiction, and many do, then Pierce's selling the Sunday ban in *Peg* as an outdoor safety measure is conceivable.

Selling judges on imaginative versions of legislative intent is made easier by the fact that not only do legislative drafters often shy from spelling out details, but also because the legislative history of a bill's passage is often obscure or unavailable. Blue laws entered the statute books back when legislatures kept few or no written records of floor debates or committee deliberations. Judges often face statutes whose vague generalizations, combined with a faded legislative history, pose issues of legislative interpretation crying out for judicial creativity. Such is the case with Pierce's last-ditch effort to avoid paying Peg's fox-bite damages by pointing to Peg's Sunday sin.

In the unlikely but not unthinkable event that Pierce's Sunday defense to Peg's damage suit strikes a judge's fancy, the next step is determining what negative impact a judge might assign Peg because of his statutory violation. At first glance the question of what effect Peg's Sunday breach is to have on his personal injury case would seem to be a statutory interpretation matter, a clear issue of Law for the judge to settle. And most judges in most cases in most

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67 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

68 *Id.* at 401.

states will indeed say that the consequence of Peg's criminality is in their Law-deciding hands. These judges, furthermore, will declare, as custom dictates, that Pierce's blue law defense is a complete (Contributory Negligence Per Se) defense, and rule without the jury's help that Peg, because of his Contributory Negligence, deserves no damages on his Negligence claim.

Some courts, however, will call the question of whether Peg's Sunday violation should kill his tort claim an issue of Fact (Contributory Negligence) for the jury.[69] If at this point you object to the idea of a civil jury, rather than a judge, judging the meaning of a criminal statute, consider this: Whether sinner Peg is to be denied civil damages will not, regardless of who decides, involve any actual legislative intent. Pierce's Sunday defense, remember, is tied to a criminal statute drafted by a legislature with no thought given to regulating damage-suit liability. So, even though judges in tort cases involving criminal breaches speak the language of statutory interpretation, what judges (or juries) actually do in such cases is borrow policy ideas from the criminal code for importation into personal injury common law. And once the borrowed criminal policy takes on common law coloration, disputes often arise about which accidents are covered by the borrowed statutory principle. This in turn means judges must decide whether to label as Fact or Law such statutorily-derived coverage issues. So in the end, what is Law or Fact becomes itself a highly technical question of Law for the common law judge. Got all this? If so, you're well on your way to legal wizardry.

Dumping this whole Sunday-ban matter into the jury's lap would, in *Peg v. Pierce*, take the form of asking the jury whether plaintiff Peg failed to use Reasonable Care, and so was Contributorily Negligent, on the day of the hunt. The jury would be told to consider Peg's statutory Sunday crime as a part of Peg's total conduct which it is to review for Reasonableness. Under this scenario, Peg wins compensation only if he passes the Reasonable Care test. If, however, the jury concludes that Peg's Sunday crime is tantamount to (un)Reasonable Care, such a finding of Contributory Negligence cancels out any Negligence on Pierce's part and marks plaintiff Peg a tort loser.

In tort cases involving a criminal breach, the trial judge's deci-

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69 *See generally*, DAN B. DOBBS, TORTS AND COMPENSATION 141 (2d ed. 1993) (discussing the jury's role as the trier of fact in assessing negligence); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 231-32 (5th ed. 1984) (discussing the negligence standard and the effect this standard has in statutory violation cases).

sion whether to involve the jury in gauging the impact of a statutory violation may depend on which government entity adopted the criminal regulation in question. The tendency is for judges to treat breaches of statutes drafted by a state or federal legislature as automatic equivalents of (un)Reasonable Care, and to enter a (Negligence Per Se) judgment against the statutory violator without asking the jury its opinion. If the breached regulation, however, is the legislative handiwork of a lesser agency of government, judges customarily treat the regulatory violation merely as *some evidence* of Negligence.[70] This means the jury, in deciding whether a litigant deserves the Negligent label, will be allowed to consider for what it's worth a litigant's breach of, say, a county ordinance.

Assume now that Peg's lawyer persuades the jury to label defendant Pierce a Negligent defendant, or else a Batterer, and that plaintiff Peg escapes the never-on-Sunday defense of Contributory Negligence. The jury, with the trial judge's collaboration, then awards Peg, in addition to $50,000 in actual damages, an additional $50,000 for something called punitive damages. This latter sum is by way of punishing Pierce and discouraging others from engaging in conduct the jury deemed "egregious."

Punitive damages are a controversial subject because of complaints by manufacturers and others that juries are too quick to label a company's conduct "egregious." Large damage-suit awards inflated by punitive damages lead reformers to advocate that judges give juries less latitude in deciding whether defendant behavior is "egregious," and, if "egregious," how many punitive dollars to award. *Peg v. Pierce* thus encounters, due to this debate over punitive damages, yet a third aspect of The Law, which is The Law at its loftiest, which is constitutional law. This is the body of jurisprudence made up of state and federal court decisions keying on the text of a state or federal constitution.

F. Due Process Of The Law

Defendant Pierce's lawyer, who has her back to the wall at this point, digs deep into her bag of defense arguments for something to reduce for Pierce the sting of a $100,000 judgment. What Pierce's lawyer comes up with — on appeal of the $100,000 award — is the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, which commands state governments to follow fair procedures in taking a person's life, liberty, or $100,000.[71] So

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70 KEETON ET AL., *supra* note 69, at 230-31.

71 U.S. CONST. amend. XIV, § 1.

here is the final issue spawned by *Peg v. Pierce*: does a state court system that offers little guidance to jurors in deciding whether and how much punitive damages to assess deprive Pierce of his property ($100,000) without Due Process of The Law?

This issue about the constitutional limits of jury power clearly should be decided by a judge. Although occasionally juries are given pieces of statutes to interpret, judges keep for themselves the authority to judge constitutional issues. So what, then, qualifies as Due Process in punitive damages cases? Did Pierce, socked with $50,000 in punitives, get the Process that is Due? Ultimately, only the nine justices sitting on the U.S. Supreme Court can settle this issue. Pierce's defense lawyer, knowing that the long-simmering Due Process controversy surrounding punitive damages is still being aired in the courts,[72] combs the law library for precedents in which judges have ruled trial procedures unconstitutional.

The best constitutional law opinions from which to draw Due Process arguments are opinions dealing with trial procedures that most resemble the contested *Peg* procedure for setting punitive damages. *Peg's* fox-bite lawyers will search initially for Due Process opinions involving tort juries. If such near-precedents are in short supply, the lawyers will improvise arguments drawing on language from less similar cases. If necessary, legal arguments can be drawn from conceptions of fairness and justice derived from sources other than judicial opinions, such as legal treaties and periodicals. Due Process briefs in *Peg* might also draw from relevant mid-nineteenth-century history concerning the drafting and ratification of the Fourteenth Amendment. (This may be barren territory given that the Reconstruction Congress which wrote the Fourteenth Amendment had Civil War matters on its mind far removed from punitive tort damages.) One faint historical possibility would be to survey mid-nineteenth-century practices in jury trials, and to infer from those practices what was thought to be fair procedure back when the Fourteenth Amendment was written.

But enough of fox-bite jurisprudence. Learning The Law through the prism of a casebook is, as you can see, a many-splendored thing.

IV. Legal Science Spawns Casebook

A. *Origins Of Casebook*

An old cartoon shows a professor drafting an exam in long-

72 *See e.g.*, Pacific Mutual Ins. Co. v. Haslip, 499 U.S. 1 (1991).

hand with his right hand while having his left hand slowly crushed in a vice. As the vice grows ever tighter, the exam-maker reacts to his pain by gleefully composing ever nastier questions. Law students sometimes see law professor editors who compile opinions into casebooks as similar hand-in-vice sadists. Students keen on having The Law presented straightforwardly are doomed to disappointment by the casebook's sadistic way of merely hinting at the shape and texture of legal affairs.

Yet presenting The Law as a straightforward (textbook) set of ocean-wide generalizations about historical judicial practices, as was early law school custom, proved numbing. Viewing what courts do solely through the lenses of a static body of legal maxims gives a misleading picture of The Law in action. A casebook devoid of the blood and guts of real-life courtroom battles, and filled instead with lifeless commentaries about general trends in judicial rationalization, presupposes a steadfast connection between dry legal doctrine and court decision that simply doesn't exist. So along came the casebook filled with opinions that mix judicial theorizing with stories about real people doing fierce legal battle. So although the casebook's original purpose was to illustrate what was thought in the nineteenth century to be the scientific nature of legalism, the casebook eventually proved its worth as an antidote to the legal textbook's overdose of encyclopedic generalization.

Casebook opinions, though still heavily weighted toward a neutral rule-of-law slant, nevertheless show courts struggling to juggle the rules to come up with decisions that we can live with. The casebook is no longer strictly a showcase for overinflated notions of The Law's scientific bent. The casebook, besides displaying the habits and attitudes embedded in the language all lawyers inherit, also reveals to close observers the looseness in the language out of which legal rules are assembled.

Nineteenth-century "legal science" was the product of turning the care and feeding of The Law over to a class of scholarly lawyers reborn as pseudo-scientific professors of The Law. This legal science movement, begun over a century ago, corresponded with the establishment of the American Bar Association.[73] The ABA disapproved of the then-popular idea that law practice is a mere trade.[74] Legal science rescued the bar by upgrading the professional status of lawyers. Yesterday's "legal trade" became today's "legal profes-

[73] STEVENS, *supra* note 43, at 92, 96-97.

[74] STEVENS, *supra* note 43, at 92, 96-97.

sion." But this shift in status came too late to save Abraham Lincoln from the "tradesman" label.

Mr. Lincoln, able lawyer though he was, lacked scientific — law school — training, and so as a lawyer never reached "professional" status.[75] Lincoln learned The Law as an office apprentice, reading not the few judicial opinions circulated in the pre-Civil War period, but by reading general commentaries on The Law. The textbook lectures Lincoln read were general discussions of past judicial practices. These printed lectures provided updated versions of English (and America's version of English) common law. These textbooks were written in a manner suitable for apprentices to absorb, for lawyers to crib from and pass on to clients, and for judges to read aloud while instructing juries or passing sentences.

Lincoln, who in 1830 at the age of twenty-one worked in New Salem, Illinois, "as a sort of clerk in a store,"[76] began his legal education at that time by reading *Blackstone's Commentaries on the Law of England.* Judge Blackstone's commentaries, being four volumes of lectures given by Blackstone to students at Oxford University, was once the apprentice's bible. About this time, *Kent's Commentaries,* a four-volume Americanized version of Blackstone's works, was also coming out. As the future Civil War president, in frontier fashion, read Blackstone and Kent by candlelight, in the East, experimental methods in legal training were underway. These experiments at turning the legal habit of mind into an academic discipline were called law schools.

Although these early New England ventures in formal schooling eventually took root, formal legal education didn't really catch hold until after the post-war industrial revolution transformed American life.[77] The early law schools were, as is true today, both private and public, college-connected and autonomous. Once formal lawyer training got up a head of steam, the apprentice method was doomed. After 1950, the making of future attorneys was to become a law school near-monopoly.

Yet even so, as of 1950, surprisingly, half the nation's practicing lawyers were former apprentices who read their legal commentaries catch as catch can while hanging around a mentor's law office picking up unscholastic tricks of the trade.[78] Today, with

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75 STEVENS, *supra* note 43, at 19 n.72.

76 LINCOLN ON DEMOCRACY xlvi (Mario Cuomo & Harold Holzer eds., 1990).

77 STEVENS, *supra* note 43, at 23.

78 STEVENS, *supra* note 43, at 209.

only two or three state bar associations still accepting apprentice applicants, Lincoln-type lawyers will soon be an extinct breed, victims finally of a formal method of legal tutoring that had its beginnings during the Revolutionary War period.

Litchfield Law School, a privately-owned school founded in 1782 in a small Connecticut village, was the nation's initial experiment in formal legal instruction.[79] Litchfield's classroom program for mastering The Law, which Litchfield divided for curriculum purposes into forty-eight titles, took fourteen months to complete.[80] John C. Calhoun was but one early statesmen-to-be who attended the legal lectures at Litchfield. Tuition, for the first year, was a hundred dollars.[81]

Harvard Law School followed in 1817, opening its doors to a charter class many of whose members lacked any previous college experience whatsoever.[82] Harvard Law helped turn law practice into a full-fledged profession by hiring professors with scholarly interests — a scholarly turn accelerated by the appointment in 1870 of Christopher Langdell (the father of American legal education) as Harvard's law dean.[83] If there are readers disenchanted with the casebook-oriented character of modern legal education who are desirous of knowing who's responsible for this state of affairs, the answer is, first and foremost, Dean Langdell.[84]

Professor Robert Stevens's recent history of legal education in the United States traces how Langdell and his Harvard compatriots, who were intent upon upgrading The Law into a science, invented the casebook together with a Socratic question-and-answer style of teaching to facilitate their (scientific) dissection of cases.[85] Within a generation or two, casebooks (and the accompanying Socratic assault upon defenseless students) became the centerpiece of law school life, first in the elite law schools, and thereafter spreading through imitation to other law schools.[86] By the end of the nineteenth century, Stevens reports, "[a] new group of students had arrived" to law school, which "was essentially the gateway to a professional career," through legal training by the casebook

79 KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 333-34 (1991).

80 *Id.*

81 *Id.* at 334.

82 *Id.* at 36.

83 *Id.* at 36-37.

84 *Id.* at 52.

85 *Id.* at 52-53, 55.

86 *Id.* at 53.

method.[87]

Although three years of mainly casebook study in a law school approved by the American Bar Association is the modern path to bar membership, oddly enough the old trade school idea has of late risen from the dead and eased its way into, of all places, the law school curriculum.[88] One result is the modern "externship," in which law students are placed in law offices to serve as apprentices. Law schools are also busy adding, under ABA pressure, clinical courses in which practice-minded professors substitute for the casebook a practice clinic set up within the law school, complete with clients to interview and forms to fill out. Clinical students, through hands-on experience, get training in gathering facts, negotiating, and other skills of the practitioner.[89] But clinical courses and externships are taken late in law school. The Langdellian casebook still dominates, especially in first-year classes.[90]

Understanding why law schools dote on the casebook method requires revisiting America's industrial revolution period. In the latter decades of the last century, the country's love affair with the new god of science reached full bloom. The rise of the factory made a hero of the natural scientist. Harvard's Langdell decided the scientific dimension that he and others believed inherent in The Law ought to be isolated and emphasized in legal education.

The result was the creation of a legal science and of Christopher Columbus Langdell's pioneering (contracts) casebook. Dean Langdell and his faculty, anxious to dispel the notion that lawyers are mere craftsmen, created a "professional" lawyer schooled in the intricacies of legal science.[91] The law faculties that molded the "scientific" lawyer, first at Harvard and then across the land, dumped Blackstone and Kent — and here's where the science came in — in favor of the appellate court opinion.[92]

"The Langdell approach," writes Professor Stevens, "not only united itself strictly to legal rules but also involved the assumption that principles were best discovered in appellate court opinions."[93] Langdell's fixation on rigid verbal formulas and hardnosed logic led him to conclude that the law library is to the lawyer what "laboratories of the university are to the chemists and physicists, the mu-

87 *Id.* at 75.
88 STEVENS, *supra* note 43, at 240.
89 *See* STEVENS, *supra* note 43, at 232-47.
90 STEVENS, *supra* note 43, at 232-47.
91 STEVENS, *supra* note 43, at 51-54.
92 STEVENS, *supra* note 43, at 52.
93 STEVENS, *supra* note 43, at 52.

seum of natural history to the zoologists, the botanical garden to the botanists."[94] Thanks to the presumed universality of true science, Harvard Law's once-fashionable laboratory principles cut across state boundaries and provided, in theory anyway, unitary, value-free, predictable theories for judging the most intractable of legal issues.[95] Today most lawyers place this opinion-based notion of a blackletter legal science under the heading of useful myths; but in Langdell's day only the occasional legal skeptic such as Oliver Wendell Holmes found legal science a jargon of quibbles.[96]

In devising a "laboratory" technique for panning principled gold out of nineteenth-century judicial opinions, Harvard-nurtured professors of legal science leaned heavily on that rigorous logic supposedly peculiar to the legal mind.[97] Legal logic was thought to enable the scientific lawyer to get at the true milk of The Law. For the scientist, the true milk of The Law is not, by the way, necessarily the rule enunciated in opinions.[98] The legal scientist strives to uncover the true nature of The Law often hidden between the lines of opinions inartfully worded; since nowhere, not even in opinions, is The Law set out clearly and straightforwardly, it was thought to require a legal scientist using legal logic to ferret out legal truth.[99] (First-year students hear echoes of this legal science today when formalistic professors say casebook opinions are not actually The Law, but are only pale reflections of the true distilled essence of The Law.) The legal scientist concludes that judges in writing opinions lack a sufficiently scientific cast of mind to be trusted to always discover legal truth. Therefore, according to the high formalism of legal fundamentalists such as Langdell, the true rule of a case is a terse statement of what a case stands for in terms of a strict legal logic, regardless of the opinion-writer's stated rationale.[100]

Harvard Law's Langdellians, believing they must distill true rules from the mass of court reports, assumed that only an enterprising intellectual legal elite could cope with the complexities of legal science.[101] The Langdellians, like the crusty Professor King-

94 STEVENS, *supra* note 43, at 53.

95 STEVENS, *supra* note 43, at 52-53.

96 HALL ET AL., *supra* note 79, at 339.

97 STEVENS, *supra* note 43, at 52.

98 STEVENS, *supra* note 43, at 52.

99 STEVENS, *supra* note 43, at 52.

100 STEVENS, *supra* note 43, at 52-53.

101 STEVENS, *supra* note 43, at 54.

sfield,[102] preached survival of the legally most fit. The student of legal science, declares the *Centennial History Of The Harvard Law School,*

> is the invitee upon the case-system premise, who, like the invitee in the reported cases, soon finds himself fallen into a pit. He is given no map carefully charting and laying out all the byways and corners of the legal field, but is left, to a certain extent, to find his way by himself. His scramble out of difficulties, if successful, leaves him feeling that he has built up a knowledge of law for himself.[103]

Anybody who has been to law school will recognize the *Centennial History's* scramble out of the pit.

Whatever science transpired in Langdell's laboratory, it was a science unlike that of the natural scientist. Beginning with Oliver Wendell Holmes (the anti-Langdellian father of legal realism), critics have noted Langdell's departure from natural science's insistence on testing propositions against observed phenomena.[104] Langdell instead put on blinders, like a racehorse afraid of the rail. Observed phenomena were, for the good Dean, and for some lawyers yet today, too far outside the airtight bubble where legal affairs are, some say, to be conducted. Legal scientists, and their formalist descendants, steadfastly refuse to look outside the law library to see how the judicial branch actually governs.

Dean Langdell and company preached that the backward-looking rule, rather than the forward-looking judge, properly governs in the courtroom.[105] Harvard Law's revolutionary approach to teaching was nothing more than putting modern dress on conventional legal religion. Holmes called formalist Langdell the country's leading legal theologian.[106]

These days the notion of a legal science is old-fashioned. Rule-of-law folklore lives on, but in diluted form and under softer names. Legal logic, which sounds so mathematical, has been toned down to a relatively modest notion of legal reasoning. Langdell's bloodless science fell victim to a twentieth-century politics of realism whose proponents preach that judges should be chosen less for the rigidity of their logic and more for the depth of their humanity.

Legal realism, the post-Langdellian idea that ours is a govern-

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102 THE PAPER CHASE, *supra* note 46.

103 STEVENS, *supra* note 43, at 52, 55.

104 STEVENS, *supra* note 43, at 55.

105 STEVENS, *supra* note 43, at 52-55.

106 Oliver Wendell Holmes, Jr., Book Review, 14 AM. L. REV. 233 (1880) (reviewing the second edition of Langdell's CONTRACTS casebook).

ment of flesh-and-blood judges and juries filling in holes in legal formulas, is increasingly part of the modern lawyer's mental makeup. Although opinion-writers today crouch behind legalisms, opinions grow less and less doctrinaire. Lawyers today are far more apt than their ancestors at the bar to acknowledge the doctrinal fluidity that leaves decision up in the air. (In the English courts, where legal formalism retains much of its turn-of-the-century vigor, the doctrinaire opinion lives on.[107]) For the last half-century, American lawyers have begun to downplay logic and instead test their legalisms (for example, the ancient Right Of Contract) against data drawn from the real world (in which the Right Of Contract once unfairly, by today's lights, blocked labor union formation through closed shop agreements). Although Dean Langdell's case dissection through Socratic questions and answers is still practiced in law schools, the old legal science emphasis is gone.

Whatever the merits of casebook dissection as science, the casebook's entertainment value as compared to *Kent's Commentaries* is clearly superior. The judges' tales of courtroom battle can make for interesting reading despite the sluggish writing. The maxim that says "negligence is the failure to use reasonable care," or the one that says "if a zoning regulation reasonably serves traditional police-power ends, the fact that esthetic factors may have played a part in its adoption does not affect its constitutionality," comes alive only in the context of a particular clash between warring litigants. Laudable efforts, such as Blackstone's and Kent's, to shape the work of the courts into an orderly, if abstract, historical form may pass legalistic muster, but page after page of such scholarship, without benefit of a juicy set of facts, paralyzes.

The modern law school's fascination with opinions spouting watered-down legal science will likely continue, despite the leaden prose and the judicial habit of circling around an idea three times before zooming in for the kill. Reading casebook illustrations of how rules are shaped, used, misused, stretched, contracted, revised, and ignored inculcates a feel for how courts operate that would otherwise be difficult for classroom-bound students to acquire. Again, learning to read opinions means learning how to read between the lines.

One of the irritations of casebook tutelage is the anxiety beginning students feel when they discover that for each casebook opinion there are hundreds or thousands of other opinions offering variations on the same legal theme sitting unread in the law library. If The Law

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107 *See generally* STEVENS, *supra* note 43, at 131-32 (discussing the philosophy of teaching law in England versus the United States).

truly is reflected in appellate opinions, how in the world can students hope to master this iceberg of opinions of which the casebook is merely the tip? What happens in law school is that this tip-of-the-iceberg anxiety lessens as the student senses that legal learning is not measured by the number of tort or contract maxims memorized. Students who learn to play legal games in one field of The Law can pretty easily get acclimated elsewhere.

The twentieth-century proliferation of opinions from the appeals courts of fifty states, the federal government, and the territories, partially explains, by the way, why the concept of legalism as a sure-enough science fell from grace. Recall that the lynchpin of Langdell's bookish science was that all materials relevant to legal science are in the law reports.[108] Prolific appellate judges have long since made composing, printing, and distribution of opinions such a booming industry that the resulting ocean of judicial outpouring has drowned the legal scientist. Carving legal doctrine, long ago, on the face of a few stone tablets was dramatic and conducive to an aura of permanence. But now we use the computer chip to corral the enormous literary output of the courts. Law students and lawyers can only manage to dip their toes in this sea of opinions.

B. Dissecting The Opinion

In the days of Langdellian legal science, dissecting the opinion was Harvard Law's classroom method for exposing blackletter gospel, just as slicing into laboratory frogs reveals anatomical truth. Then, as now, the threshold question posed by The Law's elaborate system of precedent is a puzzler: just what exactly is this thing that lies buried inside opinions that, once revealed through dissection, should guide the judgment of later courts? This question about *what precisely* ought to be the impact of case *A* upon case *B* permits no simple answer.

The huge task that precedent builders face is putting together from the opinion in case *A* a concise general statement — the holding of the case — that everybody agrees properly covers case *B*. Decision according to precedent means deciding like cases alike; yet, other than intuition, legalists lack, despite all the appeals to logic, any structured way of determining which cases are alike. Legal logic runs dry before it's decided for sure whether case *A*, which involves chickens, covers case *B*, which involves pheasants.

The result is that lawyers and students must be content with a

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108 STEVENS, *supra* note 43, at 52-57.

system in which choosing whether cases *A* and *B* are "alike" or "distinguishable" is very much in the eye of the beholder. Logic alone cannot produce generalized statements of case holdings that "take the guesswork out of choosing which cases are alike."[109] Just as in baseball the game's not over until it's over, so in the game of precedent the scope of a prior holding's influence is somewhat up for grabs every time an appellate court revisits the prior holding. If the holdings extracted from prior cases are worded so narrowly that each holding covers only the facts of the parent case, then of course stare decisis (precedent) is clearly a dead letter in a universe where no two cases are exactly alike. Yet to state the holding in case *A* in language abstract enough to cover an unspecified number of other cases creates a slippery slope of ambiguity; given cases *B* through *Z*, each of which contains some but not all facts in common with case *A*, lawyers lack a firm method for deciding which of cases *B* through *Z*, for precedental purposes, are similar enough to case *A* to fall within the precedental ambit of case *A*.

Suppose we agree on a holding, in a case forbidding a legatee to take under the will of a testator murdered by the legatee, that "[n]o one shall be permitted to . . . take advantage of his own wrong. . . ."[110] What if next time the legatee merely kills the testator in an auto accident through careless driving (a civil wrong)? Similar case? Does the civil wrong bar the careless legatee, under the rule against taking "advantage of his own wrong," from inheriting under the will? Intuition may suggest that faulty driving falls short of being similar enough to criminal murder to deny the careless-driver legatee her benefits under the will. But intuition is hardly science.

How then did the legal scientist of the last century shun intuition, and through case dissection discover, with the aid of apolitical legal logic, which cases are similar, and which are dissimilar? The answer is that old-time legal science, not to put too fine a point on it, was unscientifically grounded on faith. Legal words, it was thought, could do things that to the late twentieth-century mind seem slightly nonsensical. No amount of legal ratiocination can supply a neutral, untouched-by-human-hands means of deciding whether murder and sloppy driving belong in the same legal pigeonhole. Dissecting the opinion in the murderous legatee case so as to extract an airtight guideline pointing to decision certain in

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109 DAVID KAIRYS, THE POLITICS OF LAW 14 (1982) (collection of essays penned by exponents of critical legal studies — the "crits").

110 Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

the careless-driver case is an outmoded idea, one belonging to an age that used words to draw black and white lines in a way alien to the modern habit of teasing language into perpetual grayness.

Legal scientists a century ago told themselves they could isolate in case *A* certain items called "material facts." The trick supposedly was to first poke through the opinion's exposed innards and discard all immaterial facts. Then, with case *A's* remaining material facts in hand, case *A's* precedental value would simply be extended to all later disputes involving identical material facts.

But legal scientists were deluded in thinking that they could draw clear lines between material and immaterial facts. In today's age of lost innocence we acknowledge that black and white lines are rarely present in appellate decision-making, including decisions about which facts are "material." Today even the most Langdellian of legal scholars is apt to recognize, even though grudgingly, that choosing when to apply case *A* to later cases is in many ways a policy-making, not a rule-following, matter. Facts are "material" because the court *chooses* to make them so.

The rule or holding of case *A*, as noted, may be the rule explicitly laid down by the court that decided case *A*; or the rule of case *A* may, as a matter of legal fashion, be a different formulation adopted by a later court as the more appropriate statement of the holding in case *A*; or the authoritative holding of case *A* may be a formula composed by some influential legal scholar and offered up as the preferred rule of case *A*. Don't forget: the judge's opinion in Case *A* is but evidence of what The Law is, and maybe not always good evidence at that.

Professor Llewellyn summed up precedent fifty years ago — a summation that represents the modern substitute for a fizzled-out legal science:

> In a word, if one is to see our case-law system as it lives and moves, one must see that the relation between the rule and the cases may move all the way from copying any words printed by anybody in a "law" book to meticulous re-examination of precise facts, issues, and holdings, in total disregard of any prior language whatsoever. And any degree or kind of operation within that lordly range is correct, doctrinally, if doctrine be taken to a description of what authoritative courts are doing . . . .[111]

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111 Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1246-47 (1938). Professor Llewellyn also teaches that "general propositions are empty . . . rules *alone*, mere forms of words, are worthless." K.N. LLEWELLYN, THE BRAMBLE BUSH 2 (9th ed. 1991). A 65-year-old classic, BRAMBLE BUSH is the printed version of orientation advice that Llewellyn gave to entering students at Columbia

So although in law school, students and professors continue to carve up appellate opinions, the focus has long shifted from stagnant rule-fetishism toward the flowing stream that is The Law in action. Modern opinions continue to be couched in the logical form of facts-plus-rule-equals-decision, as if drafted by descendants of Langdell, but this is simply reverence for a dead science. Today, law students discover sooner or later that the relation between rule and decision is problematical — classroom dissection of opinions reveals that two plus two adds up, in Law, only rarely to four. When two and two add up to five, and when such a result no longer causes anxiety, you know then you are possessed of a legal mind.

From modern casebooks spill a Niagara Falls of words. On and on the stream tumbles, tangled sentences spilling into impenetrable paragraphs until student readers are led to suspect a cult of obscurity. Opinion-writers, when their prose is criticized, insist by way of defense that they are too pressed for time to polish rough drafts. This may account in part for the murky writing. It is more likely that judges, like other public officials bombarded with their constituents' opposing viewpoints, so often have little they wish to reveal publicly, while at the same time wishing to appear to have made a clean breast of it. A common solution is to write at great length about very little, and hope that the muddy prose will suggest a judicial mind too sophisticated for the common herd to grasp.

Another factor dragging down almost all legal writing is that in a

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Law School. BRAMBLE BUSH, with its heavy dose of incipient legal realism, was a new way to look at, among other things, the notion of precedent. One theory of the precedential value of a case, according to Llewellyn, is that the rule as spelled out in a judicial opinion is, no matter how broadly worded, the one and only true rule of the case. This (most often expansive) version of precedent, maximizes the impact given the precedent case. *Id.* at 74. This expansive version of precedent takes the general wording of the earlier case and applies it to a range of later cases involving different facts. This is the broad-beamed version of precedent exploited by lawyers and law students when they create legal arguments by drawing from generalizations in old opinions, while conveniently ignoring the factual details in the earlier disputes. The alternative notion of precedent, on the other hand, says that the true rule of a case may, in fact, be something other than what the earlier court said it was; the true rule may be what a later court says the earlier court really meant — usually a shrunken version of the precedent opinion's original language. This narrow form of precedent can limit the impact of an earlier case to disputes bottomed on almost identical facts: called limiting a precedent to its facts. This judicial whittling down of a precedent by deflating the original court's abstract statement of the rule is what cautious judges do as a half-way measure toward overruling inconvenient precedents. Both broad and shrunken theories of precedent are, assures Professor Llewellyn, tolerated — and even blessed — by The Law. *Id.* at 73. Llewellyn also spoke of The Law as a foreign language: "You are outlanders in this country of the law. You do not know the speech. It must be learned. Like any other foreign tongue, it must be learned: by seeing words, by using them until they are familiar . . . ." *Id.* at 39.

legal profession in which obscurity is a virtue, practitioners lose the knack for saying things simply. Some law firms must hire tutors to give in-house, plain English writing lessons, this so that firm members can understand each other's prose. Occasionally judges at judicial conferences are moved to lecture other judges about the sad state of judicial prose.

The genesis of bad legal writing is the law school emphasis on having students model their writing after the profession. Most law professors train students in the staid conventions of legalistic writing because they think it is in the students' best interest that they write the kind of ponderous prose that lawyers have always produced, and that law firms and the judiciary *expect* of law graduates. Thus the circle celebrating a turgid writing style is complete. This pressure to write legalistically produces long tedious sentences strung into endless paragraphs, a plethora of long, Latinate words, strings of "nots" and other negative phrasing, addiction to the passive verb, mindless repetition, and a terminal, if learned, case of vagueness. Lawyers who overcome their legal inheritance and write clear, vigorous, down-to-earth prose are scarce as hen's teeth. Law students find in their casebooks few samples of crisp, readable prose.

Law schools occasionally heed complaints about the way lawyers write by beefing up legal writing courses. But cleaning up legal writing is hard to do alongside the primary law school mission of transforming lay into legal minds. The legal mind and plain English remain a mismatch. The lawyer's unplain language is what makes him a lawyer. The student lawyer, bombarded with legal talk and legal writings, cannot easily avoid aping her legal masters. Legal writing instructors, furthermore, are Law-trained types and therefore reluctant rebels against lawspeak. Even were legal writing instructors eager to deflate and simplify the profession's pompous prose, first-year legal writing students are usually too preoccupied with searching for true rules and mimicking casebook prose to worry about making life easier for poor readers.

There's also the problem of the language handicap under which all lawyers labor. A legal writer, even one anxious to inform and entertain with lucid prose, is limited by The Law's circumscribed vocabulary. It's a professional jargon with a stunted imagination. Novelists who choose death as a subject can shape their prose by picking and choosing from among the riches of the English language. But legal writers, on the subject of death, are walled in by convention with the stilted language of the probate and criminal courts. In a probate case, the dreary litany of the "testatrix who, being of sound mind, did give

and bequeath a life estate," reflects the burden on the legal writer denied space for love, hate, greed, and generosity.

There is another reason why casebook opinions often read like a translation from the German composed by a tipsy translator. The "opinion of the court" is in part the handiwork of a judicial committee, a form of composition sure to breed bad writing. Although a single judge is assigned to draft an opinion, he writes for the whole court, and in so doing consults with fellow judges and shapes opinion text to reflect a collective sentiment. Writing and thinking are inseparable twins, and trying to get three or seven or nine judicial minds to think along the same tract for any significant period pressures the opinion's author into purposeful ambiguity so that reluctant members of the court will join the opinion. The contest among fellow judges for power over an opinion's final form pushes that opinion's prose further and further up the cloudy ladder of abstraction.

This ascent into metaphysics is how judges avoid taking firm stands, which allows for flexibility in dealing with later cases. When judges write cloudy prose, it not only gives the lie to the assertion that legal language celebrates precision, but also protects courts from attack. Bad writing, in which it's hard to distinguish between a horse chestnut and a chestnut horse, is its own form of armor.

Even relatively decent pieces of legal writing, such as the following Supreme Court excerpt, can be suffocating. The Court, in *Ohralik v. Ohio State Bar Association*,[112] is trying to tell the state of Ohio that the state can punish a personal injury lawyer who dares solicit cases in a hospital, despite the ambulance chaser's Free Speech protestations. Here is the Court's less-than-riveting explanation of why Free Speech claims carry less weight when an ambulance chaser gets too greedy:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," (citation omitted) we were careful not to hold "that it is wholly undifferentiable from other forms" of speech (citation omitted). We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

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112 436 U.S. 447 (1978).

> Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[113]

One hundred and thirty-nine words to say that ambulance chasers deserve some, but not much, Free Speech. Readers of academic writing are used to this learned style of writing in which a simple idea gets blown up into an overweight conceptualization. Law students likewise, after an initial period of panic, grow used to such overblown legal writing in which an ounce of content is dressed up in a pound of learned style.

Another angle for viewing opinion-writing is to consider the audience. For whom are appellate judges writing? The immediate audience is the trial judge who umpired the evidentiary hearing. It is the trial judges' judgment calls made during original trials that losers at trials want higher courts to reverse. This, of course, puts opinion-writers in the ticklish position of pointing out to fellow, if inferior, judges their flawed performances, and helps explain why strong, clear appellate critiques are abandoned in favor of weak, "it could be argued" approaches.

Like politicians skilled at appeasing opposing factions, appellate judges reviewing the work of trial judges hide behind the softer passive-voice verb, shunning the stinging rebuke, the hard-hitting review. The "polite" opinion, its hard edges thus rounded off, lacks the bite of, say, the newspaper column that spits out in certain terms just who the bastards are and why. The judge's pen, filled with the ink of professional gentility, is no mighty sword, but rather, despite the assumed air of superiority, a wet noodle. This high court gentility, alas, complicates the chore facing student readers struggling to learn from pussyfooting opinions just where the court, even waveringly, stands.

In addition to the trial judge under the appellate gun, the immediate audience for an opinion includes lawyers and litigants. In appellate cases both parties typically have a piece of justice in their corners. This means opinion-writers have the uncomfortable task of naming as losers those whose claims have at least some merit. For this reason also, opinions equivocate.

The more general audience for opinions is the practicing bar. Opinions are written in part to show lawyers that appellate judgments, considered in the light of similar past cases, fit more or less snugly

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113 *Id.* at 455-56.

into traditional grooves. To understand how case *A* fits into traditional legal channels requires a legal reader attuned to a continuing dialogue of which case *A* is but the most recent drop in the ocean. This is why first-year law students introduced to judicial prose often feel as if they've walked into the middle of a foreign movie that lacks subtitles. As for lay readers unlucky enough to be confronted with a court opinion, such readers are supposed to be so impressed with the mere shape and sound of the judges' hieroglyphics that they thank their lucky stars they live under a rule of law, even though they can't understand it.

C. Plain And Fancy Hocus-Pocus

Learning to write like a lawyer is a liability in some quarters, but in law school it's a primary goal. Beginning students, taking a natural pride in their new-founded legal tongue and in their early legal drafting exercises, tend to get carried away. Students embrace legalism and forget English Composition 101. Also forgotten, if ever learned, is that good writing informs and entertains. Once a law student absorbs legal jargon and is reborn into the legal faith, it's devilishly difficult thereafter for the legally saved to write clearly and simply. I, as a card-carrying legalist, here criticizing the prose of fellow lawyers, write in the uncomfortable knowledge that I will surely fall more than once into the very pit I'm digging.

Legal writing is heavy going partly because of the profession's felt need to dress up simple ideas so as to give off an air of scientific impartiality. Legal, like academic, jargon has its Madison Avenue component. Legal scientists, remember, were the ones who first dressed the legal trade in academic regalia to persuade the public that lawyering is a full-fledged profession worthy of high respect and higher fees. Most legal writing, which informs poorly and entertains not at all, has other aims. Law professor Fred Rodell suggested one aim of legal writing when he labeled the legal class a pseudo-intellectual autocracy "using plain and fancy hocus-pocus to make themselves masters of their fellow men."[114]

A typical practitioner of "plain and fancy hocus-pocus" was the late Irving Kaufman. A tough-minded judge on the U.S. Court of Appeals, Judge Kaufman was a leading practitioner of the formal school of legal thought. He was the kind of modern lawyer who a century ago would have gloried in The Law's deliverance from the

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[114] RODELL, *supra* note 23, at 7.

rough hands of the tradesman into the lap of the professional man of science. Kaufman on the bench preached the usual judicial line about good judges sitting detached from the fray; about how the rule of law taps in on the collected wisdom of the ages; and about how judges must resist advancing a personal vision of justice (and here's the modern twist) "except to the extent that his vision is consistent with the law as it evolves in response to social changes."[115]

Kaufman, like many who wear judicial robes, would have the gullible believe that The Law evolves all by itself; the detached judge only afterwards jumps on the socially evolving bandwagon. The idea that legal policy evolves, like a pansy from its seed, untouched by human hands, is pure drivel for peasants. The English language can prop up only so many such myths, even though the myths be noble aspirations, before the language collapses into a babel. Such Kaufmanesque, immaculate-conception thinking, still a consistent theme in mainstream legal rhetoric, is to legal writing what mud is to the Missouri River.

Other, more mundane, irritations flowing from the way judges write opinions include the judicial habit of avoiding litigants' real names. Judges substitute for litigants John Thomas Scopes, Emile Zola, Lodowick Post, and Perot Enterprises, Inc., such vague legal nicknames such as appellee, petitioner, and defendant-in-error. How much easier it would be for readers of opinions to keep in mind who plaintiff- and defendant-in-error are if said legal persons could retain their more colorful popular names. It's as if judicial use of bland, impersonal pseudonyms proves that judges are ignorant of who the real parties are, and so reinforces the pose of judicial neutrality; the pseudonyms reflect The Law's official disdain for human feelings that get in the way of neutral rule-following.

Another poor writing habit, which judges thankfully are moving away from, is withholding until the end of the opinion the news about who wins the case. Such suspense about final resolution suits detective stories. But it makes the opinion's doctrinal reasoning easier to follow when the winning party's name is revealed up front. Advance notice of the lawsuit's eventual outcome also helps clarify the relevance of the opinion's opening statement of facts.

The traditional withholding, until the final paragraph, of the winning litigant's name, however, serves a symbolic purpose. Such suspense gives the opinion more of a rule-of-law flavor; it suggests

115 *By and Large, We Succeed*, TIME, May 5, 1980, at 70.

the opinion's drafter discovered only in mid-draft, after locating and jotting down the applicable rule to apply, the court's ultimate decision. Yet the superficiality of such a decision-in-the-making pose is apparent even to students who, despite first-year fog, know that judges must first choose a winner, and only then offer legal proofs that their reasons are principled. First-year victims of "suspense" opinions should do an end run by reading first the opinion's last paragraph to see how the case comes out in the end.

Another thing that complicates entry into the casebook world is the fake cocksureness permeating most opinions. Opinion-writers, afflicted with the habit of rhetorical overkill that they acquired as lawyers and composers of appellate briefs, frequently begin opinions with a declaration that The Law — and the court's duty — is crystal clear. The reality that doctrinal uncertainty at the appellate level is the norm is avoided in judicial prose. Opinion-writers avoid the idea that appellate judging takes place in a doctrinal mist because the truth about hard choices would taint the rule-of-law pose.

Judicial practice, when confronted with equally weighty, but contradictory, sets of rules, is to fudge and imply that the losing lawyer's legalisms are "obviously" wrong-headed and unconvincing. This may lead inexperienced readers of opinions to wonder how, for goodness sakes, losing attorneys dare accept fees for appealing such "obviously" frivolous cases. But the fact is, opinions underplay the merits of the losing sides' briefs. Opinions instead are fudged to make winners look virtuous, the "obviously" mode adopted to boost the judicial above-the-fray image. Inexperienced students therefore must be alert to the large element of judicial discretion secreted behind the "obvious." When judges write that "[o]bviously, the controlling rule in this case is . . . " or that "[i]t is not to be denied that . . . " stay alert to the possibility of judicial camouflage.

Because the allure of legal science has faded, along with illusions about the meaning of words (and therefore rules) remaining constant over time, lawyers' expectations about uncovering legal gems in the rubble of opinions has been severely reduced. Still, for students to reduce an opinion to a brief written summary is good practice in learning to speak and think lawspeak. Squeezing the opinion for every last drop of meaning is good practice as well in understanding what the opinion neglects to say. Legal science may be outmoded, but the idea of a laboratory — a foreign language lab — is a good one.

In law schools today, classroom dissection of opinions may be accompanied with lectures. Lectures, when offered, are usually a professorial mix of legal history, doctrine, lawyerly reasoning, deconstruction technique, sociology, courthouse anecdotes, legal philosophy, linguistics, and a lawyer joke or two. Law students value law teachers who can deliver this classroom mosaic with enough theatrics to make The Law entertaining. The Socratic method of dissecting cases by having law teachers bombard hapless students with legal riddles likewise leans heavily on the teacher's ability to entertain, especially since so many students have trouble seeing how Socratic inquiries are teaching them anything. Socratic questioning, by yielding so few solid answers, ironically proves, by indirection, that the life of The Law is, as Holmes told us, not verbal arithmetic but subtle politics.[116]

The Socratic trial by query has in recent years lost some of its acclaim. In truth, the Socratic professor's habit of delivering a ton of questions to every pound of answers has always received mixed student reviews. Professors on their part have a sort of Hobson's choice. They can deliver the traditional lecture on historical trends in rules and the exceptions to the rules; but in so doing the lecturer risks mass boredom, plus giving the impression that The Law is driven solely by doctrine. On the other hand, Professor Socrates can toss out unanswerable questions, but then students begin to wonder if opinions are bottomed on anything but quicksand. A third, and increasingly popular technique, is for law teachers to play Socrates part of the time and to lecture part of the time, hoping to find a happy medium.

Modern law professors differ from their nineteenth-century predecessors mainly with respect to legal-religious conviction. A law professor from the 1890s, brought back to life and reinstalled at his lectern, would sound much like the modern law school lecturer or Socrates impersonator. Yet, as an exponent of legal science, our born-again professor would more likely be sincere in his affirmations of the rule of law, less likely to be, in the modern fashion, of limited faith in the possibility of reasoned neutral decision.

Law teachers today, more attuned to the chameleonic nature of legal concepts, most likely view the stolid body-of-rules version of The Law as a useful myth. Modern law teachers study at universities where at least rivulets of legal realism flow steadily into the mainstream of legal thought. The professor of legal science nurtured a faith that mechanistic legal logic would tease blackletter

116 OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

truth from the casebook; today's mainstream law professor, afflicted like Oliver Wendell Holmes with the age's skepticism about systems of thought, struggles to keep some semblance of the legal faith.

For Holmes, the age of science brought into question many old faiths, including faith in the lawyer's bag of principles as a better guide to government than the intuitions and policy planning of political men.[117] Holmes, a Boston lawyer and briefly a professor at Harvard Law who mixed with the literary and intellectual elite on Beacon Hill, wrote famous articles about legal myth and legal reality, and became a justice on both the Massachusetts and U.S. Supreme Courts.[118] Holmes, moreover, took his scientific method literally. Holmes tested Langdell's ethereal body-of-rules against the empirical data of the sensory world outside the law library, and found the established legal faith wanting.

Partly due to the influence of Holmes and later adherents to the experience-not-logic school, casebooks today offer many opinions that, although continuing to pay homage to logic and precedent, also look to Holmesian "experience." In the case of modern opinion-writers, the metaphysics of the nineteenth-century lawyer is often leavened with down-to-earth realism about judicial discretion and the need to shape decision to meet current political expectations. Holmesian "experience," in other words, generates an unruly subtext running through The Law's rule-infested text.

In sum, Holmes and his realist followers have imported into the lawyers' inner sanctum the torchlight of skepticism — and The Law has had to make adjustments. With much of the old formalist magic gone, legalism has become less a theosophy and more of a practical means for using experience to shape future legal-political directions. All this makes The Law more human, and makes law study, given the dearth of structure absent true rules, more of a course in judicial politics.

In any event, the current mixture of legal science and legal realism makes for much incongruity in the law schools, where the intellectual descendants of Langdell and Holmes persist in looking at The Law through first one end of the microscope, and then the other. Many law teachers over the years, seeking relief from doctrinal fog, have tried to step back and impose some over-arching theory — of economics or moral philosophy or political science — onto the legal system. Perceptive students will be attuned to such

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117 *See* Holmes, *supra* note 1, at 457, 469.

118 LIVA BAKER, THE JUSTICE FROM BEACON HILL 68, 188, 190, 273, 357 (1991).

nuances of the modern legal mind as it attempts to come up with reasons to explain the work of the courts. This brings us to legal reasoning, that step-child of legal logic, the focal point of casebook studies and the subject of the next section.

V. Legal Reasoning — And Other Dirty Stories

A. *The Unaccompanied Suitcase Case*

Legal reasoning is the polite, Law-abiding name given to lawyerly wrangling. In its casebook version, such disputation is called the opinion of the court. When an appellate lawyer performs legal reasoning, a brief is born. Legal reasoning is how legalists extract from the clutches of The Law the prepackaged answers to lawsuit issues. Legal reasoning, with its indefatigable redefining of terms and citing of look-alike cases, produces what lawyers call reasoned decision. John Quincy Adams called legal reasoning "law logic—an artificial system of reasoning, exclusively used in courts of justice, but good for nothing anywhere else."[119] Legal reasoning, then, is to courtroom government what powerful medicine is to witch doctors: it's the stuff of legitimation.

Reasoning as lawyers and judges reason is how The Law moves smoothly from here to there in the guise of a disinterested search for legal correctness. Legal reasoning reinforces the idea that The Law is self-contained and needs no advice from interdisciplinary outsiders. As guardians of legal orthodoxy, we lawyers are both beneficiaries and victims of the smokescreen of legal reasoning that hides the political nature of what courts do. We are beneficiaries because we sell our legal reasoning to a public devoted to The Law's fabled neutrality; we are victims because of the bad press given lawyers when legal reasoning is exposed as verbal camouflage.

Reading case after case for three years equips the dedicated law student to imitate the lawyer-judge in proving, by a careful juxtaposition of maxim, precept, and doctrine, that a horse chestnut is in fact a chestnut horse. Students learn to spin, that is, a legalistic web connecting the legal maxim of the moment with either decision *A* or its opposite *B*, or even *C* or *D*, in any case using the tricks of the legal trade to divert attention from the fact that legal reasoning, at bottom, has a leak. The proof of this leakage lies buried in every case in the casebook. Reading each opinion's generalizations carefully — and skeptically — reveals that the most legal of words,

119 The Quotable Lawyer 269 (David S. Shrager & Elizabeth Frost, eds., 1986).

no matter how carefully arranged, cannot alone do the tough appellate job of *deciding* between *A* and *B*. As an example of the "chestnut horse" nature of legal reasoning, consider the following hypothetical airline crash case, one patterned closely on actual litigation.[120]

An international treaty covering suits against international airlines limits the damages collectible by a passenger injured in a crash (or by the family of a deceased passenger) to, say, $75,000. But there's an exception to this $75,000 damages limit. If a litigant passenger, instead of claiming airline Negligence, can tie her injuries to an airline tort of Willful Misconduct, the ceiling on damages goes way up.[121] So what happens, legally, if Pan Globe Airlines's security measures go awry and, contrary to regulations, a stray suitcase, unaccompanied by a passenger, finds its way onto a flight from London to New York, and the stray suitcase conceals a terrorist's bomb?

Pan Globe of course did not purposefully accommodate the terrorist whose bomb, alas, explodes in flight over the Atlantic. The unaccompanied suitcase got on the flight without Pan Globe officials knowing it was a stray. So, one might well assume that Pan Globe's liability, if any, would be limited to a Negligence award of $75,000 per passenger. Yet Pan Globe and its liability insurance company may, thanks to the elusiveness of legal reasoning (and to a legal system geared to compensating some accident victims handsomely), wind up on the liability end of a Willful Misconduct lawsuit. This means that despite the international treaty's damages ceiling, Pan Globe crash victims and their relatives stand to collect millions.

Willful Misconduct, an intentional tort, and Negligence, an unintentional tort, clearly belong to separate legal camps. The idea behind the international treaty on airline crashes is to encourage passengers to rely on flight insurance for big-bucks compensation for accidental (unintentional) injury or death, even though attributable to airline Negligence. Only in Willful Misconduct cases is the airline to lose its treaty ceiling on tort damages.

This division between unintentional accidents and intentional injury, as we saw with Negligence and Battery earlier, is easy to

120 *See* Arnold H. Lubasch, *Pan Am is Held Liable by Jury in '88 Explosion*, N.Y. TIMES, July—11, 1992, at A1, A2.

121 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter The Warsaw Convention]; *In re* Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir. 1991).

blur. "Intentional" is in the forefront of that long list of legal words with variable meanings. And for blurring the line between accidental and intentional injury, nothing does the job quite so well as a good dose of legal reasoning.

Now, blurring doctrinal distinctions and fomenting ambiguity by severing connections between words and their meanings may sound sinister. But lawyers and judges who bend doctrine to favor airline accident victims in cases such as the terrorist's bomb are, in a sense, servants of the people. In recent decades, with the universal presence of liability insurance, Americans have clearly favored liberal expansion of tort liability — especially where corporate defendants, presumably with deep, cash-laden pockets, are involved. Legal reasoning, then, can be an instrument of public service in recasting the meaning of "intentional" so that widespread pro-passenger sympathies in the Pan Globe case can be satisfied. To put it another way, legal reasoning is the mechanism that allows the lawyers for Pan Globe passengers, with the help of an accommodating judge, to do an end-run around the international treaty's limit on accidental damages. In such a manner does the common law accommodate itself to shifts in public opinion. Some may see this as unseemly; others call it justice.

The judicial end-run around the $75,000-per-accident liability ceiling takes place by virtue of cleverly worded instructions to the jury regarding Pan Globe's slip-up allowing the stray suitcase onto the doomed airplane. Remember, this is a jury typically inclined to award damages to badly injured accident victims. Notwithstanding The Law's claims to political impartiality, sympathy clearly plays a role in the way judge and jury administer the tort system. In Pan Globe-type disasters, even though terrorists plant the bombs, sympathetic juries instinctively favor forcing airlines to compensate crash victims and their families handsomely — if only The Law can supply a method. And here, in a slippery jury instruction defining Willful Misconduct, a federal court provides the method:

> Willful misconduct is the intentional performance of an act with knowledge that performance of that act will probably result in injury or damage - or it may be the intentional performance of an act in such a manner as to imply disregard of the probable consequences of the performance of the act.[122]

Note that in this jury instruction the normal meaning of Willful (intentional wrongdoing) is shunted off, like an empty railroad car, to a side track. The emphasis is subtly shifted away from any knowing

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122 Lubasch, *supra* note 120, at A2.

transgression perpetrated by Pan Globe. The instructing judge turned the treaty's notion of intentional wrongdoing into something like unintentional Negligence. Under this instruction, "intentional wrongdoing" is so watered down that Pan Globe's perhaps miserly hiring of only two rather than three security guards may become the "intentional performance of an act in such a manner as to imply disregard of the possible consequences"[123] — and so trigger huge Willful Misconduct awards unencumbered by the $75,000 treaty limit.

Note that the jury instruction suggests the *probabilities* of an accident, as in "probably result in injury" and "imply disregard of the probable consequences." The judge's language on probability mimics Negligence law in which Negligent conduct is defined as unreasonably unsafe conduct, the "probable consequences" of which is injury. Given this transformation of Willful Misconduct into mere Negligence, it's little wonder that a jury facing the grieving families of 200 dead passengers, and a defendant airline that cut costs by skimping on security guards, can find Willful Misconduct in an unaccompanied suitcase.

This recasting of Willful Misconduct to include unintentional accidents is a prime example of the power of legal reasoning. Legal reasoning, despite some fancy talk about deductive and inductive mental gymnastics, is almost always nothing more than plain ordinary reasoning, some of it sensible, some of it nonsensical, but in any event common to lawyer and nonlawyer alike. In other words, adding the prefix "legal" to "reasoning" does not transform the commonplace into the uncommon gem of the first water. In fact, if there is anything unique about legal reasoning, it is in how legal terms are so constantly being adjusted to fit different settings by being outfitted with altered definitions.

One of the early disappointments that confronts first-year students is how often the law dictionary proves unhelpful in deciphering an opinion's legal concepts. Legal concepts are fragile constructs that are prey to changes in the wind; legal words such as Intent and Jurisdictional, given fixed meanings, would lose their usefulness in legal reasoning. Legal combatants, when forced into a corner, tend to treat the meanings behind legal labels much like a railroad ticket: good for this trip only.

Lawyers whose clients are in a bind urge upon the courts slightly outlandish definitions of Willful Misconduct, Battery, Due Process, or whatever. The common law, like the U.S. Constitution, sheds its skin

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123 Lubasch, *supra* note 120, at A2.

and grows a new one occasionally, in part by a process of endorsing newly-minted definitions of legal concepts. The first-year contracts casebook underscores this game of revolving definitions with its sales contract case that asks what the contract in question means where it reads "chicken."[124] The buyer in the case, as noted earlier, contracted to buy "chickens," but what the buyer more particularly wanted, but failed to spell out, was young fryers. When the seller delivered mature, too-tough-to-fry hens, the dissatisfied buyer made a federal case out of the meaning of "chicken."[125]

Legalistic chicken debate is of course the sort of thing that gets students of The Law laughed at in movies and books. Lawyers, despite appearances, are even able to laugh at themselves when their jargon erupts into absurdity. We lawyers couldn't live with ourselves and our legalese if we didn't make jokes to release some of the hot air in legal discourse. Examples of this anxiety-reducing humor are the make-believe opinions that circulate around law schools. One such mock judicial opinion, written for legal laughs, concerns a regulation banning horses from a city park. The issue in the opinion, which the mock court, with a straight judicial face, answers "yes," is whether a bird can, under some circumstances, be deemed a "horse." The power of legal reasoning is such that turning a bird into a horse is only slightly beyond the pale.

Another aspect of lawyerly reasoning is the lawyer's use of the legal fiction device, a sort of half-baked logic reminiscent of the kind that deters flat earth people from riding off into the sunset. This is the type of logic that once caused common law judges to decree that when a man and a woman marry, they merged into a single male entity in the eye of The Law, meaning the husband controlled all marital assets. Reasoning of the same sort resulted in the old common law fiction that a woman, because she possesses the requisite female plumbing, is presumed capable of giving birth no matter how advanced her age. A more up-to-date example of this black-is-white reasoning is the way judges avoid language in worker's compensation statutes denying compensation to the families of workers who commit job-related suicide. Suicide, reasons the legalist, is *willful* self-extinction. But since workers who kill themselves are obviously thinking abnormally, they must lack the brain power to be *willful.* Since, therefore, these suicidal workers only *unwillfully* killed themselves,

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[124] *E.g.*, BASIC CONTRACT LAW, *supra* note 55, at 335 (citing Frigaliment Importing Co. v. B.N.S. Int'l Corp., 190 F. Supp. 116 (1960)).

[125] *Frigaliment Importing Co.*, 190 F. Supp. at 116.

compensation benefits, despite the statutory bar in suicide cases, are due. Suicide, in other words, in Law, is only sometimes fatal.

Such make-believe extends even into constitutional interpretation. The Due Process Clause of the Fourteenth Amendment, written to bolster the freedom of freed slaves, is today given such an imaginative reading that corporate America is turned into a Fourteenth Amendment "person" and given a full measure of Due Process protection.[126] Then there's that most amazing, and most resilient, legal fiction, one that pervades all legal life, none other than its honor — The Law.

Some of the above examples of the illogic of lawyerly logic are admittedly extreme. But not outrageously so, considering the illogic of attaching a Willful Misconduct label worth millions to a lonely suitcase that security guards inadvertently failed to connect up to a boarding passenger. Recall also the *Peg v. Pierce*-type suit in which a criminal statute can control case results even though the statute's drafters never dreamed they were writing civil tort law.

A related use of legal logic that is too logical by half occurs in situations where the legislature obviously intends to regulate activities *A* through *Z*, but through an obvious oversight omits activity *Q* from the text of the statute. A court that reasons with a legal vengeance will take the legislature at its literal, if misspoken word, and refuse to bring *Q* within the statutory regulation. We call this exclusion of *Q* a form of legal reasoning, although remember that such dogged logic is not exclusively legal, as can be seen in the case of fundamentalist Protestant sects that ban pianos from their churches. The Biblical basis for banning instrumental music is fraught with legalistic reasoning: since New Testament descriptions of early Christians at worship mention no instrumental music, it follows, as does night the day, that God intends that Christians worship a cappella.

Professor Steven Burton illustrates how far legal reasoning has fallen from its scientific days in the legal laboratory. Burton finds reasoning by example and other such traits of the legal mind "useful," but I gather not terribly so:

> [L]egal reasoning in the analogical form remains the underlying mode of thought. . . . [T]he combination of analogical and deductive forms of reasoning is useful in many cases but does not [alone] solve the problem . . . . One cannot conclude that legal reasoning really is analogical. Nor can one conclude that legal reasoning really is deductive. In some respects it is both, and in some respects it is neither. . . . Even if legal reasoning "is

126 *See* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

not capable of founding exact logical conclusions," its interpretative method should be understood fully before the implications for legitimacy are evaluated.[127]

You see the perils of trying to put legal reasoning in capsule form. It's more helpful simply to point, as legal educators do, to what lawyers do in practice and stick a "legal reasoning" label on it. Nobody has ever worked out a sweeping theory about how reasoning by example and all the rest actually work. Lawyers in this respect are like those novelists who confess to little understanding of how they create their art.

All this inexactness about legal reasoning hits first-year students hard when they initially try to fit casebook cases into some kind of order worthy of the name "precedent." If the rule of law is truly a system of rules in which like cases are decided alike, the student needs to know how to tell which cases are alike and therefore fit under a single rule. So why don't law professors spell out the analogical-deductive-inductive-common sense mode of legal reasoning that will enable students to distinguish the cases that fit under rule *A* from those that fit under rule *B*?

B. Analogical Reasoning

Analyzing casebook opinions and writing student briefs in-

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127 STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 82-84 (1985). Also of interest to law students is EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949). Levi illustrates the peculiar nature of legal reasoning by tracing the decline and fall of the old rule exempting manufacturers from liability to consumers for injuries caused by Negligently-produced products. *Id.* at 9-27. What happened was that the common law gave birth in the mid-1800s to a tiny exception to the then-bedrock rule of manufacturer nonliability for injuries caused by defective products carelessly made. The tiny exception was a sub-rule permitting Negligence awards against manufacturers and distributors of certain Inherently Dangerous products, loaded guns, for instance. Over the years, this sub-rule's list of Inherently Dangerous items was expanded. Initially, a bottle of mislabeled poison purchased at retail triggered distributor liability. Then later, defective guns and hair wash gained Inherently Dangerous status; eventually the circle of Inherently Dangerous items widened to include defective scaffolds, coffee urns, and aerated bottles. By 1916, the New York Court of Appeals had opened the Inherently Dangerous window so wide that Buick Motor Company was deemed vulnerable to the Negligence suit of a Buick owner injured because of a defective wheel. MacPherson v. Buick, 111 N.E. 1050 (N.Y. 1916). The circle was now complete. The original rule of nonliability began with a defectively constructed wooden coach, Winterbottom v. Wright, 152 Eng. Rep. 402 (1842), and, in less than a century, swallowed its tail by recognizing as an Inherently Dangerous exception another coach in the shape of a Buick car afflicted with a defective wooden wheel. The sub-rule allowing limited manufacturer liability had thus expanded until, washed down with legal reasoning, it swallowed the parent rule of nonliability. This brand of legal reasoning can also be called an institutional change of mind about the politics of tort liability.

volves heavy doses of lining up precedent cases arguably similar to the case at hand. Dissimilar cases, which are the cases that strike the legal reasoner as analogical mismatches, are thrown on the scrap heap of cases-not-on-point. The *Roe v. Wade* pro-abortion decision,[128] for instance, is deemed by the Supreme Court to bear a likeness to the Court's earlier case of *Griswold v. Connecticut*.[129] The *Roe* Court explained that *Griswold* is "similar" because the justices in *Griswold*, by ruling that states can't bar married couples from using contraceptives, recognized a constitutional Right Of Privacy; and since child-bearing is likewise a private sexual matter, it follows that *Roe* is also a Right Of Privacy case, and, therefore, governed by the *Griswold* privacy precedent.[130]

This reasoning by analogy is a far cry from science. Still, if legal reasoners are, as is usual, representatives of a class that shares pretty much the same cultural and social values, such intuitive reasoning by example works as a way of thrashing out minor differences and ensuring minimal consistency in legal ordering. The trouble comes, as in the instance of *Roe v. Wade*, when pro-choice and pro-life forces raise the level of discord to the point that analogical reasoning about metaphysical privacy rights is too frail a vessel for carrying the contending arguments.

Consider the classroom hypothetical known to all torts students in which a stranger on a bridge ignores the cries of a swimmer drowning in the river below. The stranger, by tossing a handy life buoy to the swimmer, could easily prevent the drowning. Yet in a Negligence suit against the heartless stranger, legal custom says the defendant stranger is not liable, no damages are due.[131] Before we ponder what cases are similar and therefore controlled by the stranger-on-the-bridge case, we need to think about what words to use in stating the no-duty-to-rescue rule of this drowning case.

Here are three possible ways to state the holding in a drowning case in which the heartless stranger escapes tort liability: (1) refusal by a stranger to rescue a swimmer is no tort; (2) refusal by either a stranger or a friend to rescue a swimmer is no tort; (3) refusal to rescue, whatever the relationship or context, is no tort.

Each time the rule moves, from (1) to (3), up a rung on the ladder of abstraction, the breadth of the rule expands. Thus, ver-

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128 410 U.S. 113 (1973).

129 381 U.S. 479 (1965).

130 *Roe*, 410 U.S. at 152-56 (citing *Griswold*, *id.*).

131 KEETON ET AL., *supra* note 69, at 375-82.

sion (3) of the no-rescue rule covers all reluctant rescuers whatever the circumstances. So which of these rules negating Negligence liability for the stranger on the bridge is the "correct" rule for purposes of precedent? To put it another way, is the case of the *stranger* on the bridge similar or dissimilar, for purposes of precedent, to the case of the *friend* on the bridge? And what if the friend pushed the swimmer into the river?

Here we come to the crux of the problem of reasoning our way to an answer about when cases belong under the same rule — when, that is, the similarities between the cases are more important than the differences. The awful truth is that we lawyers lack any finely tuned way of grouping similar cases and distinguishing dissimilar cases. The Law runs out of rules just when a rule is most needed for identifying case differences that are important. Thus, lawyers must, in the absence of meaningful guidelines for distinguishing cases, play it largely by ear.

A law teacher challenging a class to state with legal finality whether case *A* is like case *B* is being disingenuous. The law teacher knows that legal finality in such matters isn't in the cards. Yet by struggling to make case *B* look like case *A*, students sharpen their skills at argument by analogy.

Students, facing daily the task of distinguishing cases, learn that the system of precedent is elastic. Lawyers can, by distinguishing *B* from *A*, foster change; or by analogizing *A* and *B*, maintain the status quo. It all depends on whether the rule of case *A* is stated broadly or narrowly. What lawyers and judges do constantly is whittle down the ancient facts of case *A* to fashion a new and narrower holding; or, on the other hand, they restate in grander form the old holding in case *A* to cover a broader range of facts. An example of the latter would be to revise the no-duty-to-rescue rule covering strangers by couching the holding in more general terms so that it absolves non-rescuing friends from liability as well.

Legal reasoning, then, is no formula for extracting "correct" holdings or identifying sure-fire "like" cases. Identifying precedent cases comes close to being a matter of intuition; justice is in this sense the outcome of judicial hunches. Looked at as pure ceremony, legal reasoning at least gives the system of precedent its semblance of inevitability. Legal reasoning helps judges dress decisions in logical wrappings, and at the same time avoid being hog-tied on other occasions by the restraints of backward-looking precedent.

Getting back to the stranger on the bridge, suppose the stran-

ger is a doctor who neglects to voluntarily treat a swimmer merely injured. Tort doctrine, again, contains no firm criteria for nailing down whether this uncaring doctor belongs in the same pigeonhole with the lay stranger in the no-liability drowning case. Precedent's flawed underpinnings is a major reason why learning The Law is in the end learning a *process and language* of decision in which rules play a limited role.

Skepticism about The Law's claims to airtight reasoning and pristine neutrality, though as old as the hills, was relatively muted in the U.S. until the Great Depression spawned the New Deal era of radical legal transformation. This was when the pre-1937 U.S. Supreme Court read the U.S. Constitution to stifle government regulation of business. This laissez-faire version of The Law blocked, for a time, Franklin D. Roosevelt's New Deal regulatory programs, and the conservative justices found themselves no longer "above the fray"; their robes could no longer conceal the pre-1937 Court's conservative political role. As a result, The Law's reputation for deathless logic and political abstinence took a beating from which it has never recovered.[132]

New Deal lawyers and law professors critical of a then-conservative judiciary went public in the 1930s with the charge that Supreme Court justices were, always had been, and would by necessity always be, political animals. Left-leaning legal realists pointed out that it wasn't the objective imperatives of legal doctrine, but right-wing politics that prompted the Court's pre-1937, anti-New Deal rulings.[133] This revelation in the 1930s of the political atmosphere from which judges, no matter how learned or elevated, can escape, was the springboard for this century's legal realist movement. The lesson was that judges, like the Wizard of Oz,[134] should be judged not on how much fog they produce, but on how wisely they govern. The Wizard of Oz, the little old man who behind his curtain cranked out impressive clouds of smoke, was unable, though a good man at heart, to perform magic.[135] Judges likewise lack extraordinary powers, surmised New Deal legal realists. The claim that only high court judges are fit to reveal constitutional truth will never again find the ready acceptance it once did.

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132 *See* FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 to 1955, ch. 7 (1955).

133 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 7 (2d ed. 1988).

134 THE WIZARD OF OZ, *supra* note 22.

135 THE WIZARD OF OZ, *supra* note 22.

C. The Abortion Case

High court judges churn out opinions not because of a felt need for self-revelation, but because we the people insist that judges account for their actions by "proving" they conform to the rule of law. This "proof," however, cannot be produced in any fully satisfying intellectual sense. Too much is asked of legal reasoning, prompting skeptics such as Ambrose Bierce to compose wicked lines such as "[a] lawyer [is] one skilled in circumvention of the law."[136]

Few in the legal community wish to disabuse the laity of its idealized model of reasoned decision. Parading a distinctively legal mode of reasoning, even if the distinctively legal is oversold, is deemed by the legal faithful a legitimate way to assure the public that judges are made of better stuff than the legislators who must cast votes without the aid of The Law. Faith, as the Bible says, is the evidence of things not seen, the substance of things hoped for.[137]

The Supreme Court's famous, or infamous, *Roe v. Wade* injunction against the states from putting severe restrictions on the abortion option is an example of legal reasoning heavily wedded to faith.[138] This is not to say that freedom of choice is wrong or that the Court acted extra-judicially in tying the hands of pro-life state legislatures. Putting aside the ultimate political and moral merits of *Roe*, the Court's pro-abortion opinion in that controversial case is a prime example of the fancy footwork that, in the land of legal legerdemain, we call legal reasoning.

The burden of *Roe's* majority opinion is to tie the justices' pro-choice, anti-states' rights theme to a piece of the Constitution. Unable to agree precisely on a constitutional rationale, the justices point variously in *Roe* to the Bill of Rights as well as to the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[139] The Bill of Rights, those original ten amendments to the Constitution, are of course restrictions on Congress and not on state legislatures. As for the Due Process Clause, the post-Civil War Fourteenth Amendment was aimed principally at insuring former slaves their civil rights. So, how can legal reasoning tie either the Bill of Rights or the Fourteenth Amendment to freedom to choose abortion?

Mainstream constitutional reasoning gets windy here, so hold

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136 AMBROSE BIERCE, THE DEVIL'S DICTIONARY 187 (1911).
137 *Hebrews* 11:1.
138 *See Roe*, 410 U.S. 113 (1973).
139 *Id.* at 176-77, 185-89, 192-95.

on to your hats. For some time now the Court has ruled that state as well as federal legislators are barred from legislating away civil liberties protected by the Bill of Rights. And the constitutional reasoning for saying state legislatures must genuflect to the Bill of Rights hinges on the Due Process Clause of the Fourteenth Amendment. Here's the legal history leading up to *Roe v. Wade.*

The Supreme Court reread, after World War II, the Fourteenth Amendment's promise that "liberty" can be restrained by the states only under "due process" procedures, and found fresh meaning. This mid-century revisionist Court reading expands the nineteenth-century abolitionists' notion of "liberty" to include most of the original Bill of Rights freedoms; this means the Bill of Rights is today a limit on state, as well as congressional, action. Not only that, but once the Court freed the "liberty" concept of its Civil War ties, the justices felt free to add freedoms not mentioned in the Bill of Rights to the list of Fourteenth Amendment limitations on state legislatures.

This Due Process legal reasoning so far comes to this: the original intent of the framers of the Constitution and its amendments doesn't alone control the Court's reading; and Due Process "liberty" is elastic enough to permit reading into it the Bill of Rights, plus other freedoms from government restraint that five of nine lawyers sitting on the high court think fitting. But how about a freedom to abort — and the fact that the Constitution is, as is so often the situation in constitutional litigation, silent on the subject?

Here again legal reasoning is up to the challenge of finding a constitutional niche for *Roe.* The constitutional niche central to *Roe* is a judicial creation called a Right Of Privacy. As noted earlier, a Right Of Privacy, not in word but in spirit, was discovered in the Fourteenth Amendment years ago[140] when, during the Warren Court era, the justices told Connecticut in the *Griswold* case that its ban on contraceptives was unconstitutional. Yet, many are troubled by the fact that we have a Constitution mute as to both abortion and privacy rights.

Lawyers in debate often argue, though usually with little effect, that where the Constitution is silent on a subject, that subject is no proper concern of the Constitution and its caretaker justices. The text of the Constitution lacks explicitness about the abortion question, and so, say legal reasoners for right-to-lifers, the justices overstep themselves by removing state bars against abortion. The same

140 Griswold v. Connecticut, 381 U.S. at 485.

"silence" argument, by the way, would negate many of the current Court's "liberty" readings, including the Court's requirement of free counsel for indigent criminal defendants: the Constitution's text stops short of promising *free* counsel, and so for the justices to read *free* into the text is, arguably, out of bounds.

This silent-Constitution logic carried to the next step would grant state governments an escape from Court oversight on issues of free speech and free exercise of religion — this because the Constitution's text nowhere says straight-out that state governments cannot censor speech or regulate religious practices. The ultimate silent-Constitution claim concerns the Constitution's embarrassing failure to name Supreme Court justices as the final federal arbiter of the meaning of the Constitution's vague and ambiguous words. But for almost two centuries *Marbury v. Madison*'s[141] declaration of judicial supremacy has sounded loud and clear despite a silent Constitution. Lawyers in the next century will no doubt continue to make silent-Constitution arguments, but will do so knowing a silent text often speaks in a shout.

Meanwhile, in decisions such as *Griswold* and *Roe*, the justices shift attention away from the Constitution's failure to treat sexual privacy explicitly by spotlighting Fourteenth Amendment open-ended "liberty" and "due process." Boiled down, *Griswold* and *Roe* rest on the general idea that Due Process promises individual *freedom*, including a *freedom* from "liberty"-denying restrictions on sexual privacy. More particularly, some of the *Griswold* justices found a Right Of Privacy in the marriage bed to be a part of the "liberty" that Fourteenth Amendment Due Process puts outside the reach of state legislatures.[142] These justices read "liberty" broadly enough to reach the marriage bed without calling on the Bill of Rights for help. Other *Griswold* justices found a Right Of Privacy lurking in the Bill of Rights as a sort of silent partner to the explicit Free Speech, Free Press, and (freedom from) Unreasonable Searches provisions previously incorporated into the Fourteenth Amendment.[143] From *Griswold's* legal reasoning the jump to *Roe* was easy.

The legal reasoning underlying *Roe*, couched in the lawyer's traditional "obviously" mode, can be summed up this way: the concept of Fourteenth Amendment "liberty" standing either alone, or in conjunction with the Bill of Rights' freedoms otherwise grafted onto the Fourteenth Amendment, obviously suggests sufficient

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141 5 U.S. (1 Cranch) 137 (1803).

142 *Griswold*, 381 U.S. at 486.

143 *Id.* at 486 (Goldberg, J. concurring).

concern for an individual's interest in privacy and autonomy to support an implied Right Of Privacy; this implied Right Of Privacy was the constitutional foundation for the *Griswold v. Connecticut* decision killing a state ban on contraceptives; *Roe v. Wade* is "like" *Griswold* in that both cases involve sexual intimacy; the Right Of Privacy recognized in *Griswold* therefore extends to the sexual intimacy central to the abortion question posed by *Roe*; and so forth (more on *Roe's* legal foundation in Section IX's look at constitutional law).

Equally reasonable legal arguments contrary to *Roe's* majority ruling can be and are made. For instance, there's the argument that *Roe* is quite "unlike" *Griswold* in that only *Roe* involves a fetus. But such arguments simply prove the point that legal reasoning, like legal doctrine in general, does not dictate appellate results. Legal reasoning can only help judges choose between competing precedents. Reliance on past trends of decision does, however, feed experience and structure into the courtroom mix, and is a powerful debating point. But, in the end that's all precedent is: a debating point! Law school's lesson is, again, that to write down The Law of the appellate courts is to write in the sand.

Given the failure of the rule of law to rule us by words alone, cases consequently must be decided ultimately on extra-legal — social and moral — grounds. Knowing early in law school how short The Law falls in keeping judges above the fray permits budding legalists to focus more energies on the moral-political-economic consequences of legal operations. Law, seen as social engineering, invites into legal learning and practice a needed concern for realistic techniques for dealing with the political element in judicial governance. The deficiencies inherent in legal reasoning leave a vacuum to be filled, with the insights and methods of political science, economics, psychology, and statistics.

VI. Torts In A Devil's Nutshell

A. *Modern Rise Of Negligence Doctrine*

The following sketch of first-year torts shows newcomers to lawspeak the bare bones of personal injury law. Any other first-year subject would do as well for a general introduction to the legal mind-set. The vocabularies of first-year torts, contracts, property, and procedure vary, but the underlying legal process by which doctrine and judicial discretion merge into courtroom decision is similar whatever the legal field.

This unifying legal process explains why law students can an-

swer bar exam questions on subjects not studied in law school. Learning to talk the language of torts is a language skill readily transferable to wills, evidence, and even The Law of oil and gas. Law graduates preparing for a bar exam subject neglected in law school, let's say bills and notes, need only learn a little bills and notes vocabulary, and then plug these new terms into their *Juris Doctor* learning.

Law school's division of legal doctrine into neatly arranged subdivisions is slightly artificial anyway. The split of doctrine into such topics as workers' compensation and conflicts of laws is helpful in the same way that a table of contents helps bring order to a world history text. But for the practicing lawyer, whose clients have problems that span the legal globe, the law school split between torts and contracts frequently gets lost in the shuffle.

The following look at tort doctrine shuns the narrow body-of-rules approach common to the legal encyclopedia. In avoiding the rule-oriented approach in favor of a broader overview of the litigation process in tort law, my aim is to help beginners more quickly cope with casebook lore. Although it's perfectly respectable to present torts or any other first-year subject in the form of a list of rules and exceptions to the rules, torts is a poor subject for such blackletter treatment. So unruly is personal injury law that a student could memorize all the doctrines surrounding Negligence litigation and yet have little understanding of the complexities that appellate judges discuss in opinions.

Historically, tort law is the new kid on the block. Property and contract learning go almost back to disputes about who slept where and with whom in stone age caves. Yet, even in the 1770s, when American colonists sent British lawyers home and put judicial robes on a homegrown set of lawyers, there was little tort law to administer. On neither side of the Atlantic was a single treatise on tort law published before 1850. Before 1850, say historians, Negligence was the merest dot on the law.[144]

Once upon a time, in a primitive day before there were even doctors for tort lawyers to sue, English people made do without tort law by arranging to have God available to judge accident cases. God presided over what the early English called trial by ordeal,[145] a procedure through which God pointed out the wrongdoers re-

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144 *See* HALL ET AL., *supra* note 79, at 178-80.

145 *See, e.g.*, ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL (1986); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342-43 (1771).

sponsible for paying damages. In trial by ordeal, an alleged wrongdoer was subjected to some unpleasantness, such as having an arm immersed in boiling water.[146] If the scalded arm failed to heal, this was God's sign that the lame-armed litigant was indeed a wrongdoer and liable for damages.[147]

Trial by ordeal proved satisfactory as long as people believed that God would point out, by healing the burns of virtuous litigants, the path to justice. A variation on trial by ordeal, which was outlawed in England only in 1819,[148] was called trial-by-battle. Instead of a contest of words, litigants fought each other with, among other quasi-legal weapons, swords.[149] The swordplay in trial by battle continued until God tired of the sport and pointed with an authoritative finger to the party at fault — the wrongdoer through whose chest the opponent's bloodied sword protruded.[150]

Trial by swordplay in merry old England, by the way, is how the plaintiffs' lawyer first made his entrance. This trial-by-battle advocate was hired on as a "champion" to match swords on behalf of his litigating client. Today, this tort "champion" uses verbal darts to champion the cause of the injured in adversarial common law battle.

Not until the middle of the last century, when engines and machines began to replace horses and buggies, did tort law, and Negligence doctrine in particular, become a growth industry.[151] Machines, less manageable than the plodding horse, soon began to maim and cripple people. The early railroads helped create a strong economy, but left along their tracks thousands of injured and dead. Victims of the new machine age increasingly looked to the courts to ease their pains with jury awards.

Compensation under a Negligence regime was slow, however, in coming to accident victims. A hundred years ago, before liability insurance and skilled plaintiffs' lawyers were common to the legal scene, few accident victims won Negligence suits. And jury awards, when granted, were modest. History reveals that nineteenth-century trial and appellate judges resisted any large scale shifting of personal injury costs over to railroads, factories, or other enterprises springing up out of the industrial revolution. The industrial revolution after the Civil War was just beginning to get up a head

146 BARTLETT, *supra* note 145, at 4.
147 BARTLETT, *supra* note 145, at 4.
148 *See* I.W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 308-10 (1969).
149 BARTLETT, *supra* note 145, at 110.
150 BARTLETT, *supra* note 145, at 103.
151 KEETON ET AL., *supra* note 69, at 160-61.

of steam. Free enterprise, concluded the political, business, and legal establishment, should be allowed to develop unfettered by too many costly tort awards.[152]

Of course, juries sat in Negligence cases back then as they do now, and presumably jurors then as now felt sorry for severely injured workers and others seeking accident damages. But, as this chapter teaches, the judiciary ultimately ran the tort show, and a conservative judiciary ran a pro-business Negligence show up until World War II. In essence, then, judges, by taking cases away from juries through rulings, for instance, on the adequacy of proof, can veto pro-plaintiff juries. The liberal exercise of this jury veto power by business-oriented judges early in this century finally led labor leaders to accuse these legal priests of laissez-faire capitalism of subsidizing industry with the spilt blood of workmen.

Turn-of-the-century judges were so tough on injured employees seeking tort relief that a whole new political movement evolved. This pro-worker movement eventually led to a partial abolition of the tort system, and to replacing Negligence doctrine in the workplace with a nation-wide system of workers' compensation.[153] Workers' compensation is paid to injured workers even in the absence of employer Negligence. Under workers' compensation, any on-the-job injury is covered automatically by government-required, employer-financed insurance that pays injured workers, not millions, but most medical expenses and a big chunk of lost wages.

When, in the mid-century, political attitudes shifted, and liability (for Negligence) insurance became almost universal, defendant-minded judges were replaced with risk-spreading, enterprise-liability, pro-plaintiff judges. Today, as a result of a more liberal judiciary having invited sympathetic jurors to take charge of Negligence awards, personal injury law works more often to compensate injured plaintiffs.[154] The extent of this turnabout in Negligence litigation, which today gives the accident victim at least an even shot at winning a jury award, is illustrated by a 1975 California case.[155]

A small private plane mysteriously crashed, killing all on board.[156] The cause of the crash, other than some suggestion that the plane ran out of gas, remains unexplained. The families of the

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152 LEON GREEN, THE LITIGATION PROCESS IN TORT LAW 29 (2d ed. 1977).

153 *See* Kenneth Vinson, *Tort Reform the Old-Fashioned Way: By Trial and Appellate Judges*, 1987 DET. C.L. REV. 987.

154 *Id.* at 989-90 n.11 (citing *Report of the Tort Policy Working Group*).

155 Newing v. Cheatham, 540 P.2d 33 (Cal. 1975).

156 *Id.* at 36.

dead passengers sued the estate of the aircraft's owner-pilot.[157] The traditional common-law policy would have required plaintiffs, before collecting tort damages, to offer some proof that the crash was attributable to pilot error. Yet, in this California case, the estate of the owner and pilot of the plane was compelled to pay damages despite the inability of anyone to explain why the plane fell from the sky.[158] Pilot carelessness, although but one of several possibilities, was simply assumed.[159] The California court blazed a new legal trail by more or less relieving the plaintiff survivors of any obligation to prove pilot error.[160]

When judges of yesteryear, by rulings on evidentiary adequacy, restrained juries from freely voting their pro-plaintiff sympathies, business interests were thereby protected from the threat of a run of large jury awards. Businesses are no longer insulated from tort liability; juries have been unleashed; businesses, when possible, buy liability insurance protection against financial ruin. Nor are private citizen defendants, unless protected by liability insurance, free from the risk of ruinous liability. Many Negligence judgments, for example, go against the individual driver of a privately or company-owned automobile. (Intentional torts, by the way, are not the bread and butter of trial lawyers; although victims of Assault, Battery, False Imprisonment, and Wrongful Infliction Of Mental Distress may have good claims, such victims often must suffer an intentional wrongdoer who lacks reachable assets and whose liability insurance only covers Negligence judgments.)

Although auto accident victims ordinarily sue the driver of the other car, the real and unnamed defendant behind the scenes is usually a liability insurance company, the deep pocket backing up the defendant driver. Liability insurance provides the bulk of the money that today fuels the tort system's lottery-like shifting of accident costs from the backs of about one out of two accident victims.[161]

This liability insurance money becomes available to pay for a victim's injuries only in instances where the insured defendant, in the opinion of judge and jury, has committed a Negligent act. Liability insurance monies, or else corporate or government treasuries, are the principal sources for tort compensation for not only

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157 *Id.*

158 *Id.* at 40-41.

159 *Id.*

160 *Id.*

161 *See* JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME 119 (1986).

traffic accident victims, but also in claims involving the two other most frequent victims of lawsuit-breeding accidents — consumers of products defectively designed or manufactured, and health-care patients damaged by careless medical attention. Because most jurors have come to understand that in most personal injury suits an insurance company or a presumably well-heeled corporation will pay any tort awards assessed, such jurors may have few qualms (other than the slight risk of prompting higher insurance premiums or consumer prices) about sticking it to the deep pocket defendant.

The modern unleashing of award-happy juries is judicially justified by an unusually candid political rationale dubbed "enterprise liability."[162] Enterprise liability means, in the jargon of torts, shifting more of the costs of accidents to business concerns or government entities, who presumably are good cost-spreaders.[163] Cost-spreading is done by using liability insurance and, in the case of government defendants, taxes to spread accident costs widely over premium payers and taxpayers.

Under enterprise (loss-spreading) liability, the question of whether carelessness caused an accident is often still relevant, and the response of judge and jury is presumably influenced by a defendant's ability to spread losses through liability insurance or higher commodity prices or, in the case of defendant government agencies, higher taxes. Spreading accident losses is better economics and better justice, so current theory goes, than leaving catastrophic losses upon individuals and their families.[164] Accident law, in thus taking its cue from shifts in political currents, is a sort of living law in which judges and juries go with the flow of public (loss-spreading) demand, defining Negligence (or Strict Liability) from case to case to fit the politics of the moment.

At one time, tort law's complicated judge-and-jury system of punishing faulty tortfeasors by forcing them to pay damages interested mainly the trial bar. But, given the current obsession with suing at the drop of a hat, the business community is now much concerned with The Law of torts. Business interests have increasingly borne the brunt of larger and more frequent jury awards. This inflation of business's litigation expenses explains the higher

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162 *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); KEETON ET AL., *supra* note 69, at 24 (discussing relative capacity of respective parties to bear or distribute loss).

163 *See generally* Priest, *supra* note 162.

164 Priest, *supra* note 162.

cost and occasional unavailability of liability insurance, and explains also why the business community has lately become a highly visible force for legislative tort reform.[165] Business-oriented reformers ask legislators to limit Negligence damages, tighten up on the time allowed for filing lawsuits, require firmer proof of defendant carelessness, cap plaintiff lawyers' contingent fees, require more trustworthy proof of injury, and in general tinker with the civil jury system so that damage-suit defendants aren't themselves victimized by bleeding-heart juries manipulated by the histrionics of silver-tongued plaintiffs' lawyers.[166]

There is also the more radical breed of tort reformer, found usually on law school faculties, who argue that from the point of view of accident victims, the tort system, even given the expansion in enterprise liability, is nevertheless an inadequate compensation system.[167] Radical reformers remind us that half of all accident victims, for one reason or another, still go uncompensated; that jury suits are devilishly expensive and that too little of the liability insurance money actually winds up in the pockets of victims fortunate enough to win lawsuits; and that in any event the lawyers' high-priced adversarial system is a nasty, lengthy, tedious business for litigants to have to suffer through when there are more decent ways to run a compensation system.[168] Why not, say these tort dissidents, install a no-fault, automatic-pay system like workers' compensation, adapted to auto accidents and medical malpractice, and better designed to serve efficiently and fairly the goal of compensating for accidental personal injuries.[169]

Nonetheless, personal injury law, despite minor legislative intervention of late, remains much the same common law creation it has always been. Understanding the fault-based torts process, then, requires an appreciation of how judge and jury, without benefit of statutory guidance, determine when in fairness accident losses should be shifted to a defendant. Such common law adjudication has over the years produced a special language and a highly complex procedure for dealing with car crashes, defective lawnmowers, slips on banana peels, medical butchery, and even the launching of a possum-playing fox.

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165 Vinson, *supra* note 153, at 990-91.

166 Vinson, *supra* note 153, at 990-91.

167 Vinson, *supra* note 153, at 987.

168 Vinson, *supra* note 153, at 987-88.

169 For one of the latest in a long series of proposed no-fault compensation schemes see STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989).

B. Litigation Process In Tort Law

As noted earlier, to learn that the Negligence standard triggering an auto driver's liability for damages involves a "failure to use reasonable care" is to learn, given the indeterminacy of "reasonable care," very little. The complex procedure, moreover, that judge and jury follow to pinpoint those deficient in Reasonable Care further complicates the reading of the torts casebook. Beginning students too often minimize the procedural (and human) aspects of the litigation process and of appellate opinion-writing. The chief obstacle torts students must overcome is the bred-to-the-bone idea that legal mastery comes with rule-learning alone.

Moreover, the fact that there's a separate first-year course in civil procedure leads overly doctrinaire students to conclude that a clear line exists separating trial procedure and substantive law. Torts is in theory a "substantive" law course, a label suggesting large doses of meaty rules. Yet, setting the mind to look for meaty substance in the flimsy doctrinal apparatus of tort litigation is a handicap. Students should focus on the *procedure* by which judge and jury flesh out, case by case, the content of so-called substantive doctrines such as that of Reasonable Care. The torts casebook mainly shows careful readers the *procedure* through which judge and jury share the discretionary power of choosing who deserves tort awards.

One famous case included in all torts casebooks tells the story of an injured Helen Palsgraf, who failed in the 1920s to win a Negligence suit against the Long Island Railroad.[170] *Palsgraf v. Long Island R.R.*[171] is famous because of the intricate dance of doctrine choreographed by Judges Cardozo and Andrews of the New York Court of Appeals (Cardozo later became a justice on the U. S. Supreme Court). These two jurists wrote majority and dissenting opinions explaining to Helen Palsgraf, and to countless law students, how The Law and New York's highest court answer her claim.

Like many casebook cases, the outcome in *Palsgraf* hinged on a close appellate vote. The case could easily have been decided in Helen Palsgraf's favor. In fact, plaintiff Palsgraf won at the trial court level, and then again when the railroad appealed to an intermediate appellate court. But, the defendant railroad's lawyers persevered, and at the end of the appellate line, convinced four of

170 *See, e.g.*, DOBBS, *supra* note 69.

171 162 N.E. 99 (N.Y. 1928).

seven high court judges that Helen Palsgraf was a loser in the blame game called torts.[172]

The events that transpired long ago to cause injury to Helen Palsgraf as she waited on the Long Island Railroad platform for a train were, at the appellate level, undisputed.[173] Palsgraf was hurt when free-standing platform scales toppled over and fell on her.[174] The scales were somehow knocked over when a package of explosives dropped by a nearby boarding passenger exploded.[175] The unidentified boarding passenger dropped the package when, in attempting to board a crowded and moving car, he was pushed by railroad employees attempting to stuff yet another body aboard the departing train.[176]

Perhaps if Helen Palsgraf could have identified the boarding passenger with the harmless-looking but accident-causing package, her lawsuit might better have been aimed at this explosive passenger, if by chance this passenger carrying fireworks to a party had money in the bank to pay damages. Yet in shopping for defendants who are neither immune from suit nor judgment-proof, plaintiffs such as Palsgraf often must take second choices, in this case the Long Island Railroad. As the case turned out, Helen Palsgraf and her lawyer could take solace only in *Palsgraf's* dissenting opinion in which Judge Andrews argued that plaintiff Palsgraf was denied her just financial desserts only because the Cardozo-led, pro-railroad majority lacked keen enough insight into The Law.[177] And it's to Cardozo's and Andrews's insights in *Palsgraf* that we now turn. Ahead is a tangled web of legal formulas and trial procedure that, when unraveled, reveals a good bit about the litigation process in tort (from Latin, meaning twisted) law.

At the outset, keep in mind that the game plan for lawyers representing accident victims such as Helen Palsgraf is to get the injured client's case to a jury. The assumption among lawyers around the courthouse is that damage-suit juries are predisposed to give pro-plaintiff verdicts.[178] The defense lawyers for the railroad in *Palsgraf* knew this, and no doubt sought to have the trial judge, and later the appeals judges, bypass the jury and make the ultimate (pro-railroad) judgment from the bench. And the way for

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172 *Id.* at 105.
173 *Id.* at 99.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.* at 101-105 (Andrews, J. dissenting).
178 *See* Vinson, *supra* note 153, at 989 n.7.

defense lawyers to accomplish this bypassing of the jury is to persuade judges that a case hinges on issues of Law, the sort of courtroom issue to which judges alone supply answers. This all adds up, in *Palsgraf*, to subtle legal maneuvering between opposing lawyers — and between Judges Cardozo and Andrews — over how judge (Law) and jury (Fact) ought to share the power of judging Helen Palsgraf's suit for personal injuries. (Law and Fact, remember, are flexible, stick-on labels that by legal convention carry unconventional meanings.)

Cardozo's opinion tells us that the trial court jury that heard the story of Helen Palsgraf's accident determined that the railroad, by virtue of its employees' efforts to crowd another passenger or two onto a train, was Negligent.[179] Based on that jury finding of what lawyers call Fact, the trial judge awarded Palsgraf damages against the railroad.[180] Since the Negligence issue is one of Fact, and since the jury determines issues of Fact, the lawyers for the Long Island Railroad couldn't legitimately ask an appellate judge to forthrightly second-guess the jury's Negligence verdict. But defense lawyers in such a situation can nevertheless attempt to carve out of Negligence doctrine an issue of Law that delivers to the judiciary an ace with which to trump a jury's pro-plaintiff Negligence card.

Here again we find surfacing that duality running throughout The Law. Just as legal rules tend to travel in pairs of opposites, one for plaintiff, one for defendant, so are trial court issues of Law and Fact often mirror images of each other. For example, at the *Palsgraf* trial, after the jury's Negligence (Fact) decision prompted the trial judge's judgment for Helen Palsgraf, the railroad's lawyers no doubt appealed that judgment on grounds that Helen Palsgraf presented Insufficient Evidence (a Law question) at trial to support the jury's verdict of railroad Negligence — that in other words the trial judge, because Negligence proof was skimpy, ought to have intervened and declared the defendant railroad as a matter of Law liability-free, and thereby prevented Helen Palsgraf's case from going to the jury.

Although the jury is the official Fact-finder, it's traditionally the trial judge's job to decide if the trial testimony is adequate proof to create a genuine question of Fact. If the evidence concerning possible railroad carelessness is so one-sided, in favor of either litigant, that the judge can see no legitimate room for dis-

179 *Palsgraf*, 162 N.E. at 101.
180 *Id.*

pute over whether Negligence existed, her job is to say so and bypass the jury. In other words, whether Sufficient Evidence of (Long Island Railroad) Negligence was introduced at the *Palsgraf* trial to warrant giving the Negligence issue to the jury was an issue of Law for the trial and appellate judges to ponder.

Theoretically, then, the Cardozo-led Court of Appeals could have justified its pro-railroad decision on the question-of-Law ground that Helen Palsgraf introduced Insufficient Evidence to justify asking the jury its opinion on railroad Negligence. Since there is no litmus test of what constitutes Sufficient Evidence, this evidential question of Law in effect allows the judiciary wide discretion to disregard inconvenient jury verdicts of Negligence. Judicial opinions written to explain judicial vetoes on Insufficient Evidence grounds are notorious for their opaqueness. Such opinions lean heavily on vague boilerplate definitions of Reasonableness and make for especially woolly reading.

Cardozo's opinion in *Palsgraf*, not one of his clearer literary efforts, in fact contains language suggestive of an Insufficient Evidence rationale. (Even law teachers aren't sure what Cardozo is saying.) Cardozo at one point argues that the railroad's efforts to assist the passenger carrying the explosives, even though Negligent as to the package carrier, falls short of showing a lack of Reasonable Care *as to* Helen Palsgraf.[181] So it is possible to read Cardozo here as consigning plaintiff Palsgraf's case to an Insufficient Evidence grave. But the preferred reading of *Palsgraf v. Long Island R.R.* keys instead on two other legalisms, Duty and Proximate Cause. Duty and Proximate Cause, like the issues of Negligence and Insufficient Evidence of Negligence, are opposite sides of the same coin. Duty is the Law side of the coin; Proximate cause is the Fact side.

C. *Duty Or Proximate Cause*

Duty is tort law's doctrinal doorman. When a Helen Palsgraf knocks on the courthouse door with a Negligence damage-suit complaint in hand, the trial judge has the discretion to immediately wave her away without further ceremony, to dismiss, without a trial, her lawsuit in its infant (paper) stage. Trial judges who in this way close courthouse doors declare, as a matter of Law, that the defendant owed the injured plaintiff no Duty to exercise Reasonable Care under the circumstances presented. This early No-Duty

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181 *Id.* at 99-100.

dismissal, for policy reasons, of a lawsuit means no day in court for the injured plaintiff. A No-Duty dismissal is the judicial method of signaling policy limits to liability regardless of Negligent conduct. Helen Palsgraf's eventual fate, as it turns out, was just such a No-Duty dismissal, imposed not by the trial judge, however, but retroactively by the Court of Appeals.

For housekeeping purposes, judges need this No-Duty mechanism for use in preemptively closing the door on plaintiffs whose claims are trivial, incomplete, far-fetched, overreaching, or otherwise deemed to involve policy deliberations that courts, even though defendants may be at fault, ought to stay out of. The effect of this Duty rule in *Palsgraf* is that even though the railroad was at fault in boarding passengers, plaintiff Palsgraf nevertheless loses her case when the Court of Appeals concludes that the railroad, as to her, owed no legal Duty of care. The precise nature of this thing called Duty, and just what it is that judges do, intellectually, in deciding if someone such as Helen Palsgraf is owed a Duty (and is therefore entitled to go to trial on the Negligence issue), is a matter which The Law pretty much keeps under its hat. Judge Cardozo, in his majority opinion dismissing Palsgraf's suit, attempts only a fuzzy definition of the Duty of Reasonable Care in holding that the Long Island Railroad owed no Duty to the woman pinned under the railroad's platform scales.[182]

This description of Duty as a judicial doorkeeping device for early screening of tort claims focuses on the functional role of the Duty concept. The (No) Duty concept, which Cardozo discusses in theoretical, substantive, rule-of-law terms, is legal shorthand for closing courthouse doors on prospective lawsuits judged unworthy of closer attention by judge and jury. In his *Palsgraf* opinion, Cardozo describes Duty as part of that broad Negligence equation (see below) that purports to be a blueprint for determining, with neutral principles, the outcomes of accident suits.[183] Here then is The Law's — and Cardozo's — principled rationale for closing the door on claimants such as Mrs. Palsgraf.

Accident victims, first of all, have overcome a major hurdle to winning their Negligence suits when they prove to the satisfaction of judge and jury that a defendant auto driver or railroad or fox hunter injured them by failing to exercise Reasonable Care. Yet, a Negligent defendant's liability must have limits. Suppose the Long Island Railroad is Negligent in pushing a passenger with a package

182 *Id.* at 99.
183 *Id.*

onto a crowded car. Suppose further that the boarding passenger's dislodged package contains a priceless, and fragile, piece of sculpture which falls on the boarding passenger's toe, breaking both the toe and the sculpture. The Negligent railroad would undoubtedly be liable for the broken toe, but perhaps should escape liability for the broken work of art.

This is where Duty enters the picture. The basic Negligence equation is that although the railroad owes a Duty to use Reasonable Care in running its railroad, that Duty to be careful exposes wrongdoers to liability only for accidents Reasonably Foreseeable. Cardozo in *Palsgraf* says that a platform accident such as Helen Palsgraf's can trigger defendant liability only if Reasonably Foreseeable.[184] This means, therefore, that in the case of the broken work of art, Cardozo would say the following issue of Duty presents itself: was it Reasonably Foreseeable that a railroad's Negligence in boarding passengers would damage something like a priceless sculpture? This (Law) issue of Duty puts to judges the task of listening to lawyers disagree over the vague boundaries of Foreseeableness, and then judicially legislating (by opening or closing the courthouse door) liability limits for accidents.

In Helen Palsgraf's case, Cardozo argued that her platform injury was too bizarre, too remote from the exploding package to meet the Reasonably Foreseeable test for railroad Duty.[185] I say Cardozo "argued" because what is or is not Foreseeable is too elastic a concept to permit certitude from even a legal giant. Few of The Law's guidelines exude more spring in the joints than the Reasonably Foreseeable measure for Duty.

In classroom debate, several options are forthcoming for countering Cardozo's no-Duty release of the Long Island Railroad from liability. One option is to focus on the elasticity inherent in tracing Foreseeable consequences, and to argue for stretching Foreseeability to encompass passengers positioned near platform scales even though yards distant from exploding fireworks. Another option is to argue that the Foreseeability concept is hopelessly vague, and that absent meaningful doctrinal reasons for limiting liability, the court should (for various straightforward economic or other policy reasons) extend protection of Negligence law to victim Helen Palsgraf.

Then there's a third option for dissenting from the Cardozo opinion, and that's the option taken by the three dissenting New

184 *Id.*
185 *Id.* at 101.

York Court of Appeals judges in *Palsgraf.* This brings us to Judge Andrews's powerful dissent. Incongruous as it may seem to beginning students expecting more blackletters in their lives, Andrews's argument for the *Palsgraf* dissenters represents as valid and authoritative a picture of modern Negligence law as Cardozo's famous essay on Duty. According to Andrews, the issue in *Palsgraf v. Long Island R.R.*, begging the pardon of the learned Cardozo, isn't Duty at all.[186]

Dissenter Andrews's pro-plaintiff opinion argues that the trial court jury, not his four misguided brothers in the Court of Appeals majority, is the proper arbiter of whether the Negligent railroad's scope of liability ought to extend to Helen Palsgraf's odd calamity. A stranger to the twisted path of tort law might well wonder where in the legal world Andrews can find an issue-of-Fact-for-the-jury with which to trump the majority opinion's No-Duty pronouncement. The Negligence theory of recovery, recall, says that the Long Island Railroad need pay damages only to those accident victims to whom it owes a Duty of Reasonable Care, and whose injuries are Proximately Caused by railroad Negligence. Andrews concludes that instead of Duty, the debate in *Palsgraf* about the proper scope of railroad liability ought to be decided as an issue of Proximate Cause.

This (Fact) issue of Proximate Cause is sometimes, depending on a court's mood, split into two parts. One part, the cause-and-effect part, is easy to grasp: was the railroad's conduct in any physical way connected with Palsgraf's injury? (That the railroad's operation of its train clearly contributed to the platform scales accident was, in *Palsgraf,* undisputed.)[187]

The other half of the Proximate Cause issue is complex; this, the metaphysical "proximate" half, in effect asks whether a Negligent defendant's liability *ought* to extend to include so freakish an injury as that suffered by plaintiff Palsgraf. This latter "proximate" half, although by legal convention tagged a question of Fact, is clearly a question purely of values. Keeping separate the simple cause-and-effect form of Proximate Causation from its metaphysical, scope-of-liability, value-laden twin is a constant struggle throughout legaldom. The Proximate Cause issue that Judge Andrews writes about is the scope-of-liability version.[188] The chal-

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186 *Id.* at 102-03 (Andrews, J. dissenting).

187 *Id.* at 99-101.

188 *Id.* at 103 ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to

lenge for first-year students is to appreciate that Andrews's issue of Proximate Cause is, lo and behold, the same scope-of-liability problem that Cardozo labels a Duty issue, the big practical difference being that Cardozo's Duty, dressed up in question-of-Law garb, cuts the jury out of helping set liability limits.

Proximate Cause in its simple, cause-and-effect form concerns, in those rare cases when cause-and-effect is unclear, a dispute about physical history: was, for instance, the Proximate Cause of Helen Palsgraf's injuries the railroad's boarding procedure, or were her injuries Proximately Caused by something else, say a fall on her way to the station? This causal connection form of the Proximate Cause issue asks only the physical question — what in fact happened? None of the philosophical messiness of the ought-the-railroad-to-pay question is here involved. Instead, when cause-and-effect is at issue, the jury listens to witnesses tell what they saw and heard, and then the jury makes an educated guess as to the empirical truth about which historical real world events precipitated the injury.

Next is an example, drawn from Andrews's dissenting opinion, of Proximate Cause in its complicated, how-proximate-is-Proximate form. Here, Proximate Cause is the mirror image of the Duty issue posed by the Cardozo majority in *Palsgraf*. Both Andrews and Cardozo are asking, in legalese, the messy *ought* question of how broad a Negligent railroad's liability ought to be under the freakish circumstances surrounding Helen Palsgraf's misfortune. Here is a statement of the Proximate Cause issue, stripped of its legal veneer, that the *Palsgraf* dissenters answered in favor of Helen Palsgraf: were the railroad's Negligent boarding actions a Proximate Cause of injury to Helen Palsgraf in the sense that the railroad *ought*, as a policy matter, to be held responsible for the freakish chain of circumstances leading to the platform scales accident?[189]

It's this freakishness about the falling scales that, after all, prompts any hesitation about extending railroad liability. *Palsgraf* clearly, once the doctrinal curtain is removed, is a debate over what *ought* to be liability policy for this case. And the difference between couching the *ought* debate in Duty or Proximate Cause terms boils down to whether the jury is or is not to play a policy-making role in *Palsgraf*. In this instance, the New York court split 4-3 in favor of cutting the jury out of a policymaking role in this case.

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trace a series of events beyond a certain point. This is not logic. It is practical politics.")

189 *Id.* at 101-105.

The legalistic measuring stick for both Duty and Proximate Cause is, notice, the same question-begging inquiry: whether, under the circumstances of the railroad station explosion, harm to bystanders on the platform is Foreseeable? Foreseeability, like Proximate Causation, is one of those more-than-half-empty concepts that The Law pretends deserve rule-of-law status. Judge Andrews in dissent, however, perceives the shortcomings of trying to rationally measure railroad liability by so frail a measuring stick as Foreseeability. Andrews writes that behind the facade of Foreseeable Causation, the underlying problem is one of "practical politics" in drawing lines which limit, at some point, Negligence liability.[190] Andrews, as would a respectable number of state court judges sitting then and now, concludes in *Palsgraf* that the jury rather than the judge should draw the line placing plaintiff Palsgraf within or without tort law's protection.[191]

D. Devil's Nutshell

First-year torts is mostly Negligence law, and Negligence law revolves around the concepts of Duty, Proximate Cause, and that insufficiency of Reasonable Care that personal injury lawyers call Negligence. Torts students expect to discover finely-tuned formulas lighting up the Duty-Causation-Negligence waterfront. But nowhere is there a sub-set of rules clarifying accident law's vague axiom that defendants are liable only to victims who fall within the scope of a defendant's Duty of Reasonable Care, and whose injuries are Proximately Caused by defendant's Negligent conduct.

The reality is that this over-arching platitude leaves up for grabs just which defendants must pay which bills for which accident victims. This Duty-Causation-Negligence formula, with its overlay of Reasonable Foreseeability, is simply the stage on which the players will perform. This basic Negligence equation glosses over, and hides from the uninitiated, the fact that The Law of Negligence is three parts procedure (through which judge and jury exercise discretionary power), and one part substantive doctrine (providing limited guidance to judge and jury).[192]

Judge and jury, lacking any clear direction from the Negligence formula, have no choice but to make — not find or apply — The Law. For this reason, the torts casebook is in many ways a book of procedure. Once students are able to sift through the obli-

190 *Id.* at 103.
191 *Id.* at 105.
192 *See* Leon Green, *The Negligence Issue*, 37 YALE L.J. 1029 (1928).

gatory tributes to the neutral rule of rules, they can see exposed the procedures by which judge and jury draw the policy lines that give meaning to Reasonable Care and Foreseeability.

Behind the smoke and mirrors of tort doctrine, two basic questions arise in an accident case. The first is "what happened," and is simply a matter of settling on some version of the history of the plaintiff's suit. The second bedrock question is "who pays," a pure policy choice over whether to shift accident losses to a defendant. And it is over this latter *ought* "who pays" question that The Law pulls down a curtain of secrecy called Reasonable Foreseeability.

"What happened" and "who pays" are simply plain English equivalents for the legally-worded issues that lawyers talk about in Negligence cases. The way the Negligence system works, albeit under complex doctrinal cover, is that *both* judge and jury participate in deciding "what happened" and "who pays." The judiciary, however, with its power to control what issues the jury decides, always has the wherewithal to have the last say.

Understanding when and how judges exercise control over juries is a big part of understanding torts. And to appreciate when and how judges control juries requires a grasp of how Negligence doctrine splits up the "what happened" and "who pays" questions into a complex of legal issues that challenge first-year understanding.

The Duty concept, for example, which we've learned functions as a doorkeeper device shutting out freakish or unpolitic claims, is strictly a policy matter of "who pays." Since the Duty issue is a Law question for the judge, the jury is excluded from this portion of the "who pays" determination (as when Judge Cardozo defined the *Palsgraf* issue as one of Duty). On the other hand, Proximate Cause and Negligence, so-called Fact issues by convention left to the jury, may contain elements of both "what happened" and "who pays." And since "who pays" is strictly an *ought* question, it is inaccurate to view Proximate Cause and Negligence as mere factual matters involving mere disputes about history. In *Palsgraf*, Judge Andrews's issue of Proximate Cause was a matter of pure policy.[193]

Another example from *Palsgraf* of a pure-policy Fact issue is the Negligence issue. Unless there was a dispute at trial over the physical details of how passengers were boarded ("what happened"), the only circumstance in *Palsgraf* raising a Negligence issue was the moral dispute over whether to label the railroad

193 *Palsgraf*, 162 N.E. at 103.

Unreasonable in its boarding practices ("who pays"). With respect, finally, to Palsgrafian Proximate Cause, such an issue could have included both a "what happened" dispute (over whether, say, Helen Palsgraf's hurts were faked), as well as a "who pays" dispute (about the scope of railroad liability to victims of freak accidents).

Proximate Cause is a doctrinal jungle largely because lawyers and judges are unable or unwilling to keep separate the historical or scientific "what happened" element from the political "who pays" element. This is the same type of confusion generated by lay persons who, when they say "Jo was a cause" of a car crash, fail to make clear whether they are making a moral judgment about Jo's blameworthiness, or merely pointing out that Jo's conduct, regardless of her blameworthiness, contributed in a cause-and-effect sense to an accident. Judges, in instructing juries on the ins and outs of Proximate Cause, traditionally produce a rhetorical nightmare. Jurors no doubt get little out of the judges' boilerplate definitions of Proximate Causation. Definitions couched in terms of both historical fact and of blameworthiness are mixed into an indigestible stew. The same garbled jury instruction on Proximate Cause is given regardless of whether the controversy: (1) is about what physically occurred on the railroad platform or, (2) is about whether the railroad, no matter the freakish circumstances, ought to pay damages, or (3) both. Lawyers and judges throw the whole mess into a single Proximate Cause sinkhole such as the following model jury charge drawn from Texas trial practice:

> Proximate cause means that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause the act or omission complained of must be such that a person using ordinary care would have foreseen the event, or some similar event, which might reasonably result therefrom. There may be more than one proximate cause of an event. New and independent cause means the act or omission of a separate and independent agency, not reasonably foreseeable, which destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question, and thereby becomes the immediate cause of such occurrence.[194]

Such garbled jury instructions — directing the jury to look for physical cause-and-effect connections through metaphysical "natural and foreseeable" lenses — disguise the value judgments implicit in

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[194] CASES AND MATERIALS ON TORTS 342 (William L. Prosser et al. eds., 8th ed. 1988).

deciding whether to shift accident losses. In this way, a submerged "who pays" question sneaks the forbidden politics into the courtroom. Juries, under the cloak of legal conventions about Fact questions, are thrown by The Law's lack of clear definition into the arms of politics, economics, morality, psychology, ethics, sociology, and anything else that tugs on the human conscience, including the stabilizing influence of notions about precedent and the rule of law.

Students wishing to master the Proximate Cause riddle must resist being misled by coded opinions, and must make their own assessment of what's at the heart of any judicial discussion of Causation. To appreciate what's at the bottom of Proximate Cause opinions, the reader must set aside for a moment the judge's talk of Causation metaphysics. The task then is to figure out, based alone on the case's bare factual record and without the court's diverting noises, whether the court began with a question about what actually happened in the past, or whether the issue is a post-facto, loss-shifting, *ought* problem similar to the "who pays" issue in *Palsgraf.*

It's one kind of job, and a real factual inquiry, to empirically trace, for instance, the history of the planet's pollution back to the ape who crawled down a tree, urinated in a stream, and first began to upset nature's balance. It's quite another kind of job to select, from among a jungle of contributors, which polluting apes should as matter of public policy be liable for damages. Confusing history with the politics of loss-spreading, as is the courtroom custom in cases such as *Palsgraf,* makes for weak history and poor politics — and causes first-year students to stumble repeatedly while attempting to get a feel for such legal legerdemain.

Judge Andrews's *Palsgraf* dissent talks candidly about how defining the scope of a tortfeasors's liability in Proximate Cause terms is akin to tracing the outward spread of ripples on a pond into which a stone has been tossed.[195] In *Palsgraf,* Andrews considers the liability of a Negligent driver who, hypothetically, triggers an explosion that, among other fallouts, causes a startled nurse blocks away to drop an infant.[196] Andrews talks about the practical politics involved in choosing whether to extend liability to include the dropped infant.[197] Andrews's concern with the ripples on the pond (the extent of the Long Island Railroad's liability) is obviously a concern over "who pays," despite the Fact label given the Proximate Cause issue.

Most judicial opinions expounding on the Proximate Cause crea-

195 *Palsgraf,* 162 N.E. at 104 (Andrews, J. dissenting).
196 *Id.*
197 *Id.* at 103.

ture are less forthright than Andrews's talk of "practical politics." Some judges addressing a "who pays" question inexplicably sprinkle their opinions with Proximate Cause dogma that smacks of a physical cause-and-effect inquiry about history. Such cause-and-effect language suggests, falsely, that even though a Proximate Cause issue be purely a matter of *ought*, it nevertheless can be determined through precise measurements of time and space, as though deciding at what policy point to limit liability is the equivalent of measuring in a physics lab the attributes of the atom.

The biggest metamorphosis that the concept of Proximate Cause can undergo, however, is not the one bridging the gap between historical factfinding and the practical politics of fixing liability limits. The biggest metamorphosis is the one engineered by Justice Cardozo in his majority opinion spelling out Helen Palsgraf's legal downfall. Take note that the two lower courts that decided Palsgraf against Long Island Railroad saw the case as a problem in Proximate Cause.[198] Yet with a flick of his pen, Cardozo turned a jury issue of Proximate Cause into a Duty issue for the court.

Aside from Cardozo's switch in legal name tags and the consequent removal of the jury from the scene, nothing was changed by Cardozo's calling the *Palsgraf* issue one of Duty. Beneath either the Duty or Causation label, the fundamental question (upon which reasonable people surely can disagree) is the same: should the railroad pay for this freakish accident? Cardozo and his concurring brethren decided that the railroad needn't pay. Yet, had one additional Court of Appeals judge voted for Helen Palsgraf, Cardozo's theory on Duty would have been theory only, and Helen Palsgraf would have taken home her Proximate Cause jury award.

So who's correct, Cardozo or Andrews? And how does a student know when to put a freakish accident like Helen Palsgraf's in the Duty pigeonhole and when to put it in the Proximate Cause pigeonhole? To these questions of high legal principle, down-to-earth answers are scarce. Judicial custom, as revealed in casebooks, gives but tentative answers. In future cases, a latter-day Cardozo and Andrews must continue this tug of war between Duty-for-the-judge and Proximate-Cause-for-the-jury.

Juggling labels after the fashion of the *Palsgraf* court has its counterpart in Mark Twain's *Huckleberry Finn*.[199] Tom Sawyer has to strug-

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198 222 A.D. 166 (N.Y. App. Div.), *aff'g* 225 N.Y.S. 412 (1927), *rev'd* 162 N.E. 99 (N.Y. 1928).

199 MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 288 (Heritage Press ed., 1940) (1887).

gle to keep life, and Huck, square with principle.[200] Huck Finn, possessing a lay mind insensitive to the finer points of legalism, concludes that pickaxes are best for digging under the cabin in which Jim is trapped.[201] Tom Sawyer knows better; he calls for case-knives (table knives): "It don't make no difference how foolish it is, it's the right way — and it's the regular way. And there ain't no other way that I ever heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife."[202]

After hours of fruitless digging, a light dawns in Tom's legal mind. He drops his table knife and commands Huck to give him a "case-knife." Huck tells the rest:

> He had his own by him, but I handed him mine. He flung it down and says, "Gimme a case-knife." I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickaxe and give it to him, and he took it and went to work and never said a word. He was always just that particular. Full of principle.[203]

The Law is full of just that kind of principle, which is why casebook rationalizations must be taken with a grain of salt. The flood of words that appellate judges give us for washing down their decisions contains more than a little "case-knife" jurisprudence. Proximate Cause is a good case study in how lawyers ask legal language to carry more weight than mere words can sensibly manage.

Over the last century, dozens of adjectives have been tried as tort substitutes for the evasive Proximate, all in the vain hope that by changing the adjective The Law could be as principled as Tom Sawyer. Some legalists apparently believe the confusion in Proximate Cause doctrine is in the fuzziness of the adjective "Proximate" rather than in the double-meaning and the excessive load assigned to the Proximate Cause concept. The tried but failed substitutes for Proximate include the adjectives Sole (Cause), Active, Direct, Legal, Effective, Operative, Independent, Efficient, Preponderating, Foreseeable, Substantial, and Responsible. No matter which loose adjective precedes Cause, judge and jury can't avoid having to feed meaning into the adjectival void.

Proximate Cause, despite Andrews's forthright essay on Causation's underpinnings in "practical politics," is nevertheless still a handy hide-and-seek device for opinion writers. Although usually a

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200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.* at 291-92.

question for the jury, judges can control the Proximate Cause outcome by turning the issue into a Law question: whether Sufficient Evidence of Proximate Cause exists to warrant jury consideration. By this procedural Sufficient Evidence device, judges, under the seemingly neutral cover of measuring evidential Sufficiency, can and do legislate the outcomes in tort cases.

Judges who, in explaining their decisions, point toward Proximate Causation's gloomy corner win no prizes for candor. But from the point of view of the judiciary, putting responsibility for a decision on the weak back of Proximate Cause saves having to talk straight "practical politics," and at the same time enables judges to quietly and unobtrusively control unruly juries. Dean Prosser, to whose hornbook on torts[204] weary students go for relief from casebook puzzles, declares Proximate Cause, in the end, a lost cause:

> Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space . . . natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting . . . .[205]

For the beginning torts student, the secret of managing the Negligence case is learning how Duty, Causation, and Reasonable Care doctrines mesh with trial procedures for farming out the underlying factual and policy questions to judge and jury; and learning as well how interchangeable these pseudo-substantive doctrines are. Duty-Causation-Negligence are somewhat interchangeable because the basic "who pays" inquiry is common to all three segments of the formula. The legal system recognizes this without saying so by assigning, as a measure of Duty, Proximate Cause, and Negligence, the same fools-gold legal test of Foreseeability.

The railroad, for example, owes a Duty to use Reasonable Care if danger on its platform is *Foreseeable*; thereafter the railroad violates its Duty (Negligence) if it fails to use Reasonable Care to avoid *Foreseeable* risks; and such Negligence is a Proximate Cause of injury if injury is *Foreseeable*. Yet what is and is not *Foreseeable* is in good measure in the eye of the beholder. Such a weasel word simply asks the "who pays" question in a less than candid, but legal, form.

E. Tort Reform

A crisis periodically occurs in the personal injury world. These

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204 *See* KEETON ET AL., *supra* note 69.

205 William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 32 (1953).

crises center in the insurance industry that supplies the money driving the tort system. On occasion, for reasons having to do with interest rate cycles and with what many deem a litigation explosion, liability insurance becomes widely unavailable or premiums shoot up.[206] When this occurs, legislatures try to lower litigation costs — and thereby pacify complaining premium payers — with damages ceilings and other tort reforms of the sort mentioned earlier.

Torts casebooks touch on these reform matters, and often refer to even more radical departures from common law torts such as workers' compensation acts and no-fault auto insurance plans.[207] The following is a brief introduction to one aspect of the ongoing debate about tort reform — the merits of scrapping or retaining the civil jury. Since the jury is so integral a part of the litigation process in torts, beginning students should have some familiarity with long-standing critiques of that ancient institution.

Juries were popular in colonial times because, in rendering their verdicts, jurors often disregarded unpopular legislation drafted by representatives of the English crown.[208] Eighteenth-century jurors, both civil and criminal, won the hearts of their colonial neighbors by ignoring royal edicts and giving down-home verdicts more in tune with the revolutionary times.[209] The colonial jury was revered because, like Robin Hood's merry men, it was an outlaw band.

More recently, the civil jury has been equated with grass-roots democracy and the wisdom and impartiality that comes with collective judgment. Especially in personal injury litigation, the jury is thought to be a needed antidote to The Law's emotional detachment; the jury can provide human sympathy to the injured in the form of generous awards. The civil jury and its merits are well-known, and in many states this reverence for the civil jury takes the form of state constitutional provisions guaranteeing a right to jury trial in personal injury and other civil suits.[210]

Twentieth-century critics of the civil jury point out that most civil disputes outside the torts area are decided by judges without

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206 *See* DOBBS, *supra* note 69, at 856-58; O'CONNELL & KELLY, *supra* note 161, at 73-83, 109.

207 *See, e.g.*, CASES AND MATERIALS ON TORTS, *supra* note 194.

208 *See* Robert G. Johnston, *Jury Subordination Through Judicial Control*, 43 LAW & CONTEMP. PROBS. 24, 25-26 (Autumn 1980). *See generally* Warren Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205 (1985); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); R. Ben Hogan, III, *The Seventh Amendment*, TRIAL, Sept. 1987, at 76.

209 Johnston, *supra* note 208, at 26.

210 VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 250-51 (1986).

calling on juries.[211] These critics urge that juries in personal injury cases should also be scrapped because juries are too slow and expensive, too secretive, too easily misled by cunning lawyers into awarding outlandish sums, too unrepresentative, too unpopular among people assigned jury duty, and in sum, too horse-and-buggy an institution for handling the factual and legal complexities of modern litigation.[212]

Plaintiffs' lawyers, pleased with the jury's tendency to side with their accident victim clients, and confident of the jury's ability to perform ably and wisely, adamantly oppose reforming, much less scrapping, the civil jury system.[213] All this makes for a heated political fight from which editors of casebooks and law professors generally distance themselves. Nevertheless, readers of the modern torts casebook would do well to understand that just beneath the surface of the printed page a battle rages over whether the torts system and its love affair with the jury is working. Only about half of the liability insurance dollar, after all, gets into the hands of injured claimants. And even then, that helps only the lucky claimants, since half of the victims of traffic, medical, and other accidents receive, for one reason or another, no compensation at all from the torts system.

England, the birthplace of the jury,[214] has long since retired the civil jury in all but a handful of cases.[215] English officials deem the jury too costly, too slow, and too inept (except for criminal cases, where defendants confront the state both as judge and as prosecutor).[216] Here in the United States, each time a rash of

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211 FRANK, *supra* note 28, at 170-85; JEROME FRANK, COURTS ON TRIAL 108-45 (1949). *See also* Edward J. Devitt, *Federal Civil Jury Trials Should be Abolished*, 60 A.B.A. J. 570-74 (1974); Jeffrey O'Connell, *Jury Trials in Civil Cases?*, 58 ILL. B.J. 796-815 (1970); O'CONNELL & KELLY, *supra* note 161, at 23-32; Donald Alexander, *Civil Juries in Maine: Are the Benefits Worth the Costs?*, 34 ME. L. REV. 63 (1982); Aron Steuer, *The Case Against the Jury*, 47 N.Y. ST. B.J. 101 (1975). *But see* Donald P. Lay, *Can Our Jury System Survive?*, TRIAL, Sept. 1983, at 50.

212 *See* sources cited *supra* note 211.

213 *See, e.g.*, CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 147-53 (1962) (pro-jury book). *See also* HANS & VIDMAR, *supra* note 210. The foundation study for much of the empirical data supporting those who support civil juries is reported in HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). This famous University of Chicago Law School study of the American jury system is, however, according to some jury researchers, both flawed, *see* JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 6-8, 12 (1979), and biased, *see* THEODORE LEWIS BECKER, COMPARATIVE JUDICIAL POLITICS 329, 334 (1970).

214 HANS & VIDMAR, *supra* note 210, at 23.

215 JOHN GUINTHER, THE JURY IN AMERICA 169 (Facts on File Publications 1988).

216 Interview with Jeffrey Hackney, Fellow and Tutor in Law, Wadham College, in Oxford, England (July 9, 1994).

multi-million dollar jury awards and concomitant insurance premium increases cause another crisis in the Negligence industry, a few more observers wonder if retaining the expensive jury-based tort lottery is worth the candle.

Despite its critics, however, the civil jury in the U.S. will probably continue to withstand the slings and arrows of reformers. But students of torts may see, as the century closes, a gradual tightening of the reins on tort juries. This tightening of the reins can occur either through legislative action, or through the subtle judicial techniques for controlling jury discretion illustrated in this section.

VII. THE LAW IN TRANSLATION

A. Pierson v. Post[217]

Pardon for again digging up the long dead fox whose ghost haunts law school casebooks, but here comes that promised translation, from Law into English, of the New York Supreme Court opinion in *Pierson v. Post*.[218] This is the pursuit of Br'er Fox that has introduced hosts of law students to appellate legal thought. *Pierson* is a good springboard for those Socratic queries with which professors of property law reduce first-year students to jelly. (New York's Supreme Court is no longer, by the way, that state's highest court; although most states call their highest appeals court a "supreme court," New York now settles for the Court of Appeals.)

Since law school learning is so largely a matter of acquiring a new language, appreciating fully the nuances of even a single opinion can be a huge step toward obtaining legal prowess. In fact, it's only slightly farfetched to talk about teaching and learning an entire legal subject by analyzing in excruciating detail the technicalities of a single case, filling in any subject gaps with consideration of hypothetical questions. The following translation of *Pierson v. Post* into plainer English will aid in learning the lawyer's reverse trick of turning plain English into legalese.

This actual 1805 fox chase case is of legal interest because, underlying Lodowick Post's claim for damages, is the (property) issue concerning which hunter was the fox's legal owner.[219] New York sportspersons Post and Pierson, you recall, quarreled long ago over the remains of a "wild and noxious" fox.[220] Plaintiff Post

217 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
218 *Id.*
219 *Id.* at 175.
220 *Id.*

and his hounds, prior to the fox's demise, had for some time chased this fox over uninhabited public wastelands.[221] (This is the sport that anti-hunter Oscar Wilde called the pursuit by the unspeakable of the inedible.) Then, as the chase drew near a sedentary Pierson, Pierson roused himself to intervene, to slay, and to carry away Post's "wild and noxious" prey.[222] This ungentlemanly intervention prompted Post to sue Pierson for damages for taking his "wild and noxious" property.[223]

On what was surely a slow day in appellate court, even nearly two centuries ago, the *Pierson* judges listened patiently to the fox hunters' lawyers argue from long, Latin-studded briefs. After deliberating on the finer points of The Law of wild beasts, the New York Supreme Court concluded that Post had suffered no property damage. All but one of the judges agreed that the fox in the end belonged to defendant Pierson, despite Pierson's joining the hunt for the kill only as Post's hounds were closing in.[224]

Although a fox free in the woods belongs to nobody in particular, once the fox is captured (or in legal parlance, "occupied"), the fox joins the legal list of things to which owners hold title. The fox then becomes, like Pike's Peak, a hunk of property. A fox, to qualify as property, must of course have a legally certified title-holding owner. And it's The Law's job to match up owners and properties. *Pierson* shows how The Law does this. Below is reproduced most of the original text from the *Pierson v. Post* opinion (and, because it's an 1805 opinion, it contains an indecent amount of Latin, a form of preening that modern judges usually forego). Interspersed at intervals is my interpretation of what the New York Supreme Court had on its legal mind. The original text is in the paragraphs indented in block form. Translation paragraphs are set

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221 *Id.*

222 *Id.* at 177.

223 *Id.*

224 *Id* at 175. *Compare with* 2 WORLD OF LAW 599-605 (Ephraim London ed., 1960) (presents excerpt from MOBY DICK illustrating the "fast-fish" and "loose-fish" principles of whaler jurisprudence: a fast-fish belongs to the party fast to it; a loose-fish is fair game for anybody who can catch it. But when, in whaler law, is a fast-fish fast? Who gets Moby Dick if plaintiffs harpoon him, then abandon their vessel in a storm to save their lives, and later see defendants come along and retrieve Moby Dick, harpoons and all? Fundamental to all human jurisprudence, Melville reminds, is that possession is nine-tenths of The Law. Therefore, plaintiffs, who abandoned their ship and their catch, must in Law lose their fish — just as in precedent, records legalist Melville, the first gentleman who harpoons the lady and has her fast and abandons her so that she becomes a loose-fish to be subsequently re-harpooned by a second gentleman, loses his former fast-fish, "along with whatever harpoons might have been found sticking in her." *Id.* at 601.).

off by italics; the occasional comments in parentheses are simply asides that, though not strictly part of the translation, help flesh out the story. Here, then, with due respect to Br'er Fox, is another autopsy of that long-suffering casebook favorite:

> This was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff. . . . A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.[225]

At trial, Lodowick Post won a jury verdict for damages against defendant Pierson. Pierson has appealed, arguing that Post's claim is so weak that the trial judge should have thrown this lawsuit out of court before it got to a jury trial. (Note that the legal pigeonhole into which Post tried to fit his damage suit was Trespass On The Case. This ancient tort now has a new name — Negligence. Once upon a time all of tort law was classified under either the Trespass label or Trespass On The Case. The difference in the labels was this: if you threw a dead fox on the road and scored a direct hit on Lodowick Post, that was a Trespass injury; if, however, you threw a dead fox on the road and Post came along later and tripped over the carcass, that was an indirect injury and belonged under Trespass On The Case. To understand even vaguely why English lawyers of old put such emphasis on distinguishing direct-Trespass injury and indirect-Case injury would require close reading of ancient and dusty English materials long ignored in American legal education, and in any event a venture unlikely to shed much light. Note also the opinion writer's reference to "now plaintiff" and "present defendant." Although the case name originally was, because Post was the trial court plaintiff, *Post v. Pierson*, when Pierson appealed his trial court loss he became the "now plaintiff," and the name of the case on appeal was turned around to become *Pierson v. Post.* This appellate practice of arranging the case name so that the name of the party appealing, the loser in the court below, comes first is still common practice in most jurisdictions. "Now plaintiff" and "present defendant," and "appellant" and "appellee," are but a sampling of the confusing name tags that opinion writers, unconcerned with readability, employ in a manner reminiscent of the classic Bud Abbot and Lou Costello baseball comedy routine called "*Who's* on First, *What's* on Second.")

> Tompkins, J., delivered the opinion of the court. . . . The question submitted by the counsel in this cause for our determina-

225 *Pierson*, 3 Cai. R. at 175.

> tion is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away? . . . It is admitted that a fox is an animal *ferae naturae,* and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals?[226]

The question is whether Lodowick Post and his dogs got close enough to the fox to justify our letting a jury make Pierson pay damages for his intervention toward the end of Post's chase. (Incidentally, note Judge Tompkins's insistence that the question is a "simple" one of "occupancy." Judges are quick to say that legal issues are "simple." "Simple" belies the presence of hard choices. Hard choices, once acknowledged, put judges on the spot, and make difficult the appearance of neutrality. Yet were the question of "occupancy" really so "simple," the *Pierson v. Post* dispute would never have gone to trial, much less been appealed. Note, too, how the unadorned matter of whether in fairness Post, because of his vigorous pursuit of the fox, should get damages from Pierson is, once in court, turned into a wooly-headed Law question about "occupancy." The Law wants to know whether Post's close pursuit passed the test for "occupancy"; if so, Post holds title as a property owner, and, as a property owner, Post would be, to complete the circle, entitled to damages from Pierson for Pierson's running off with Post's bushy-tailed property. This judicial quest for the meaning of "occupancy" in *Pierson* therefore is not unlike the chasing, like a fox of its tail, of big bushy words around in a circle. Judge Tompkins, by the way, was the judge on the Supreme Court assigned to write the court's opinion in which, as we'll see, all but one outspoken member of the court joined.)[227]

> If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes lib. 2, tit. 1, S. 13 and Fleta, lib. 3, c. 2, p. 175, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton lib. 2, c. 1, p.8.[228]

A sixth-century Roman treatise writer and two authors of treatises on general principles of thirteenth-century English law, whose advice we may or may

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226 *Id.* at 177.
227 *Id.*
228 *Id.*

not choose to follow, wrote that pursuit-absent-a-taking, such as Post's, is good exercise, but no way to win a wild fox. (Note Judge Tompkins's backhanded suggestion that the trial judge's ruling that Pierson pay Post's damages was "obviously" incorrect. "Obviously" is a dead giveaway that the opinion-writer's conclusion is anything but obvious. In the heat of legal battle, "obviously" means, at best, "perhaps." Lawyers and judges who wish to appear confident in argument, but at the same time assure credibility, sometimes begin their assertions with the more modest "Few would deny.")

> Puffendorf (lib. 4, ch. 6, sec. 2 and 10) defines occupancy of beasts *ferae naturae*, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.[229]

Two other ancient civil law authorities likewise support the idea that a fox belongs to an intervenor who beats a competitor's hounds to the prey.

> It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *ferae naturae* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.[230]

Were there English decisions or other authority proclaiming that a closely pursued fox belongs to the close pursuer, we might agree to damages for Post. But we find no English cases about foxes on public lands snatched from beneath the noses of a hunter's hounds.

> Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms, that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an

229 *Id.*
230 *Id.* at 178.

> appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts . . . [or] encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them.[231]

It is true that noted civil lawyers once differed over whether a pursuing hunter could claim a fox short of actually grabbing its tail. But even so, Lodowick Post, with his close-pursuit claim, is out of luck; the ancient authority nearest Post's close-pursuit position suggests only that mortally wounding or throwing a net over a wild fox might suffice to confer ownership.

> We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.[232]

If we take this dead fox, or its value, away from intervenor Pierson and give it to Post, we'd be opening up a can of worms. Everytime a hunter like Post so much as spotted an elusive but doomed prey, he'd be tempted to sue the intervenor. (Here Judge Tompkins offers a peace-and-order rationale to back up the opinion's moldy authorities. The argument that awarding Post damages might prompt a flood of lawsuits would hold more water had Tompkins not already admitted to a dearth of fox hunt precedents.)

> However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous, and

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231 *Id.*

232 *Id.* at 179.

ought to be reversed.[233]

As we've been hinting all along, we conclude that Pierson, rude interloper though he may be, need pay no damages. Pierson can disregard the contrary judgment of the wrongheaded judge and jury below.

B. Judge Livingston In Dissent

Tompkins's majority opinion ends with the above announcement that Post loses. But the court record doesn't end there because we're treated next to a rousing dissenting opinion by a Judge Livingston. The importance of dissenting opinions cannot be overstated. Many a view first expounded in dissent has in the long run become a majority opinion. For example, a half-century before the U.S. Supreme Court in *Brown v. Board of Education*[234] ruled "separate but equal" schools for black kids unconstitutional because inherently unequal, Justice Harlan foreshadowed *Brown* by dissenting in the Supreme Court's "separate but equal" approval of a Louisiana statute segregating railroad cars.[235] *Brown v. Board of Education's* desegregation rule was, under this analysis, always The Law; it just took half a century to "find" it.

Judge Tompkins's majority view in *Pierson* therefore may in time turn out to be bad Law, a minority position. Should Tompkins's *Pierson* ruling on "occupancy" later be discovered to be what lawyers call "in error," conventional legal theorists will say the true rule was lying around all the time, merely awaiting judges more adept at "finding" The Law.[236] Livingston's *Pierson* dissent, therefore, is conceivably the germ of The Law of the future.

In addition to paving the way for The Law to be rediscovered, dissenting opinions also serve to keep majority opinions honest. Students should beware of the unanimous court opinion in which judges march in goose step. Unanimity can be misleading. Opinion-writers, like the lawyers they are, tend to fudge their arguments — on both the case facts and The Law — unless kept honest by a tough-minded dissenter. Appellate judges tend to be fierce partisans for their judicial views, and naturally shape their rule-of-law reasoning to convince readers that they "obviously" have a stranglehold on legal truth. The law student's best Law-learning exercise is

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233 *Id.*

234 347 U.S. 483 (1954).

235 Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896).

236 *See generally* Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, PRECEDENT IN LAW 73-87 (Laurence Goldstein ed., 1989) (discussing the "declaratory theory" of law).

to look for the soft spots always present in an opinion's legal reasoning and, if no dissenting opinion is available to exploit those soft spots, to compose a private dissent showing how the ambiguity in the rule of the moment permits of a contrary argument.

Opposing lawyers' appellate briefs are the best evidence of how unbalanced partisan legal debaters can be in shaping legal materials to point toward preordained conclusions. The ostensibly objective "opinion of the court" differs from an advocate's brief, yet it may be mainly a cosmetic difference. Often the court's reasons for decision are little more than a warmed-over version of the winning lawyer's brief, the rough edges of partisan advocacy smoothed over with judicial professions of neutrality in deciding what is, after all, only a "simple question . . . of occupancy."[237] Until law students learn something about judging the extent to which a court's formal words involve hype and fudging, as opposed to a balanced treatment of facts and precedents, reading first-year casebooks remains a risky enterprise.

As you read Judge Livingston's dissenting treatment of the scholarly authorities paraded in *Pierson v. Post*, remember that judges, although by tradition inclined to travel along the historical paths of precedent, can always choose in a pinch to blaze a new road. Judges, however, usually shy from openly and brazenly changing directions, preferring to squeeze their way quietly and gingerly around inconvenient precedents. In Lodowick Post's case, Judge Livingston, if he doesn't blaze a new road, at least extracts from the moldy authorities enough "occupancy" to give a legalistic cast to his lonely pro-Post, pro-property vote.

Thinking like a lawyer-judge chooses to think means looking at old opinions and thinking: which pieces of text can I use in an argument for giving Post the fox? For giving Pierson the fox? For cutting the fox in half? Legal minds fret little about "correct" legal solutions. Legal minds, for a fee, argue either side. Unfortunately, the ultimate quest in law school is rarely for any kind of political truth; the quest is for another counter-argument.

One final matter before beginning the translation of Judge Livingston's argument that Lodowick Post got close enough to the fox to "occupy" the beast. Livingston's writing reflects, compared to the court majority's buttoned-down opinion, a free spirit. This is often the case in dissenting opinions. First of all, a dissent reflects the view only of the writer or of a small minority of judges. It's

237 *Pierson*, 3 Cai. R. at 175.

easier to write clearer, more vigorous prose when writing for the few rather than the many. The larger the committee drafting a report, the denser the prose. Individual writers such as Livingston, shorn of responsibility for pleasing fellow judges, can tap into their private reservoir of passion. Such a "personal" opinion tends to be more readable than the opinion of the court. Since a judge agitated enough to draft a dissent often brings to the task considerable passion, such passion produces on occasion a message with bite written in down-to-earth prose. Legal literature, because of dissenters' sound and fury, is much the richer.

Here, then, is the bulk of Judge Livingston's vivid, crisply written opinion in *Pierson v. Post*, together with a translation that Livingston might with some justice object to, give or take a few anachronisms, as unnecessary:

> Livingston, J. My opinion differs from that of the court. . . . This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard* would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment . . . [The fox's] depredations on farmers and on barn yards have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, "*sub jove frigido*," or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business, in the language of the declaration in this cause, "with hounds and dogs to find, start, pursue, hunt, and chase," these animals, and that, too,

> without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes would have taken care not to pass it by, without suitable encouragement. If anything, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*; and if men themselves change with the times, why should not laws also undergo an alteration?[238]

Although these two hunters should have spared this court their trivial haggling over the spoils of the hunt, I vote to affirm the jury's award of damages to Post and his hounds. Had Post and Pierson put their quarrel to a vote of fellow sportsmen, the sportsmen no doubt would have condemned Pierson for snubbing the gentlemanly custom of giving the hunter, whose hounds jump and pursues, the chance to run down his prey. In any event, killing foxes benefits chicken farmers. Therefore, Post and other keepers of hounds should be encouraged in their devotion to the hunt — and protected from interlopers such as Pierson who seek the prize earned by another's pursuit. As for Justinian and his moldy crowd, those ancients knew nothing of fox hunts, English or American; had the Romans followed the hounds, Roman law would have protected close pursuit. In any event, the failure of aged treatises to equate close pursuit with ownership doesn't settle the matter. Everything changes with time, even The Law.

> It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law, who have favored us with their speculations on these points, differ on them all . . . After mature deliberation, I embrace that of Barbeyrac as the most rational, and least liable to objection.[239]

I've studied the authorities cited, and unlike my fellow judges, I find little agreement about whether close pursuit stamps the pursuer as tentative owner. Of all the scholarly opinions put forth by counsel, Barbeyrac's, which favors Post, appeals to me.

> Now, as we are without any municipal regulations of our own . . . we are at liberty to adopt . . . the learned conclusion of Barbeyrac, that property in animals *ferae naturae* may be ac-

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238 *Id.* at 180.
239 *Id.* at 181.

> quired without bodily touch or manucaption, provided the pursuer be within reach, or have a *reasonable* prospect (which certainly existed here) of taking what he has thus discovered an intention of converting to his own use.[240]

Since there's no local legislation covering fox hunts, we judges need not worry overmuch about legal niceties. Lodowick Post, before Pierson came along, was close on the fox. Reasonably close is good enough in horseshoes, as well as in The Law according to Barbeyrac.

> When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily *seisin*, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil. The justice's judgment ought, therefore, in my opinion, to be affirmed.[241]

As I've said, foxes are destructive beasts. Gentlemen and hounds of the chase should be encouraged. If by affirming Post's lower court judgment for damages, The Law gets stretched a bit, it's for a good cause.

C. *The Law In Action*

And there you have it, The Law in action. Appellate debates rarely lend themselves to ready answers deducible from the law library's morass of authorities. In cases on appeal, the opposing briefs usually contain solid reasons for decision either way, including selected pieces of The Law pointing — both ways. Opinions such as *Pierson* reveal that The Law's logic and stability is balanced by The Law's elasticity and capacity for altering direction.

Judges Tompkins and Livingston passed that poor fox back and forth in the name of The Law, but not even the heavy sprinkling of Latin legalisms can disguise the human shapes at work beneath the surface of printed page. *Pierson v. Post*, on first reading, may appear to be a case in which authoritative Latin texts speak with finality in a single clear voice as to the inadequacy of merely close pursuit. Before the first law school year of casebook reading concludes, however, student readers will view Post's fruitless following of the hounds as only the beginning of a never-ending chase of a creature most wily.

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240 *Id.* at 182.
241 *Id.*

VIII. Another Piece of the Law in Translation

A. Ghassemieh v. Schafer[242]

Eighth-grader Elaine Schafer played a poor joke on her art teacher, Karen Ghassemieh. As Ms. Ghassemieh was attempting to sit down, Elaine, intending not an injury but a prank, pulled her teacher's chair away.[243] Ghassemieh fell to the classroom floor and hurt her back. The resulting litigation spawned *Ghassemieh v. Schafer*, an intermediate appellate court opinion from Maryland reviewing on appeal the judgment of a Baltimore County trial court.[244] Teacher Ghassemieh sued her prankster pupil on a tort theory of Negligence.[245] Following a trial at which the jury gave Schafer its verdict, Ghassemieh appealed, and lost again.[246] In *Ghassemieh*, the Maryland court explains that even though the injured Ghassemieh had a valid complaint about the trial judge's conduct at her trial, she nevertheless failed to follow the rules for perfecting an appeal, and therefore was disqualified from having the merits of her appeal considered.[247] Portions of the *Ghassemieh v. Schafer* opinion are here reproduced in paragraphs block-indented, interspersed with passages in italics translating the opinion's lawyer English into something closer to the language of the street. The opinion opens with a review of the trial judge's conduct of the trial:

B. *Original And Translation*

> At the close of the evidence, each side moved for a directed verdict. . . . The appellee's [defendant Schafer's] motion was predicated on a claim that the evidence established a battery, an intentional tort, and not negligence, as alleged. Both motions were denied. With respect to the defendant's motion, the [trial judge] ruled: "As to the motion of the defendant, the Court will deny that motion, but I will include in the instructions the definition of a battery and let the jury make the determination whether this in fact was, if it was a negligent act on the part of the defendant or if in fact it was a battery, which would certainly not be encompassed in the action brought by the plaintiff in this case, but I would allow that to go to the jury by way of instruction."[248]

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242 447 A.2d 84 (Md. Ct. Spec. App. 1982).
243 *Id.* at 85.
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.* at 88.
248 *Id.* at 86.

Both plaintiff Ghassemieh and defendant Schafer, after the jury heard testimony but before the jury retired to pick a winner, asked the trial judge to take the case away from the jury. Both teacher and student, speaking through their lawyers, argued that no jury was needed because the law permits but a single outcome; Ghassemieh and Schafer, in other words, both claimed that the trial judge should recognize each individually as the easy outright winner. In support of her easy-winner contention, Elaine Schafer insisted that her art teacher deserved no personal injury damages because Ghassemieh's lawyer filed the wrong kind of tort action — that not Negligence but an intentional Battery was the legal banner under which the plaintiff teacher should have proceeded to court.

The Baltimore County trial judge refused, however, to dismiss the jury and declare from the bench the name of an outright winner. As to young Schafer's defense that her injured instructor fatally blundered by inartfully suing in Negligence instead of Battery, the trial judge ruled that it should be not the trial judge's but the jury's job to decide if Schafer's practical joke does indeed amount in law to a Battery — in which case plaintiff Ghassemieh loses because she pleaded her lawsuit on the wrong legal theory.

> Before the judge instructed the jury, the following exchange occurred:
>
> MR. CASKEY (counsel for defendant/appellee): "I would move that the Court present the question to the jury as a question as to the battery versus negligence issue. I would request that the jury be given the instructions as to what constitutes negligence and as to what constitutes battery and to have them answer the question—do you find that it was negligence, battery, or neither?"
>
> MR. HUESMAN (counsel for plaintiff/appellant): "Well, I think, Your Honor, before I respond to that, I guess a lot would depend on exactly the way the questions are phrased."[249]

After the trial judge decided the case should go to the jury for decision, the lawyers for Ghassemieh and Schafer met with the judge to help decide on the verbal form for asking the jury its judgment. Lawyer Caskey, defending student Schafer against a charge of Negligence, was no dummy. Caskey spoke up to make sure the trial judge explained to the jury that Negligence and Battery theories are distinct legal creatures, and that his client Schafer's little joke, if a Battery, couldn't also be Negligence. (Defense lawyer Caskey no doubt hoped with the jury's help to have Ghassemieh's suit for Negligence thrown out of court on a jury finding that Ghassemieh's omitted but proper — and exclusive — theory of recovery was for Battery. And by the way, Ghassemieh's lawyer in all likelihood had good reason for

249 *Id.*

pleading Ghassemieh's damage suit in Negligence and ignoring the more plausible Battery theory — perhaps because the statute of limitations had run out on a Battery claim, or perhaps because liability insurance existed covering 13-year-old Schafer's liability for damages in Negligence but not in Battery.)

Lawyer Huesman for plaintiff Ghassemieh, responding to Schafer's push for jury instructions on Battery, told the trial judge he was unsure how to respond. (As events proved, what slow-off-the-mark Huesman should have argued to the trial judge was that Negligence and Battery aren't always distinct legal creatures, and that since pulling out the teacher's chair could legitimately be deemed Negligence as well as a Battery, therefore a mutually-exclusive Battery jury instruction would unfairly prejudice Ghassemieh's case for Negligence.)

> In the instructions which immediately followed, the court began by saying: "The case before you is an action based on a claim of negligence. . . ." The court then instructed on battery, as follows:
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> "The Court has indicated that this is an action in negligence. A *battery is an intentional touching which is harmful or offensive.* Touching includes the intentional putting into motion of anything which touches another person or the intentional putting into motion of anything which touches something that is connected with or in contact with another person. A touching is harmful if it causes physical pain, injury or illness. A touching is offensive if it offends a person's reasonable sense of personal dignity."
>
> *"If you find that the defendant acted with the intent to cause a harmful or offensive touching of the plaintiff and that that offensive touching directly or indirectly resulted, then this constitutes a battery and your verdict must be for the defendant,* as this suit has been brought in negligence and is not an action in battery."[250]

The trial judge told the Baltimore County jurors that they must reject Ghassemieh's suit for Negligence if they judge Schafer's practical joke to be a Battery — that Battery trumps Negligence. To constitute a Battery, instructed the judge by way of definition, Schafer need only have intentionally put into motion events causing teacher Ghassemieh a harmful contact.

> At the conclusion of the instructions, trial counsel for the plaintiffs (appellants) excepted as follows:
>
> *"Also, we except to that portion of the charge with regard to the definition of battery. . . .* We believe that it is necessary to show that the defendant *actually intended to harm the plaintiff* and we believe on

250 *Id.*

> the basis of the defendant's own testimony that she did this as a joke, that she had no intention to commit bodily harm." The trial court overruled all objections. With respect to the battery objection, the court did not address the definitional point raised, but said:
>
> "The battery instruction, the Court felt was appropriate in view of the fact that this is an action in negligence, and if the jury would find from hearing the testimony in the case that in fact there was a battery and not negligence, it may very well have the opportunity to make a determination in favor of the defendant."[251]

When the trial judge finished instructing the jury on the elements of a Battery, Ghassemieh's lawyer, Huesman, protested to the judge that Battery was no proper part of this case because Schafer's practical joke clearly evidenced no intent to harm her teacher, and intent to harm, said lawyer Huesman, is a necessary ingredient for a Battery. The trial judge ignored or misunderstood this objection to his definition of Battery, and thereafter merely reiterated his opinion that Negligence and Battery are mutually-exclusive theories of recovery, and that a jury finding of Battery would condemn Ghassemieh's Negligence case to the scrap heap. (The jury, says the opinion in *Ghassemieh v. Schafer* in a passage here omitted, eventually returned a verdict relieving student Schafer of any liability for her teacher's injured back.[252] The general form of the jury's verdict leaves unclear just how the verdict was reached. One possible basis for the jury's pro-Schafer decision — other than a finding of no Negligence committed by the youthful prankster — may of course have been the jury's conclusion that a Battery occurred, and that therefore Ghassemieh's claim of Negligence, given the trial judge's edict that Battery and Negligence cannot overlap, must go out the window. The appellate court next discusses teacher Ghassemieh's appeal of her trial court defeat.)

> The gravamen of the plaintiffs' appeal is that the trial court erred in giving the following portion of the instruction on battery quoted above:
>
> "If you find that the defendant acted with the intent to cause a harmful or offensive touching of the plaintiff and that that offensive touching directly or indirectly resulted, then this constitutes a battery and your verdict must be for the defendant, as this suit has been brought in negligence and is not an action in battery."

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251 *Id.* at 86-87.
252 *Id.* at 90.

> In support of this principal contention, appellants maintain that:
>
> "(1) The mere fact that the evidence adduced may have established that the defendant acted intentionally in pulling the chair out from under the appellant, Karen B. Ghassemieh, does not preclude recovery of damages for a cause of action in negligence. . . .
> (3) To permit the defendant to escape liability for her tortious conduct merely because she acted intentionally, rather than negligently, would be fundamentally unjust and contrary to public policy."[253]

In asking the intermediate appellate court to reverse her trial court defeat, Ms. Ghassemieh's argument is that the trial judge mistakenly told the jury that pulling the chair out from under her, if a Battery, could not at the same time be the sort of unreasonable behavior worthy of the name of Negligence. Ghassemieh insists that even though her student's prank was an intentional act, justice requires that Ghassemieh's plea of Negligence be deemed an alternative to Battery as a basis for recovery of damages. (The legal textbook, note, divides tort theories of recovery into intentional (Battery) and unintentional (Negligence) wrongs. The legal beginner might think it simple to keep separate Negligence and Battery, and to wonder why in *Ghassemieh v. Schafer* there seems so much confusion. The problem is that law students and lawyers alike can never quite be certain what makes for "intentional." Schafer's intentionally pulling the chair away was also unintentional in so far as Schafer intended her teacher no harm; some would say that such a lack of intent to harm negates Battery. On the other hand, intentionally driving a car above the speed limit may well be Negligence, despite the obvious intent to do wrong. What this suggests is that student hopes of nailing down the meaning of "intent" once and for all, in a legal system in which the meaning of "intent" is forever shifting, is doomed.)

> We are confronted with a threshold consideration not raised by the appellee and, therefore, neither briefed nor argued but essentially jurisdictional: Was the appellants' objection to the battery instruction, quoted above, a sufficient predicate for their position on appeal? They now argue:
>
> "The instruction given by the trial judge was improper because if the jury had found that the defendant acted intentionally in pulling the chair out from under the appellant, Karen B. Ghassemieh, it could nevertheless have awarded damages for negligence."

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253 *Id.* at 87.

And further:

> "Thus, a finding of gross negligence or of willful and wanton misconduct may impute a finding of intentional conduct. Consequently, a finding that the appellee had acted intentionally would have been fully consistent with the allegations of the declaration charging negligence. The trial court, therefore, erred in instructing the jury to the contrary. While it is clear that [appellee] intended to pull the chair out from under Mrs. Ghassemieh, it is equally clear that she did not intend to injure Mrs. Ghassemieh . . . ."[254]

We judges must first of all decide if the trial court loser, plaintiff Karen Ghassemieh, followed proper legal procedure for appealing the error of which she accuses the trial judge. Did she, in other words, make an appropriately-focused objection during her trial to the trial judge's telling the jury that Battery and Negligence are mutually-exclusive grounds for recovery of damages? Appellate court procedure requires that Ghassemieh, to be able to complain on appeal to some aspect of the trial judge's conduct of the trial, must have objected during the trial hearing to the particular judicial error she now wishes to raise. Nor is it enough in this case that Ghassemieh did in fact object to one aspect of the trial judge's Battery instruction; the question is whether Ghassemieh's earlier objection at her trial — to a definition of Battery that dispensed with an intent-to-harm element — suffices to permit her to complain for the first time on appeal about the very different matter of the trial judge's declaring Battery and Negligence to be mutually exclusive?

Now according to legal convention, defendant Schafer herself should have raised this question of whether Ghassemieh's trial objection lacked sufficient focus for appeal purposes. Yet in neither her appellate brief nor in appellate argument did Schafer call this court's attention to Ghassemieh's tardiness in complaining of the jury instruction about Battery and Negligence being always alien to one another. We nevertheless are in this instance going to consider on our own initiative the matter of whether, during the trial of this case, plaintiff Ghassemieh jumped through the appropriate hoops and so qualified to have her appeal heard on its merits.

> Our problem arises from Maryland Rule 554 (Instructions to the Jury) (1982 ed.), particularly subsections (d) and (e) concerning, respectively, "objection" and "appeal." Subsection (d) provides in part:
>
> "If a party has an objection to any portion of any instruction given, or to any omission therefrom, or the failure to give any instruction, *he shall before the jury retires to consider its verdict make*

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254 *Id.*

such objection stating distinctly the portion, or omission, or failure to instruct to which he objects and the ground of his objection."

And subsection (e) provides in its entirety:

"Upon appeal a party in assigning error in the instructions, *shall be restricted* to (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct *distinctly objected to before the jury retired* and (2) *the grounds of objection distinctly stated at the time,* and *no other errors or assignments of error in the instructions shall be considered by the appellate court.*"[255]

This requirement that trial court objections to jury instructions, to constitute a proper groundwork for appeals, be narrowly focused, is bottomed on Maryland's written rules for appellate procedure, in particular Rule 554. Rule 554 insists that "the grounds of objection [be] distinctly stated at the time"[256] *and forbids an appellant from adding other objections later during the appeal.*

Trial counsel for the plaintiffs did not object, as appellate counsel now objects, to *any* instruction on battery, but only to "that portion of the charge with regard to the *definition* of battery." Trial counsel was objecting to the court's definition of battery as an "intentional touching which is harmful or offensive. . . ."

Trial counsel never stated as a basis for his objection that no instruction on battery should be given because this was an action in negligence. The objection at trial was simply that the definition of battery lacked an essential element, *i.e.*, the defendant actually intended to harm the plaintiff. However, intent to do harm is not essential to a battery. The gist of the action is not hostile intent on the part of the defendant, but the absence of consent to the contact on the plaintiff's part. Thus, horseplay, pranks, or jokes can be a battery regardless of whether the intent was to harm.

Trial counsel never argued to the trial court that, as contended at oral argument before us, negligence and battery are not mutually exclusive, or that a single intentional act can be the basis for both battery and negligence, or that the jury could award damages for negligence even if a battery had also been proved. Only on appeal do appellants make clear their challenge to the instruction that "this suit has been brought in negligence and is not an action in battery" and if battery were found, "your verdict must be for the defendant." The trial judge was not given to understand that the plaintiff really objected to any instruction on battery. The judge reiterated his negligence versus battery

255 *Id.* at 88.
256 *Id.*

> instruction in explaining why he felt the battery instruction was appropriate, and the plaintiff did not object.
>
> Thus, the objection below did not reach the broader issue raised on appeal, and under Rule 554(e) it "may not be considered by the appellate court."[257]

Plaintiff Ghassemieh's objection at trial that the jury instruction on Battery lacked an essential intent-to-harm ingredient was the wrong objection. Ghassemieh should have objected at trial to the jury being told by the trial judge that Ghassemieh's theory of Negligence would be trumped by a jury finding of Battery. Because Ghassemieh waited until she appealed to make this objection, her tardy claim, under Rule 554, "may not be considered by the appellate court."[258] *Incidentally, Ghassemieh's assertion that Battery requires intent to harm is, in this court's judgment, bad law; horseplay and practical jokes, after all, can trigger batteries despite a batterer's innocent intent.*

> [T]he presence of an intent to do an act does not preclude negligence. The concepts of negligence and battery are not mutually exclusive. . . .
>
> We see no reason why an intentional act that produces unintended consequences cannot be a foundation for a negligence action. Here, an intentional act — the pulling away of the chair — had two possible consequences: the intended one of embarrassment and the unintended one of injury. The battery — an indirect offensive touching, a technical invasion of the plaintiff's personal integrity—was proved. However, a specific instruction on negligence — namely, that the defendant had a duty to refrain from conduct exposing the plaintiff to unreasonable risk of injury and breached that duty, resulting in her injury — was not requested. Nor was any exception made to the general negligence instruction that was given. Nor did the plaintiff at trial take the unequivocal position that she was proceeding on a theory of negligence, notwithstanding the co-existence of an intentional act, *i.e.*, a battery. In sum, appellants are asserting now the arguments they should have made at trial. Such hindsight can avail them nothing.
>
> JUDGMENT AFFIRMED; APPELLANTS TO PAY THE COSTS.[259]

Not that it will do plaintiff Ghassemish any good at this point, given the tardiness of her objection to the trial judge's procedure, but we do happen to believe she's right as rain about Battery and Negligence being alternative ways to approach this lawsuit. The trial judge was, we think, wrong in telling the

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257 *Id.*
258 *Id.*
259 *Id.* at 89-90.

jury that Battery trumps Negligence. The concept of "intention" should not, in the legal mind, a prison make; there's no reason, given the elasticity of "intention," that defendant Schafer's practical joke can't be at the same time an intentional-harmful-touching as well as intentional-conduct-creating-unreasonable-risk-of-unintended-injury. Nevertheless, under Rule 554, we must close our ears to Ghassemieh's appeal; the trial court's judgment in favor of the defendant student and practical joker is affirmed.

IX. The Law From the Marble Palace

A. *The Constitution And Original Understanding*

Constitutional law is the showcase for The Law's fusion of custom, experience, wisdom, fantasy, lawyer logic, and moral fine-tuning at its most grandiose. Front and center is the text of the U.S. Constitution, from which U.S. Supreme Court Justices cite scripture and verse for their Olympian pronouncements. In addition, each of the fifty states has its own constitution, a supreme legal text under which state judges rule their subjects. Each of the fifty states therefore has its separate body of constitutional law made up of state appellate interpretive decisions that, except where trumped by The Law of the federal constitution, constitute fifty state versions of judicial supremacy. Just as judges have the final say in the meaning of a litigated statute or common law principle, so do the provisions of a state or federal constitution mean, no more or no less, than what judges say they mean.

First-year instruction in federal constitutional law principles introduces students to The Law as proclaimed on decision days at the U.S. Supreme Court Building. This is the occasion when the Justices file into the public red-velvet chamber of their marble palace and, with somber formality, offer up their freshly-minted opinions. The pomp and ceremony surrounding decision day is The Law's high mass, lending credence to the Court's reputation for highmindedness and impartiality.

If the U.S. Supreme Court were truly as politically impartial as the red-velvet presentation of Court opinions suggests, then the replacement of retiring Justices would have no heavy-duty political ramifications. Yet the Supreme Court is so obviously a big-league player in shaping the nation's political life that presidential nominations to fill Court vacancies often trigger major political battles pending Senate confirmation. The Justices' reading of the framers' vague and ambiguous master blueprint, given the U.S. practice of judicial supremacy in matters of constitutional interpretation,

propels the Court, willing or not, headlong into the political thicket.

Even so, Court members feel they must promote the pipe dream of judicial neutrality. The obligatory salutes in Court opinions to neutral principles, and the pomp and ceremony of decision day, promote The Law's reputation for disinterestedness, and keep the public half-convinced that the justices are never creators, only restrained discoverers, of The Law. Yet for the legally alert, it's too late in the day to pretend that the rhetoric of blindfolded disinterestedness is much more than a figleaf.

Experienced Supreme Court watchers, expert at stripping away pretenses of antiseptic purity in Constitution-reading, recognize that constitutional law doctrines are, like lesser forms of legal rhetoric, a form of code. This red-velvet code manages to mask somewhat the elasticity inherent in Court determinations about which appeals to hear, which phrases in the Constitution's text to resuscitate, which competing Court precedents to follow, and which among equally attractive constitutional doctrines to stress in drafting opinions. The first-year constitutional law student must learn to swim in pseudo-legal policy waters weighted down with such judicial dead weight as the great Chief Justice John Marshall's pronouncement, with a straight face, that courts are "mere instruments of the law, and can will nothing."[260] Marshall's "mere instruments" mythology comes to us today reinforced with an array of Courtly procedures and verbal chants that create a fantasy land through which first-year students must pass on their way to *terra firma.*

The U.S. Constitution, despite The Law's publicized aversion to the politics of the street nevertheless had a tainted, highly political, birth. Its drafting took place with a supremely political flaunting of proper form. The fifty-five delegates to the 1787 constitutional convention in Philadelphia were sent there by the thirteen state legislatures, after all, merely to patch up the country's ground-breaking Articles of Confederation, not to draft a new charter for federal government.[261] Yet a new charter came out of that runaway convention in which the upright George Washington presided and father-of-the-Constitution James Madison kept then-secret notes. And it's that new charter's abstract, imprecise language that, even after two hundred years of debate, continues to prompt fierce disputation about the framers' cloudy intentions. As

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260 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

261 Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987).

robed leaders in a continuing national constitutional debate, Supreme Court Justices annually issue their mind-gumming judgments about the master blueprint's current meaning, adding to a growing mountain of constitutional doctrine that first-year students can but sample in casebook form.

The starting point for debating the meaning of the Constitution's seven brief articles and twenty-plus amendments traditionally focuses on the framers' (and ratifiers') Original Understanding of the shape of the federal system they were constructing. This Original Understanding, if you take Court opinions at face value, was and is the touchstone for judicial interpretation. Original Understanding theory, which many find comforting, holds that the closer the Justices stick to an Original Understanding reading, the greater the protection against Justices reading their personal political values into the framers' phrases. Original Understanding bolsters the idea of a limited role, in a democracy, for life-tenured judicial interpreters of constitutions. Justices, unaccountable at the ballot box, are obligated, as neutral-principle watchdogs, to exercise judicial veto power in the name of constitutional interpretation only when backed by Original Understanding. Original Understanding isn't the sole theory about the proper constitutional role for appointed-for-life federal judges. Original Understanding is, however, the theory of interpretation that leads to bromides about judicial self-restraint being the path to judicial virtue.

Original Understanding theory builds on the premise that the framers were prescient enough to provide clear enough directions to enable compliant judges to be Law-finders rather than Law-makers. The popular appeal of a Constitution that can be compared to an architect's detailed blueprint is obvious. To appear to extract from the framers' hallowed words a comprehensive Original Understanding serves much the same purpose as when religious sages extract spiritual truth from Holy Writ. Citizens wary of the sometimes unsavory give and take of legislative infighting among elected representatives are comforted by the thought that something better than politics as usual guides The Law's managers.

Yet no lawyer, not even arch-conservative Judge Robert Bork, whose unyielding commitment to Original Understanding cost him a seat on the U.S. Supreme Court, believes Original Understanding can alone settle the constitutional puzzles that confront the Justices. Original Understanding often plays but a ceremonial role in the Supreme Court's fleshing out of the Constitution. Constitutional litigation raises issues in which the framers' deep ambi-

guities defy Original Understanding solutions. While Original Understanding is far from irrelevant in the Court's work, nods to Original Understanding often serve mainly as a sort of prayer with which to open Court services.

The vagueness inherent in constitutional concepts of Interstate Commerce, Due Process, Equal Protection, and Free Speech compels Supreme Court Justices to decipher such abstractions by looking outside constitutional text and history. Even if eighteenth-century dictionaries existed, reading with any precision the minds of the framers is out of the question. The framers held no finely drawn collective vision of the future. Our Constitution-makers were never of one mind. No Original Understanding can make clear the modern application of the Bill of Rights. In any case, even had those responsible for putting the Constitution together possessed a collective Original Understanding relevant to current issues, the trustworthy historical materials for digging out any such eighteenth-century consensus are wafer thin. This is why constitutional interpretation must in the end come down to constitutional creation.

The 1787 convention was a closed-door affair: no reporters. The less-than-half of the fifty-five delegates who regularly attended the Philadelphia sessions hammered out in private what was very much a compromise document. The Constitution came out of a fierce convention struggle between proponents of a strong central government and those preferring a looser confederation of powerful sovereign states. What we don't know, because no complete, reliable account of convention proceedings is available,[262] is exactly what was said and done to hammer out a consensus national blueprint.

Virginian James Madison was one of several convention delegates who kept private notes. Years later he dug out those convention notes and revised them. After Madison's death, several decades after the Constitution's ratification, his notes were finally published.[263] Today, Madison's notes are a key source of information from which accounts of the Constitution's framing have been fashioned.

Other delegates likewise, years after the Constitution's ratification, released their fading memoirs or issued recollections of bits

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262 John G. Wofford, *The Blinding Light: The Uses Of History In Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 504-06 (1964).

263 1 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 (James D. Richardson ed. 1896).

and pieces of convention history. Yet from such evidence drawn from memoirs and private notes it is best to remember: old men forget; moreover, they can have opportunistic memories. Aside from the question of how credible these tardy revelations may be, one revelation emerges from this checkered history: the framers had no Original Understanding apart from the understanding reflected by the text of the Constitution. Rather than preserving convention history, the framers chose to leave only one piece of history, one document, relevant to constitutional interpretation, and that's the text of the seven articles to which they signed their names in 1787.

Even had the Philadelphia framers preserved trustworthy records evidencing a fixed vision for the future, there's the additional difficulty of what to do about the tangle of nation-building ideas held by that secondary category of founding fathers, the hundreds of delegates to the 1788 state ratification conventions. How should the mind-set of state delegates attending the various conventions be factored into the constitutional interpretation equation? This is a question largely left unanswered, and, here again, because the spotty history of the debates at the state ratifying conventions has never been thought helpful as a guide to interpretation.[264] Even during the thirty-four-year reign of Chief Justice John Marshall (who, as a state convention delegate in Virginia, helped ratify the Constitution), Original Understanding, in the sense of who thought about what in 1787-88, came infrequently to the aid of Supreme Court interpreters. Original Understanding in sum is one, but not the only, ingredient of a constitutional decision.

Though Original Understanding fails to make constitutional interpretation a strictly historical operation, consensus among the framers on some general points did exist. The framers agreed the national government needed taxing powers, plus the power to make treaties and go to war. Also agreed was that giving to Congress a power to regulate interstate commercial activity was the only way to avoid economic rivalry between states that would weaken the nation. The economic interests of gentlemen farmers (such as Virginia's Washington and Madison) and their cousins, the bankers, were also the obvious reason for adding a Contracts Clause forbidding state legislatures from relieving the debtor class of their debts.

But if there was agreement in Philadelphia on these points,

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264 *See* Jefferson H. Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 (1993).

there are key areas in which the Constitution stutters and stammers. Nowhere in the text, shockingly, is there mentioned which branch of the federal government is to have the last word on what a disputed constitutional text means. The Constitution doesn't say, despite Supreme Court claims to the contrary, that the Court may exercise veto power over any state and federal legislation the Justices think conflicts with constitutional directions. If, as many believe, there was an Original Understanding that the Justices were to have the last word (known as the power of judicial review), the framers chose to omit from their text this design for judicial supremacy.

Legal historians believe that some framers favored giving the last word on constitutional interpretation to non-elected Justices, that some framers opposed making lifetime justices the final authority on constitutional meaning, and that some framers kept mum about their preferences. Perhaps the issue of judicial supremacy was thought too controversial in 1787 for inclusion in a document the framers were trying to peddle nation-wide as the latest thing in *representative government.* In any event, not until 1803, when the Supreme Court decided *Marbury v. Madison,*[265] did the Justices establish the Court as the final authority on the meaning of the Constitution.

In the *Marbury* case, the Court for the first time vetoed (part of) an act of Congress deemed inconsistent with the Constitution. The statute that the Justices declared unconstitutional (setting up the system of federal courts) was enacted in 1789 by a Congress that included many of the framers of the Constitution.[266] In *Marbury,* typically the opening case in constitutional law casebooks, the Court conveniently spied, hidden between the lines of the Constitution, its authority to render definitive interpretations of murky constitutional passages. Chief Justice John Marshall's opinion for a unanimous Court, for readers familiar with Federalist politics of that era, has a Machiavellian cast. Marshall offered a meager rationale for its assumption of broad judicial review powers.

John Marshall had been Secretary of State in the Federalist administration of John Adams.[267] As President Adams left the White House in 1801, he named Marshall to head the Supreme Court and, from that jurisprudential foothole, to hold as best he

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265 5 U.S. (1 Cranch) 137 (1803).

266 William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 32.

267 *Id.* at 3.

could the Federalist fort against the incoming Republican onslaught.[268] Chief Justice Marshall, a good soldier, defended well the Federalist fort, using his great influence over his fellow justices to remold the Supreme Court into a dominant force in national politics. *Marbury v. Madison's* strained reading of Congress's and, as we shall see, the framers' text, was the cornerstone of a Marshall Court that thereby armed itself with judicial review power over the other branches of both federal and state governments.[269]

The *Marbury* dispute was on the surface a fight over filling a low-level judgeship. In fact, as numerous historians have explained, it was a Washington, D.C. tug-of-war between outgoing Federalist (President John Adams) and incoming Republican (President Thomas Jefferson) administrations.[270] William Marbury, a Federalist lame duck judicial appointee, asked the Supreme Court (without bothering to start with a lower-level court) to take original jurisdiction of his case and order the new Secretary of State, James Madison, to give Marbury his judgeship.[271] Madison was part of the incoming, anti-Federalist Thomas Jefferson administration.[272] The *Marbury* judgeship controversy required that the Supreme Court construe a piece of the federal Judiciary Act of 1789 concerning which cases the Court can hear only on appeal, and which cases can be filed originally at the marble palace.[273]

The Judiciary Act was the original congressional blueprint detailing which cases the Supreme Court would have original or appellate jurisdiction to hear.[274] Congress assumed this job of allocating the Court's jurisdiction because the Constitution merely lists, without purporting to be exhaustive, a handful of cases for the Court's original jurisdiction, such as lawsuits between states.[275] *Marbury*, which is the creation, in every sense of the word, of Chief Justice John Marshall, entered the history books because the Marshall Court purposefully misread the 1789 Judiciary Act's list of original jurisdiction cases.

John Marshall's *Marbury* claimed, by a severe twisting of the text, to find in the Judiciary Act an attempt by Congress to add mandamus lawsuits such as Mr. Marbury's to the Constitution's list

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268 *Id.* at 3-4.
269 *See generally id.*
270 *See, e.g.*, STONE ET AL., *supra* note 6.
271 Van Alstyne, *supra* note 266, at 4-5.
272 Van Alstyne, *supra* note 266, at 4-5.
273 Van Alstyne, *supra* note 266, at 13-14.
274 Van Alstyne, *supra* note 266, at 14.
275 U.S. CONST. art. III, § 2, cl. 2.

of original jurisdiction cases. Having mangled the Judiciary Act, Chief Justice Marshall then, conveniently, faced the first of two constitutional issues upon which he longed to render an opinion. The first issue was whether Congress had constitutional authority to tell the Supreme Court to entertain original jurisdiction cases in addition to those on the Constitution's short list in Article III of original jurisdiction cases. Marshall, in order to reach this constitutional Article III issue, chose, for political reasons, to misread Congress's Judiciary Act. Those political reasons relate to presidential politics and to the Chief Justice's championing of a more powerful role in the national government for the Supreme Court.[276]

After Chief Justice Marshall in *Marbury* insisted that Congress intended, in its Judiciary Act, to confer additional original jurisdiction on the Court, Marshall next judged that Congress cannot constitutionally add to the constitution's brief list of Supreme Court original jurisdiction cases. The Judiciary Act as thus misread, the Chief Justice opined, conflicts with the Constitution. Article III of the Constitution, of course, doesn't actually say that the Constitution's short list of original jurisdiction cases is exclusive; Article III can easily be read to permit — in fact invite — Congress to add to the list. But John Marshall, according to conventional historical wisdom, wished to find a conflict, because by so doing the Court now faced the ultimate issue Marshall so wished to exploit. For now Marshall had a platform for preaching judicial supremacy to his political antagonists in the White House and in Congress. The Chief Justice's ultimate issue: who has the last word on the meaning of the U.S. Constitution?

Since the Constitution stands mute on judicial review powers, opinion-writer John Marshall was forced to wing it in explaining why judges can invalidate, in the name of the Constitution, federal and state legislation. Marshall in *Marbury* legally reasons that "obviously" the Court must be the supreme Constitution-interpreter because the Constitution is a written legal document, and because lawyer-justices know best what The Law is. Furthermore, Marshall argues, the Constitution commands that Justices swear an oath (as do most government officials) to obey constitutional commands, and Justices so sworn have no choice but to strike down statutory departures from the constitutional design.[277] So, *Marbury* concludes, it's the Court's prerogative to tell Congress it can't add to Article III's original jurisdiction list and force the Court to take

276 *See generally* RODELL, *supra* note 132.
277 *See Marbury*, 5 U.S. (1 Cranch) at 175-78.

original jurisdiction of Mr. Marbury's mandamus request: therefore Mr. Marbury's application for mandamus was dismissed for lack of jurisdiction at the Supreme Court level.[278]

The genius of John Marshall's *Marbury* decision is that the Court refuses, because of a presumed lack of constitutional jurisdiction, to order Republican Secretary of State Madison to deliver Marbury's judgeship, an order that in any event the Republican Administration would have snubbed. The Court in *Marbury v. Madison*, in short, reads the Judiciary Act of 1789 to say what it was never intended to say — that the Court must accept original jurisdiction over cases like would-be Judge Marbury's. Then the Court similarly gives the Constitution a one-eyed reading to say that the framers barred Congress from doing what Congress never tried to do (add to the Court's original jurisdiction). Then to top it all off, the *Marbury* opinion takes it for granted that the Constitution, despite its silence on the subject, makes the Court the number one interpreter of the framers' wishes. Marbury against Madison, nevertheless, is still good Law — and great Federalist politics.

Although *Marbury's* tortured rendering of the framers' text is no ringing tribute to Original Understanding, the steep slide away from a constitutional law keyed, at least in theory, to 1787-88 intentions, came much later. Today much of constitutional law study concerns justifications other than Original Understanding for the gloss the Supreme Court regularly affixes to the Constitution. *Home Building and Loan Ass'n v. Blaisdell*,[279] for example, a case involving debtor relief legislation passed during the Great Depression of the 1930s, is one of many Supreme Court cases in which the framers' intentions, even though for once clear, counted for little or nothing.

The Minnesota legislature in the 1930s sought to help out strapped debtors by forcing creditors to extend the time for paying off mortgages.[280] Minnesota creditors yelled foul and pointed with their lawyers at the Contracts Clause of the U.S. Constitution.[281] The Contracts Clause bars state legislation that would interfere with pre-existing contractual obligations such as mortgage payment schedules.[282] The Contracts Clause, remember, was a big item in Philadelphia in 1787 because, ever since the Revolutionary War,

278 *Id.* at 180.
279 290 U.S. 398 (1934).
280 *Id.* at 402.
281 *Id.* at 404.
282 *Id.*

state legislatures had been upsetting commercial expectations by too cavalierly letting citizen debtors off the hook.

The Supreme Court in *Blaisdell* hemmed and hawed about Original Understanding. But in the end a New Deal Court said that despite the Contracts Clause ban on "impairing the obligations of contracts," it was okay for Minnesota to impair the obligations of these Minnesota mortgage contracts.[283] During the national economic crisis of the Great Depression, state laws slowing down mortgage foreclosures were part of a popular effort to soften the blows of financial catastrophe for farmers and others. The nation-wide economic collapse persuaded the Court in *Blaisdell* to read the Contracts Clause out of the Constitution. In so doing, the Justices explained that Original Understanding is not the only guideline for interpretation:

> It is no answer to say that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation . . . as Justice Oliver Wendell Holmes wrote, "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[284]

If, therefore, what was said two hundred years ago is only advisory, as *Blaisdell* suggests, then Original Understanding needs help from some other theory of constitutional interpretation.

B. A Living Constitution

A legal regime supporting contradictory theories about how the Constitution ought to be read is par for the legal course. The Law, after all, beneath its semi-illusory body of fixed rules, nurtures a much more fluid body of competing arguments. Under this system, then, Original Understanding theory vies with Living Constitution theory for the Court's favor. Living Constitutionalists see the Justices as delegates to an ongoing convention, rewriting the Constitution for each generation. Original Understanders, on the other hand, see the Justices as automatons programmed to play, without variations, the symphony composed by the framers. What

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283 *Id.* at 447-48.

284 *Id.* at 442-43 (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)).

this boils down to is that when you find in constitutional law a slice of *truth*, watch out lest you find on the flip side a contrary *truth*.

Supreme Court opinions, out of respect for The Law's conservative leanings, play down the Living Constitution element in the Justices' work. Despite increasing recognition of the political nature of the Court's role in American political life, the symbolic power of marrying the Justices to Original Understanding will not die. Thus, this judicial struggle to explain Living Constitution decisions with Original Understanding slogans makes for a casebook replete with insincere rhetoric. Justices, because of the pressure they're under to give lip service to the rule of law, cannot avoid writing vague, insincere opinions denying that judges must read life into the Constitution's anemic words. As George Orwell states in "Politics and the English Language," the great enemy of clear language is insincerity.[285]

Consider, for a moment, the seating of a hypothetical relative of the great Oliver Wendell Holmes on the current U.S. Supreme Court. Let's call her Olivia Wendy Holmes. How should this latter-day Holmes confront the political dimensions of her justiceship? Justice Olivia Holmes, let's assume, is a former U.S. Senator of liberal persuasion appointed by a president anxious to move the Court leftward. Olivia Wendy Holmes, though like her namesake a legal realist and fully aware that neutral decision-making is the stuff of dreams, knows also that legal fashion demands that, once robed, she make a public display of dropping partisan passions.

As Senator O. W. Holmes, she voted a left-of-center agenda on social welfare, affirmative action, progressive taxes, abortion rights, environmental protection, and civil liberties. As Justice Holmes, why should she vote any differently? Given that her judicial votes on free speech, abortion, and the death penalty must ultimately come down on one side or the other of the political equation, can Holmes the Justice eclipse Holmes the Senator?

As a new Justice, Olivia Wendy Holmes will enter a sedate Supreme Court environment far removed from a freewheeling U.S. Senate where reading the will of the people and partisan politics are often one and the same. In the marble palace, constitutional case law offers at least minimal guidelines for appellate decision. Even Original Understanding can point Justice Olivia Wendy Holmes in the general direction of decision. Then there's the goal shared by all Supreme Court Justices: keeping intact the

285 GEORGE ORWELL, *Politics and the English Language*, *in* THE COLLECTED ESSAYS OF GEORGE ORWELL 127 (Harcourt, Brace, & World 1968).

Court's reputation for self-restraint through a public display of devotion to precedent and rule-of-law reasoning. A new Holmes, like the old, must cast votes and judicial rhetoric in a way designed to keep the Court out of political hot water and to preserve the Court's limited amount of political goodwill. Yet, despite these institutional restraints, Olivia Holmes, whether in judicial or senatorial dress, would likely vote much the same ticket, which in all likelihood is just what politicians who might engineer such a Holmes appointment to the Court would have in mind.[286]

Although waving the rule-of-law flag will never disentangle the Supreme Court from the politics inherent in interpreting vague constitutional clauses, the Justices on the other hand are handicapped in making the policy choices their pseudo-interpretive job demands. This is because the Court, by convention a Law-finding rather than a Law-making body, lacks the information-gathering apparatus that helps legislatures shape policy. The Court is thus forced to look to brief-writing lawyers to serve as a substitute legislative staff of sorts. Yet lawyers trained to see The Law as separate from politics are poorly equipped to think (and research) in broad policy terms about abortion, discrimination, unfair trade practices, censorship, crime and punishment, and the like.

Nevertheless, the Supreme Court has for two centuries, by voting its collective conscience, played a leading role in setting national economic and social policy. The Court's many policy-packed decisions "interpreting" one of the Constitution's most important and most malleable clauses, the Commerce Clause,[287] illustrate well the nature of Living Constitution jurisprudence. The Commerce Clause grants authority to Congress to regulate commerce among the states. The framers' purpose was to make the nation a single economic unit. Congress's job under the Commerce Clause is to outlaw economic rivalry between the states that might stunt national growth. Included in what the Constitution leaves unclear, however, is just how much space, if any, the Commerce Clause leaves for individual states to regulate commercial activity that congressional legislation fails to reach. In *Gibbons v. Ogden*,[288] a cornerstone case that involved steamboat competition in New York State waters, the Court almost cut the states entirely out of the regulation business.

The *Gibbons v. Ogden* opinion, authored by Chief Justice John

286 *See* RODELL, *supra* note 132, at 9-10.
287 U.S. CONST. art. I, § 6, cl. 3.
288 22 U.S. (9 Wheat.) 1 (1824).

Marshall, recites how the New York legislature granted to a steamboat operator (who carried passengers from New Jersey to New York) a monopoly on entering New York's Hudson River.[289] Another steamboat operator, a competitor barred from the Hudson, objected. The plaintiff-competitor persuaded the U.S. Supreme Court in *Gibbons* that New York lawmakers are constitutionally barred from passing out a monopoly for Hudson River steamboating.[290] Marshall's opinion in *Gibbons* at first hints at the possibility that the Commerce Clause shifts all power to regulate interstate commerce to the federal government, forever tying the hands of state legislators. But then the *Gibbons* Court hedged, and eventually voided New York's monopoly legislation by using a constitutional rationale that stepped more lightly on states' rights toes.[291]

The *Gibbons* opinion notes that Congress, in the pre-steamboat years of the Republic, had set up a licensing system for maritime shippers along the Atlantic seaboard.[292] This federal licensing system was apparently a tax exemption device involving local versus foreign shipping, and had nothing to do with right of access to local (Hudson River) waters. But this federal tax exemption statute nevertheless fit nicely into the *Gibbons* rational for why New York can't restrict Hudson River steamboat traffic. According to Chief Justice Marshall, the Congressional tax exemption statute and the New York steamboat monopoly statute, oddly enough, conflicted.[293] (Marshall, you recall from *Marbury v. Madison*, was a great one for finding a tempest in any teapot.) Marshall then pointed to the Supremacy Clause of the U.S. Constitution, which says that federal statutes trump inconsistent state statutes. New York's "conflicting" monopoly statute, ruled the Justices, is therefore unconstitutional — and New York's waters are therefore open to steamboat competition.[294]

Gibbons v. Ogden's battle of the steamboats left unclear whether, in instances of non-regulation by Congress of particular segments of commerce, a state can constitutionally fill that vacuum with state regulations. But before the nineteenth century was out, the Supreme Court fleshed out the bony Commerce Clause with a Living Constitution compromise in the Port of Philadelphia

289 *Id.* at 6.
290 *Id.* at 239-40.
291 *Id.*
292 *Id.* at 2.
293 *Id.* at 42, 238-240.
294 *Id.* at 238-40.

case.[295] In question was a Pennsylvania state regulation requiring that local harbor pilots be hired to guide ships into the port of Philadelphia.[296] Congress had no legislation regulating such maritime matters. The issue, given the general grant to Congress of the commerce power, was this: could the state of Pennsylvania legislate the hiring of local pilots on ships entering the port of Philadelphia in the absence of Congressional action?

With their answer the Justices added a little more gloss to the Constitution. This judicial creativity was necessitated by the states' need to know how much their hands were tied by a Commerce Clause that granted authority to Congress without specifying what powers remained at the state level. The Court in the Port of Philadelphia case — under which Pennsylvania's local pilot requirement passed constitutional muster — decided that when Congress doesn't act, a state can intervene to regulate "local subjects"; on the other hand, "national subjects" demanding the uniform treatment that only Congress can provide were stated to be matters exclusively within federal control.[297] This constitutional formula, typically, leaves the precise meanings of "local subjects" and "national subjects" to be worked out in the future, case by case. In the instance of hiring harbor pilots for the Port of Philadelphia, the Court concluded that hiring local pilots is a "local subject" constitutionally fit for state rather than federal legislation.[298]

The all-important question on the flip side of the Commerce Clause is what are the boundaries of Congressional authority when it comes to exercising its broad power to control interstate traffic? In no other constitutional area has Original Understanding taken more of a beating than in this Commerce Clause area. Over the last century the Supreme Court has endorsed an almost limitless range of Congressional activity aimed at furthering the framers' vision of a national economic unit — and at furthering other social goals as well. Just how far the notion of federal regulation of commerce can be extended is indicated by recent proposals in Congress for legislation guaranteeing access to abortion.

The abortion controversy is, of course, related in no way to the eighteenth-century problems of interstate commercial rivalry that gave rise to the Commerce Clause. Yet modern Commerce Clause opinions have so extended the reach of Congress's commerce

295 Cooley v. Board of Wardens, 53 U.S. (1 How.) 299 (1851).

296 *Id.* at 300.

297 *Id.* at 320-21.

298 *Id.*

power that lawyers can easily draft constitutional justifications for a federal abortion statute. Generally accepted principles of constitutional law have long legitimated social, as opposed to commercial, regulation by Congress in the name of the Commerce Clause. Recall that the Commerce Clause began legal life as part of a constitutional compromise between framers committed to a powerful central government and those bent on preserving broad state powers. As a result of constitutional adjudication over the intervening years, that compromise has shifted toward a Washington-centered regulatory state. A racially segregated barbeque restaurant operating in Birmingham, Alabama, discovered long ago the reach of federal commerce power.[299] The Supreme Court held that Congress could integrate Ollie's Barbeque because some of the chickens Ollie barbequed were originally hatched in neighboring Mississippi.[300] In fact, Congress routinely, in the name of regulating commerce, regulates a variety of social matters, including various forms of discrimination, gambling, child labor, and sex.[301]

How one feels about the Supreme Court's role in legitimizing the federal regulatory system depends ultimately on one's political views. In the years just before and after the turn of the century, a conservative, pro-business Court vetoed, in the name of Original Understanding, a variety of Congressional restrictions on business enterprise. This was a Court whose members believed passionately, as did much of the country a century ago, in an unfettered free market economy. Free market Justices accordingly read the Commerce Clause narrowly to limit Congress's ability to intervene in the market. During this earlier period, acts of Congress axed by a pro-business Court included legislation restricting child labor[302] as well as legislation aimed at preventing business monopolies.[303]

Then came the Great Depression. When stubborn laissez-faire Justices continued their anti-federal regulation ways in the face of a newly-elected New Deal administration pushing for national controls over the economy, a constitutional slugfest ensued. When the political in-fighting (including President Franklin D. Roosevelt's threat to pack the Court with New Deal Justices) abated after 1937, the Supreme Court, with an eventual influx of Roosevelt-appointed

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299 Katzenbach v. McClung, 379 U.S. 294 (1964).

300 *Id.* at 304-305.

301 *See generally* STONE ET AL., *supra* note 6.

302 Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116 (1941).

303 United States v. E.C. Knight Co., 156 U.S. 1 (1895).

Justices, did an about-face.[304] The dam constructed by the earlier Court to hold back the federal regulatory state broke, and the Commerce Clause was outfitted in modern dress suitable for a centrally-controlled national economy. Constitutional interpretation, as the Court's back-and-forth reading of the Commerce Clause illustrates, has a way of accommodating, like other departments in The Law, to the felt needs of the time.[305]

C. *Due Process Clause*

The Fifth and Fourteenth Amendments promise that neither "life, liberty, [nor] property," shall be taken by federal or state governments without Due Process.[306] The earlier Due Process Clause contained in the Fifth Amendment was the part of the Bill of Rights that commanded the *federal* government to give citizens a fair hearing before sentencing them to prison or appropriating their cattle. Due Process at the birth of the Bill of Rights meant *fair procedure*, nothing more, nothing less.[307] When in 1868 the abolitionist framers of the Fourteenth Amendment limited a *state's* ability to deny life, liberty, or property, here again *fair procedure* for new black citizens was the framers' principal aim.[308]

Due Process, in this procedural sense, is at the center of Supreme Court cases naming which criminal suspects can be searched without a warrant and which recipients of government entitlements are entitled to notice and hearing before payments are reduced. But then there's another kind of Due Process that for the past century the Justices have been extracting from between the lines of the Constitution. Lawyers call this Substantive Due Process. Under Substantive Due Process, the Justices examine the statutory handiwork of federal and state legislatures to see if legislative *policy*, even though procedurally adequate, nevertheless fails to satisfy the Court's economic or social conscience. The first-year casebook devotes entire chapters to Substantive Due Process. *Roe v. Wade's* abortion ruling, for example, is a piece of Substantive Due Process. So, for that matter, are Court decisions overturning state censorship of speech or state strictures on religious freedom.

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304 *See* Robert L. Stern, *The Commerce Clause and the National Economy: 1933-1946*, 59 HARV. L. REV. 645 (1946).

305 *Id.*

306 U.S. CONST. amends. V & XIV.

307 *See* Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

308 E. CORWIN, LIBERTY AGAINST GOVERNMENT 114 (1948) ("The 'due process' clause, which had been intended originally to consecrate a mode of procedure. . . .").

The metamorphosis of the Due Process Clauses into a Living Constitution program for Supreme Court review of substantive legislative policy has been gradual. Like the development of common law Negligence, Substantive Due Process originated as a judicial boost to the free enterprise spirit of the industrial revolution. A pre-World War I, laissez-faire Supreme Court protected business by creating a Substantive Due Process doctrine for vetoing state or federal statutes that didn't figure into the free market picture. Between 1890 and 1937, Court majorities ruled that the Due Process Clause barred state legislatures from, among other matters, setting maximum railroad rates;[309] from imposing consumer protection controls on mail-order insurance companies;[310] from enforcing minimum wage acts;[311] and from punishing employers who keep bakery workers at the ovens more than sixty hours a week.[312]

This economic, free enterprise form of Substantive Due Process eventually, like other symbols of the laissez-faire era, succumbed to FDR's New Deal. The liberal New Deal Court of the late 1930s and 1940s viewed with alarm its predecessor's Substantive Due Process promotion of laissez-faire ideology. The New Deal Court, feigning shock, wondered aloud about the mangled interpretation given by an earlier laissez-faire court to the Original Understanding of Due Process.[313] Yet, in short order, liberal Justices would commence to reinvent Substantive Due Process, this time as a euphemism for a progressive, mid-century Court program promoting civil rights and liberties. The modern Court's abandonment of pro-business Substantive Due Process and substitution of a civil liberties version of Substantive Due Process has prompted the current debate about the proper role of the Court in areas such as freedom of expression, abortion, and affirmative action.

Discomfort about proper judicial roles is reflected in Substantive Due Process opinions in constitutional law casebooks. Substantive Due Process opinions employ imaginative, if laborious, rationales for conclusions. To begin with, note how the Supreme Court concocted its modern Substantive Due Process gloss by recasting the Bill of Rights. The first ten amendments to the Consti-

309 The Shreveport Rate Cases, 234 U.S. 342 (1914).

310 Allgeyer v. Louisiana, 165 U.S. 578 (1897).

311 Adkins v. Children's Hospital, 261 U.S. 525 (1923).

312 Lochner v. New York, 198 U.S. 45 (1905).

313 Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955) ("[The] day is gone when this Court uses the Due Process Clause [to] strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

tution, which limit congressional control over speech, religion, and so forth, are not the people's only Bill of Rights. A second Bill of Rights, according to the Supreme Court, is hidden deep within the generalities of the Due Process Clause of the Fourteenth Amendment, which restrains state encroachment on civil rights. This second, subterranean Bill of Rights provides the rationale for the Court's constitutional review of the judgments and statutes of *state courts* and *state legislatures* challenged as violative of free expression, religious freedom, sexual privacy, or some other civil liberty.

The key constitutional concept in recasting the original Bill of Rights to cover actions of state government is found in the single word "liberty." The Reconstruction Congress, in drafting the Fourteenth Amendment as an antidote for badges of slavery, wrote that "liberty" can be taken only after a person receives "due process." In that single word "liberty" the Court, over the past half-century, has located those civil rights the Justices believe deserving of protection against unsympathetic state officials. In the best tradition of Original Understanding, two liberal New Deal Justices once tried to make the case that the Fourteenth Amendment's broad language was intended to incorporate all of the original Bill of Rights as additional protection for individuals against state infringements on civil liberties.[314] But later historians conclude that there is no more historical support for such a Fourteenth Amendment incorporation claim than there is for the idea that laissez-faire capitalism is part of the "liberty" or "property" protected by Due Process.[315]

If, therefore, modern civil liberties decisions such as the *Roe v. Wade*[316] abortion decision represent good judicial government, justification lies outside Original Understanding. One rationale for freeing up abortion rights draws on a Court theory developed in earlier Due Process cases which condemned state actions thought too restrictive of personal freedom. This theory is that the "liberty" protected by Due Process encompasses something called "fundamental rights."[317] "Fundamental rights," like the Substantive Due Process doctrine of which it's a part, is defined, so to speak, in terms of which claims for civil rights and liberties garners the votes of five of nine Justices. The *Roe* majority concluded that the right to choose abortion early in a pregnancy is a "fundamental right"

314 Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J. dissenting).

315 C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 132, 137-39 (1949).

316 410 U.S. 113 (1973).

317 *Id.* at 153.

and that statutes outlawing early abortion deprive reluctant mothers of a "fundamental" Right Of Privacy derived from the Constitution's "liberty."[318]

A slightly different rationale exists for a constitutional Right Of Privacy that has a stronger Bill of Rights flavor. This is the Right Of Privacy rationale spotlighted by Justice William O. Douglas in *Griswold v. Connecticut*,[319] the earlier contraceptive case. This *Griswold* version of the origins of the Right of Privacy is favored by those who deem "liberty" and its vague natural law-based "fundamental rights" too wishy-washy a constitutional foundation. This *Griswold* reasoning derives from earlier Fourteenth Amendment decisions involving the First (free expression), Fourth (bar against unreasonable searches), and Fifth (self-incrimination protection) Amendments, and concludes that the Right Of Privacy is an offshoot of the privacy vibrations given off by (the Fourteenth Amendment version of) the First, Fourth, and Fifth Amendments.

When the *Griswold* Court ruled that married couples must be permitted to buy condoms, it spoke of "penumbras, formed by emanations" from the Bill of Rights.[320] In something of a nose-thumbing at Original Understanding, Justice Douglas wrote that constitutional principles need have no precise textual home base in the Constitution.[321] Douglas notes that Freedom Of Association, for example, has been adopted into the Constitution by piggybacking astride Free Speech.[322] The freedom to travel across state boundaries and to choose a private rather than a public school education are likewise orphaned principles adopted into the constitutional family.[323] So why not, asks Justice Douglas, a Right Of Privacy?

According to Justice Douglas — a former Yale law teacher, noted environmentalist, author, humanitarian, poker player in FDR's White House, and sophisticated dealer in legal wizardry— various pieces of the Bill of Rights give off subtle rays that form "zones of privacy."[324] These privacy zones promote freedom from prying eyes — and from there it's a short *Griswold* step toward protecting sexual life from government snooping and censoring. Thus, does *Griswold's* Bill of Rights privacy zones lead to *Roe*, and to

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318 *Id.* at 154.
319 381 U.S. at 484-86.
320 *Id.* at 484.
321 *Id.* at 482-86.
322 *Id.* at 482.
323 *Id.*
324 *Id.* at 485.

the abortion debate between right-to-lifers (Original Understanding) and freedom-of-choicers (Living Constitution) that promises to enliven the twenty-first century.

For law students, the trick to reading the likes of *Roe* is to appreciate that abortion and other such political issues, just because they've been turned into legal issues, haven't lost their political character. When Chief Justice William Rehnquist dissents in *Roe* on Original Understanding grounds, the *Roe* reader can best understand Rehnquist by keeping in mind the code mentality that pervades judicial talk. Rehnquist's (anti-abortion) tribute to Original Understanding, like his more liberal colleagues' tribute to the "emanations"[325] and "zones"[326] of a Living Constitution, simply reflects the way judges argue politics. As in politics, so in The Law are opposing forces constantly at work breeding contradiction and change.

In the abortion controversy, perhaps neither right-to-life nor freedom-of-choice advocates will escape some kind of government compromise between their polar positions. Likewise, in constitutional law, theories of Original Understanding and of a Living Constitution will continue to share the legal stage, as they did in 1992 when the Supreme Court revisited *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[327] and decided, five to four, to overturn and, at the same time, to affirm the *Roe* precedent.

The Court in *Casey* gave lip-service to *Roe* by stating that it was not to be considered overturned.[328] Then the Court majority proceeded to sadden *Roe* supporters by seriously undermining *Roe*. Many of the restraints placed on pro-life state legislatures by *Roe's* original tri-semester rationale were relaxed in *Casey*,[329] freeing the states to place additional limits on access to abortion. And thus did the Court effect its compromise between Original Understanding and a Living Constitution. *Roe* was, in name, retained so that the Court might avoid appearing political in overturning under public pressure the twenty-year-old *Roe*,[330] a judicial salute to stability, history, and Original Understanding. On the other hand, the *Casey* majority worked its Living Constitution will by taking a sizable step in a right-to-life direction.

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325 *Griswold*, 381 U.S. at 484.
326 *Roe*, 410 U.S. at 152.
327 505 U.S. 833 (1992).
328 *Id.* at 845-46.
329 *Id.* at 869-73.
330 *Id.* at 853-56.

D. Professors Of Legal Craftsmanship

The Supreme Court opens each term with a call to God to "save this Honorable Court." This call to God is no idle gesture. The Justices, perched as they are in a position to tell all officialdom, from the President on down, what they can and cannot do, are on the hot seat. Sometimes the Justices make choices that enrage the multitudes, as they did with the decision banning prayer in public schools.[331] When Court prestige, propped up by rule-of-law gospel, falters, those first to the Court's rescue are usually law school professors of constitutional law.

Maintaining public confidence in the nation's high court is a job law professors of late take to naturally. This is partly because academic lawyers are usually card-carrying Living Constitutionalists at peace with the modern Court's civil liberties thrust. Like pedagogical mother hens, these professor-guardians of the Court advise the Justices on tactics for maintaining a low profile through convoluted legal reasoning. Professors write articles certifying that the Justices' elaborate theories of constitutional interpretation are the rule of law incarnate. Thus is a Living Constitution kept somewhat under wraps by a legal community that steers clear of unseemly politics, activist usurpation, or tell-tale signs of social engineering.

Doctrinal-minded professors sensitive to partisan blemishes on The Law's disinterested face become distressed when Court opinions display something they call "sloppy legal craftsmanship." Sloppy craftsmanship is the label put on judicial handiwork such as Justice Douglas's *Griswold* reliance on blatantly fuzzy "emanations and zones." Such reliance on mere "emanations" perhaps comes too close to the slipperiness of the politician; "emanations" don't sound like the rule of law. A vocabulary of "emanations" and "privacy zones" exposes too vividly the Court's debt to a Living Constitution. Douglas would have done better, say censors of sloppy legal craftsmanship, to tie his Right Of Privacy to the more formalistic "fundamental rights" subsumed under Due Process "liberty."[332] The more conventional sounding "liberty" keeps the cat of judicial legislation better contained within the legalistic bag.

Justices themselves occasionally fret in public about the Supreme Court's image. One Justice, for example, will accuse another of using rhetorical devices in an opinion to achieve, of all things, non-neutral ends. Yet the Justices know, as do professors of

331 *See* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

332 *Roe*, 410 U.S. at 153.

legal craftsmanship, that rhetorical devices are what The Law is all about.

Finally, there is Bishop Hoadly who, in a sermon preached before the English King in 1717, declared: "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is He who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them."[333]

Beginning law students, then, as they submit to the tutelage of professors of legal craftsmanship, must somehow swallow Bishop Hoadly's cynical pill without at the same time throwing up Justice Douglas's "emanations and zones."

X. CONCLUSION

This article's peek into that policy-political underworld operating beneath the body of rules is part of a wider literature. Over a half-century ago, a handful of writings taking The Law to task began to surface, a few of which are mentioned in the footnotes to this article. In addition, current legal academics, starting from three somewhat different places, all on the left of the political center, are building a body of scholarly work that builds on realist perspectives.

The first such group, mainly middle-aged professors who cut their legal teeth during the dissident 1960s, are proponents of a scholarly wave called critical legal studies. "Crits" find the policy-political underworld beneath legal doctrine too conservative, and strive to substitute a liberal "crits" agenda.[334] Two newer but similar groups explore The Law's policy-political underworld under the banners of feminist theory and critical race theory. These new wave scholars also see The Law as a form of code, a code that disguises contests over values touching on gender and race.

The real fun of law school is in discovering the exciting, value-laden, fluid system of courtroom government that is often obscured by staid language. Standard guides on how-to-succeed-in-law-school perhaps give valuable advice on study habits and exam-taking, but these primers shy from exposing the word-magic and the half-truths so central to legal life. Of course various methods exist for slaying the law school dragon,[335] but it's a shame that

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333 JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 119-20 (1909).

334 *See* HALL ET AL., *supra* note 79, at 552-54. *See generally* KAIRYS, *supra* note 109, at 14 ("First, we reject the idealized model and the notion that a distinctly legal mode of reasoning or analysis characterizes the legal process or even exists.").

335 *See* GEORGE ROTH, SLAYING THE LAW SCHOOL DRAGON (2d ed. 1991).

some students never see past the rules to the politics hidden in the basement.

The best bet is to use common sense and decide for yourself what study methods and materials, not to mention long-range goals, best suit your needs and temperament. Some students, for example, may profitably work within a group; others, to achieve an understanding of the subtleties of the lawyers' code, need to work things through on their own. In any event, it's unclear how different methods of study — memorizing patchwork principles, sifting through self-made or commercial study outlines, reading law reviews, perusing old exams — will affect grades. Given that law students are generally evenly matched in industry and in ability to cope with legal language, it's unfortunate that most law faculties continue the tyranny of grades.

Law professors keen on helping beginning students cut through the bramble bush of legal doctrine also face a few dragons. First, there's the tension between the lure of the blackletter and the temptation to give political explanation for decisions; a tension that professors sometimes tip-toe politely around. Also complicating life for law teachers is pressure, on the one hand, to make law school a trade school in the mechanical nitty-gritty of law practice; and pressure, on the other hand, to make law training a broader grounding in the art of shaping government policy. And for those law professors who deplore the fierce, dehumanizing contest for high marks on exams, there's the sad realization that grade reform is blocked by the insistence of law firm hiring committees that the survival-of-the-fittest grading system be preserved.

James White, author of *The Legal Imagination*,[336] talks about the challenge of carving out in interesting fashion "your own intellectual life in the law."[337] White explores how a decent human being can become a lawyer without becoming a bloodless, hyper-legalistic, have-gun-will-travel son of a bitch — except *Legal Imagination* sets the discussion on a higher plane. White, along with public interest lawyer Ralph Nader,[338] is a leader in a small movement

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336 JAMES BOYD WHITE, THE LEGAL IMAGINATION (abr. ed. 1985) (1973) (originally cast as a course book for law students, this work contains valuable insights into the legal process, interesting comparisons between law and literature, and guidelines for writing — decently — about legal subjects).

337 *Id.* at xxi.

338 Nader complains of a too-narrow legal education modeled on Harvard Law's "brilliant myopia." Such focusing on legal minutiae, says Nader, goes hand in hand with the "escape from responsibility for the quality and quantity of justice in the relationships of men and institutions [which] has been the touchstone of the legal profession." Nader, *supra* note 25.

that in recent years has called for an injection of civic passion and humanism into The Law and into the law schools.[339] The question is, how can we legal types stay alive to the world of feeling in a land of Acceptance, Fee Simple Absolute, Nolo Contendere, and Proximate Cause? Does The Law's heavy dose of formalism permit us to stay attuned to something grander than "brilliant myopia"?

Certainly some law students risk imprisonment by their newly-acquired language. Law school has been called the deep-freeze of university emotional life "where old men in their twenties go to die."[340] White urges law students to cling to their creativity and individuality by artistically controlling legal language, just as the sculptor must learn to do with clay: "You may feel that you are controlled by your material, as indeed you are. But compare the pianist, who is told what notes to play, in what order, how long and how loud; yet art is surely possible there."[341]

Understanding law school means appreciating that the language is coded, that an underworld of politics is hidden in the basement, and that law school is a place where an active imagination and independent thinking can be rewarding.

339 *See* WHITE, *supra* note 336, at xxi-xxv.

340 Paul Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 460 (1970). *See generally* KAZUO ISHIGURO, THE REMAINS OF THE DAY (1989) (protagonist butler so dehumanized by his professional standards and jargon that he cannot relate to female co-worker).

341 WHITE, *supra* note 336, at xxv.

POSITIVE POLITICAL THEORY AND THE STUDY OF U.S. SUPREME COURT DECISION MAKING: UNDERSTANDING THE SEX DISCRIMINATION CASES*

Lee Epstein†
Thomas G. Walker‡

How do justices of the U.S. Supreme Court reach decisions? To answer this question, social scientists have invoked an increasingly sophisticated set of statistical tools. While in yesteryears simple counts of, say, the number of dissents cast by justices would have sufficed,[1] in today's academic marketplace analytic models that permit the consideration of more than one factor at a time are omnipresent.[2]

That the statistical tool chest of social scientists has expanded substantially over the last half century or so is not all that surprising. After all, scholars working in so many of the social sciences — from psychology to sociology to political science — have become adept methodologists. Almost all graduate programs require their students to take at least one course in statistics — as well they should. It would be nearly impossible to read the various disciplinary journals without a working knowledge of, at the very least, multiple regression analysis.[3]

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* We could not have written this article without access to the Papers of Justice William J. Brennan, Jr. We are thus grateful to Justice Brennan for allowing us to use his collection and to Mary Wolfskill and David Wigdor of the Library of Congress for easing considerably the data compilation process. We also thank the National Science Foundation (SBR-9320284) and the Center for Business, Law, and Economics at Washington University for the support of this work. Finally, we appreciate the helpful comments provided by Charles Cameron, Jack Knight, and Jeffrey A. Segal.

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1 *See, e.g.*, C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 (1948).

2 J.A. SEGAL & H.J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 72 (1993).

3 In its simplest form, regression analysis assumes that the relationship between a dependent variable (say the number of cases decided by the Supreme Court over the past 50 years) and an independent variable (say the number of lawyers in the United States) is linear. Multivariate regression models allow researchers to consider more than one independent variable (e.g., perhaps the number of lawyers and the number of laws passed by Congress) when they seek to explain a phenomenon (e.g., the

And, yet, while those of us who study courts — like most other social scientists — occasionally invoke the tools of statisticians to conduct our research, we have often looked toward lawyers for our theoretical grounding. When law schools were advocating positivist (or analytical) jurisprudence, our writings followed suit.[4] When the legal realists of the 1920s and 1930s rejected positivism for sociological jurisprudence, many social scientists too abandoned analytical approaches and began to develop more "realistic" models of judicial decision making.

Now that a new movement — called positive political theory (PPT) — has emerged from the halls of the nation's law schools, a natural question emerges: Will social scientists adapt its theoretical premises to their work? We argue that the answer is yes, for PPT provides a good deal of leverage to answer perennial and central questions concerning U.S. Supreme Court decision making.

We develop this argument in four steps. In the first step we provide a brief overview of the relationship between political science theories of judicial decision making and those that have been offered by law professors. Our goal here is to explain how and why social scientists adapted sociological jurisprudence to their research. In the second step, we turn to the PPT movement. We explore the central assumptions on which PPT accounts of courts rest and argue that PPT will make some inroads into the social science literature if it can help analysts to unravel the complexities of decision making — just as legal realism did. The third step demonstrates that PPT can, in fact, meet this goal. We accomplish this by exploring the development of constitutional standards for the adjudication of sex discrimination claims. Finally, we summarize our results and underscore the contribution PPT can make to the study of judicial decision making.

I. Lawyers and Social Scientists: Developing Models of Decision Making

One of the central themes of this article is that social scientists have a long history of adapting theories articulated by law school professors to their work. In this section, we briefly consider two major examples of this phenomenon: positivist jurisprudence (the legal model) and sociological jurisprudence (the attitudinal

growth in the Court's caseload). For an introduction to regression analyses, see M. Lewis-Beck, Applied Regression — An Introduction (1980).

[4] Robert E. Cushman, *Constitutional Law in 1927-28,* 23 Am. Pol. Sci. Rev. 78 (1929).

model). We place emphasis on why this "borrowing" occurred so that we may be able to understand whether or not positive political theory will have an equally important impact on the direction of future social science research.

A. *Positivist Jurisprudence (The Legal Model)*[5]

Whether termed *positivist jurisprudence* (as lawyers often refer to it[6]) or *the legal model* (as it is commonly called by political scientists[7]), this school of thought centers on a rather simple assumption about judicial decision making: legal doctrine, generated by past cases, is the primary determinant of case outcomes. This model views judges as constrained decision makers who will base their decisions on precedent and "will adhere to the doctrine of *stare decisis* . . . ."[8] Some scholars label this *mechanical jurisprudence* because the process by which judges reach decisions is highly structured. As Rogat described it, "[t]he judge's techniques were socially neutral, his private views irrelevant: judging was more like finding than making, a matter of necessity rather than choice."[9] Levi was more specific about this basic pattern of legal reasoning — reasoning by example — for which this approach calls: the judge (1) observes a similarity between cases, (2) announces the rule of law inherent in the first case, and (3) applies that rule to the second case.[10]

Legal education and scholarship adopted "reasoning by example" — the process by which judges and lawyers should proceed. Eschewing normative approaches, political scientists (at least through the 1950s) instead viewed "reasoning by example" as the way judges do proceed. Cushman,[11] Corwin,[12] and many others centered their work on the notion that previously announced legal doctrine provides the single best predictor of Court decisions.

How positivism became so entrenched in the social science

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5 The material in this section and part I.B. Sociological Jurisprudence, *infra*, comes from George & Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 324 (1992).

6 *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (1904).

7 *See* SEGAL & SPAETH, *supra* note 2, at 65.

8 STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 264-65 (1988).

9 SEGAL & SPAETH, *supra* note 2, at 65.

10 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4-5 (1949).

11 Cushman, *supra* note 4, at 78.

12 Edward S. Corwin, *Constitutional Law in 1922-23*, 18 AM. POL. SCI. REV. 49 (1924).

literature is not difficult to discern. Many scholars reasoned that judges (all schooled in the approach) would naturally gravitate to it upon their ascension to the bench. After all, how else would judges approach decision making? So too, the case studies of the day reinforced the positivist approach's value. Articles published in political science journals summarized the reasoning used and the precedents set by the justices, disregarding any other factors contributing to outcomes. Cushman's examination of the 1936-37 term (one of the most volatile in Supreme Court history) provides an example. After acknowledging that the "1936 term . . . will probably be rated as notable," he enumerated some of the facts "one should bear in mind"[13] — Roosevelt had won a landslide re-election and had submitted his Court-packing plan. Rather than demonstrate how those "facts" might have affected Court decisions, however, Cushman simply noted that "no suggestion is made as to what inferences, if any, might be drawn from them."[14] He then proceeded to analyze the New Deal cases via existing precedent — a difficult task indeed.

In other words, although Cushman published his work in a premiere political science journal (the *American Political Science Review*), it could have appeared in any law review of the day. For both the theory he adopted — positivist jurisprudence — and his analytic approach — the examination of precedent — had originated in the nation's law schools.

B. Sociological Jurisprudence (The Attitudinal Model)

While the legal model was predominating political science thinking about the Court, new perspectives emerged from the ranks of the nation's judiciary and from its law schools. In general, these thinkers denounced legalism as mechanical jurisprudence,[15] and they beckoned judges to consider more dynamic factors as bases for decisions. Many credit Holmes's *The Common Law*[16] with initiating this plea. Students of this school often cite as exemplary his remark that "[t]he life of the law has not been logic: it has been experience. . . . [I]t cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[17] Illus-

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13 Robert E. Cushman, *Constitutional Law in 1936-37*, 32 AM. POL. SCI. REV. 278, 278 (1938).

14 *Id.*

15 *See* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

16 OLIVER W. HOLMES, JR., THE COMMON LAW (1881).

17 *Id.* at 1-2.

trative, too, is Louis Brandeis's famous brief in *Muller v. Oregon*,[18] containing 113 pages of sociological data but only two of legal argument. It was Pound,[19] however, who catalyzed the first strain of extrajudicialism, sometimes called sociological jurisprudence. In his seminal *Harvard Law Review* article, Pound drew his now-famous distinction between "law in books" and "law in action," behooving judges to adopt the latter, without necessarily abandoning the former. Cardozo and many others followed suit.

Later adapters of sociological jurisprudence — the realists of the 1930s — though were far more radical in orientation, maintaining that rules based on precedents were nothing more than smokescreens[20] or "myths, clung to by man out of a childish need for sureness and security. A mature jurisprudence recognizes that there is no certainty in law. . . ."[21]

So began a long line of thinkers who harshly critiqued legal reasoning for its inadequacy as a basis for judicial decision making, an inadequacy stemming from various considerations. From a normative standpoint, many followed Brandeis's lead, arguing that extra-legal factors should enter judicial deliberations. After all, if judges were constrained by precedent, law would remain static when it should reflect changing morals and values. Additionally, critics asserted that values and attitudes developed during childhood certainly influence justices, just as they do all other people.[22] It would be extraordinary, they claimed, to think that judges, just because they don black robes, were any less susceptible to such influences. Indeed, justices may be even more vulnerable than other decision makers because the rules of law are "typically available to support either side."[23] In making choices between competing precedents, then, other factors are bound to come into play.

Although legal realism gained a strong following within the nation's leading law schools during the 1930s, political scientists were reluctant adherents. It was not until the publication of Pritchett's *The Roosevelt Court* [24] in 1948 that students began to abandon a positivist approach and view Court decisions more critically and an-

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18 208 U.S. 412 (1908).

19 Pound, *supra* note 15, at 697.

20 *See* JEROME FRANK, LAW AND THE MODERN MIND (1930); JEROME N. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1950); KARL N. LLEWELLYN, THE BRAMBLE BUSH (1951).

21 HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 16 (1988).

22 *See, e.g.*, FRANK, *supra* note 20.

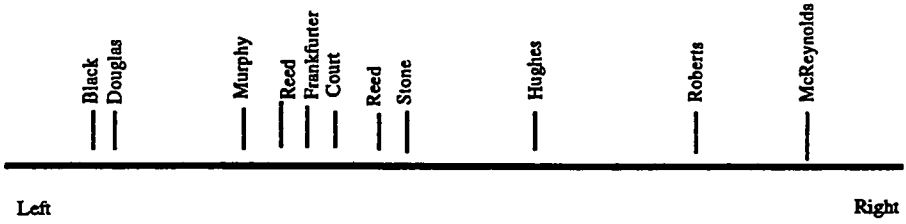
23 C. Herman Pritchett, *The Development of Judicial Research, in* FRONTIERS OF JUDICIAL RESEARCH 31 (Joel B. Grossman & Joseph Tanenhaus eds., 1969).

24 PRITCHETT, *supra* note 1.

alytically. In essence, Pritchett brought legal realism to political science. More specifically, Pritchett observed that dissents accompany many decisions.[25] If precedent drove Court rulings, Pritchett asked, then why did various justices in interpreting the same legal provisions consistently reach different conclusions on the important questions of the day? He concluded that the law was unable to explain why the justices voted the way they did; rather, he argued that justices were "motivated by their own preferences," just as Frank and the other legal realists maintained.[26]

Pritchett's work, however, did more than simply adapt legal realism to political science. It also equipped scholars with the tools necessary to estimate and evaluate its propositions. For it was Pritchett who first systematically examined dissents and voting blocs on the Court; he was also the first to invoke left-right voting continuums to study ideological behavior. That Pritchett was able to place justices of the Roosevelt Court on continuums, such as the one depicted in Figure 1, helped him to substantiate his conclusion that political attitudes have a strong influence on judicial decisions.

FIGURE 1. PRITCHETT'S LEFT-RIGHT CONTINUUM OF JUSTICES SERVING BETWEEN 1939 AND 1941*



* C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 AM. POL. SCI. REV. 894 (1941).
Note: Reed appears twice because his dissents were "equally divided" between the liberal and conservative wings of the Court.

Finally, Pritchett's work provided the fodder for development of the contemporary version of legal realism in the form of the attitudinal model — a development more fully stylized and realized by Schubert,[27] Spaeth,[28] and Ulmer,[29] who incorporated the

25 PRITCHETT, *supra* note 1.

26 PRITCHETT, *supra* note 1, at xiii.

27 *See* GLENDON SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963 (1965).

assumptions of legal realism into their models of decision making. Like Frank, they viewed the Court's environment as one that provided the justices with "great freedom to base their decisions solely upon the personal policy preferences."[30] But, unlike the realists, Schubert and the others proceeded to define and to test systematically attitudinal models of judicial behavior.

The refinement of the attitudinal model since the 1960s is a story that has been well-told elsewhere.[31] It is enough to note here that this model — which follows legal realism to the extent that it views justices as "single-minded seekers of legal policy,"[32] whose votes depend solely on the facts of cases vis-à-vis their attitudes and values — predominates the empirical political science literature. Why? Two answers come to mind. First, beginning with Schubert[33] and culminating with Segal and Spaeth,[34] attitudinalists have claimed to gather a tremendous amount of systematic support for their theory that unconstrained attitudes largely determine votes. To test this view, contemporary political scientists usually begin with a measure of political preferences — a measure that is independent of the vote. In Table 1, we depict such a measure. It was formulated by analyzing the comments of editorial writers on Supreme Court nominees, and it ranges from -1 (extremely conservative) to 1 (extremely liberal).[35] Attitudinalists then correlate this measure with aggregated voting behavior (see Table 1) to determine the degree to which they are related. Their results are quite robust; for example, one can predict nearly 70% of the civil liberties votes based solely on the policy preferences (as measured by the editorial scores) of the justices. It is just this sort of prediction accuracy that political scientists find especially attractive.[36]

But there is a second reason for the attitudinal model's domination. Just as scholars were claiming that the key premise of the attitudinal model held up against systematic, data-intensive investigations,

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28 *See* Harold J. Spaeth, *An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior*, 6 MIDWEST J. POL. SCI. 54 (1961).

29 *See* S. Sidney Ulmer, *The Analysis of Behavior Patterns in the Supreme Court of the United States*, 22 J. POL. 629 (1960).

30 DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 22 (1976).

31 *See generally* SEGAL & SPAETH, *supra* note 2, at 73.

32 George & Epstein, *supra* note 5, at 325.

33 *See* SCHUBERT, THE JUDICIAL MIND, *supra* note 27.

34 *See* SEGAL & SPAETH, *supra* note 2, at 73.

35 For more details on this measure, see Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995).

36 *See, e.g.*, SEGAL & SPAETH, *supra* note 2.

TABLE 1. JUSTICES' VALUES AND VOTES*

Justice	Appointing President	Ideological Value	Civil Liberties Vote	Economics Vote
Black	Roosevelt	.75	73.9	81.7
Reed	Roosevelt	.45	35.1	54.0
Frankfurter	Roosevelt	.33	53.8	39.9
Douglas	Roosevelt	.46	88.4	79.4
Murphy	Roosevelt	1.00	80.0	77.9
Jackson	Roosevelt	1.00	40.4	40.4
Rutledge	Roosevelt	1.00	77.2	80.0
Burton	Truman	-.44	38.9	50.0
Vinson	Truman	.50	36.7	50.2
Clark	Truman	.00	43.8	69.7
Minton	Truman	.44	36.8	59.5
Warren	Eisenhower	.50	78.5	79.8
Harlan	Eisenhower	.75	43.7	42.0
Brennan	Eisenhower	1.00	79.5	70.5
Whittaker	Eisenhower	.00	43.3	34.6
Stewart	Eisenhower	.50	51.3	47.7
White	Kennedy	.00	42.4	59.2
Goldberg	Kennedy	.50	88.9	65.4
Fortas	Johnson	1.00	81.0	67.4
Marshall	Johnson	1.00	81.4	65.9
Burger	Nixon	-.77	29.6	42.8
Blackmun	Nixon	-.77	52.3	55.0
Powell	Nixon	-.67	37.4	46.0
Rehnquist[a]	Nixon	-.91	19.8	42.0
Stevens	Ford	-.50	62.0	58.0
O'Connor	Reagan	-.17	34.1	43.2
Rehnquist[b]	Reagan	-.91	22.5	44.8
Scalia	Reagan	-1.00	30.2	44.5
Kennedy	Reagan	-.27	35.1	45.6
Souter	Bush	-.34	47.6	50.0
Thomas	Bush	-.68	28.3	41.3
Ginsburg	Clinton	.36	—	—
Breyer	Clinton	-.05	—	—

Note: Ideological Value is derived from content analyses of newspaper editorials. It ranges from -1.00 (extremely conservative) to 1.00 (extremely liberal). Civil Liberties Vote and Economics Vote represent percent liberal votes in those issue areas during the 1946-1992 terms.

* Segal et al., *supra* note 35, at 816.

[a]Values and votes as a Nixon appointee

[b]Values and votes as a Reagan appointee

they were also arguing that other perspectives — especially approaches grounded in positivist jurisprudence — could not withstand similar scrutiny. In one particularly interesting study, Segal and Spaeth examined whether justices follow previously established legal

rules even when they disagree with them. They found that the vast majority of justices who dissented from precedents set in landmark cases were not influenced by those precedents in subsequent decisions.[37]

In short, it is easy to see why legal realism, in the form of the attitudinal model, has come to dominate the way many social scientists — particularly political scientists — think about judicial decision making. Its ability to account for votes is quite high and it seems to provide a more robust explanation for judicial behavior than other existing approaches, particularly positivism.

II. Positive Political Theory

Despite the attitudinal model's domination, it is not without its problems. Two points of critique are particularly relevant here. The first deficiency is that the attitudinal model does not admit strategic behavior on the part of the justices in their voting on the merits of cases. That is, it assumes that justices reach decisions without regard to the preferences of other relevant actors (their colleagues, the public, Congress, and so forth) and the actions they expect them to take. In this model, justices are naive actors, who simply and always vote their sincere preferences into law. To put it another way, attitudinalists believe that "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."[38]

Yet, there is substantial evidence that this is not always the case, that, in fact, an interdependent (or strategic) component exists in Supreme Court decision making. Eskridge, for example, has shown that justices driven by policy goals do not vote their sincere preferences when they are interpreting civil rights laws if they believe that Congress desires to and has the wherewithal to overturn their decisions.[39] By the same token, Murphy[40] and Howard[41] have demonstrated that justices are open to persuasion from their colleagues; in fact, justices often change their votes sometime between conference (when the initial vote is taken) and opinion

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[37] Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices*, Am. J. Pol. Sci. (forthcoming 1996) (manuscript at 14-16, on file with the authors and the *New York City Law Review*).

[38] Segal & Spaeth, *supra* note 2, at 65.

[39] *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613 (1991).

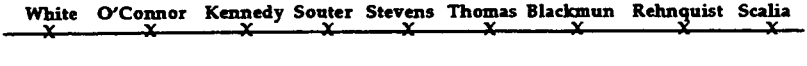
[40] *See* Walter F. Murphy, Elements of Judicial Strategy (1964).

[41] J. Woodford Howard Jr., *On the Fluidity of Judicial Choice*, 62 Am. Pol. Sci. Rev. 43 (1968).

publication.[42]

The second and related deficiency of the attitudinal approach is that it gives us little leverage on understanding Court policies and the process that generates them because it focuses exclusively on votes. To see this, consider the simple example depicted in Figure 2. There, we use the editorial scores (see Table 1) to align the justices on a left-right scale. Now suppose we wanted to use these scores to tell us about the law generated by an abortion case, say, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[43] in which the Court, among other things, struck down a spousal notification provision by a 5-4 vote. Using the continuum depicted in Figure 2, the attitudinal model would predict that Scalia, Rehnquist, Thomas, and Blackmun dissented. But that prediction would be wrong: Blackmun voted to strike the spousal consent requirement; it was White who voted with the dissenters to uphold it. Yet, even if the prediction were correct, how much would the attitudinal model tell us about the policy resulting from the Court's decision? Would it give us any information about the standard the plurality adopted to adjudicate future abortion cases? The answer is no: it would simply attempt to predict the votes in the case.

FIGURE 2. ORDINAL RANKINGS OF JUSTICES BASED ON EDITORIAL SCORES*



* Constructed by the authors with scores derived from Ideological Values in Segal et al., *supra* note 35, at 816.

It is these shortcomings of the attitudinal model that may attract social scientists to positive political theory (PPT). For (1) the assumption of strategic interaction is central to many of these PPT models and (2) the goal of PPT, in an important sense, is to understand the law, not just votes. Let us elaborate.

A. *Positive Political Theory: An Overview*

The application of positive political theory to judicial decisions is a relatively recent phenomenon. Although some scholars

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42 Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 530 (1980) (shows that at least one Justice changed his vote in sixty-one percent of cases decided during the 1946, 1947, 1949, 1950, 1954, and 1955 terms of the Supreme Court).

43 505 U.S. 833 (1992).

invoked the intuitions of this approach as early as 1958,[44] contemporary usage has its genesis in a 1989 dissertation by Brian Marks, a student of economics at Washington University.[45] In that work, Marks set out to understand why Congress did not overturn the U.S. Supreme Court's decision in *Grove City College v. Bell*.[46]

Since Marks's work, numerous analysts (who generally refer to themselves as positive political theorists) have set out to build on it. The list of PPTheorists is long, with some of its most important practitioners[47] coming from the ranks of the nation's law schools. And their numbers are growing, as is their influence.

But what does PPT entail? As with most emerging research programs, there is some dispute among practitioners over the precise meaning of the enterprise. Still, most seem to agree that "PPT consists of non-normative, rational-choice theories of political institutions."[48] So, at the very least, PPTheorists promote a particular kind of rational choice account of judicial decisions — an account we shall call strategic rationality. We can state that account in the following terms: U.S. Supreme Court justices are strategic single-minded seekers of legal policy, who realize that their ability to achieve policy goals depends on the preferences of others, on the choices the justices expect others to make, and on the institutional

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44 *See* Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958).

45 Marks, *A Model of Judicial Influence on Congressional Policymaking:* Grove City College v. Bell, Ph.D. diss., Washington University (1989) (on file with the authors).

46 465 U.S. 555 (1984).

47 Some of the more prominent scholars include: William Eskridge of the Georgetown University Law Center (*see, e.g.*, Eskridge, *supra* note 39; W.N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 417 (1991); W.N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994)); Daniel Farber of the University of Minnesota School of Law (*see, e.g.*, D.A. FARBER & P.P. FRICKEY, LAW AND PUBLIC CHOICE (1991)); Daniel Rodriguez of the Boalt Hall School of Law (at the University of California at Berkeley) (*see, e.g.*, Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. LAW Q. 1 (1994)); and Matthew Spitzer of the University of Southern California Law Center (*see, e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994)).

Should anyone doubt the growing influence of this group, note the foreword to the Harvard Law Review's examination of the Supreme Court's 1993 term. It was co-authored by Eskridge, one of the leaders of the PPT movement. Also consider that important law reviews and journals have dedicated volumes to PPT (*e.g.*, GEO. L.J. and LAW & CONTEMP. PROBS.). Finally, several influential university presses, including Harvard (D.G. BAIRD ET AL., GAME THEORY AND THE LAW (1994)) and Chicago (D.A. FARBER & P.P. FRICKEY, LAW AND PUBLIC CHOICE (1991)) have put their imprint on this work.

48 *See* Farber & Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 467 (1992) (contains the results of a survey of Positive Political Theorists).

context.[49]

This account contains three important ideas: (1) justices' actions are directed toward the attainment of goals (primarily they are "single-minded seekers of policy"[50]); (2) justices are strategic (they "realize that their ability to achieve their goals depends on the preferences of others" and "on the choices they expect others to make"); and (3) institutions ("the institutional context") structure justices' interactions.[51] Each of these components deserves some attention.

B. Justices as Single-Minded Seekers of Legal Policy

A key assumption of strategic rationality is that actors make decisions consistent with their goals and interests. Indeed, we say that a "rational" decision occurs when an actor takes a course of action (makes a decision) that satisfies her desires most efficiently. This means that when a political actor selects, say, between two alternative courses of action, she will choose the one that she thinks is most likely to help her attain her goals; all we need to assume is that she acts "intentionally and optimally" toward some specific objective.[52]

Rational choice accounts further suggest that an actor can order her desires on a scale — called "utility" — based on the "pleasures" she will obtain by satisfying them. Once the actor orders her desires, she can compare the relative degree of satisfaction (utility) generated by each decision and, in turn, act so as to maximize her utility.[53] To put this in terms of a concrete example, consider Figure 3 below. Here, we show the choices confronting a justice over which standard of review to apply in abortion cases. Now suppose Justice *X* sincerely prefers "compelling interest" to "undue burden" to "rational basis." If that were the case, then we would say that *X* assigns a higher utility to "compelling" than to

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49 LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (forthcoming 1997) (on file with the authors).

50 Typically, rational choice theorists assume that justices are "single-minded seekers of policy," George & Epstein, *supra* note 5, at 325, but that need not be the case. As we discuss below, it is up to the researcher to specify the content of actors' goals.

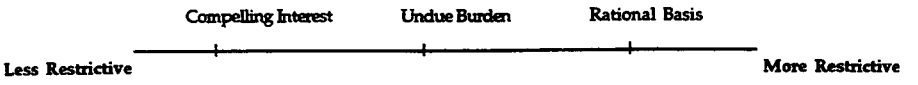
51 We adopt Knight's working definition of a social institution. First, "an institution is a set of rules that structure social interactions in particular ways." Second, "for a set of rules to be an institution, knowledge of these rules must be shared by members of the relevant community." *See* J. KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 2-3 (1992).

52 *Id.* at 17.

53 SHAUN HARGREAVES HEAP ET AL., THE THEORY OF CHOICE: A CRITICAL GUIDE 5 (1992).

"undue burden" than to "rational basis" and that *X* will take actions (that is, make choices) to maximize the chances of obtaining "compelling."

FIGURE 3. CHOICES OF LEGAL STANDARD IN ABORTION CASES*



* Constructed by the authors.

To give meaning to the assumption that people are "utility maximizers," however, analysts must specify the content of actors' goals.[54] And that is where the notion of justices as "single minded seekers of legal policy"[55] comes in. On many PPT accounts, the primary goal of all justices is to see the *law* reflect their preferred policy positions, and that they will take actions to advance this objective.

In so arguing, though, most PPTheorists recognize that policy is not the only goal justices pursue. In some of this work, in fact, scholars explore another important goal: to establish and retain the legitimacy of the Court.[56] For, as PPT advocates realize, the Court must possess some level of respect before it can make authoritative policy — policy that other institutions, the public, and states will view as binding on them.

Still, readers should not lose sight of the general point: legitimacy, like most other goals scholars ascribe to justices, is a means to an end — and that end is policy.[57] This is not a particularly controversial claim. Justices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things

54 If they do not, then resulting explanations take on a tautological quality, "since we can always assert that person's goal is to do precisely what we observe him or her to be doing." PETER C. ORDESHOOK, A POLITICAL THEORY PRIMER 10-11 (1992).

55 George & Epstein, *supra* note 5, at 325.

56 Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, LAW & SOC'Y REV. (forthcoming 1996) (manuscript on file with the authors and the *New York City Law Review*).

57 For example, in a particularly thoughtful essay, Baum suggests that some members of the Court desire to interpret the law in a principled, consistent, and accurate fashion. He calls this a "legal" goal, as it typically entails adhering to precedent. *See* Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RESEARCH Q. 749 (1994). As Segal and Spaeth (1996) demonstrate, however, most justices take this route only when the existing precedent favors their particular policy position. In other words, precedent is a means to a policy end. *See* SEGAL & SPAETH, *supra* note 37 (manuscript at 1-7, on file with the authors and the *New York City Law Review*).

over which almost all students of the judicial process — legal realists and positive political theorists alike — agree.

C. *Strategic Justices*

The second part of the PPT account ties back to the first: for justices to maximize their utility, they must act strategically in making their choices. By "strategic," as we suggested above, PPTheorists mean that judicial decision making is interdependent. It is not enough to say, as the attitudinal model does, that Justice *X* chose action 1 over 2 because she preferred 1 to 2. Rather, interdependency suggests the following proposition: Justice *X* chose 1 because *X* believed that the other relevant actors — perhaps Justice *Y* or Senator *Z* — would choose 2, 3, etc., and given these choices, action 1 led to a better outcome for Justice *X* than did the other alternative actions.[58] To put it more plainly, a justice acts strategically when she realizes that her fate depends on the preferences of the other actors and the actions she expects them to take (not just on her own preferences and actions).[59]

Occasionally, strategic calculations lead justices to vote their sincere preferences or sign opinions that reflect them. Suppose, in our example, all of the other justices agreed that "compelling interest" was the appropriate standard to use in abortion cases and that they knew that they all agreed. If this were the case, then our Justice *X* (who, recall, sincerely prefers the compelling interest test) may feel free to write an opinion that reflects her sincere preferences, for they are the same as everyone else's.

In other instances, strategic calculations lead justices to act in a sophisticated fashion (that is, in a way that does not reflect their sincere or true preferences) so that they can avoid seeing their most preferred policy rejected by, say, their colleagues in favor of their least preferred one.[60] To see why, reconsider Figure 3. Again, suppose that Justice *X* was to select among three possible standards in an abortion case; further suppose that Justice *X* was, in fact, a single-minded seeker of legal policy. While the attitudinal Justice *X* would vote her unconstrained preference of "compelling interest," the strategic Justice *X* might choose undue burden if — depending on, say, the preferences of the other justices — that

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58 *See* ORDESHOOK, *supra* note 54, at 7-56.

59 Charles Cameron, *Decision-Making and Positive Political Theory (Or Using Game Theory to Study Judicial Politics)* 2-3 (Nov. 11-12, 1994) (position paper prepared for the 1994 Columbus Conference, Columbus, OH) (on file with the authors).

60 *See* MURPHY, *supra* note 40; Rodriguez, *supra* note 47.

would allow her to avoid "rational basis," her least preferred position. In so doing, Justice *X* would be choosing the course of action that any rational actor, concerned with maximizing policy preferences, would take. That is, for Justice *X* to set policy as close as possible to her ideal point — which, recall, is the goal most PPTheorists ascribe to all justices — strategic behavior is essential. In this instance, she would need to act in a sophisticated fashion, given her beliefs about the preferences of the other justices and the choices she expected them to make.

But, as the work of PPTheorists makes abundantly clear, strategic considerations do not simply involve calculations over what colleagues will do. Justices must also consider the preferences of other key political actors, including Congress, the President, and even the public. The logic here is as follows.[61] As all students of American politics know, two key concepts undergird our constitutional system. The first concept is the separation of powers doctrine, under which each of the branches of government has distinct functions: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second concept is the notion of checks and balances: each branch of government imposes limits on the primary function of the others. For example, as Figure 4 shows, the judiciary may interpret laws and even strike them down as being in violation of the Constitution. Congressional committees, however, can introduce legislation to override the Court's decision; if they do, Congress must act by adopting the committees' recommendation, adopting a different version of it, or rejecting it. If Congress takes action, then the President has the option of vetoing the law. In this depiction, the last "move" rests again with Congress, which must decide whether to override the President's veto.[62]

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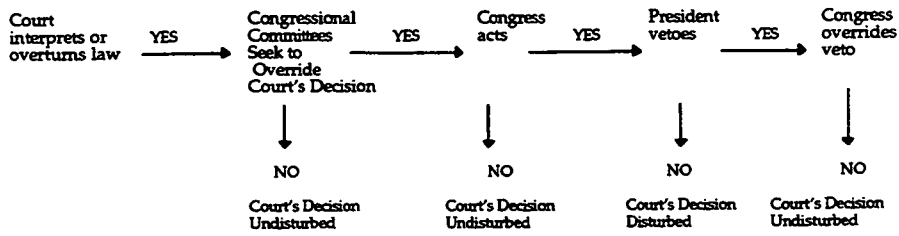
61 We adopt this discussion from LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 49-50 (2d ed. 1995).

62 In this figure, we depict a sequence in which the Court makes the first "move" and Congress the last. Of course, it is possible to lay out other sequences and to include other (or different) actors (*see* Christopher J. Zorn, *Congress and the Supreme Court: Reevaluating the "Interest Group Perspective"* (April 1995) (paper presented at the 1995 annual meeting of the Midwest Political Science Association) (on file with the authors). For example, we could construct a scenario in which the Court moves first; congressional committees and Congress again go next but, this time, they propose a constitutional amendment (rather than a law); and the states (not the President) have the last turn by deciding whether or not to ratify the amendment.

It is also worth noting that such a reconstruction might make more sense for cases, such as Planned Parenthood v. Casey, 505 U.S. 833 (1992), that involve constitutional questions. Our reasoning here is as follows: Although Congress can pass leg-

FIGURE 4. THE SEPARATION OF POWERS/CHECKS AND BALANCES SYSTEM IN ACTION: AN EXAMPLE*



* *Adapted from:* Eskridge, *supra* note 39, at 644 (1991).

It is just these kinds of checks that lead policy-oriented justices to concern themselves with the positions of Congress, the President, and even the public. For if their objective is to see their favored policies become the ultimate law of the land, then they must take into account the preferences of the key actors and the actions they expect them to take. Otherwise, they run the risk of seeing, say, Congress replace their most preferred position with their least, or of massive non-compliance with their rulings in which case their policy fails to take on the force of "law."[63]

To see these points, consider Figure 5, which we adopt from Eskridge's work on the Court's interpretation of civil rights legislation.[64] On the horizontal line — which represents the possible interpretations the Court could give to, for example, a civil rights statute ordered from most liberal to most conservative — we place the preferences of several key political actors. We denote the Court's and the President's most preferred positions as "J" and "P," respectively. "M" signifies the preferred position of the median member of Congress and "C" of the congressional committees with jurisdiction over civil rights bills.[65] "C(M)" represents the commit-

islation to alter the course of future constitutional rulings (*see e.g.*, the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993)), the more commonly-discussed route is through the proposal of a constitutional amendment. If this is so, then we might want to reconstruct the sequence in a way that would allow the Court to consider whether Congress has the requisite numbers (two-thirds of both Houses) to propose an amendment and whether three-fourths of the states would support ratification — and not whether Congress and the President would overturn its decision through legislation.

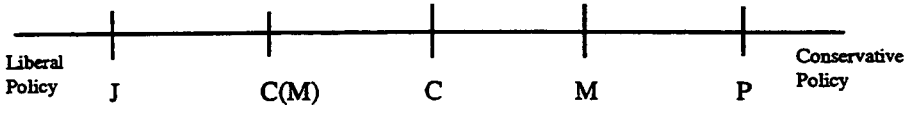
63 They also open themselves up for other forms of retaliation on the part of Congress and the President: legislation removing their jurisdiction to hear certain kinds of cases and impeachment, to name just two. *See* MURPHY, *supra* note 40.

64 LEE EPSTEIN & THOMAS G. WALKER, THE ROLE OF THE SUPREME COURT IN AMERICAN SOCIETY: PLAYING THE RECONSTRUCTION GAME, *in* CONTEMPLATING COURTS 321-324 (Lee Epstein ed., 1995).

65 In denoting these preferred points of J, M, P, and C, we assume that the actors

tee's indifference point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber."[66] To put it another way, because C(M) and M are equidistant from C, the committee likes C(M) as much as it likes M; it is indifferent between the two.

FIGURE 5. HYPOTHETICAL DISTRIBUTION OF PREFERENCES*



* Adapted from Eskridge, *supra* note 39, at 613 and Eskridge, *supra* note 47, at 417. *Note:* J=majority of Supreme Court; C(M)=committees' indifference point; C=relevant committees; M=median member of Congress; P=president.

As we can see, the Court is to the left of Congress, the key committees, and the President. This means, in this illustration, that the Court favors a more liberal policy than do the other institutions. Now suppose that the Court has a civil rights case before it, one involving the claim of a woman who says that she has been sexually harassed at her place of employment in violation of federal law.

How would the Court decide this case on its merits? Under the logic of the "attitudinal" approach the justices would vote exactly the position shown on the line; they would set the policy at J. The PPT account suggests a different response: given the distribution of the most preferred positions of the actors in Figure 5, strategic justices would not be willing to take the risk and vote their sincere preferences. They would see that Congress could easily override the Court's position and that the President would support Congress. That is because the policy sincerely desired by the Court would be to the left of the indifference point of the relevant committees, giving them every incentive to introduce legislation lying at their preferred point of C. Congress would support such legislation because it would prefer C to J and the President would sign it as he too likes C better than J. So, in this instance, the rational course of action — the best choice for justices interested in policy

prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [the actor's] ideal point, utility always declines monotonically in any direction. This feature is known as single-peakedness of preferences." *See* Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUDIES Q. 259, 263 (1988).

66 Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 47, at 381.

— is to place the policy near C(M). The reason is simple: since the committees are indifferent between C(M) and M, they would have no incentive to introduce legislation to overturn a policy set at C(M). Thus, the Court would end up with a policy close to, but not exactly on, their ideal point without risking congressional reaction.

Of course, by acting in a sophisticated fashion, the Court's majority would neither see its most preferred position nor its least preferred position written into law. Yet, this course of action — the rational course of action under the circumstances — may lead to the best possible outcome for the majority.

D. Institutions

The PPT account of decision making suggests that we cannot fully understand the courses of action justices take unless we consider the institutional context under which they operate. By institutions, PPTheorists mean sets of rules that "structure social interactions in particular ways." Under this definition, institutions can be formal (such as laws) or informal (such as norms and conventions). For laws, norms, and conventions to be institutions, however, members of the relevant community must share knowledge of them.[67]

For example, it is hard to imagine a plausible story of judicial decision making that did not consider the norm governing the creation of precedent: that a majority of justices must sign an opinion for it to become the law of the land. Consider the following: suppose our Justice *X* knew that four other justices shared her preference for "compelling interest" over "undue burden" over "rational basis" and further suppose that *X* was to write the opinion for the Court. Surely, under those circumstances, she would feel freer to adopt the compelling interest standard than she would be if only three others were squarely in her camp. Indeed, if less than four others were firmly behind her, she might be willing to consider "undue burden" if that was the best she thought she could do. This is why the rule for the establishment of precedent is so important; if only four justices' "signatures" were required for precedent, then our opinion writer would be in a far better position.

Another institution of some significance is the constitutional "rule" that justices "hold their Offices during good Behaviour."[68] In other words, barring an impeachment by Congress, justices have

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67 See KNIGHT, *supra* note 51, at 2-3.

68 U.S. CONST. art. III, § 1.

life tenure. In contrast to members of legislatures and even to judges in many states, justices do not have to face the voters to retain their positions. This lack of an electoral connection — the institution of life tenure — speaks to the goals justices possess: instead of acting to maximize their chances for reelection (as do members of Congress[69]), justices act to maximize policy.[70] To see just how consequential the institution of life tenure can be, one only has to think about the kinds of activities in which an electorally-oriented (as opposed to a policy-oriented) justice would engage. For example, instead of considering the preferences of her colleagues and Congress over what test to use in an abortion case, our Justice *X* would be tapping the pulse of her "constituents," talking with lobbyists, holding press conferences and otherwise behaving in the ways we associate with members of Congress, not justices of the Supreme Court.

These are but two examples. On the PPT account, institutions governing the opinion assignment process,[71] certiorari decisions,[72] and conference discussion,[73] are equally as central to understanding judicial decisions.

E. Discussion

As our discussion above suggests, PPTheorists and Legal Realists agree on some fundamental aspects of judicial decision making. First, both schools typically suggest that justices are driven by policy in that they desire to etch their preferences into law. Second, both agree on the importance of institutions, though they interpret their effects somewhat differently. For attitudinalists, the institution of life tenure frees justices to vote their sincere preferences. For PPTheorists, it does no such thing; in other words, if justices behave in ways that accord with their unconstrained preferences, it is not necessarily because they lack an electoral connection.

It is this last issue that brings us to the major points of disagreement between the two approaches. First, and most obvious, is

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69 *See* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

70 *See* SEGAL & SPAETH, *supra* note 2, at 69-72.

71 *E.g.*, that the Chief Justice assigns the opinion if he is in the majority; if he is not, the most senior associate member of the majority coalition assigns the opinion. *See* SEGAL & SPAETH, *supra* note 2, at 262.

72 *E.g.*, that four justices of the nine justices must want to hear a case ("the Rule of Four"). *See* SEGAL & SPAETH *supra* note 2, at 180.

73 *E.g.*, that conference discussion begins with the Chief Justice and moves in order of seniority. *See* SEGAL & SPAETH, *supra* note 2, at 210-211.

that attitudinalists take issue with the PPT characterization of justices as strategic actors. They claim that justices, unlike members of Congress and the President, are free to vote their unconstrained preferences largely because they have no fear of electoral defeat. Proponents of the attitudinal school, Segal and Spaeth, put it this way, "Members of the Supreme Court further their policy goals because they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction. Although the absence of these factors may hinder the personal policy-making capabilities of lower court judges, their presence enables justices to vote as they individually see fit."[74]

However, PPT suggests that this argument is both misguided and internally inconsistent. It may be misguided because justices do not need an electoral connection to act strategically. They know that the other institutions wield an impressive array of weapons — weapons that range from overturning judicial decisions through legislation to holding judicial salaries constant to impeaching justices and that can be deployed to move policy away from their preferred positions or threaten their institutional power in other ways. To argue that justices do not consider the preferences of other institutions is to argue that justices do not care very much about what happens to policy after a case leaves their chambers. This makes little sense, especially since the justices know that Congress quite often reviews their decisions.[75]

It is also possible that when attitudinalists characterize justices as "naive" actors, they are making a claim that is inconsistent with their own theory. Consider how two attitudinalists, Rohde and Spaeth, describe their perspective: "[T]he primary goals of Supreme Court justices in the decision-process are policy goals. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences."[76] Herein lies the inconsistency: if justices are the policy maximizers that Rohde and Spaeth make them out to be, then at the very least they must be concerned with the positions of their colleagues. For they know that their colleagues can make credible threats to abandon a majority coalition, to write separately, to switch their votes, and, generally, to move policy far from

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74 SEGAL & SPAETH, *supra* note 2, at 69.

75 Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 47, at 331.

76 ROHDE & SPAETH, *supra* note 30, at 72.

their preferred positions. How can justices possibly achieve their policy goals if they vote naively?

By the same token, PPTheorists suggest that it is only common sensical to believe that collegial court decision making is an inherently strategic situation. One scholar remarks on the context of U.S. Court of Appeals decision making in this way: "the outcomes of cases in federal appellate courts depend on the individual votes of several judges sitting as a panel. Plausibly, the judges care about the outcome of cases, and they certainly recognize that outcomes depend on collective behavior."[77] The same, of course, is true of U.S. Supreme Court justices.

A second point of disagreement between PPTheorists and attitudinalists, as we have already described, concerns the emphasis of their studies. While attitudinalists seek to explain the vote on the merits of cases, a goal that seems to be quite narrow in scope, PPTheorists attempt to understand "law" and the process by which law is made.

Although this aim is admirable, PPTheorists are only beginning to sustain their position. Thus, in the remainder of the article, we consider this question: does PPT provide us with leverage to understand the law and the process by which the Court develops it? This is obviously a crucial question to raise, for if we answer it in the affirmative, we suspect that social scientists may begin to adopt its premises to their research. On the other hand, if PPT fails to provide a useful framework to study the development of the law, it is likely that the tenets of legal realism will continue to dominate contemporary research.

III. Constitutional Standards for Adjudicating Sex Discrimination Claims

To answer this question, we apply the PPT account of judicial decisions to the development of constitutional standards for adjudicating sex discrimination claims. We describe and analyze the events surrounding two cases which were critical to that development: *Frontiero v. Richardson*[78] and *Craig v. Boren*.[79] Our specific interest is in using PPT to explain the courses of action taken by Justice William J. Brennan, Jr., the opinion writer in both cases.

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77 Cameron, *supra* note 59, at 3.

78 411 U.S. 577 (1973).

79 429 U.S. 190 (1976).

A. *From* Reed v. Reed *to* Frontiero v. Richardson

Although *Frontiero* is of immense significance, it is not the starting point for most modern-day discussions of tests governing sex discrimination claims. That distinction belongs to *Reed v. Reed* [80] in which the Court struck down an Idaho law that gave preference to men over women as estate administrators. In so doing, the justices seemed to apply a rational basis standard, even though attorneys for the appellant Sally Reed (including Ruth Bader Ginsburg) had urged the Court to find sex a suspect class and had only offered the traditional approach as an alternative.[81] As Chief Justice Burger's unanimous opinion indicates: "[t]he question presented by this case. . . is whether a difference in the sex of competing applicants for letters of administration bears a *rational relationship to a state objective that is sought to be advanced by the operation of [the law].*"[82]

The answer, according to the Court, was that it did not. In particular, the justices rejected Idaho's two major justifications for the law: that it would reduce the workload of probate courts and that men had more education and experience in financial matters than women. Both justifications, according to Burger, constituted precisely the kinds of arbitrary legislative choices and overbroad assumptions that the Equal Protection Clause was designed to prevent.

From the time the Court handed down *Reed*, analysts and practitioners have disagreed over whether the ruling hindered or helped the plight of women. Hordes, for example, was critical of Burger's application of the rational basis standard:

> [T]here is a real danger that *Reed* will be used in the future to deny the claims of women plaintiffs. For *Reed* reaffirms the heavy burden of proof that the plaintiff must meet, and may well demonstrate that only in the most blatant of cases will relief be granted. The Court specifically refused — although urged — to hold that classification by sex is inherently suspect.[83]

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80 404 U.S. 71 (1971).

81 More accurately, the attorneys offered an "intermediate" standard — what attorneys called a "reasonable-relationship test" as an alternative. As the brief put it, "If the Court concludes that sex is not a suspect classification, appellant urges application of an intermediate test." Under this test, the Court would ask if the law was "arbitrary and capricious and bears no rational relationship to a legitimate legislative purpose." Brief for Appellants at 60, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4). It is worth emphasizing, however, that this truly was a back-up position; the brief indeed stressed the suspect classification route.

82 *Reed*, 404 U.S. at 76 (emphasis added).

83 W. William Hodes, *A Disgruntled Look at* Reed v. Reed, *From the Vantage Point of the*

Hordes is correct to the extent that invocation of a traditional rational basis standard probably would have spelled trouble for future litigation efforts. After all, under this standard, at least as the Court applies it to economic legislation, the justices typically uphold laws. This is true even for laws that they think are "needless and wasteful" or "unwise, improvident, or out of harmony with a particular school of thought."[84] In short, while the Idaho law at issue in *Reed* was sufficiently arbitrary to fail the rational basis test, other laws and policies might well survive it. Or at least that was Hordes's view.

Other scholars, however, were quite encouraged by the *Reed* decision. They argued that, although Burger claimed to be applying a rational basis standard to the law, this was hardly the case. As Gunther put it: "It is difficult to understand the result [in *Reed*] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means . . . can the result be made entirely persuasive."[85] *Reed* was, in other words, a departure from the "traditional deferential approach" inherent in the rational basis standard.

Goldstein agreed with this analysis. She called *Reed* "enforcement of the reasonableness standard with bite."[86] Mezey too wrote that

> The statute under attack in *Reed* was based on the reasonable (and accurate) assumption that men generally had more business experience than women. And although the law was more defensible than others that had survived judicial scrutiny in the past, the Supreme Court invalidated it. Perhaps signaling its desire to enter a new phase of sex discrimination law, the Court cited no sex discrimination case in its opinion.[87]

This last point is especially important. For, regardless of whether one agrees with Hordes or Gunther, *Reed* constituted a major break with the past. It was the first time the Court had ever invalidated a law on the grounds that it constituted sex discrimination. The very fact that the Court took this step surprised even Sally Reed's lawyers, including Ginsburg. After all, *Reed* came just ten years after the Court, in *Hoyt v. Florida*,[88] declared:

Nineteenth Amendment, 2 WOMEN'S RTS. L. REP. 9, 12 (1972), *reprinted in* H.H. KAY, SEX-BASED DISCRIMINATION 38 (1981).

84 Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-488 (1955).

85 Gerald Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972).

86 LESLIE FRIEDMAN GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN 112 (1988).

87 SUSAN GLUCK MEZEY, IN PURSUIT OF EQUALITY 18 (1992).

88 368 U.S. 57 (1961) (upholding a Florida law that automatically exempted wo-

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[89]

So it is hardly surprising that Ginsburg assessed her chances of winning Reed as "nil."[90] But win she did. At least on the merits of the case, the Court held for Sally Reed. Still, the decision left open a number of questions, with the most important one centering on the classification for sex: would the Court continue to apply the rational basis standard? If so, would it take the tack it did in *Reed* and apply the test with a "bite"? Or would it revert to a more traditional approach? *Frontiero* provided some answers to these questions and that, at least in part, is what makes it such an important ruling.

Sharron Frontiero was a lieutenant in the U.S. Air Force, and her husband, Joseph, was a full-time student at Huntingdon College in Mobile, Alabama.[91] Sharron applied for certain dependent benefits for her husband, including medical and housing allowances. These benefits were part of the package the military offered to be competitive with private employers. To receive the benefits for her spouse, Sharron had to prove that Joseph was financially dependent upon her, which meant that she provided at least half of her husband's support. Male officers, however, were not required to provide evidence that their wives were dependent upon them. Air Force regulations presumed such financial dependence.

According to the facts to which both parties agreed, Joseph's expenditures amounted to $354 per month. He received $205 (58% of his monthly expenses) from his own veterans' benefits. Consequently, Joseph was not considered financially dependent on his wife, and the benefits were denied.

When the case reached the U.S. Supreme Court, attorneys for the Frontieros made the following claim: "Although *Reed v. Reed* em-

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men from jury service unless they asked to serve), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975).

89 *Hoyt*, 368 U.S. at 61-62.

90 Ruth B. Cowan, *Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project*, 1971-1976, 8 COLUM. HUM. RTS. L. REV. 378 (1977).

91 We draw these facts from LEE EPSTEIN & THOMAS WALKER, CONSTITUIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 692 (1995).

ployed the rational basis test to judge a sex classification, the Court apparently left open the prospect that stricter review could be applied in an appropriate case. This is such a case."[92] Clearly, then, the Frontieros' attorneys were pushing the suspect class approach; yet they provided the Court with an alternative, albeit with some reluctance: "Despite our position that the instant burdensome classification by sex is suspect, and therefore subject to strict scrutiny, the plaintiffs submit that the challenged statutes fail even to meet the traditional reasonableness test."[93]

In an amicus curiae brief, attorneys for the Women's Rights Project of the ACLU (again, including Ginsburg) approached the case somewhat differently. They too urged the justices to find sex a suspect class, but they were less circumspect about offering an alternative:

> With respect to the standard of review in this case, our position is three-fold: (1) [the challenged provisions] establish a suspect classification for which no compelling justification can be shown; alternatively, (2) the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective; and, finally, (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing between married servicemen and married servicewomen for purposes of fringe benefits, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.[94]

What would the Court do? Justices William J. Brennan, Jr.'s and William O. Douglas's notes from conference discussion are partially revealing.[95] They suggest that five of the justices (Douglas, Brennan, Stewart, White and Powell) strongly believed, as Stewart put it, that the policy "on its face grossly discriminates against a readily identifiable class in a basically fundamental role of life."[96] Two others (Blackmun and Marshall) cast tentative votes to reverse, while Burger and Rehnquist thought the decision should be affirmed. In Burger's mind, *Reed* had "nothing to do" with the case, a position with which

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92 Brief for Appellants at 10-11, Frontiero v. Laird, 409 U.S. 840 (1972) (No. 71-1694).

93 *Id.* at 33.

94 Brief for the American Civil Liberties Unions, *amicus curiae* at 23, Frontiero v. Laird, 409 U.S. 840 (No. 71-1694).

95 We draw the following discussion from Brennan's and Douglas's notes from the Court's conference on *Frontiero v. Richardson.* Letter from William O. Douglas, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (March 3, 1973) (on file with the authors and the *New York City Law Review*).

96 *Id.*

Brennan took issue noting that he could not distinguish the two. Burger also said that he thought *Frontiero* was a "tempest in a teapot," with "enormous" implications. These factors led Burger (and Rehnquist) to conclude that the military had the right to draw the lines it did.[97]

The conference majority also, apparently, agreed that the Court could dispose of the case without stating a specific standard of review. For, on February 14, 1973, Brennan circulated the following memo, along with the first draft of his majority opinion:

> As you will note, I have structured this opinion along the lines which reflect what I understood was our agreement at conference. That is, without reaching the question whether sex constitutes a "suspect criterion" calling for "strict scrutiny," the challenged provisions must fall for the reasons stated in *Reed.* I do feel however that this case would provide an appropriate vehicle for us to recognize sex as a "suspect criterion." And in light of Potter [Stewart's] "Equal Protection Memo" circulated last week,[98] perhaps there is a Court for such an approach. If so, I'd have no difficulty in writing the opinion along those lines.[99]

In other words, the first draft of Brennan's *Frontiero* opinion sidestepped the classification issue and, instead, invoked a *Reed* approach to dispose of the case. As he put it in his initial circulation:

> At the outset, appellants contend that sex, like race, alienage, and national origin, constitutes a "suspect criterion," and that a classification based upon sex must therefore be deemed uncon-

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97 *Id.*

98 Apparently, Brennan is referring here to a memo Stewart wrote to Powell on February 8, 1973. In that memo, Stewart wrote: "Application of the so-called 'compelling state interest' test automatically results, of course, in striking down the statute under attack. . . . There is hardly a statute on the books that does not result in treating some people differently from others. There is hardly a statute on the books, therefore, that an ingenious lawyer cannot attack under the Equal Protection Clause. If he can persuade a court that [a fundamental interest] is involved, then the state cannot possibly meet its resulting burden of proving that there was a compelling state interest in enacting the statute exactly as it was written." BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 220 (1990)

Stewart went on to say that the strict scrutiny approach could be dangerous because it would "return this Court, and all federal courts, to the heyday of the Nine Old Men, who felt that the Constitution enabled them to invalidate almost any state laws they thought unwise." Still, Stewart wrote in the memo that he thought "some few classifications are suspect, notably and primarily race, but also others, including alienage, perhaps sex, perhaps illegitimacy, and indigency." *Id.* at 220-221.

Despite these words — and they were tentative — Stewart never again took the position that sex should be a suspect class.

99 Memoranda from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to the Conference, Supreme Court of the United States (Feb. 14, 1973) (on file with the authors and the *New York City Law Review*).

> stitutional unless necessary to promote a compelling interest. We need not, and therefore do not, decide this question, however, for we conclude that the instant statutes cannot pass constitutional muster under even the more 'lenient' standard of review implicit in our unanimous decision only last Term in *Reed v. Reed*.[100]

Brennan went on to echo his conference position, namely, "[i]n terms of the constitutional challenge, the situation here is virtually identical to *Reed*,"[101] and to reverse the lower court judgment.

The draft drew immediate responses from several members of the Court. Powell quickly joined the opinion,[102] and took the opportunity to state his opposition to considering the classification issue by stating:

> "I see no reason to consider whether sex is a 'suspect' classification in this case. Perhaps we can avoid confronting that issue until we know the outcome of the Equal Rights Amendment."[103]

Stewart agreed with Powell but went one step further:

> I see no need to decide in this case whether sex is a "suspect" criterion, and I would not mention the question in the opinion. I would, therefore, eliminate the first full paragraph on page 5 [this is the paragraph excerpted above], and substitute a statement that we find that the classification effected by the statute is invidiously discriminatory. (I should suppose that "invidious discrimination" is an equal protection *standard* to which all could repair, even though the dissenters would not find such discrimination in this case.)[104]

White, Douglas, and apparently Marshall, though, felt quite differently. In a short note to Brennan, penned on the bottom of Brennan's memo of February 14, Douglas said that he preferred the suspect class approach. Marshall, who Douglas recorded as "tentative"

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100 Draft opinion by Associate Justice William J. Brennan, Jr., Supreme Court of the United States, at 5 (Feb. 14, 1973) (on file with the authors and the *New York City Law Review*).

101 *Id.* at 7.

102 When justices agree to sign on to an opinion draft, they typically write a memo to the writer saying that they "join" the opinion. Many simply write "I join" or "Join me."

103 Letter from Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 15, 1973) (on file with the authors and the *New York City Law Review*) (At the time Powell wrote this memo, 22 states had ratified the ERA; in fact, during January, February, and March of 1973 alone, 8 states had approved it. It was not until after March 1973 that the ratification pace slowed considerably.).

104 Letter from Potter Stewart, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 16, 1973) (on file with the authors and the *New York City Law Review*).

at the justices' conference, had apparently solidified his views. In a typed note, he wrote:

> I share Bill Brennan's view that this case would provide an appropriate vehicle for recognizing sex as a suspect criterion calling for stricter review of the challenged class. Indeed, I would have difficulty joining an opinion invalidating this classification under a "rational relationship" test; and might ultimately be forced to concur separately.[105]

Whether Marshall circulated this note is unclear. But he apparently made his views known to some members of the Court — as the following memo from White to Brennan reveals:

> I think *Reed* v. *Reed* applied more than a rational basis test. Thurgood is right about this. If moving beyond the lesser test means that there is a suspect classification, then *Reed* has already determined that. In any event, I would think that sex is a suspect classification, if for no other reason than the fact that Congress has submitted a constitutional amendment making sex discrimination unconstitutional. I would remain of the same view whether the amendment is adopted or not. Whether it follows from the existence of a suspect classification that "compelling interest" is the equal protection standard is another matter. I agree with Thurgood that we actually have a spectrum of standards. Rather than talking of a compelling interest, it would be more accurate to say that there will be times — when there is a suspect classification or when the classification impinges on a constitutional right — that we will balance or weigh competing interests. Of course, the more of this we do on the basis of suspect classifications not rooted in the Constitution, the more we approximate the old substantive due process approach.[106]

So, by the end of February, the justices — while remaining of the opinion that the lower court should be reversed — disagreed over the appropriate standard of review. As Table 2 depicts, four justices (White, Douglas, Marshall, and Brennan) thought the Court should apply the suspect class approach and reverse; at least two others wanted to reverse but on the *Reed* rational basis standard (Powell and Stewart); and three remained silent during this initial circulation period (Burger and Rehnquist who voted in conference to affirm and Blackmun who had tentatively voted to reverse).

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105 Thurgood Marshall, Note on *Frontiero v. Laird*, Feb.-Mar. 1993, located in Box 100 of the Thurgood Marshall collection at the Library of Congress (on file with the authors and the *New York City Law Review*).

106 Letter from Byron R. White, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Feb. 15, 1973) (on file with the authors and the *New York City Law Review*).

TABLE 2. PREFERENCES IN *FRONTIERO V. RICHARDSON*: CONFERENCE VOTES AND POSITIONS AFTER BRENNAN CIRCULATED HIS FIRST DRAFT*

Justice	Conference Vote	Position on Standard of Review: Reactions to Brennan's First Draft
Burger	Against Frontiero	No reaction
Douglas	For Frontiero	Preferred Suspect Class
Brennan	For Frontiero	Preferred Suspect Class
Stewart	For Frontiero	Preferred Draft as is (Rational Basis)
White	For Frontiero	Preferred Suspect Class
Marshall	For Frontiero (tentative)	Preferred Suspect Class
Powell	For Frontiero	Preferred Draft as is (Rational Basis)
Blackmun	For Frontiero (tentative)	No reaction
Rehnquist	Against Frontiero	No reaction

* Data collected by the authors.

This preference configuration created something of a quandary for Brennan. When Douglas assigned the opinion to him,[107] Brennan knew, as do all justices, that he needed to obtain the signatures of at least four others if his opinion was to become the law of the land. If he failed to get a majority to agree to its contents, his opinion would become a "judgment of the Court," and would lack precedential value.

The "majority" requirement for precedent is another of the Court's many norms and, in *Frontiero*, a seemingly imposing one. For, from Brennan's perspective, only three other justices (Marshall, White, and Douglas) agreed with his most preferred positions in the case: reversal of the lower court decision and application of a strict scrutiny standard. From where would the fourth vote come? Rehnquist and Burger were out of the question. Not only did they disagree with Brennan over the appropriate standard of review (they favored rational basis), but they even disagreed over the disposition of the case (they favored affirmation). Powell and Stewart were closer to Brennan — at least they wanted to reverse — but they made it crystal

[107] Douglas, as the senior member of the majority, assigned the opinion to Brennan.

clear that they wanted to use the *Reed* rationale. If Brennan failed to do so, they might pull their support.

That left Blackmun. He had several feasible courses of action, which Table 3 depicts: join the majority opinion, concur "regularly," concur "specially," or dissent. Based on his conference position — an inclination to reverse without providing a clear statement of the standard — it was possible that Blackmun (as well as Powell and Stewart) might join Brennan's disposition of the case (that Frontiero should win), but disagree with the standard the opinion articulated (strict scrutiny). This would not be propitious from Brennan's perspective because such disagreement — called a "special" concurrence — would mean that Blackmun would fail to provide the crucial fifth signature. On the other hand, Blackmun might simply join the majority opinion coalition while writing a "regular" concurrence. Since a regular concurrence, in contrast to a special concurrence, counts as joining the majority opinion, Brennan would have his fifth vote.

If Brennan is a rational actor, whose goal is to set policy as close as possible to his ideal point (in this instance, a suspect classification for sex), what would PPT predict Brennan would do? Stick with his first opinion draft which adopted the rational basis approach or circulate a new draft which would apply strict scrutiny? To address this question, we begin by conceptualizing Brennan's situation as a "game"[108] — one pitting him (as an advocate of suspect class) against Powell/Stewart[109] (as justices content with the rational basis approach). Moreover, based on the memoranda we have compiled, it seems reasonable to assume that both "players" — Brennan and Powell/Stewart — shared the following beliefs about their *Frontiero* interaction. First, both players believed that, regardless of whether Brennan adopted a rational basis standard or a suspect class standard, the majority of the justices would agree to reverse the lower court's decision. Given the conference vote (7-2) and the memoranda of the justices, this seems like a reasonable assumption and one that Brennan and Powell/Stewart probably took as a given. The choice for the

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[108] In game theoretic terms, a game is a strategic situation. As Cameron puts it, "Technically, this means that the fate of each actor must depend on the decisions of other actors (not just his or her own actions), and the actors must realize their interdependence. For example, the outcome of cases in federal appellate courts depend on the individual votes of several judges sitting as a panel. Plausibly, the judges care about the outcome of cases, and they certainly recognize that outcomes depend on their collective behavior. Hence, voting in appellate adjudication is technically a game." Cameron, *supra* note 59, at 2-3.

[109] Since Powell and Stewart agreed on the desirable outcome — a victory for Frontiero — and on the standard of law to obtain that outcome — a rational basis test — we treat them as one player.

TABLE 3. MAJOR VOTING AND OPINION OPTIONS AVAILABLE TO THE JUSTICES*

Option	*Meaning*
1. Join Majority[a]	The justice is a "voiceless" member of the majority[a]. That is, the justice writes no opinion but simply agrees with the opinion[b] of the Court.
2. Write or Join[c] a Regular Concurrence	The justice writes (or joins) an opinion and is also a member of the majority[a] opinion coalition.
3. Write or Join[c] a Special Concurrence[d]	The justice agrees with the disposition made by the majority[a] but disagrees with the reasons contained in the opinion. The justice is not a member of the majority [a] opinion coalition.[e]
4. Write or Join[e] a Dissent[f]	The justice disagrees with the disposition made by the majority[a]. The justice is not a member of the majority[a] opinion coalition.

[a]Or the plurality, if the opinion writer can't get a majority of justices to agree to the opinion's contents.
[b]Or the judgment of the Court. A judgment of the Court results when the opinion writer can't get a majority of the participating justices to agree to the opinion's contents.
[c]To join is to sign on to an opinion.
[d]Or simply note such a concurrence, as in "Justice Stewart concurs in the judgment of the Court."
[e]Thus, at least one justice must cast such a concurrence to produce a Judgment of the Court.
[f]Or simply note such dissent, as in "Justice Stewart dissents."
* *Adopted from:* SEGAL AND SPAETH, *supra* note 2, at 276.

two players, then, boiled down to the choice of a legal standard — suspect class or rational basis. Second, both players knew with a good deal of certainty their opponent's preferences. That is, Brennan wanted a suspect class, while Powell/Stewart desired a rational basis standard. Although there are several ways we could set out those preferences, let us suppose that both players cared more about policy than about marshaling a Court behind a particular approach, and that they believed the other knew this. In other words, Brennan preferred a suspect class majority opinion to a suspect class judgment to a rational basis opinion; Powell/Stewart's preferences were precisely the opposite. Third, both players were uncertain about Blackmun's position in the case. Recall that Blackmun's conference vote was tentative and that he had not circulated any response to Brennan's first draft.

With these preferences and beliefs in mind, we can now turn to the key question: what are the rational courses of action for these actors? The answer is straightforward enough: Given Brennan's preferences (he preferred a suspect majority opinion to a suspect judgment to a rational basis opinion), his beliefs about the preferences of the other actors and the actions he expected them to take (he knew Powell/Stewart preferred rational basis), and the context (he was uncertain about Blackmun's position), we might hypothesize that Brennan would recraft his opinion to adopt a suspect class for sex, and that Powell/Stewart would take the rational basis route — and concur in judgment. The justices would make these decisions regardless of what they thought Blackmun would do.

To see this, readers need only put themselves in the actors' positions and believe, for example, that there was a 95% chance that Blackmun would choose the suspect classification. If that were the case, then surely Brennan would choose the suspect class route (for the chances of obtaining a Court behind a suspect class opinion would be quite high) and Powell/Stewart would choose the rational basis path (even though they would know that the odds of obtaining a rational basis opinion or a judgment were quite small). If we reversed the situation and posited that there was only a .5 probability of Blackmun going suspect, the same results would be obtained. For, if Brennan continued to embrace the rational choice standard under these circumstances, then surely Blackmun, Stewart, and Powell would have rallied around his opinion. Burger and Rehnquist, though disagreeing with the use of the standard to reverse, would also have articulated a rational basis approach. This would have created a Court behind the rational basis approach — Brennan's least preferred standard.

Thus, it is not so surprising that Brennan, on February 28, 1973, took the rational course of action and circulated a new draft of his opinion with a memo attached stating: "[s]ince the previous circulation attracted only Lewis's full agreement and Potter's partial agreement, and since Bill Douglas and Byron have indicated a preference for the "suspect criterion" approach, the attached new circulation embodies the latter approach (which is also my own preference)."[110] Indeed, this draft (which resembles the final, published version) explicitly held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying

110 Memoranda from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to the Conference, Supreme Court of the United States (Feb. 28, 1973) (on file with the authors and the *New York City Law Review*).

the analysis mandated by that stricter standard of review, we can only conclude that the statutory scheme now before us is constitutionally invalid."[111]

The reactions were predictable. White, Douglas, and Marshall immediately joined the new draft. Powell, however, refused to do so. In a March 2, 1973, memorandum to Brennan, Powell wrote:

> This refers to your . . . draft opinion in the above case, in which you have now gone all the way in holding that sex is a "suspect classification."
>
> My principal concern about going this far at this time, as indicated in my earlier letter, is that it places the Court in the position of preempting the amendatory process initiated by Congress. If the Equal Rights Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. If, on the other hand, this Court puts "sex" in the same category as "race" we will have assumed a decisional responsibility (not within the democratic process) unnecessary to the decision of this case, and at the very time that legislatures around the country are debating the genuine pros and cons of how far it is wise, fair and prudent to subject both sexes to identical responsibilities as well as rights.
>
> The point of this letter is not to debate the merits of the Equal Rights Amendment, as to which reasonable persons obviously may differ. Rather, it is to question the desirability of this Court reaching out to anticipate a major political decision which is currently in process of resolution by the duly prescribed constitutional process.
>
> I joined your opinion in its original draft on the authority of *Reed v. Reed.* This is as far as we need go in the case now before us. If and when it becomes necessary to consider whether sex is a suspect classification, I will find the issue a difficult one. Women certainly have not been treated as being fungible with men (thank God!). Yet, the reasons for different treatment have in no way resembled the purposeful and invidious discrimination directed against blacks and aliens. Nor may it be said any longer that, as a class, women are a discrete minority barred from effective participation in the political process.
>
> For these reasons, I cannot join your new opinion and will await further circulations.[112]

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111 Draft opinion by Associate Justice William J. Brennan, Jr., Supreme Court of the United States, at 11 (Feb. 28, 1973) (on file with the authors and the *New York City Law Review*).

112 Letter from Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Mar. 2, 1973) (on file with the authors and the *New York City Law Review*).

Stewart immediately told Brennan that he agreed with Powell.

That left Blackmun, who had not expressed an opinion on either of Brennan's drafts. So whatever hopes Brennan had for marshaling a Court hung on him. But Blackmun did not leave Brennan hanging for long. In a March 5 memo, Blackmun wrote:

> This case has afforded me a good bit of difficulty. After some struggle, I have now concluded that it is not advisable, and certainly not necessary, for us to reach out in this case to hold that sex, like race and national origin and alienage, is a suspect classification. It seems to me that *Reed* v. *Reed* is ample precedent here and is all we need and that we should not, by this case, enter the arena of the proposed Equal Rights Amendment. This places me, I believe, essentially where Lewis and Potter are as reflected by their respective letters of March 2 and February 16.[113]

Brennan tried to salvage the situation. The day after he heard from Blackmun, he wrote to Powell:

> You make a strong argument and I have given it much thought. I come out however still of the view that the "suspect" approach is the proper one and, further, that now is the time, and this is the case, to make that clear. Two reasons primarily underlie my feeling. First, Thurgood's discussion of *Reed* in his dissent to your *Rodriguez* convinces me that the only rational explication of *Reed* is that it rests upon the "suspect" approach. Second, we cannot count on the Equal Rights Amendment to make the Equal Protection issue go away. Eleven states have now voted against ratification (Arkansas, Connecticut, Illinois, Louisiana, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Utah and Virginia). And within the next month or two, at least two, and probably four, more states (Arizona, Mississippi, Missouri and Georgia) are expected to vote against ratification. Since rejection in 13 states is sufficient to kill the Amendment it looks like a lost cause. Although rejections may be rescinded at any time before March 1979, the trend is rather to rescind ratification in some states that have approved it. I therefore don't see that we gain anything by awaiting what is at best an uncertain outcome. Moreover, whether or not the Equal Rights Amendment eventually is ratified, we cannot ignore the fact that Congress and the legislatures of more than half the States have already determined that classifications based upon sex are inherently suspect.[114]

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113 Letter from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Mar. 5, 1973) (on file with the authors and the *New York City Law Review*).

114 Letter from William J. Brennan, Jr., Associate Justice, Supreme Court of the

This was insufficient, however, to persuade Powell to change his mind. At the end of the day, Brennan failed to bring a Court together (i.e., his writing was a judgment, not a majority opinion). As Table 4 shows, only four justices supported the strict scrutiny standard, with the rest advocating rational basis.

TABLE 4. FINAL VOTES CAST IN AND TESTS ADOPTED BY JUSTICES IN *FRONTIERO**

Justice	Final Vote	Position on Standard of Review: Reactions to Brennan's Final Draft
Burger	For Frontiero[a]	Rational Basis
Douglas	For Frontiero	Suspect Class
Brennan	For Frontiero	Suspect Class
Stewart	For Frontiero	Undeclared
White	For Frontiero	Suspect Class
Marshall	For Frontiero	Suspect Class
Powell	For Frontiero	Rational Basis
Blackmun	For Frontiero	Rational Basis
Rehnquist	Against Frontiero	Rational Basis

[a]Voted against Frontiero at conference.
* Data collected by the authors.

B. *From* Frontiero v. Richardson *to* Craig v. Boren

Despite his failure to forge a majority in *Frontiero,* Brennan, given his beliefs, preferences, and the context of the decision, took the rational course of action when he rewrote the first draft to adopt a strict scrutiny standard. As such, we think Brennan's decision provides an interesting example of the utility of the strategic rationality approach.

The decision also kept the hopes of women's rights litigators alive. As Schwartz put it, "[h]ad the Brennan [first draft] come down as the *Frontiero* opinion, it might well have aborted the substantial development of sex discrimination law that occurred in the Burger Court. The use of the rational-basis test in both *Reed* and *Frontiero* would probably have meant its adoption for all cases involving sexual classification."[115] But, because *Frontiero* did not decisively reject or accept the suspect class test, several women's rights groups continued their efforts to convince the Court to adopt the higher level of scrutiny, and the Court continued to decide such

United States, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (Mar. 6, 1973) (on file with the authors and the *New York City Law Review*).

115 SCHWARTZ, *supra* note 98, at 223.

disputes. Between 1973 (*Frontiero*) and 1976 (*Craig*), as Table 5 shows, the Court resolved, with a signed opinion, ten cases involving sex discrimination, with the litigant claiming discrimination prevailing in six of the cases.

TABLE 5. SEX DISCRIMINATION CASES DECIDED BY THE COURT BETWEEN *FRONTIERO* AND *CRAIG**

Case	*Vote*	*Outcome*
Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)	5-4	+
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974)	7-2	+
Kahn v. Shevin, 416 U.S. 351 (1974)	6-3	–
Corning Glass v. Brennan, 417 U.S. 188 (1974)	5-3	+
Geduldig v. Aiello, 417 U.S. 484 (1974)	6-3	–
Schlesinger v. Ballard, 419 U.S. 498 (1975)	5-4	–
Taylor v. Louisiana, 419 U.S. 522 (1975)	8-1	+
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	8-0	+
Stanton v. Stanton, 421 U.S. 7 (1975)	8-1	+
General Electric v. Gilbert, 429 U.S. 125 (1976)	6-3	–

Note: + = Court struck down sex-based classification; – = Court upheld sex-based classification.

* MEZEY, *supra* note 87, at 22-23; O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS 96-97 (1980).

Still, the Court apparently could not agree over the legal standard by which to adjudicate constitutional cases. Indeed, in *Stanton v. Stanton,*[116] a case quite proximate to *Craig,* the Court seemed to give up the search for an appropriate test. At issue in *Stanton* was a Utah law which specified that, for purposes of child support payments, men reach adulthood at age 21 and women at 18. Writing for the Court, Justice Blackmun held that the law constituted impermissible sex discrimination, but it failed to articulate a standard of review. Instead, the majority opinion noted: "[w]e . . . conclude that under any test — compelling state interest, rational basis, or something in between — [the Utah law] . . . does not survive . . . attack."[117]

Such rulings sent mixed signals to the legal community. As one federal district court judge put it, "lower courts searching for guidance in the 1970s Supreme Court sex discrimination precedents [prior to *Craig*] have 'an uncomfortable feeling' — like players at a

116 421 U.S. 7 (1975).

117 *Id.* at 17.

shell game who are 'not absolutely sure there is a pea.' "[118] Attorneys working in this area of the law found themselves in much the same boat. At the very least, though, women's rights attorneys and organizations knew, as Table 5 shows, that they had five justices on whose votes they could generally (but not always) count: Brennan, White, Douglas, Marshall, and Stewart. But the potential for change was in the wind when Douglas retired and President Ford replaced him with John Paul Stevens. Would Stevens support women's right claims? What classification would he favor?

These questions loomed large when the Court agreed to decide *Craig v. Boren.* At issue in *Craig* was an "equalization" statute passed by Oklahoma in 1972.[119] This law set the age of the legal majority for both males and females at eighteen.[120] Before then, females reached legal age at eighteen and males at twenty-one.[121] The statute, however, contained one exception. The law prohibited men from purchasing beer until they reached the age of 21, but allowed women to buy (low-alcohol content) beer at 18.[122] The state differentiated between the sexes in response to statistical evidence indicating a greater tendency for males in the eighteen to twenty-one age bracket to be involved in alcohol-related traffic accidents, including fatalities.[123]

Even so, Curtis Craig, a 20 year-old male who wanted to buy beer and Carolyn Whitener, a beer vendor who wanted to sell it, viewed the law as a form of sex discrimination and brought suit in a federal district court.[124] At the district court level one of the arguments the plaintiffs made was that under *Frontiero,* laws discriminating on the basis of sex should be, at least according to the U.S. Supreme Court, subject to the "strict scrutiny" test.[125] The plaintiffs contended that under this standard the Oklahoma law could not stand because compelling governmental interest was not achieved by establishing different drinking ages for men and women.[126]

In response, the state argued that the U.S. Supreme Court had never explicitly applied the strict scrutiny test to laws discriminating

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118 KAY, *supra* note 83, at 70.

119 Craig v. Boren, 429 U.S. 190, 197 (1976).

120 *Id.* at 192.

121 *Id.* at 200-01.

122 *Id.* at 192.

123 *Id.* at 200-01.

124 *Id.* at 192.

125 Walker v. Hall. 399 F. Supp. 1304, 1307 (W.D. Okla. 1975), *rev'd sub nom.* Craig v. Boren, 429 U.S. 190 (1976).

126 *Id.*

on the basis of sex.[127] Rather, the only test that a majority of the justices had ever applied was the *Reed* rational basis approach.[128] Surely, Oklahoma contended, its law met this standard because statistical studies indicated that men "drive more, drink more, and commit more alcohol-related offenses."[129]

A three-judge district court held for the state, upholding the constitutionality of the statute.[130] While the court acknowledged that existing U.S. Supreme Court decisions were murky, it felt that the weight of the case law supported the state's reliance on the lower-level standard.[131] Furthermore, the court held that the state had met its obligation of establishing a "rational basis" for the law: given the statistical evidence, Oklahoma's goal of reducing drunk-driving incidents seemed a reasonable one.[132]

At the U.S. Supreme Court, Craig and Whitener continued to press the same claims that they had at trial (with Craig and Whitener arguing for strict scrutiny and the state advocating rational basis), but a third party advanced a somewhat different approach. Entering the case as an amicus curiae on behalf of Craig, ACLU attorneys Ruth Bader Ginsburg and Melvin Wulf argued that the Oklahoma law "could not survive review whatever the appropriate test:" strict scrutiny or rational basis or "something in between."[133] This was an argument drawn directly from the Court's indecisiveness in *Stanton*,[134] and it was interesting in two regards: it suggested that (1) the Court could apply the lower rational basis standard and still hold for Craig or (2) the Court might consider developing a standard "in between" strict scrutiny and rational basis.

What would the Supreme Court do?

That question was initially answered at the justices' conference, held a few days after oral arguments.[135] As is the Court's tradition, the Chief Justice led off the discussion. Burger asserted that *Craig* was an "isolated case" which the Court should dismiss on procedural grounds. The problem was that since Curtis Craig had turned 21 after

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127 Brief for Appellees at 3-4, Craig v. Boren, 429 U.S. 190 (1976) (No. 75-628).

128 *Id.*

129 *Walker*, 399 F. Supp. at 1309.

130 *Id.* at 1314.

131 *Id.* at 1308.

132 *Id.* at 1311.

133 Brief for the American Civil Liberties Unions, *amicus curiae* at 15-17, Craig v. Boren, 429 U.S. 190 (1976) (No. 75-628).

134 *Id.*

135 The next few paragraphs draw on the case files and docket books (which include notes of conference discussion) of Justices William J. Brennan, Jr. and Thurgood Marshall (on file with the authors and the *New York City Law Review*).

the Court agreed to hear the case, his claim was moot. Thus, the dispositive issue, to Burger, was whether or not "the saloon keeper" Whitener had standing to bring the suit.[136] Burger thought that she did not. But, if his colleagues disagreed (that is, they thought Whitener had standing), Burger said he was willing to find for Craig providing that the majority opinion was narrowly written.[137]

After Burger spoke, the other justices presented their views. They were, as Table 6 illustrates, all over the map. Powell and Blackmun agreed with the Chief Justice in that they both would dismiss on the standing issue, and they both thought that they could find for Craig. Rehnquist also wanted to dismiss on the standing issue but would hold for Oklahoma should the Court resolve the dispute. The remaining five justices would rule in Craig's favor but disagreed on the appropriate standard. Marshall clearly favored strict scrutiny, as did William Brennan, but Brennan suggested that a standard in between rational and strict might be viable;[138] White seemed to go along with Brennan; Stewart seemed to suggest that the Court need only apply the rational basis test to find in Craig's favor; Stevens argued that some "level of scrutiny above mere rationality has to be applied," but he was not clear on what that standard should be.

After the conference, it was Brennan who decided to write the opinion for the Court.[139] Again, this was a rather daunting task, for, from Brennan's perspective, at most only three other justices (Marshall and, possibly, White and Stevens) tended to agree with his most preferred positions in the case: (1) Whitener had standing (2) a strict scrutiny standard should be used, and (3) the Court should rule in Craig's favor. From where would the fourth vote come? Not from Rehnquist, as his position was diametrically opposed to Brennan's on all the key points and, thus, he would surely dissent. The sentiments

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136 The doctrine of "standing" prohibits the Court from resolving a dispute if the party bringing the litigation is not the appropriate one. In other words, Article III of the U.S. Constitution requires that the litigants demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

In Craig v. Boren, Burger felt that Whitener, being over the age of 21 and female, did not have the requisite personal stake. Again, this was a dispositive point for Burger since Craig's claim was moot. *Craig*, 429 U.S. at 190.

137 Letter from Warren E. Burger, Chief justice, Supreme Court of the United States, to William J. Brennan, Jr., Associate Justice, Supreme Court of the United States (Nov. 15, 1976) (on file with the authors and the *New York City Law Review*).

138 SCHWARTZ, *supra* note 98, at 226.

139 Letter from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (Nov. 16, 1976) (on file with the authors and the *New York City Law Review*).

TABLE 6. JUSTICES' CONFERENCE POSITIONS ON THE KEY ISSUES OF *CRAIG V. BOREN*

Justice	Conference Position		
	Standing	*Standard*	*Disposition*
Burger	No	Rational?	Dismiss/Lean toward Craig if decided on merits
Brennan	Yes	Strict/In-Between*	Craig
Stewart	Yes	Rational	Craig
White	Yes	Strict/In-Between?	Craig
Marshall	Yes	Strict	Craig
Blackmun	No	Undeclared	Dismiss/Lean toward Craig if decided on merits
Powell	No	Rational?	Dismiss/Lean toward Craig if decided on merits
Rehnquist	No	Rational	Dismiss/Lean toward Oklahoma if decided on merits
Stevens	Yes	Above Rational	Craig

?=Implicit but not explicit from conference discussion.
* Typically, Brennan's case files contain memos of the remarks he made at conferences. Unfortunately, his *Craig* conference memo was missing. So we rely on SCHWARTZ, *supra* note 98, at 226, who writes that Brennan, of course, wanted to adopt the strict scrutiny approach but offered the "in between" standard as a compromise. For now, the important point is that "strict" represented Brennan's most preferred position.

of Blackmun, Powell, and Burger too favored dismissal, but were closer to Brennan on point (3).

That left Stewart, who was in the same "make-or-break" position in which Blackmun found himself in *Frontiero* and who had the same feasible courses of action: join the majority opinion, concur "regularly," concur "specially," or dissent. Based on his conference position (he had voted in favor of standing and for Craig but was not keen on the strict scrutiny approach) and on the memorandum he circulated in *Frontiero*, it was possible that Stewart (as well as Blackmun, Powell and Burger) might join Brennan's disposition of the case (that Craig should win), but disagree with the standard the opinion articulated (strict scrutiny or, even, something "in between"). If this occurred, then once again Brennan would end up issuing a judgment in the case, rather than a majority opinion. On the other hand, Stewart might simply join the majority opinion coalition while writing a "regular" concurrence. Since a regular concurrence (in contrast to a special concurrence) includes agreement with the majority opinion, Brennan would have his fifth vote in Stewart.

After several opinion drafts, revised to accommodate the many suggestions of his colleagues, Brennan accomplished what he could not in *Frontiero.* He succeeded in marshaling a majority behind his *Craig* opinion. The final version incorporated the ACLU's suggestion (and Brennan's own conference alternative), and articulated a test for sex discrimination cases, called "heightened" (or mid-level) scrutiny, that fell somewhere between strict scrutiny and rational basis.[140] From there, the votes and positions fell out as Table 7 indicates. Note that neither Powell nor Burger nor Blackmun joined opinions that followed from their conference votes and that Marshall signed an opinion advocating a standard that was less than ideal from his point of view, and that Brennan's writing advanced a sex discrimination test that fell short of his most preferred standard. Even the votes of certain justices changed. Powell, Blackmun and Burger switched their positions, though in different directions.

In the end, thus, *Craig* leaves us with many unanswered questions. Why did Powell, Blackmun, and Burger switch their votes? Why did Brennan advance the "heightened scrutiny" test when he clearly favored "strict scrutiny"? Why did Marshall join Brennan's opinion, when it adopted a standard he found less-then-appealing? More generally, why did *Craig* come out the way it did?

Here we concentrate primarily on one of these questions — Brennan's decision to advance heightened scrutiny over a suspect classification — because its answer gives us some insight into the last and most important question of why *Craig* came out the way it did. In response, we argue that PPT provides us with leverage to address both questions. For we believe that, given his preferences, his beliefs about the preferences of others, and the institutional context, Brennan took the course of action in *Craig* that any rational actor, concerned with policy, would have taken.

Let us begin with Brennan's preferences and his beliefs about the preferences of other Court members. Suppose, in *Craig,* that all of the justices agreed on all of the key issues: (1) Whitener had standing, (2) a strict scrutiny standard should be used, and (3) the Court should rule in Craig's favor. If this were the case, then Brennan would have been free to write an opinion that reflected his sincere preferences,

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140 Brennan outlined the heightened scrutiny approach as follows: "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Under this approach the Court sometimes strikes down sex-based classifications (such as establishing different drinking ages for men and women, Craig v. Boren, 429 U.S. at 192) and occasionally upholds them (such as limiting the military draft to men, Rostker v. Goldberg, 453 U.S. 57 (1981)).

TABLE 7. POSITIONS OF THE SUPREME COURT JUSTICES ON THE KEY ISSUES OF *CRAIG V. BOREN*

Justice	Conference Position			Final Position		
	Standing	*Standard*	*Disposition*	*Standing*	*Standard*	*Disposition*
Burger	No	Rational?	Dismiss/ Craig	No	Rational	OK[a]
Brennan	Yes	Strict/In-Between*	Craig	Yes	Heightened	Craig
Stewart	Yes	Rational	Craig	Yes	Rational	Craig[b]
White	Yes	Strict/In-Between?	Craig	Yes	Heightened	Craig
Marshall	Yes	Strict	Craig	Yes	Heightened	Craig
Blackmun	No	Undeclared	Dismiss/ Craig	Yes	Heightened	Craig[c]
Powell	No	Rational?	Dismiss/ Craig	Yes	Heightened**	Craig[d]
Rehnquist	No	Rational	Dismiss/OK	No	Rational	OK[a]
Stevens	Yes	Above Rational	Craig	Yes	Heightened**	Craig[d]

?= Implicit but not explicit from conference discussion.
*See note on Table 6.
**With reservations or qualifications
[a]=Wrote dissenting opinion
[b]=Wrote opinion concurring in judgment (special concurrence)
[c]=Wrote opinion concurring in part
[d]=Wrote concurring opinion (regular concurrence)

for they were the same as the Court's. However, that was not the case in *Craig*. As we know, Brennan had to choose among three possible standards and that he preferred strict scrutiny over heightened scrutiny over rational basis. Yet, he did not select his most preferred standard, opting instead for his second choice. Why? A real possibility is that Brennan knew from the confabs over *Frontiero* that an opinion advancing strict scrutiny would have proven to be too much for certain members of the Court to handle — and that they would have pushed for a rational basis standard. Even more pointedly, he may have even thought that situation had worsened since *Frontiero*: a clear suspect class supporter (Douglas) had been replaced by a justice (Stevens) with less certain predilections. Thus, Brennan may have chosen heightened scrutiny because, based on his knowledge of the preferences of other justices, it allowed him to avoid his least preferred position (rational basis), and not because it was his first choice. Seen in this light, strategic calculations led Brennan to act in a sophisticated fashion so as to avoid the possibility of seeing his most preferred policy (suspect) rejected by his colleagues in favor of his least preferred policy (rational).

In so doing and to reiterate, Brennan took the rational course of action. In other words, for Brennan to set policy as close as possible to

his ideal point, which, recall, is the primary goal most PPTheorists ascribe to all justices, strategic behavior was essential. Moreover, in this instance, Brennan needed to act in a sophisticated fashion, given his beliefs about the preferences of the other actors and the choices he expected them to make.

Under the PPT framework, though, strategic considerations do not simply involve calculations over what colleagues will do. For reasons considered earlier in this article, justices also consider the preferences of other key political actors, including Congress, the President, and even the public. We think these considerations may have played a role in Brennan's ultimate decision to adopt the heightened scrutiny approach in *Craig*. Recall that at the time the Court was deciding the case (1976), it believed that Congress favored a strict-scrutiny approach to sex-based classifications.[141] Brennan said as much in *Frontiero*:

> [O]ver the past decade, Congress itself has manifested an increasing sensitivity to sex-based classifications . . . . [T]he Equal Pay Act of 1963 provides that no employer covered by the Act 'shall discriminate . . . between employees on the basis of sex.' And Section 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that '[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.' *Thus, Congress itself has concluded that classifications based upon sex are inherently invidious* . . . .[142]

The Court had little reason, in 1976, to think that Congress's preferences had changed. In fact, both Houses continued to support the ERA and, thus (under Brennan's logic), a strict-scrutiny approach to sex-based classifications.

Let us assume that at the time the Court was deciding *Craig*, a majority of justices viewed the political situation in the way we have described it, that is, the Court favored a lower level of scrutiny than the other branches of government.[143] What standard would a strategic policy-maximizing Court advance? Under these circumstances, it would have been unwise for the Court to vote its sincere preferences. If the Court articulated a rational basis standard, Congress may have attempted to override its decision by writing a "strict scrutiny" test into

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141 *See* GOLDSTEIN, *supra* note 86.

142 Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (emphasis added).

143 Recall that after a conference discussion of *Craig*, a majority of justices wanted to dismiss the case (Blackmun, Burger, Powell, and Rehnquist) or apply a rational basis test (Stewart). *See* Craig v. Boren, 429 U.S. 190 (1976).

law.[144] As a result, the Court had a "strong incentive" to compromise its preferences and adopt some kind of a mid-level approach (e.g., heightened scrutiny) — or, at least, one that Congress believed was the best it could do under the circumstances and, accordingly, would have left undisturbed.

Of course, and once again, by acting in this sort of sophisticated fashion the Court would neither see its most preferred position (rational basis) nor its least preferred position (strict scrutiny) written into law. Yet, this course of action, the rational course of action under the circumstances, would lead to the best possible outcome for the majority, heightened scrutiny. This was something Justice Brennan, as the opinion writer, seemed to understand.

Finally, just as PPT suggests, it is difficult to understand the Court's opinion in *Craig* without taking into account a key institution — the norm governing the creation of precedent. If Brennan believed that four other justices shared his preference for strict scrutiny over rational basis, then surely he would have written an opinion adopting the strict standard. But that was not the case. Only three justices (at the very most) were firmly behind him. This, as we suggested earlier, may explain why he was willing to consider the heightened standard. Given the norm for precedent, he thought "heightened" was the best he could do.

IV. Conclusion

William J. Brennan, Jr. played a crucial role in the development of contemporary sex discrimination law. From the time of the *Reed* decision in 1971 until *Craig* in 1976 the Court was sharply divided over the appropriate standard to apply in sex-based claims. If the justices voted on the basis of their sincere preferences the

144 Those readers who doubt that Congress would pass legislation directing the Court to apply a particular standard of law need only consider the Religious Freedom Restoration Act of 1993. Passed to undercut the Court's decision in Oregon v. Smith, 494 U.S. 872 (1990) (in which the Court ruled that Oregon could deny unemployment benefits to individuals fired from their jobs for ingesting peyote at a religious ceremony), the Act implicitly directed the Court to use a compelling interest standard to adjudicate First Amendment Free Exercise claims.

Still our discussion of *Craig* oversimplifies (1) the politics of the day (for example, by the time the Court decided *Craig* the drive to ratify the ERA had slowed considerably, even though Congress continued to back the amendment — as its extension of the ratification deadline attests) and (2) the separation of powers system as it pertains to constitutional interpretation. We use it here to make a basic point, namely that policy-oriented justices need consider the preferences of other political actors and the choices they expect them to make.

Court would remain deadlocked, unable to achieve majority support for any particular standard.

Throughout this period Brennan carried a strong preference for the application of a strict scrutiny standard to sex discrimination cases. Yet, he found himself without sufficient support from his colleagues to realize his policy goal. While his sincere preference never changed, he successfully adapted to conditions inside the Court. By acting strategically, he was able to prevent the majority from etching into law his least preferred outcome (rational basis). Although he never saw his most preferred position become the law of the land, he was able to set law as close as was possible to his ideal point by articulating an "in between" approach that continues to be used in sex discrimination cases.

Brennan's advancement and the Court's ultimate adoption of the heightened scrutiny standard — and this is a key point — cannot be adequately explained by existing models of Supreme Court decision making. To see why, reconsider the events leading up to *Craig*. Having been assigned the task of writing for the majority in *Frontiero*, Brennan faced a difficult situation. Although a clear majority supported the position that the Air Force regulations violated the Constitution, the justices apparently agreed to base the decision on an application of *Reed*, preferring not to use the case as a vehicle for articulating a particular standard.

Brennan's first draft was true to this position, but he openly declared in a memorandum that he supported the suspect class approach. When White, Douglas, and Marshall echoed his sentiment, Brennan reassessed his initial circulation. He now had four votes in support of strict scrutiny, but could he attract a fifth? With Rehnquist and Burger in dissent, and Powell and Stewart preferring that the Court avoid the issue, the spotlight inside the Court fell on Blackmun, who had not declared a position. With this voting alignment, Brennan took the rational course of action — he scrapped his *Reed*-based draft and circulated an opinion embracing strict scrutiny. Doing so carried little risk and the potential for significant reward. If he attracted Blackmun to his camp, he would have won a major policy victory; if Blackmun could not be swayed (which proved to be the case), Brennan would still block adoption of the rational choice approach and keep the legal debate alive.

In *Craig*, Brennan faced an altered social context. Majority support for strict scrutiny seemed beyond reach. With the retirement of Douglas and Blackmun's rejection of the approach, Bren-

nan had no hope of gaining support for his sincerely preferred position.

Apparently aware of this changed context, Brennan again acted strategically. He took advantage of the Court's rules by assigning *Craig* to himself. Then, he carefully crafted a new standard of review — a standard that he thought would allow him to maintain the support of White and Marshall and would attract others who generally favored *Craig*, but were not necessarily strict scrutiny advocates. Brennan's approach was successful: a majority of the justices signed his opinion.

By now, it should be clear why existing theories of decision making cannot account for the development of sex discrimination standards. Surely the intra-court negotiations in *Frontiero* and *Craig* bear no resemblance to the kinds of behavior suggested by purely legal models of decision making. At the very least, Justice Owen Roberts's classic articulation of the legal approach ("the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"[145]) does not describe what occurred in these cases. Similarly, the attitudinal approach, which assumes that justices always vote (on the merits of cases) in accord with their sincere preferences, cannot (nor does it attempt to) account for the outcomes we have described.

Positive political theory, in contrast, does provide a reasonable framework for understanding why justices act in particular ways. Here, we have highlighted the actions of Justice Brennan, who — in *Frontiero* — wrote an opinion endorsing strict scrutiny because there was a distinct possibility of attracting a fifth vote for that approach. Even if he failed to obtain a majority, he knew that he could block Court acceptance of his least preferred position. In *Craig*, faced with no possibility of majority support for strict scrutiny, Brennan acted in a sophisticated fashion, abandoning his sincerely preferred position and gathering a majority behind an acceptable alternative.

Just as positive political theory sheds light on this fascinating episode of constitutional law, it also reminds social scientists of things that law professors have never forgotten: judges and justices care about the substance of the law, they are concerned with appropriate standards, and they believe that words carry important

145 United States v. Butler, 297 U.S. 1, 62 (1936).

meaning. As a consequence, many of the most important battles inside the Court are not over which litigant prevails, but over how the case is decided. The sex discrimination cases we have discussed dramatically illustrate this point. There were clear majorities in favor of the claimants; yet members of those majority coalitions disagreed vehemently over the appropriate legal standard to employ. The legal and attitudinal approach, for different reasons, are unable to capture these crucial aspects of the process by which justices reach collegial decisions. Positive political theory, however, directs our attention toward these stages and, in so doing, carries enormous potential for helping us unravel the complexities of judicial decision making.

JUVENILE JUSTICE GONE AWRY: EXPULSION STATUTES UNJUSTLY DENY EDUCATIONAL RIGHTS TO STUDENTS

Anthony H. Mansfield†

Howard, a seventeen year old senior, had sold cocaine to undercover officers on three occasions. Two to three weeks following the last incident, the officers arrested Howard while he was at school. Approximately one month after the incident, Howard was expelled from school. None of the sales were alleged to have occurred on school property or at a school sponsored event.[1]

Jane Doe was expelled from school based on her admission that she was in possession of a lipstick case containing a one and one-quarter inch blade. The school became aware of the blade when they noticed bandages on Doe's wrist which were present because she had attempted suicide. Another student had told the teacher that Doe should show the lipstick knife. Upon doing so, Doe was suspended and a hearing was held which determined that she should be expelled.[2]

I. INTRODUCTION

"Between 1985 and 1991, arrest rates for criminal homicide increased 140% among thirteen- and fourteen-year-old males, 217% among fifteen-year-old males, 158% among sixteen-year-old males, and 121% among seventeen-year-old males."[3] Unfortunately, this violence has permeated the nation's public schools, severely impacting a child's access to public education.

It is estimated that as many as fifty young people lose their lives each year in school-related violence.[4] This has resulted in ap-

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1 Howard v. Colonial Sch. Dist., 621 A.2d 362 (Del. Super. Ct. 1992).

2 Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995).

3 Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1892 (1994) (citing Glenn L. Pierce & James A. Fox, *Recent Trends in Violent Crime: A Closer Look* [Nat'l Crime Analysis Program, Northeastern Univ.] Oct. 1992, at 2-3).

4 Charles J. Russo, United States v. Lopez *and the Demise of the Gun-Free School Zone Act: Legislative Over-Reaching or Judicial Nit-Picking?*, 99 Educ. L. Rep. (West) 11 (June 1995) (citing California Senator Dianne Feinstein, 140 CONG. REC., S6586 [daily ed. June 8, 1994]).

proximately 105 deaths attributed to school-related violence between 1990 and 1991.[5] Further, when focusing specifically on weapons, gun shot wounds are the leading cause of death among American teenage boys whether in school or out,[6] while approximately 10% of all youngsters aged ten to nineteen say they have fired a gun at someone or have themselves been the target of gunfire.[7] Accordingly, within the past ten years, the death rate from firearms for teenagers aged fifteen to nineteen has increased by 61%.[8]

In 1993, 20% of American students knew someone who had been attacked by an individual wielding a gun or a knife, while 7% had been assaulted themselves.[9] A recent survey funded by Metropolitan Life found that 11% of teachers and 23% of students reported that they had been victims of violence in or near their schools.[10]

Accompanying this increase in school violence has been a phenomenal increase in the number of weapons seized in schools across the country. Chicago schools have had a 171% increase in seizures of weapons;[11] San Francisco, a 147% increase;[12] Indianapolis, a 322% increase;[13] and, in Virginia, it was reported by a local newspaper that 2313 students were found in possession of weapons during the 1992-93 school year alone.[14] Students bring roughly 135,000 guns to the nation's 85,000 public schools each day.[15] Furthermore, while one out of five high school students carries a

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5 *Id.* n.3 (citing Todd S. Purdum, *Clinton Seeks Way of Avoiding Ruling on School Gun Ban*, N.Y. TIMES, Apr. 30, 1991, § 1, at 16).

6 Mary Kathleen Babcock, *Constitutional Issues and the Safety of Schoolchildren: The Tenth Circuit's Approach*, 34 WASHBURN L.J. 33 (1994) (citing Timothy Dyer, *War on Handguns and Other Weapons*, KAN. SCH. BOARD J., Apr.-May 1994, at 7).

7 *Id.* (citing Catherine Byers, *Will the Lone Ranger Ever Ride Again?*, KAN. SCH. BOARD J., Apr.-May 1994, at 4).

8 Bernadine Dohrn, *As I See It: Children, Violence, and Mythology*, CITYSCHOOLS, Spring 1995, at 11 (citing Michael A. Jones and Barry Krisberg, *Images and Reality: Juvenile Crime, Youth Violence and Public Policy*, NAT'L COUNC. ON CRIME & DELINQ., June 1994 Fig. 6 at 18, source, Centers for Disease Control and Prevention).

9 Deborah Austern Colson, *Safe Enough to Learn: Placing An Affirmative Duty of Protection on Public Schools Under 42 U.S.C. § 1983*, 30 HARV. C.R.-C.L. L. REV. 169 (1995) (citing ROBERT L. MAGINNIS, FAMILY RESEARCH COUNCIL, VIOLENCE IN THE SCHOOL-HOUSE: A 10-YEAR UPDATE 3 (1994)).

10 R. Craig Wood & Mark D. Chestnutt, *Violence In U.S. Schools: The Problems and Some Responses*, 97 Educ. L. Rep. (West) 619 (Apr. 1995) (citing THE METROPOLITAN LIFE SURVEY OF THE AMERICAN TEACHER, Sept./Oct. 1993).

11 ABA Report; America's Children at Risk, at 28 (1995).

12 *Id.*

13 *Id.*

14 Wood & Chestnutt, *supra* note 10, at 619 (internal citation omitted).

15 Colson, *supra* note 9, at 170 (citing MAGINNIS, *supra* note 9, at 3).

weapon to school on a *daily* basis,[16] it is estimated that 20% of American high school students carry a weapon to school at least once a month.[17]

In response to this increase in weapons and violence within the nation's schools, various states have enacted legislation to combat and prevent school related violence. Unfortunately, the effect of these expulsion statutes has been to unjustly deny educational rights to many students. More importantly, expulsion statutes represent a severe departure from the goal and function of the juvenile justice system and do not address the actual cause of delinquent behavior. In addition, most expulsion statutes do not provide for alternative educational services or programs to actually address the increase in violence or to prevent recidivism amongst juvenile offenders.

In an attempt to answer these concerns, this Note will focus on current statutes which provide for (1) the expulsion from school of students found to possess a weapon and (2) the expulsion from school of students who have been convicted for felonies and/or adjudicated a delinquent.[18] Part II of this Note gives a brief historical overview of the juvenile justice system and where it stands at present. Part III gives an overview of the statutes in various states which require the expulsion of students for the reasons previously mentioned. Part IV presents a discussion of the problems which expulsion statutes create. The problems addressed focus primarily on how expulsion statutes depart from the intent behind the juvenile justice system and how such statutes fail to provide alternative educational and other services to combat or prevent juvenile violence. In addition, statutes are also discussed which provide for the disparate treatment of students. Part V addresses solutions which have and are currently being implemented in various states to address the issue of school-related violence as well as preventive steps which this author believes must be considered.

II. HISTORICAL OVERVIEW OF THE JUVENILE JUSTICE SYSTEM

In 1833, Nicholas White, a nine-year old boy, removed a few

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16 Babcock, *supra* note 6, at 33.

17 Colson, *supra* note 9, at 169 (citing Denise M. Topolnicki, *Voices From the Mean Street*, MONEY, June 1994, at 129).

18 There are also state statutes which provide for the expulsion of students for other behavior such as the destruction of school property, threatening faculty and/or students, disobedience, and possession of drugs and/or alcohol. However, this Note will only focus on the two issues presented as they relate specifically to juvenile adjudication.

crayons from a broken window of a London shop.[19] For this offense, Nicholas was sentenced to a public hanging.[20] Unfortunately, this was not a rare occurrence for, during the eighteenth century, children who committed offenses were tried in the same courts and received the same punishments as adults, including death.[21] This was also the situation in the United States because our juvenile justice system developed out of England's chancery courts, which were established to "protect and supervise" delinquent children.[22]

Under this system, the prevailing view was that children under the age of seven were incapable of forming the intent necessary for the imposition of criminal liability.[23] Therefore, these children were not held liable for felonious behavior.[24] However, this presumption of absolute incapacity was rebuttable for children aged seven to fourteen by a demonstration that the child was able to distinguish between right and wrong, that she had understood the nature of the act, and that she knew that the act was wrong.[25] If this was rebutted, the child was punished under the adult criminal system. Conversely, children fourteen years or older were deemed to have the same criminal capacity as adults and, therefore, were subject to arrest, trial, and punishment like adult offenders.[26]

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19 William Wilson, Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344 (1983) (citing E. CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 5 (2d ed. 1971)).

20 *Id.* (citing CALVERT, *supra* note 19, at 5-6).

21 *Id.*

22 Susan S. Greenebaum, Note, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?*, 44 WASH. U.J. URB. & CONTEMP. L. 135, 140-41 (1993).

23 Linda André-Wells, Comment, *Imposing the Death Penalty Upon Juvenile Offender's: A Current Application of the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 21 N.M. L. REV. 373, 375 (1991) (citing Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614-15 (1983)); Helene B. Greenwald, Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1473 (1983) (citing Martin A. Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U. L.Q. 113, 113); Etta J. Mullen, Note, *At What Age Should They Die? The United States Supreme Court Decision With Respect to Juvenile Offenders and the Death Penalty:* Stanford v. Kentucky *and* Wilkins v. Missouri, 109 S. Ct. 2969 (1990), 16 T. MARSHALL L. REV. 161, 163 (1993) (citing Lisa Kline Arnett, Comment, *Death At An Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 246 (1988)).

24 Greenwald, *supra* note 23, at 1473.

25 André-Wells, *supra* note 23, at 375; Greenwald, *supra* note 23, at 1473 (citing Frey, *supra* note 23, at 113); Mullen, *supra* note 23, at 163 (citing Streib, *supra* note 23, at 614).

26 André-Wells, *supra* note 23, at 375 (citing Streib, *supra* note 23, at 614-15); Mullen, *supra* note 23, at 163 (citing *In re* Gault, 387 U.S. 1, 16 (1967)); Greenwald, *supra*

Under this system of justice, children seven and above could be, and were, tried, convicted, and sentenced under the adult criminal system.[27]

Early reform movements of the nineteenth century sought to change the system so children would not be subjected to the adult process. The establishment in 1899 of a juvenile court in Cook County, Illinois, marked the beginning stages of a separate judicial system where the sole concern was the problems and misconduct of youth.[28] By 1912, approximately half the states in this country had juvenile justice legislation;[29] by 1925 all but two states, Maine and Wyoming, had juvenile courts.[30]

It was at this time that the court first began to act as *parens patriae,* thus becoming the parental authority with the obligation of protecting children who were no longer able to care for themselves.[31] The court attempted to steer away from punishment and, therefore, was allowed broader discretion to intervene in the lives of children. Through this approach, children were no longer dealt with as criminals, but rather as wards of the state who were not fully responsible for their conduct and, therefore, capable of rehabilitation.[32] The philosophy was that children were in need of protection from themselves and others and, if their families would not or could not provide this protection, then the courts would. In accordance with this belief, children were designated delinquents rather than criminals, hearings were considered "civil" rather than "criminal",[33] and findings and decisions were made without follow-

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note 23, at 1473 (citing L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 12 (1948); Frey, *supra* note 23, at 113).

27 Greenwald, *supra* note 23, at 1473 (citing A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 198-99 (2d ed. 1977)).

28 Sheila L. Sanders, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line,* 19 S.U. L. REV. 141, 143 (1992); Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction,* 38 ST. LOUIS U. L.J. 629, 643 (1994) (citing Sanford J. Fox, *Responsibility in Juvenile Court,* 11 WM. & MARY L. REV. 659 (1970)); SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, § 1-2 (2d ed. 1994).

29 Victor L. Streib, *Death Penalty for Juveniles,* JUV. IN L. & SOC'Y, at 4 (1987).

30 *Id.*; Greenwald, *supra* note 23, at 1474.

31 DAVIS, *supra* note 28, § 1-2.

32 DAVIS, *supra* note 28, § 1-2 (citing Julian W. Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 109 (1909)).

33 DAVIS, *supra* note 28, § 1-3 (citing *Ex parte* Sharp, 96 P. 563 (1908)); Greenebaum, *supra* note 22, at 141-42 (citing McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.5 (1971)).

ing normal criminal procedure rules.[34]

Because the proceedings followed a different approach, steps were taken to distinguish a juvenile proceeding from a criminal proceeding. The juvenile court building was located apart from the criminal court building so as to avoid any stigma from the adult proceeding.[35] A "euphemistic"[36] vocabulary was introduced, hearings were confidential, and access to court records limited.[37] Further, juvenile court proceedings focused more on the child's background and welfare than on the facts of the alleged crime.[38] Judges began to see their jobs as including "early identification, diagnosis, prescription of treatment, implementation of therapy, and cure or rehabilitation under aftercare supervision."[39] They depended solely on the principles of psychology and social work rather than on formal rules in their decision process. The court's responsibility became one of collecting information about the child's life history, character, social environment, and individual circumstances.[40] At hearings and dispositions, the court directed its attention first and foremost to the child's character and lifestyle because it believed that the child's past would reveal the proper treatment.[41]

The underlying goal of the juvenile system was to intervene before serious misconduct occurred. Rather than reflecting over past criminal acts, the system attempted to predict the behavior of the child in the hopes of preventing the behavior from actually occurring. The system was designed to offer a child approximately the same care, custody, and discipline that a loving parent would.[42] This was done by avoiding harsh criminal penalties for child offenders and providing conventionally approved moral, ethical, political, and social values for deprived, unfortunate children.[43]

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34 Greenebaum, *supra* note 22, at 142 (citing McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.5 (1971)).

35 Barry C. Feld, *The Juvenile Court Meets the Principle Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 825 (1988) (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 92-93 (1967); D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVE IN PROGRESSIVE AMERICA 205, 217-18 (1980)).

36 *Id.*

37 *Id.*

38 *Id.*

39 Frederic L. Faust & Paul J. Brantingham, Juvenile Justice Philosophy: Readings, Cases and Comments 147 (1974).

40 Feld, *supra* note 35, at 825.

41 Feld, *supra* note 35, at 825.

42 Streib, *supra* note 29, at 4.

43 Streib, *supra* note 29, at 5.

The emphasis was on rescue, meaning that the proceeding was to be non adversarial, presided over by a judge—a father figure[44]—who represented the interests of the child and the interests of the state. The ultimate hope was that reformed children would be free of any stigma of being a delinquent child.[45]

However, the historical process of the juvenile justice system began to change with the Supreme Court's decision in *Kent v. United States*.[46] In *Kent*, the Court dealt with the due process requirements of a sixteen-year old whose case was transferred from juvenile to adult criminal court, was convicted of six felonies, and was sentenced to a total of thirty to ninety years in prison. This was the first time the U.S. Supreme Court demonstrated a willingness to review the juvenile justice process and establish standards for due process and individual rights within the system. In conjunction with this holding, the judiciary, Congress, and society, began to question the *parens patriae* approach and, as a result, juvenile proceedings have become more similar to those of adult criminal proceedings.

Recent legislation has also taken a more punitive philosophy as opposed to the historical rehabilitative philosophy of the juvenile system.[47] This departure has largely been in response to society's belief that there has been a substantial increase in violent youth crime.[48] Juvenile courts are now required to adhere to specific constitutional guidelines and may no longer ignore procedural "niceties"[49] so as to provide the treatment a judge may believe is in the best interest of the child. Because the focus is now more on punishment than on treatment, serious juvenile offenders are being transferred from juvenile court to criminal court. This is evident in a recent Senate bill which provided that a juvenile between the ages of thirteen and fourteen accused of a serious federal violent crime be tried as an adult, which, in turn, could expose

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44 DAVIS, *supra* note 28, § 1-2.

45 Greenebaum, *supra* note 22, at 142 (citing Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 282 (1967)).

46 383 U.S. 541 (1966).

47 This is seen in criminal proceedings in which children above the age of thirteen and/or fifteen are tried as adults for specific designated felonies. *See, e.g.*, N.Y. PENAL LAW § 30.30.

48 According to a 1982 public opinion poll commissioned by the National Council on Crime and Delinquency, the Field Institute, and the Hubert Humphrey Institute of Public Affairs, which was conducted by the Opinion Research Corporation, 87% of those polled believed that juvenile crime was increasing at an alarming rate.

49 Streib, *supra* note 29, at 6.

them to the death penalty.[50] Unfortunately, the statistics present throughout the country[51] are moving this transition along much faster and are affecting more areas of a minor's life than anyone may have expected or even been aware.

III. Overview of Weapon Expulsion Laws

In response to the increase in school related violence, Congress enacted the Federal Gun-Free Schools Act as part of the Crime Control Act of 1990.[52] This Act would make it a federal offense for any individual to knowingly possess a firearm in a place that the individual believed or had reasonable cause to believe was a school zone.[53] In addition, federal education funds were conditioned on a state's adherence to the Act. Under the Act, a school zone was defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1000 feet from the grounds of a public, parochial or private school."[54] However, this Act was held unconstitutional by the Supreme Court of the United States in *United States v. Lopez*.[55]

Although *Lopez* nullified the original Gun-Free School Zones Act, forty-three states have statutes imposing sanctions on individuals who bring weapons onto school property.[56] The Court's holding in *Lopez* did not invalidate these state statutes, nor did it prevent school districts from drafting other restrictions pertaining to weapon possession within a school zone. This is primarily because *Lopez* did not eliminate "the obligation of states receiving federal education funds to mandate specific penalties for students who carry firearms onto school property under the 'Gun-Free Schools Act of 1994' which Congress enacted as part of amend-

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50 *See Juvenile Crime and Delinquency: Do We Need Prevention?*, 1994: *Hearing Before the Subcommittee on Human Resources Committee on Education and Labor United States of Representatives*, 104th Cong., 1st Sess. (1994) [hereinafter Committee Hearing] (statement of Karabelle Pizzigati, Director of Public Policy, Child Welfare League of America).

51 *See supra* text accompanying notes 3-17.

52 18 U.S.C. § 922(q)(1)(A) (1988 ed.).

53 *Id.* at (q)(1)(l).

54 18 U.S.C. § 921(a)(25).

55 115 S. Ct. 1624 (1995).

56 *High Court Derails Federal Anti-Gun Law*, Sch. L. News, 23, May 5, 1995, at 1, 3. The article notes that only seven states lack statutes similar to the Gun-Free School Zones Act. These states include Alaska, Delaware, Hawaii, Iowa, Montana, New Hampshire and Wyoming. However, New Hampshire has passed Chapter 193-D which establishes standards and procedures which shall require expulsion of a pupil for knowingly possessing a firearm in a safe school zone without written authorization from the superintendent or designee.

ments to the Elementary and Secondary Education Act (ESEA)."[57] Therefore, states that wish to receive educational funding are mandated to implement policies which require the referral of any student who brings a weapon to school to the criminal justice system or juvenile delinquency system.[58] This provision passes constitutional muster because, unlike *Lopez*, it is premised on Congress's power under the Spending Clause of the United States Constitution.[59]

In addition to these statutes, legislation has designated other various circumstances in which a student may be suspended and/or expelled from school at a principal's, school board's, or superintendent's discretion. And, in accordance with the Act, the most common circumstance among state statutes is where students are found to be in possession of weapons. Another circumstance gaining significant respect is where students are charged and/or convicted of a felony and/or adjudicated a delinquent, even for behavior off school grounds.

A. *Weapons*

States which have enacted legislation allowing for the expulsion of students who bring weapons to school are numerous and distinguishable.[60] One distinction between these statutes is the

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[57] Daniel B. Kohrman & Kathryn M. Woodruff, Commentary, *The 1994-95 Term of The United States Supreme Court and its Impact on Public Schools*, 102 Educ. L. Rep. (West) 421 (Oct. 1995).

[58] *Id.*

[59] U.S. CONST. art. I, § 8.

[60] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-841(B) (1995) (a pupil may only be expelled for violent behavior which includes the use or display of a dangerous instrument or deadly weapon or possession of a gun); CAL. EDUC. CODE § 48900(b) (West 1993-94) (a pupil shall be suspended from school or recommended for expulsion if the superintendent or the principal of the school determines that the pupil has possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object unless, in the case of possession of any object of this type, the pupil had obtained written permission to possess the item from a certified school employee, which is concurred in by the principal or the designee of the principal); CONN. GEN. STAT. § 10-233d(a) (1995) (expulsion proceedings shall be required whenever there is reason to believe that any pupil was in possession of a firearm or deadly weapon and such pupil shall be expelled for one calendar year); GA. CODE ANN. § 20-2-751.1(a) (1995) (each local board of education shall establish a policy requiring the expulsion from school for a period of not less than one calendar year any student who is determined to have brought a weapon to school); IDAHO CODE § 33-205 (1995) (the board shall expel from school for a period of not less than one year a student who has been found to have carried a weapon or firearm on school property); KY. REV. STAT. ANN. § 158.150(1)(a) (Baldwin 1995) (the carrying or use of weapons on school property, as well as off school property at school-sponsored activities, constitutes cause for suspension or expulsion from school); LA. REV. STAT. ANN. § 17:416(B) (West 1994) (a

length of an expulsion for the possession of a weapon. While most of the statutes cited provide for an expulsion period of one year,[61] some provide for a modification on a case-by-case basis,[62] some provide for permanent expulsion,[63] while others differ even more significantly.[64]

While the above mentioned statutes clearly provide for the expulsion of a student found to be in possession of a weapon, there are other statutes which allow similar results without such specific

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principal may recommend, after immediate suspension, expulsion of a student carrying or possessing a firearm); MD. CODE. ANN., EDUC. § 7-304(2) (1995) (if the county superintendent or the superintendent's designated representative finds that a student has brought a firearm onto school property, the student shall be expelled); MASS. GEN. LAWS ANN. ch. 71 § 37H (West 1993) (grants discretionary power to the principal to expel a student for the possession of a dangerous weapon on school property or at a school-sponsored event); MICH. COMP. LAWS ANN. § 380.1311(2) (West 1995) (if a pupil possesses a weapon, the school board, or the designee of the school board, shall expel the pupil from the school district permanently, subject to possible reinstatement under subsection (5)); N.H. REV. STAT. ANN. § 193-D:2(I)(2) (1994) (the state board of education shall adopt rules regarding standards and procedures which shall require expulsion of a pupil for knowingly possessing a firearm in a safe school zone without written authorization from the superintendent or designee); N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1978) (each school district shall adopt a policy providing for the expulsion from school, for a period of not less than one year, of any student who is determined to have knowingly brought a weapon to a school); N.C. GEN. STAT. § 115C-391(d1) (1995) (a local board of education shall suspend for 365 days any student who brings a weapon onto school property); OR. REV. STAT. § 339.250(6) (1995) (a school district shall have a policy that requires the expulsion from school for a period of not less than one year any student who is determined to have brought a weapon to a school); S.D. CODIFIED LAWS ANN. § 13-32-4 (1995) (the board may expel from school any student for the use or possession of a firearm on or in any elementary or secondary school premises, vehicle, or building or any premises, vehicle, or building used or leased for elementary or secondary school functions or activities); UTAH CODE ANN. § 53A-11-904(2)(a)(i) (1995) (a student shall be suspended or expelled from a public school for the possession, control, or actual or threatened use of a real, look alike, or pretend weapon, explosive, or noxious or flammable material).

61 CONN. GEN. STAT. § 10-233d(a) (1995); GA. CODE ANN. § 20-2-751.1(a) (1995); IDAHO CODE § 33-205 (1995); MASS. GEN. LAWS ANN. ch. 71 § 37H (West 1993); MD. CODE. ANN., EDUC. § 7-304(2) (1995); N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1978); S.D. CODIFIED LAWS ANN. § 13-32-4 (1995); UTAH CODE ANN. § 53A-11-904(2)(a) (1953).

62 CONN. GEN. STAT. § 10-233d(a) (1995); GA CODE ANN. § 20-2-751.1(a) (1995); IDAHO CODE § 33-205 (1995); MD. CODE. ANN., EDUC. § 7-304(3) (1995) (however, this will only apply if alternative education has been approved); N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1978); N.C. GEN. STAT. § 115C-391(d1) (1995); UTAH CODE ANN. § 53A-11-904(2)(b) (1953).

63 MICH. COMP. LAWS ANN. § 380.1311(2) (West 1995); PA. STAT. ANN. tit. 24, § 13-1318 (1949); 89-66 S.C. Op. Att'y Gen. 168 (1989).

64 OHIO REV. CODE ANN. § 3313.66(B) (Baldwin 1995) (provides for the expulsion of a student for up to 80 days).

language.[65] The language in these statutes is very broad, making it possible for a student in possession of a weapon to be expelled even though the statute does not specify such an action.

These statutes are also important because, in all states cited and under the requirements for receiving federal funding, a student who is found to be in possession of a weapon must be reported to the criminal justice system or juvenile delinquency system[66] and possession of a weapon constitutes a crime in which a minor can be charged. Thus, while students are being expelled from school for such offenses, they are also being indicted. Accordingly, in those situations where a minor is only subject to suspension for a possession violation, she is often later expelled if convicted and, in some states, is even charged as an adult.

Two examples of this are Arkansas and Illinois. Arkansas has a statute which makes the possession of a handgun by any person on school property or any school bus a felony.[67] In addition, any student who violates the statute is not permitted a suspended or limited sentence. An Illinois statute provides that a minor, aged fourteen to sixteen, who is indicted for the unlawful possession or use of a weapon in or on school grounds, will have her case automatically transferred to criminal court.[68]

B. Conviction For Felonies/Adjudication As A Delinquent

Of greater concern to the aforementioned weapon expulsion statutes are those expulsion statutes which authorize school districts, either through the principal, superintendent, or local school board, to expel students who have been charged with and/or convicted for felonies or adjudicated a delinquent.[69] These statutes

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65 FLA. STAT. ANN. § 232.26(1)(c) (West 1994) (the principal may recommend to the superintendent the expulsion of any student who has committed a serious breach of conduct, including willful disobedience, violence against persons, or any other act which substantially disrupts the orderly conduct of the school); N.J. STAT. ANN. § 18A:37-2(C) (West 1994) (any pupil who is guilty of conduct of such character as to constitute a continuing danger to the physical well-being of other pupils shall be liable to punishment and expulsion from school); PA. STAT. ANN. tit. 24, § 13-1318 (1949) (every principal or teacher may permanently expel any pupil on account of disobedience or misconduct); S.C. CODE ANN. § 59-63-210 (Law. Co-op 1973) (any district board of trustees may authorize or order the expulsion of any pupil for a commission of any crime, gross immorality, gross misbehavior, persistent disobedience, or when the presence of the pupil is detrimental to the best interest of the school).

66 Kohrman & Woodruff, *supra* note 57.

67 ARK. CODE ANN., § 5-73-119 (Michie 1992).

68 ILL. REV. STAT., ch. 37, para. 702-6 (1992).

69 *See, e.g.*, ALASKA STAT. § 14.30.045(5) (1994) ("A school-aged child may be sus-

permit school districts to go beyond disciplining students for conduct or behavior which occurs on school property or while on school-sponsored activities. The statutes, however, generally differ as to whether there is an immediate expulsion following the student being *charged* with a felony or whether a student is automatically expelled upon *conviction and/or adjudication* as a delinquent.

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pended from or denied admission to the public school that the child is otherwise entitled to attend" if the child is convicted of a felony "that the governing body of the district determines will cause the attendance of the child to be inimicable [sic] to the welfare or education of other pupils."); COLO. REV. STAT. ANN. § 22-33-105(5)(a) (1994) ("Whenever a petition filed in juvenile court alleges that a child between the ages of 14 and 18 has committed an offense that would constitute a crime of violence if committed by an adult or whenever charges are filed in district court allege that a child has committed such an offense, the board of education of the school district shall conduct a hearing to determine whether the student should be educated in the school. Thus the board shall determine if sufficient grounds exist to expel the student at that time and shall proceed with the expulsion. Alternatively, the board may determine that it will wait until the conclusion of the juvenile proceedings to consider the expulsion matter."); FLA. STAT. ANN. § 232.26(2) (West 1994) ("Suspension proceedings may be initiated against any pupil who is formally charged with a felony, or with a delinquent act which would be a felony if committed by an adult if that incident is shown to have an adverse impact on the educational program, discipline, or welfare in the school in which the student is enrolled. Any pupil who is suspended as a result of such proceedings may be suspended from all classes of instruction on public school grounds during regular classroom hours for a period of time, which may exceed 10 days, as determined by the superintendent. If the pupil is found guilty of a felony, the superintendent shall have the authority to determine if a recommendation for expulsion shall be made to the school board."); LA. REV. STAT. ANN. § 17:416(D) (West 1994) ("For the conviction of any student of a felony or the incarceration of any student in a juvenile institution for an act which had it been committed by an adult, would have constituted a felony, shall be cause for expulsion of the student for a period of time as determined by the board."); MASS. GEN. LAWS ANN. ch. 71, § 37H 1/2 (West 1994) ("The principal may suspend, for a period of time determined appropriate by the school's principal, any student against whom a criminal or felony delinquency complaint has been issued. In addition, the principal may expel any student who has been convicted or admitted guilt in court with respect to a felony delinquency."); N.C. GEN. STAT. § 115C-391(d) (1995) ("A local board of education may, upon recommendation of the principal and superintendent, expel any student 14 years of age or older who has been convicted of a felony and whose continued presence in school constitutes a clear threat to the safety and health of other students or employees."); OHIO REV. CODE ANN. § 3313.662 (Baldwin 1995) ("The superintendent of public instruction may issue an adjudication order that permanently excludes a pupil from attending any of the public schools of this state if the pupil is convicted of, or adjudicated a delinquent child for, committing, when he was 16 years of age or older, an act that would be a criminal offense if committed by an adult."); S.C. CODE ANN. § 59-63-210 (Law. Co-op 1973) ("Any district board of trustees may authorize or order the expulsion, suspension, or transfer of any pupil for a commission of any crime when the presence of the pupil is detrimental to the best interest of the school."); UTAH CODE ANN. § 53A-11-904(2)(a)(ii) (1995) ("A student shall be suspended or expelled from a public school for the commission of an act involving the use of force or the threatened use of force which if committed by an adult would be a felony or class A misdemeanor.").

Some school districts are authorized to suspend a student immediately after she has been charged with a felony or criminal juvenile complaint.[70] Such statutes allow for the principal, superintendent or school board to suspend a student who has a criminal or felony delinquency complaint filed against her for a period of time deemed appropriate. Under such statutes, if the charges are later dismissed or the student has been convicted and/or adjudicated a delinquent, then the suspension is terminated. Unfortunately, in the latter situation, expulsion is substituted for the suspension. It is only Florida, however, that mandates alternative education for any student it decides should be suspended from school while court proceedings are occurring.[71] It is thus the school board's responsibility to provide suspended students with an appropriate alternative educational program or a home-based educational program. Conversely, most state statutes do not mandate that educational services be provided at any time during expulsion. This issue is discussed in greater length in part IV.

There are expulsion statutes which go beyond simply suspending students charged with a felony or juvenile charge. Some statutes permit school districts to *expel* a student merely for being charged with a felony or delinquent act.[72] Such statutes provide that if the principal or school board determines that the student's presence within the school system presents a danger to the safety and health of other students and/or employees, then the student may be expelled immediately—even prior to conviction or adjudication.[73]

The final step authorized by school districts is the expulsion from school of those students who have been convicted for a felony and/or adjudicated a delinquent.[74]

IV. POTENTIAL PROBLEMS

A. *Lack of Alternative Education or Readmission Programs*

The most notable departure of expulsion statutes from the historical concept of juvenile justice is that education is no longer

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70 *See, e.g.*, COLO. REV. STAT. ANN. § 22-33-105(5)(a) (1994); FLA. STAT. ANN. § 232.26(2) (West 1994); MASS. GEN. LAWS ANN. ch. 71, § 37H 1/2 (West 1994).

71 FLA. STAT. ANN. § 232.26(2) (West 1994) (such suspension shall not affect the delivery of educational services to the pupil, and the pupil shall be immediately enrolled in a daytime alternative education program, or an evening alternative education program, where appropriate.)

72 *See, e.g.*, COLO. REV. STAT. ANN. § 22-33-105(5)(a) (1994).

73 *Id.*

74 *See, e.g.*, ILL. REV. STAT., ch. 37, para. 702-6 (1992).

viewed as essential. This is demonstrated in the fact that under some expulsion statutes, school districts are not mandated to provide an alternative education to suspended and/or expelled students. Nor are school districts mandated to provide for the readmission of an expelled student to another school or school district. Therefore, this author believes that the first place to start in challenging the constitutionality of expulsion statutes is to determine: (1) whether there is a federal or state constitutional right to an education; (2) whether alternative education is offered to those students who are expelled; (3) whether an expelled student is permitted to transfer to another school district; and (4) what detriment is caused by the lack of alternative educational services.

The issue of whether there is a federal right to an education was addressed by the Supreme Court in *San Antonio Indep. Sch. Dist. v. Rodriguez*[75] where the Court held that public education was not a right granted to individuals by the United States Constitution.[76] However, while the Court was not willing to hold education to be a fundamental right subject to strict scrutiny analysis, the court explicitly accepted the premise from *Brown v. Board of Educ.*[77] that "education is perhaps the most important function of state and local governments."[78]

Further, in *Plyler v. Doe*,[79] while the Court again declined to hold that education was a fundamental right, the Court nevertheless appeared to treat education under a higher standard than a mere rational relationship test.[80] Therefore, while the Court held that education is not a right guaranteed by the United States Constitution, it does hold such a privilege to a higher standard.

Since there is no fundamental right to an education in the federal constitution, we must look to individual state constitutions. Because state constitutions can expand the rights of state citizens beyond those they hold as a matter of federal law,[81] students in some states have a guaranteed right to an education while students in other states receive it only as a privilege.

Massachusetts, which guarantees a free education in its consti-

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75 411 U.S. 1 (1973).

76 *Id.* at 26.

77 347 U.S. 483 (1954).

78 *Id.* at 493.

79 457 U.S. 202 (1982).

80 *Id.* at 225. In *Plyler v. Doe*, under an equal protection argument, the Court held that there was no rational reason that the state could give for denying children of illegal aliens an education.

81 *See, e.g.*, William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

tution,[82] is among the states which establish state constitutional protection in the area of public education.[83] In *McDuffy v. Secretary of the Executive Office of Educ.*,[84] the Supreme Judicial Court of Massachusetts held that, after examining the views of those who framed and adopted the state's constitution, there was compelling support that the legislature has a duty to provide an education "for all its children, rich and poor, in every city and town of the Commonwealth at the public school level."[85]

However, while some states do provide education as a fundamental right,[86] they do not provide alternative forms of education for students who have been expelled. Therefore, while expulsion statutes have expanded the powers of principals, superintendents and school boards, these same statutes have failed to protect the cast-out students by not requiring re-admittance to school or the mandate to provide educational services to the student who has been expelled.

For example, in Massachusetts, which provides that education is a fundamental right, school districts are refusing to provide alternative educational services to expelled students by relying on *Board of Educ. v. Sch. Comm. of Quincy*.[87] There, the state's high court held that compulsory attendance statutes create no right of alternative education for expelled students. The court stated that compulsory attendance statutes address only who shall attend school and where; they do not require a school committee to provide an educational alternative to an individual child who is excluded from the public school for disciplinary reasons.[88] The court stated that if this were the case, the board would exceed its statutory authority and intrude on the school committees' right to discipline stu-

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82 MASS. CONST. part II, ch. 5, § 2.

83 According to Victoria J. Dodd, *An (Adequate) Education for All:* McDuffy v. Secretary of Education, THE ADVOCATE, Fall 1993, at 20, Arkansas, California, Connecticut, Kentucky, Montana, New Jersey, Texas, Washington, West Virginia, and Wyoming are among the states that guarantee an education in their constitution. In addition, according to case law, other states also provide education as a constitutional right in their state constitutions, including Alaska (Hootch v. Alaska State-Operated School System, 536 P.2d 793 (Alaska 1975)); Arizona (Roosevelt Elementary Sch. Dist. Number 66 v. Bishop, 877 P.2d 806 (Ariz. 1994)); Georgia (Wells v. Banks, 266 S.E.2d 270 (Ga. 1980)); Minnesota (Skeen v. State, 505 N.W.2d 299 (Minn. 1993)); New York (Scott v. Bd. of Educ., 305 N.Y.S.2d 601 (Sup. Ct. Nassau County 1969)); and North Dakota (Bismark Public Sch. Dist. #1 v. North Dakota Legislative Assembly, 511 N.W.2d 247 (N.D. 1994)).

84 615 N.E.2d 516 (Mass. 1993).

85 *Id.* at 548.

86 *See supra* note 83.

87 612 N.E.2d 666 (Mass. 1993).

88 *Id.* at 670.

dents.[89] (In Massachusetts, the school committee consists of members who are elected officials whereas a school board is composed simply of parents and teachers from a particular school.)

This issue of a state's failure to provide alternative education is vitally important because some students who are expelled are not permitted to transfer to another school district or to a school in a different state. In essence, a child is refused any future opportunity to learn.

An example of this is Arkansas,[90] where a school district may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution. In addition, Michigan[91] provides that, except if a school district operates or participates in a program appropriate for individuals expelled and, in its discretion, admits the individual to such program, an expelled student is expelled from all public schools in the state and a school district shall not allow the individual to re-enroll in the school district unless the individual has been reinstated.[92] Unfortunately, many states follow this process.[93]

By not allowing a student alternative forms of education or the opportunity to re-enter school, states are depriving students of the fresh start envisioned by the juvenile justice system. By not providing students with a fresh start, we are creating, rather than preventing, the problem. Because they are not provided the knowledge necessary to lead a productive future, most students who do not receive an education are caught in a never ending cycle which, for some, leads to future crime.

While schooling has as its most important goal the teaching of academics to students, it also serves the essential task of preparing young people for their future roles as workers and consumers.[94] A major function of schools is to socialize young people to assume a position within the national economy.[95] Therefore, the process is not a "simplistic education [of] particular mental and physical

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89 *Id.*

90 *See* ARK. CODE ANN. § 15-841(C) (Michie 1994).

91 *See* MICH. COMP. LAWS ANN. § 380.1311(3) (West 1995).

92 *Id.*

93 *See* ALASKA STAT. § 14.30.045 (1994); ARIZ. REV. STAT. ANN. § 15-841(C) & (D) (1994); CONN. GEN. STAT. § 10-233d(h) (1995); IDAHO CODE § 33-205 (1995); KY. REV. STAT. ANN. § 158.155(1) (Baldwin 1995): LA. REV. STAT. ANN. § 17:416(B) (West 1994); MISS. CODE ANN. § 37-13-92(2) (1993); OR. REV. STAT. § 339.115(4)(a) & (b) (1995); UTAH CODE ANN. § 53A-11-904(3) (1953).

94 M.A. BORTNER, DELINQUENCY AND JUSTICE: AN AGE OF CRISIS 19 (1988).

95 *Id.*

tasks or the attainment of particular skill levels[, but] involves an [indoctrination] of the attitudes and values [which are] necessary for individuals to fit into the adult working world."[96] This hidden curriculum instills in students the values and attitudes which are essential to generate conformity with the dominant power and work force within the country.[97]

In addition, the importance of education can be seen in the fact that historically, Americans have consistently placed great value on public education because it is

> perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal [sic] instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*[98]

Moreover, it has been held that children benefit more from being educated in a collective classroom environment than in individual seclusion at home.[99] The importance of education is also evident in the fact that all states provide for compulsory school attendance either legislatively or through constitutional provisions.[100]

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96 *Id.*

97 *Id.* (citing LARRY VAN SICKLE, THE AMERICAN DREAM AND THE IMPACT OF CLASS: TEACHING POOR KIDS TO LABOR (1985)).

98 Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (emphasis added).

99 It has been held by numerous courts that it is permissible for a state to prohibit home tutoring in place of its compulsory school attendance requirement because of the effect that classrooms have on youth. *See, e.g.*, Duro v. District Attorney, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). In so holding, courts have reasoned that states have a legitimate interest in requiring children to be educated in a classroom because children can benefit from the social interaction with other children who have different attitudes and abilities. *See, e.g.*, Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989).

100 *See, e.g.*, ALASKA STAT. § 14.30.010(a) (1962-1995) (every child between 7 and 16 years of age shall attend school); ARIZ. REV. STAT. ANN. § 15-802(a) (every child between the ages of 6 and 16 shall be provided instruction in at least the subjects of reading, grammar, mathematics, social studies and science); CAL. EDUC. CODE § 48200 (West 1993-94) (each person between the ages of 6 and 18 years is subject to compulsory full-time education); COLO. REV. STAT. ANN. § 22-33-104 (West 1963) (every child between the ages of 7 and 16 shall attend public school); D.C. CODE ANN. § 31-402(a) (1983) (every child between the ages of 5 and 18 shall attend public school); FLA. STAT. ANN. ch. 232.01 (West 1994) (all children between the ages of 6

Youth who receive no form of formal education, or receive an inadequate education, will be unable to function in the future or to compete with those who have received either an elementary, secondary, or post graduate education. This is because, as Thomas Jefferson suggested, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."[101] Education provides a basic tool by which youth lead economically productive lives to the benefit of society. We cannot ignore the significant social costs borne by our nation when select groups of children are denied the means to learn the values and skills upon which our society depends simply because they have engaged in behavior which is not considered to be moral or in the best interests or safety of those who attend elementary and secondary schools.

When looking at the premise behind the juvenile justice system, education is the first step to rehabilitation. To disrupt a child's education for a substantial period of time either while a trial is pending or after conviction is extremely damaging, both academically and psychologically.

Firstly, to deprive a child of an education is to tell her that society has given up on her and that she is not as worthy as other children. If society is not willing to provide an individual youth with an education,

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and 16 are required to attend school regularly during the entire school term); HAW. REV. STAT. § 298-9(a) (1988-94) (all children between the ages of 6 and 18 shall attend either a private or public school); IDAHO CODE § 33-202 (1948-95) (every child between the ages of 7 and 16 shall be instructed in subjects commonly and usually taught in the public schools); ILL. ANN. STAT. ch. 105, para. 26-1 (Smith-Hurd) (every child between the ages of 7 and 16 shall attend some public school); IOWA CODE ANN. § 299.1A (West 1994) (a child between the ages of 6 and 16 shall attend school); KAN. STAT. ANN. § 72-1111(a) (1994) (every child between the ages of 7 and 16 shall attend school); KY. REV. STAT. ANN. § 159.10 (Baldwin 1994) (every child between the ages of 6 and 16 shall attend a regular school); LA. REV. STAT. ANN. § 221 (West) (every child from the age of 7 to 17 shall attend school); ME. REV. STAT. ANN. § 3271 (children who are at least 7 and under 17 shall attend a public day elementary or secondary school or an approved private school); MD. CODE ANN., EDUC. § 7-301 (1991 & 1992 Supp.) (requires compulsory school attendance for children between the ages of 5 and 16); MICH. STAT. ANN. § 3271 (every child from the age of 6 to 16 shall attend public school); MISS. CODE ANN. § 37-13-91(f) (compulsory-school-age child means a child who has or will attain the age of 6 on or before September 1 and who has not attained the age of 17 on or before September 1); OR. REV. STAT. § 339.010 (1993) (all children between the ages of 7 and 18 who have not completed the 12th grade are required to attend regularly a public full-time school); TENN. CODE ANN. § 49-6-3001 (1992) (requires compulsory school attendance for children between the ages of 6 and 17); UTAH CODE ANN. § 53A-11-101 (every minor between 6 and 18 years of age shall attend a public or regularly established private school). The only major difference among all compulsory attendance statutes are (1) the difference in the minimum and maximum age requirements, and (2) whether home tutoring is included.

101 Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (quoting Thomas Jefferson).

then what other services will it be willing to provide when the child is unable to provide further for themselves?

Secondly, if we fail to educate our children, then we are not providing them with the necessary tools to survive. By not providing an education, society is setting up these youth for failure and future criminal involvement. When these children become adults, they will be less apt to provide financially for themselves and/or their families because, with a limited or no source of income, they are more likely to turn to crime to survive.

It is essential to consider this issue because most expulsion statutes cited provide for the exclusion of students for a time period of not less than a year,[102] while some go as far as expelling a child permanently.[103] In addition, some statutes do not provide a time frame for the exclusion, thus leaving the determination to the principal, superintendent or school board. Therefore, many of these youth are losing a substantial, if not a complete, education. If nothing is provided for them, we, as a society, have failed.

In contradiction to expulsion statutes which provide for no forms of alternative education, either temporarily or permanently, these states do have statutes which mandate compulsory school attendance. This raises two issues: (1) states still act as *parens patriae*,[104] and (2) states are portraying a hypocritical belief that education is important for some, but not for all of its children.

A state is acting as *parens patriae* when, as is evident in most of the statutes cited,[105] it provides some form of punishment for parents who do not ensure that their children are attending school. Therefore, the state is essentially stepping in and telling the parents that if they do not provide this essential tool to their children, they will be punished. A state's strong belief that education is important and essential for the well-being of minors is evident in the fact that a state frequently has the power to require school attendance even over parental objection.[106] This leads to the issue that states are governing under a double standard.

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102 *See, e.g.*, CONN. GEN. STAT. § 10-233D(a) (1995); GA. CODE ANN. § 20-2-151.1(a) (1995); IDAHO CODE § 33-205 (1995); MASS. GEN. LAWS ANN. ch. 71, § 37H (West 1993); MD. CODE ANN., EDUC. § 7-304(2) (1995); N.M. STAT. ANN. § 22-5-4.7(A) (Michie 1978); OR. REV. STAT. § 339.250(6) (1995); S.D. CODIFIED LAWS ANN. § 13-32-4 (1995); UTAH CODE ANN. § 53A-11-904(2)(a) (1953).

103 *See, e.g.*, MICH. COMP. LAWS ANN. § 380.1311(2) (West 1995); PA. STAT. ANN. tit. 24, § 13-1318 (1949); 89-66 Op. Att'y Gen. 168 (S.C. 1989).

104 *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).

105 *See supra* note 100.

106 Prince v. Massachusetts, 321 U.S. at 166.

By creating compulsory attendance statutes, all states express their belief that education is essential. However, not all states are willing to provide this essential privilege to all children. This is demonstrated by a state's lack of alternative educational programs for those students who have been excluded from school. This again suggests that states are governing with a double standard. This can only reinforce a student's belief that she is unworthy.

B. Behavior Off of School Grounds

As mentioned previously, states are failing to consider that students expelled because of a conviction more likely than not engaged in this behavior off of school grounds; the requisite conduct does not need to be an act which occurred on school property or against school personnel. Children are being excluded from school for behavior which may have little or no relationship to their conduct or performance in school.

An example of this is Connecticut where a local or regional board of education may expel any pupil whose conduct endangers persons or property or whose conduct on or off school grounds is seriously disruptive of the educational process, or violates a publicized policy of such board.[107] The statute does not explain what is meant by this standard nor does it outline a test which should be applied to the conduct. The statute neither addresses nor shows a correlation between this "off-school-grounds" behavior and obedience of school rules. There is, in fact, no relationship. How are we to punish kids when there is no demonstrated relationship?

C. Confidentiality of Records

An issue which must be addressed when considering expulsion based on conviction and/or adjudication statutes is the confidentiality of juvenile records. In response to this issue, legislation has historically protected a juvenile's identity from the general public so as to aid in the rehabilitation of the juvenile and prevent the stigmatization of the youth.[108] However, expulsion based on conviction statutes now make it necessary for the principal, school superintendent, or board of education to be notified or given access to a juvenile's criminal record in order to determine if that student has been charged with or convicted for a felony and/or adjudicated a delinquent. Therefore, the question of imminent concern

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107 CONN. GEN. STAT. § 10-233d(a) (1995).

108 Feld, *supra* note 35, at 825.

is how does this process work to favor a juvenile under the intended purpose of the juvenile justice system?

In answer to this question, many respond that "[i]f schools know the identity of a violent juvenile, they can respond to misbehaviors [sic] by imposing stricter sanctions, assigning particular teachers, or having the student's locker near a teacher's doorway entrance so that the teacher can monitor his conduct during the changing of class periods. In short, this . . . would allow schools to take measures to prevent violence"[109] which some view as the goal behind the juvenile justice system. However, the reason for such confidentiality is the rehabilitation of delinquent children as opposed to punishment and retribution. Therefore, to accomplish these objectives, certain basic changes in the traditional method of dealing with criminal offenders has been made in the case of juveniles. Partly to avoid infringement of the constitutional rights of juveniles and partly to avoid attaching to them the stigma of being criminals, special procedures for the hearing of juvenile offenses have been established.[110]

In accordance with this purpose, since its inception, it has been the goal of the juvenile justice system that all proceedings be conducted outside of the public's eye and that youths brought before juvenile courts be shielded from publicity.[111] This insistence on confidentiality is centered around a concern for the welfare of the child, "to hide his youthful errors and bury them in the graveyard of the forgotten past."[112] The prohibition of publication of a juvenile's name is designed to protect her from the stigma of her misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the state.[113] It has always been held that the publication or release of the names of juvenile offenders would seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public.[114] Thus, the widespread dissemination of a juvenile offender's name would detract from the "beneficent and rehabilitative purposes" of a state's juvenile court system.[115] However, as

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109 141 CONG. REC. S13,656-05 (1995).

110 *See* MASS. GEN. LAWS ANN. ch. 119, § 53; Metcalf v. Commonwealth, 156 N.E.2d 649, 651 (Mass. 1959).

111 *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979).

112 *In re* Gault, 387 U.S. 1, 24-25 (1967).

113 *Daily Mail Publishing Co.*, 443 U.S. at 107.

114 *Id.* at 107-08.

115 *Id.*

indicated by statutes in various states, this desire for confidentiality has rapidly crumbled and entered into the school setting.

States which permit the suspension and/or expulsion of a student based on a charge and/or conviction generally provide for the release of juvenile records to the school district.[116] As demonstrated by the statutes cited, the court is allowed, and under some statutes, mandated to inform members of the school district of a student's charge and/or conviction. This is a substantial departure from the intent of the juvenile justice system and provides no assurance that a student is not treated according to the charge. Once a

116 *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-27-309(d) ("Prosecuting attorneys or the juvenile court may provide information, concerning the disposition of juveniles who have been adjudicated delinquent to the school superintendent of a school district. Further, when a juvenile is adjudicated delinquent for an offense for which he could have been charged as an adult or for unlawful possession of a handgun, the prosecuting attorney shall notify the school superintendent of the school district in which the juvenile is currently enrolled."); COLO. REV. STAT. ANN. § 19-1-119(5) ("Whenever a petition filed in juvenile court alleges that a child between the ages of 14 and 18 years has committed an offense that would constitute a crime of violence if committed by an adult or whenever charges filed in district court allege that a child has committed such an offense, then the arrest and criminal records information shall be made available to the public. Basic identification information, along with details of the alleged delinquent act or offense, shall be provided immediately to the school district in which the child is enrolled."); CONN. GEN. STAT. § 54-761 ("The court may permit an inspection of any papers or records and the court shall make the identity of a person who is adjudged a youthful offender as a result of a felony known to the superintendent of schools. Such superintendent shall use the information for school placement or disciplinary purposes only."); FLA. STAT. ANN. § 39.045(5) ("All information obtained in the discharge of official duty by any judge, . . . is confidential and may be disclosed only to the . . . school superintendents and their designees. Within each county, the sheriff, . . . school superintendent, and the department shall enter into an agreement to share information about juvenile offenders among all parties. In addition, subsection provides that . . . , when a child of any age is taken into custody by a law enforcement officer for an offense that would have been a felony if committed by an adult, or a crime of violence, the law enforcement agency must notify the superintendent of schools that the child is alleged to have committed the delinquent act. Upon notification, the principal is authorized to begin disciplinary actions. In addition, the information must be released within 48 hours after receipt to appropriate school personnel of the school of the child. The principal must immediately notify the child's immediate classroom teachers."); LA. REV. STAT. ANN. ch. 3, art. 412(H)(1) ("Within 24 hours after receiving a predisposition report, the sentencing court shall order the release of any portion of a predisposition report containing and limited to conviction, adjudication, or disposition of a child in grades seven through twelve, who is arrested, charged, or adjudicated a delinquent for committing a felony-grade delinquent act or a misdemeanor-grade delinquent act involving the distribution or possession with intent to distribute a controlled substance or any violent offense against the person, to the principal of the school in which the child is registered and enrolled or registered and enrolled but suspended. Such notification shall be a continuing responsibility of the court through adjudication and disposition. The principal shall have a continuing responsibility to advise each teacher who has that student assigned to his class of the notification, within two school days, after the principal receives it.").

teacher or principal is informed of the child's history, that student will not receive the same educational benefits as other children whether they are expelled or not.

After receiving the label of delinquent, a student will be expected to exhibit certain behavior and, accordingly, these expectations will be communicated repeatedly and effectively to the individual.[117] In addition, these expectations will influence teachers' and other school personnel's responses to the student, as well as the student's self-concept and response to the community.[118] Consequently, this will serve the opposite role of rehabilitation. "[T]he stigmatization of a young person as 'bad,' and the negative responses of the larger community to the juvenile once she or he is categorized as 'delinquent' all contribute to the likelihood that a juvenile will embark upon more and perhaps escalated delinquent activities. The social definition of the young person, complete with officially pronounced disapproval and condemnation, may act as a triggering agent or a catalyst that propels the juvenile into more delinquency."[119]

In addition, students are often placed into "tracks"[120] when it is known that they have a court record. These tracks have two effects. First, students are typically assigned to low-functioning classrooms which are below the students' actual levels of functioning because teachers, principals, other school personnel, and students themselves come to expect less.[121] Second, in response to this placement, the student will engage in school crime both to live up to school personnel's expectations as well as their own expectations[122] and also to obtain some level of success and well-being.[123]

Unfortunately, courts are aware of this detriment but are unwilling to step in and correct the situation.[124] Therefore, the judiciary has left to the discretion of the legislature the decision regarding the precise type of treatment a juvenile should receive as compared to an adult. This is demonstrated in court rulings that while "publicity might have an adverse effect on the prospects of

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117 BORTNER, *supra* note 94, at 249.

118 BORTNER, *supra* note 94, at 249.

119 BORTNER, *supra* note 94, at 250.

120 Richard Lawrence, *Controlling School Crime: An Examination of Interorganizational Relations of School and Juvenile Justice Professionals*, 46 JUV. & FAM. CT. J. 3, 7 (1995).

121 *Id.*

122 *Id.* at 8 (citing D.H. Kelly & W.T. Pink, *School Crime and Individual Responsibility: The Perpetuation of a Myth?*, 14 URB. REV. 47, 55 (1982)).

123 *Id.*

124 *See, e.g.*, News Group Boston, Inc. v. Commonwealth, 568 N.E.2d 600 (Mass. 1991).

rehabilitation of a particular juvenile and, [while] public disclosure of certain information about a juvenile could have adverse consequences, . . . [it is] a question for legislative judgment"[125] as to what type of differential treatment a juvenile should receive.

Therefore, while courts admit that public access to a juvenile's name has a negative impact on the entire rehabilitative process, they are unwilling to correct it. This is worsened by the fact that expulsion statutes are applicable to students who are only *alleged* to have committed a crime. In such cases, there has been no conviction according to law, yet there has been a conviction according to society.

Recent legislative enactments demonstrate that juvenile records are becoming more and more accessible to the public either through open court rooms or failure to seal or expunge records. While some statutes still restrict many segments of the public from access to such records, the only individuals who appear to have little or no access are employers. This has remained such so that courts can protect a juvenile's ability to obtain future employment. However, this same reasoning is an argument that may be made for education. It is allowed by state statute that if a child is convicted of committing a felony, she may be excluded from school permanently or for a lengthy period of time. If courts do not step in and limit access to a juvenile's criminal record to school departments and personnel, those juveniles convicted will be denied an equal opportunity to an education and, therefore, will not have an equal opportunity for employment because they will lack the necessary skills. Not only will the release of confidential records allow for the failure of states to provide juveniles with an education, it will also influence a juvenile's future involvement in crime because students will not be able to obtain employment to provide for themselves and their families.

D. Presumption of Innocence

Many expulsion statutes overlook the premise behind the justice system that a person is innocent until proven guilty. This is evident in the fact that school districts are permitted to suspend and/or expel a student who has simply been charged with a felony or delinquent act. There is no required scrutiny of the facts which underlie the charge nor is there a reasonable doubt standard under which conviction could be had. Instead, a report is simply

125 *Id.* at 603.

received stating that the student has been charged for an offense and the school then decides whether such alleged behavior would be harmful to other students and/or school personnel. What about a determination that the student in fact committed the alleged act? No time is given to analyze the facts. The premise seems to have now become guilty until you prove yourself innocent.

Further, under expulsion statutes which are based upon conviction and/or adjudication, students that have pled guilty to charges brought against them are expelled. They are also expelled for judgments of a continuance without a finding. Therefore, it must always be explained to a student that if they plead guilty to a charge, regardless of the reason, they will be expelled from school. This is also an issue which should be addressed by the defense to a judge when a juvenile in a state providing for such an expulsion is faced with a felony or juvenile charge. Without this discussion, many more students are going to be expelled from school with no further education.

V. Possible Solutions

When considering possible solutions, I believe that there are two areas which must be addressed: (1) pre-delinquent intervention[126] and (2) post-adjudication intervention.[127] Within these two areas, I will discuss programs which have previously been and/or are currently being implemented. In addition, I will present issues which must be addressed in order to work towards the prevention of violence which expulsion statutes do not address.

However, prior to considering the following solutions, the best solutions are to either abolish or amend all current expulsion statutes. I am of the strong belief that the only true way to prevent this injustice and deprivation of an education is to abolish all existing expulsion statutes. If this is not an option, then these statutes must be amended so as to mandate that an alternative education be provided to all students who are expelled regardless of the reason. If neither option is to occur, then we must look to the following solutions.

A. *Pre-Delinquent Intervention*

It is my contention that before Congress and the various state

[126] Richard J. Lundman, Prevention and Control of Juvenile Delinquency 13 (1984).
[127] *Id.* at 14.

legislatures can begin to punish specific conduct, they must first determine the cause and, in response, possible solutions to prevent such violent behavior.

In approaching violence in the schools, Congress and the legislatures must first determine the cause and then attempt to prevent such behavior from occurring within society. To approach this, there are several things that must be done.

First, legislative bodies must actually talk and listen to students. Students, much more than the government, have some idea as to what the cause is, and how to prevent violence in the schools. This is so simply because it is students who are either carrying weapons or who need protection from those who are. It is difficult, if not impossible, for Congress and state legislatures to address the issue of school violence without knowing how adolescents struggle with the issue. When asked about violence and its effect on the future, one student responded that:

> [t]he world today is very violent and it is hard trying to survive. I picture the world as a big tree, and everyone starts at the bottom and when you are at the top you have survived. On your way to the top are many branches, twigs and leaves. I try to move to the top very fast, but carefully.
>
> I made a lot of mistakes. On the way I have shot at people. I have gotten into gangs. I have stabbed people, and have fought people. As I moved deeper down the branches, (they) get thinner and thinner and at the end that is where I fall and die. What I tried to do is leave the branch. Put myself in reverse and move on.
>
> I moved a little. I go to school and I don't sell drugs yet, hopefully, I won't. Hopefully, I'll just move the right way, move towards a positive branch.[128]

Another student stated that "[a]s for the future, I see a bunch of bodies lying on the street."[129]

In addition, when asked about possible solutions, the answers one would most likely hear are "I would have counseling"[130] or "I would make all gangs come together during school hours and make a little peace treaty during school hours"[131] or "it's not a matter of more security or any types of things like that as it is kicking the knowledge to

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128 DEBORAH PROTHROW-STITH & MICHAELE WEISMANN, DEADLY CONSEQUENCES: HOW VIOLENCE IS DESTROYING OUR TEENAGE POPULATION AND A PLAN TO BEGIN SOLVING THE PROBLEM 87 (1991).

129 *Id.* at 94.

130 Lynette Richardson & Debra Williams, *Teens Sound Off On School Security*, CATALYST, Nov. 1994, at 11.

131 *Id.*

the people that this is your school, making safety for yourself . . . . They need to come out with some kind of counseling thing where students try to work out their problems by themselves."[132]

While talking to students may seem somewhat trivial, simplistic, and idealistic, it is what the students believe is needed and, therefore, are solutions that must be addressed when implementing solutions to the problem of violence in neighborhoods and schools.

This style of conversation with students is the first necessary step which must be taken when considering possible methods of prevention rather than, or at least before, punishment. In order to combat a problem, there must be a cause. Simply punishing the behavior after it occurs is not going to correct or prevent it from occurring in another neighborhood or school.

In addition to talking with students, Congress and the states should look to other school districts around the nation to consider programs which, through student involvement, have been implemented to combat and prevent the issue of violence.

For example, in Chicago, Illinois, public schools have implemented a program known as STAR (Straight Talk About Risks).[133] This program attempts to teach children about the dangers of guns, how to recognize threatening situations, and how to make wise choices to ensure their safety.[134]

In Baltimore, Maryland, after the superintendent of schools realized that children were afraid of going to and from school, the public schools created a "safety corridor."[135] This involves a group of churches, businesses, and other institutions that volunteer to open their doors to students for two hours before and after school.[136] The volunteers are trained in conflict resolution and crime prevention and have also been taught what to do if a child has been involved in a crime, is injured or ill, or is just plain scared.[137]

In Cleveland, Ohio, public schools have developed a program for elementary school students which teaches what is and is not appropriate behavior. The program teaches kids what hands should and should not be used for, as well as covering such issues as sexual misconduct, fighting, and cheating on tests.[138]

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132 *Id.*

133 *Teaching Kids How to Handle Anger, Avoid Violence*, CATALYST, Nov. 1994, at 12.

134 *Id.*

135 Elizabeth Crouch, *What Other Cities Are Doing to Protect Kids*, CATALYST, Nov. 1994, at 7.

136 *Id.*

137 *Id.*

138 *Id.*

In conjunction with the aforementioned, there must be a re-investment of economic resources into poor, underserved communities. Resources are necessary to rebuild and revitalize neighborhoods and business districts of these communities. We must devise programs in which youth from surrounding communities go into neighborhoods and clean up streets and alleyways, paint buildings, and help remodel the interiors and exteriors of vacant buildings. Buildings that are remodeled may then be rented or sold, or used for subsidized housing. By this revitalization, businesses will be more apt to move back into these communities, thus creating jobs for the unemployed.

Through the implementation of such programs, youth will begin to feel a sense of pride in their communities and in themselves due to their involvement in the revitalization process. In addition, with the revitalization of neighborhoods, adults will also begin to take pride in their communities. With a new sense of pride, adults will have a reason to take back their neighborhoods and they will have a better sense of self due to better living conditions. This in turn will have a positive effect on their children.

There must also be a financial investment in the school system. All schools need to be upgraded to a standard that far surpasses what is currently available in many areas throughout the country. Through the reinvestment of money, more teachers can be hired which will help lower classroom size, making them more personal and structured. This is essential because, "[r]esearch shows that schools with strong principals; schools that are not too large; schools where discipline is fair, but firm; schools where teachers are imbued with high expectations for every child; schools where parents are drawn into the educational orbit, are schools where learning takes place."[139] With an investment of funding, these factors will be attainable.

Further, the curriculum in schools must be improved so as to include cultural education, drug and alcohol awareness programs, and violence prevention programs.

First, by teaching students about all cultures we are educating them about different histories, backgrounds and races. This is essential because if children are taught about our differences, then they will also be made aware of our commonalities. In addition, if children learn about their ancestors, they will have more pride in who they are.

Second, children need to be educated about violence and drugs and alcohol in the first grade because they are subjected to these things at a very young age due to television, movies and society. How-

139 PROTHOW-STITH & WEISMANN, *supra* note 128, at 168.

ever, this education needs to continue throughout a child's schooling and, as students progress into higher grades, this education should become much more intense, specific and straight forward. The effects and consequences of violence and drugs and alcohol should be expressed in a very honest and realistic manner. Students need to be made aware that death is final and effects many people, both in relation to the victim and the perpetrator.

Moreover, there need to be other outlets presented to youth that take the place of "hanging out" on street corners with their friends. Possible outlets can include such things as the Boys and Girls Clubs, neighborhood sports leagues, neighborhood dances, or community centers where kids can go to be with their friends while taking part in some form of activity. Through these types of centers, youth are taken off the street and given other choices that are fun and social.

> Making available after-school, weekend, and evening youth activities that provide academic, vocational, athletic, artistic, and other types of activities for young people will provide positive opportunities to prevent crimes [because we] are providing life-enhancing alternatives to criminal activity. Midnight sports league programs, for example, provide young people with structured athletic, educational, and job training activities that keep at-risk youth off the street at night and provide key educational and employment support.[140]

Another solution that must be considered is counseling services in schools. Schools need to provide both individual and group counseling for those youth who have either become involved with violence or who are within a high-risk population. Through counseling, students will find other options for dealing with feelings and fears that do not involve violence.

Individual counseling is important because it provides students with a neutral person with whom to talk. Many of these youth do not have, or feel they do not have, an adult figure in their lives to whom they can go to talk about issues which are creating pressures and fears.

Further, there needs to be some form of groupwork with these youth. Groupwork is important because it shows kids that they are not alone—that there are others with the same issues they have. It is often easier for a youth to listen to someone their own age who is going through or has gone through similar experiences and who is growing up under the same pressures.

In looking at other solutions for the prevention of violence, we need to realize that youth are affected by many varying environmental

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140 Committee Hearing, *supra* note 50.

and psychological factors that were not as prevalent two decades ago when the juvenile justice system was in its prime. One such factor is a self-fulfilling prophecy.[141] Many of our youth have been stereotyped as being part of a population that is lazy, uneducated, and involved with drugs and, therefore, heavily involved in crime and violence. In response to this, society treats youth according to this stereotype and, after having been treated accordingly for such a significant period of time and by such a significant number of people, "[e]ventually, the prophecy creates the facts which prove it correct."[142] Our youth have seen generations before them follow in those footsteps and believe that it is the only way of life. With this "criminal" lifestyle comes not only an image of a person driving a nice car, but also the necessary concern of being safe. Many youth who are involved in violence grow up in a community in which they live in fear. This typically means growing up very fast and much to soon. To the younger population, a nice car and money means respect from one's peers, while fear means safety.

Moreover, a feeling of isolation, poor relationships with friends and family, weak decision making skills, and low self-esteem, are internal beliefs or feelings that motivate a youth towards violence.[143] Through the use of weapons and criminal involvement, a youth is achieving a sense of respect which helps to relieve feelings of loneliness and self-doubt. In conjunction with this, we must also look at the environment in which most kids involved in violence are living, the type of activities they engage in, and opportunities they have available to them.[144] While there are kids that have achieved while growing up in the same situation, we must address the ones that have not. We must determine what it is that they need to achieve.

There have been several programs at various times throughout the country which have addressed all of the issues which I have discussed in the hopes of solving this very problem. These programs, some of which are either still in existence or which have been replicated, were developed specifically to prevent violence in communities. For example, the Chicago Area Project (CAP), which began in 1932, attempts to prevent juvenile delinquency through neighborhood involvement and improvement.[145] This program, which functions mostly through adult volunteers, encourages adults within the neigh-

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141 BORTNER, *supra* note 94, at 249.

142 BORTNER, *supra* note 94, at 249 (citing Kai T. Erikson, *Notes on the Sociology of Deviance* 302 *in* THOMAS J. SCHEFF, MENTAL ILLNESS AND SOCIAL PROCESSES (1967)).

143 BORTNER, *supra* note 94, at]218-24.

144 BORTNER, *supra* note 94, at 218-24.

145 LUNDMAN, *supra* note 126, at 58.

borhood to join community committees, elect committee leaders, and initiate fund-raising activities.[146] The funds which are raised are spent mostly to employ indigent gang workers who are assigned to neighborhood youth gangs, refurbish rented storefront community centers, and buy sports equipment used in the recreational programs run by adult volunteers.[147]

Through community committees, CAP focuses on three primary activities. First, it sponsors recreational programs for neighborhood children through the use of neighborhood park facilities. In addition, several of the community committees built summer camps outside of the city and sponsor extensive summer camp programs for neighborhood juveniles.[148] Second, community committees sponsor needed community improvement campaigns which focus primarily on health care, sanitation, educational, and law enforcement services.[149] Lastly, community committees engage in specific activities intended to prevent and control juvenile delinquency.[150]

The prevention of juvenile delinquency is done in several ways. First, CAP employs indigent gang workers who are assigned to neighborhood youth gangs.[151] Second, gang workers, staff members, and adult volunteers advocate on behalf of neighborhood juveniles with the juvenile justice system.[152] These workers also advocate on behalf of neighborhood juveniles prior to arrest, following arrest, and during incarceration.[153] However, if these attempts fail, staff members and volunteers frequently visit the juvenile so they realize that the community is still behind them and is ready to provide acceptance and assistance upon their return.[154]

Similarly, Midcity Project (MP), which was located in Boston, Massachusetts, from 1954 to 1957, also directed its efforts at three factors thought to play a causal role in urban delinquency: the community, the family, and the neighborhood gang.[155] MP developed and strengthened previously existing community groups and utilized existing professional agencies, such as settlement houses.[156] In addition, families which had a long history of repeated use of welfare services

146 LUNDMAN, *supra* note 126, at 62.
147 LUNDMAN, *supra* note 126, at 62.
148 LUNDMAN, *supra* note 126, at 62.
149 LUNDMAN, *supra* note 126, at 62-63.
150 LUNDMAN, *supra* note 126, at 63.
151 LUNDMAN, *supra* note 126, at 63.
152 LUNDMAN, *supra* note 126, at 63.
153 LUNDMAN, *supra* note 126, at 63.
154 LUNDMAN, *supra* note 126, at 63.
155 LUNDMAN, *supra* note 126, at 68.
156 LUNDMAN, *supra* note 126, at 68.

were identified and subjected to a special and intensive program of psychologically-oriented case-work.[157]

However, the major thrust of MP's work was similar to that of CAP's work with indigent gang members. The only noticeable difference was that MP's workers were social workers with graduate degrees.[158] These workers changed the gangs into formal clubs, served as "intermediaries between gang members and adult institutions, such as employers, schools, police, and other professional agencies, and encouraged law-abiding behavior through groupwork techniques, persuasion, and role modeling."[159] The workers were in contact with the gangs on an average of three times per week, and each of these contacts lasted between five and six hours.[160] The remainder of the workers' time was spent performing other services such as conferences with teachers and police officers.[161] These services lasted for approximately ten to thirty-four months.[162]

The last project worth mentioning, the New York Mobilization for Youth (MFY), functioned under the premise that youth must be given an opportunity to act in nondelinquent ways so as to prevent them from participating in delinquent acts.[163] MFY included thirty separate programs which focused on the areas of work, education, community organizations, and group service.[164]

One of MFY's programs, Urban Youth Services Corps, hired several hundred unemployed neighborhood youths and focused on fostering the types of attitudes and behaviors (e.g., following orders, reporting to work on time) necessary to succeed in the working world, and on strengthening the participants' job skills.[165] Following this training, a Youth Jobs Center attempted to find permanent jobs for those who successfully completed the training program.[166]

In addition to Youth Services Corps, MFY also created educational programs, such as the Homework Helper program, in which low-income high school students were hired to tutor children in ele-

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157 LUNDMAN, *supra* note 126, at 68 (citing Walter B. Miller, *The Impact of a 'Total Community' Delinquency Control Project*, SOCIAL PROBLEMS, Fall 1962, at 169).

158 LUNDMAN, *supra* note 126, at 69.

159 LUNDMAN, *supra* note 126, at 69.

160 LUNDMAN, *supra* note 126, at 70.

161 LUNDMAN, *supra* note 126, at 70.

162 LUNDMAN, *supra* note 126, at 70.

163 ALBERT R. ROBERTS, JUVENILE JUSTICE: POLICIES, PROGRAMS, AND SERVICES, 47-48 (1989).

164 *Id.* at 48.

165 *Id.*

166 *Id.*

mentary school.[167]

Lastly, a group service aspect of the project included services for youths who had joined a gang, as well as delinquency prevention programs aimed at younger children.[168] For youths aged eight through twelve, MFY developed the Adventure Corps which was a character-building organization designed to reach delinquency-prone youths by providing exciting recreational and educational activities for young people as an alternative to gang membership.[169]

While these are only a few prevention programs that have been and can be implemented, through their use, it is my contention that many youth will have a better sense of self and feeling of safety. They will be given guaranteed choices to help alleviate some of the issues and pressures that are prevalent in their daily lives. Through these programs, students have another route offered other than the path of violence.

While society is concerned with the cost of funding these types of programs, we must realize that violence in itself is a very costly problem. The cost of criminal violence on a national scale has been estimated to cost more than $3.5 billion, with $1.5 billion resulting from firearms.[170] The average cost to treat a child wounded by a gun is more than $14,000 alone.[171] With costs being this high, how can we not afford to invest in the prevention of violence? With this investment, we are not only helping those individuals who are at-risk of becoming juvenile offenders, but we are improving society as a whole while also helping to prevent a problem.

In addition to these prevention programs, other steps need to be taken which many may view as extreme. One such step is either a complete ban on weapons or some other action which will make it more difficult for a person to purchase a weapon. While individuals are given such a fundamental right under the United States Constitution,[172] some control needs to be in place so that access to these weapons is not so simple. It should be of great concern to society that a youth on the street can obtain a weapon faster than she can obtain a Big Mac.

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167 *Id.*
168 *Id.* at 49.
169 *Id.*
170 Committee Hearing, *supra* note 50.
171 Committee Hearing, *supra* note 50.
172 U.S. Const. amend. II.

B. Post-Adjudication Intervention

In regards to individuals who have been convicted for felonies or adjudicated delinquent, services must be provided to them so that they are not simply placed back in a situation in which they were unable to function previously without the use of violence. Intensive counseling needs to be provided while a youth is either in lock-up or in a detention center so that she is taught ways to handle the stress of growing up in a violent world. This is important especially when kids are carrying weapons because "they think [that] by carrying guns, . . . they will be protected from dying."[173]

An example of a program that has implemented these services is the Provo Experiment (Provo), an all-boys program which was located in Utah County, Utah between 1959 and 1965. Provo was premised on the belief that treatment had to be community based, because it was in the community that juveniles made their delinquent decisions.[174] This nonresident facility utilized an intensive group program with employment and a delinquent peer group as the primary instruments of treatment.[175] In Provo, the boys primarily lived at home and when they were not in school, they were either working in a paid city program or at the site partaking in group activity. However, following their departure from either school or work, the boys attended a group meeting.[176] Following the completion of the meetings, the boys returned to their own homes. During the summer, except on rare occasions, every boy attended an all-day program which involved work and group discussion.[177] This treatment program lasted approximately five to six months for each boy.[178]

In accordance with the services previously mentioned, it is essential that individuals who have been expelled under weapon and conviction statutes be provided with educational services. However, these services must be more structured and monitored than regular school services. This alternative education should include individualized instruction, reward systems, goal-oriented work, strong and competent teachers, small classrooms, and continuous activity. While these sound like essential elements of all educational services, it is primarily needed in the case of at-risk juveniles.

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173 PROTHOW-STITH & WEISSMAN, *supra* note 128, at 84.
174 LUNDMAN, *supra* note 126, at 157.
175 LUNDMAN, *supra* note 126, at 158.
176 LUNDMAN, *supra* note 126, at 158.
177 LUNDMAN, *supra* note 126, at 158.
178 LUNDMAN, *supra* note 126, at 158.

These youth need structure and commitment in their lives so that they can overcome the label and life they have come to know.

VI. CONCLUSION

In the past year, nearly 1000 students were expelled from school under suspension and expulsion statutes.[179] Twenty percent of those expelled were thirteen-years old or younger, while some were as young as eight-years old.[180] The offenses leading to expulsion ranged from snapping a girl's bra strap to murder. If we have any hope of saving the younger generation and preventing further increase in the lethality of juvenile crime, we must realize that expulsion statutes are not working. We must begin to progress back to the thought process that initiated the separation of the juvenile justice system from the adult system. The focus must once again be on rehabilitation and prevention as opposed to punishment and retribution.

Unfortunately, the impetus behind expulsion statutes fails to address these issues and are, therefore, not confronting the most relevant factors which permeate violence in and around schools. Because of this, the goal behind expulsion statutes is unassailable because the statutes do not provide solutions to problems which actually plague the public schools and surrounding communities. Often, the statutes actually create more harm than good.

179 *Student Expulsions on the Rise*, LAWYERS WKLY., May 8, 1995, at 8.
180 *Id.*

MBANMIRI v. BUM OIL CO.: A HYPOTHETICAL CASE OF INTERNATIONAL ENVIRONMENTAL TORTS

Okechukwu Athanasius Duru†

I. INTRODUCTION

It was about 11:00 in the morning. Ngozi had just missed the last twenty-passenger boat to Ikwem, the nearest city, which was approximately three hours away by this mode of transportation. Consequently, Ngozi had no other means of getting to Ikwem to buy the ingredients for the family's dinner. Other than by air transportation, the only feasible means for Ngozi to get to Ikwem would be to swim through the dangerous and polluted river that links the village to the city. The makeshift roadways are covered in mud, about twenty-feet deep. What used to be a bridge had turned into a death trap that had killed ten villagers from Mbanmiri.

Married with five children — two boys and three girls, ages twelve to twenty-four — Ngozi's ordeal is typical of the daily lives of Mbanmirians, whose standard of living has been reduced to subhuman standards since BUM Oil Company[1] started its oil exploitation.[2]

Mbanmiri is a small village of approximately 100,000 people, located within southeastern Nigeria.[3] Mbanmirians have a long and proud history of being self-sufficient. Their livelihood revolves around farming and fishing. Most of the local stores and marketplaces were established to accommodate the tourist industry, which developed from the uniqueness and quality of the seafood from Mbanmiri. Isolated from other villages, Mbanmirians never had to deal with the economic or social concerns that prevailed in neighboring cities. There was never a health epidemic of any sort; the primary health concerns ranged from the common cold to severe body aches, something often attributed to the Mbanmirians' more than fifteen

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1 Hereinafter "BUM."

2 The story of Ngozi and BUM is fictional. What follows in this Introduction is the factual background for Mbanmiri v. BUM Oil Co., the hypothetical international environmental tort action analyzed in this Note.

3 Although the country of Nigeria is not used in a hypothetical manner, the village of Mbanmiri is purely the writer's creation.

hours-a-day work habit. Of course, this was Mbanmiri before the coming of BUM.

BUM is incorporated in the state of Delaware, with more than fifty branch offices in major cities in the United States. BUM started its oil exploration in Mbanmiri in 1971 when Nigeria became the eleventh member of the Organization of Petroleum Exporting Countries (OPEC).[4] BUM also maintains offices in three different cities in Nigeria. Perhaps to avoid developing a true relationship with Mbanmirians, BUM maintains only its drilling facilities in Mbanmiri. There are no separate offices or employee residences in Mbanmiri. Indeed, a majority of BUM employees are either from neighboring cities or from other parts of Nigeria. The handful of Mbanmirians who are employed by BUM are primarily used as unarmed security guards for the path to the makeshift roadways that lead to the drilling site. BUM's senior employees are transported to the drilling site by corporate helicopter, while lower level employees are driven in a Mack truck that was converted into a passenger bus. Other types of automobiles cannot be used on the treacherous roadways.

The daily output for BUM's oil exploration is about 350,000 barrels.[5] However, maintaining such an output is not without consequences to the Mbanmirians. BUM paid little attention to the environmental safety standards that are customary for oil companies engaged in the business of oil exploration, storage, and/or handling.[6] By 1980, the village of Mbanmiri was threatened with starvation. Its waters were polluted by the untreated sludge that resulted from BUM's practice of cleaning its machinery in a swamp that is directly connected to Mbanmiri waters. Further, there were occasional leaks from ruptured pipes that carried oil from Mbanmiri to BUM's depots in neighboring cities. These oil leaks accounted for approximately 15,000 barrels a day. By 1990, there were reported leaks from the poorly built landfills where BUM dumped its waste. The toxin[7] leaks

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4 *See, e.g.*, Chudi Ubezonu, *Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice*, 28 INT'L LAW. 345 n.3 (1994).

5 Some oil producing regions have daily outputs of more than 350,000 barrels. *See, e.g.*, Victoria C. Arthaud, Note, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT'L ENVTL. L. REV. 195, 205 (1994) (citing Diego Cevallos, *Ecuador-Environment: Indigenous People Fight Petroleum Expansion*, INTER PRESS SERVICE, Mar. 11, 1994).

6 *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6924, 6925 (1988) (stating standards for the handling and disposal of hazardous wastes); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

7 The word toxin generally refers to "any poison or toxicant." BLACK'S LAW DICTIONARY 1492 (6th ed. 1990).

subsequently destroyed whatever was left of Mbanmiri's vegetation. A preliminary investigation by an American human rights organization revealed that BUM was not using the proper equipment, and where proper equipment was used, it lacked adequate maintenance. BUM did not respond to the human rights organization's inquiry.

By 1992, there was a sudden outbreak of related diseases and birth defects.

By 1994, Ngozi had lost her husband and grandparents who were poisoned from eating contaminated fish. Community stores and businesses had stopped operating. As a result, many Mbanmiri women were forced into prostitution, typically at the leisure of BUM's employees.[8] Deprived of their drinking water and vegetation, the once self-sufficient and proud people of Mbanmiri were reduced to near destitution.[9] Today, Ngozi and her fellow Mbanmirians must hurry to catch the daily twenty-passenger boat to Ikwem, where they buy everything from bottled drinking water to basic food items.[10]

The Mbanmirians would like to bring a tort action against BUM in the United States, since BUM has developed a symbiotic relationship with some power brokers in the Nigerian government, particularly where the corporate officers of BUM have been known to have "sympathetic" friends within every level of the Nigerian government — from one administration to the other.

This Note analyzes the issue of whether plaintiffs can bring international environmental tort actions[11] in United States courts for injuries that occurred in a foreign country. Part II discusses the relevant doctrines in this area, with emphasis on strict liability. Part III reviews the relevant doctrinal defenses that might preclude the bringing of any such action in the United States, with a closer look at the doctrine of forum non conveniens. The Note concludes with a proposal for a court initiated approach where the defenses would be less onerous on

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[8] *See, e.g.*, Arthaud, *supra* note 5, at 214 (noting the effect of oil company development in the *Oriente*, ranging from destruction of the region's livelihood — hunting, fishing, and farming — to prostitution at the oil camps by the indigenous people) (footnote omitted).

[9] Arthaud, *supra* note 5, at 201 (noting the detrimental effects of oil development on the lives of the indigenous people in the *Oriente*).

[10] While the foregoing fact-pattern is a hypothetical, it nevertheless mirrors some of the facts that are emerging as a result of the on-going debate on how to curb international environmental tort actions against multinational corporations that operate in less-developed countries where these corporations engage in activities that are often unconscionable, immoral, unethical and sometimes illegal. *See, e.g.*, Howard W. French, *Nigeria Accused of a 2-Year War on Ethnic Group*, N.Y. TIMES, Mar. 23, 1995, at A12; Arthaud, *supra* note 5, at 195-97.

[11] *See, e.g.*, Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990) (applying some of the relevant doctrines in an international environmental tort action).

plaintiffs who are similarly situated to the indigenous people of Mbanmiri.

II. Environmental Tort Doctrines

An environmental tort has been defined as "a civil action seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances."[12] The following causes of action are pertinent for environmental tort actions.

1. *Nuisance.* There are two types of nuisance causes of action, namely, private and public.[13] The Second Restatement of Torts defines public nuisance as "an unreasonable interference with a right common to the general public."[14] In *Graham Oil Co. v. BP Oil Co.*,[15] the district court held that the defendant's conduct, which subsequently contaminated the surrounding water and soil, interfered with the public's right "to soil and water free of contamination."[16]

In *Graham*, the contamination resulted from the defendant's activities in running a gasoline station and service center.[17] In finding public nuisance, the *Graham* court reasoned that the plaintiff was uniquely affected given that "it makes commercial use of its property . . . ."[18] Similarly, the Mbanmirians have suffered harm unique from other villages, given that BUM's conduct destroyed the village's commercial fishing.

Under the Restatement's formulation, to determine when an interference with the public right is unreasonable, the court may look at the following factors: (a) Whether the conduct significantly interferes with the public's health, safety, peace, comfort or convenience;[19] (b) whether the conduct is prohibited by law;[20] and (c) whether the conduct "has produced a permanent or long-lasting effect . . . ."[21]

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12 N.J. Stat. Ann. § 2A: 15-5.3(f)(1) (West 1995).

13 *See, e.g.*, Bolin v. Cessna Aircraft Co., 759 F. Supp. 692, 719-20 (D. Kan. 1991) (distinguishing private nuisance from public nuisance).

14 Restatement (Second) of Torts § 821B(1) (1979).

15 885 F. Supp. 716 (W.D. Pa. 1994).

16 *Id.* at 723.

17 *Id.* at 718.

18 *Id.* at 723.

19 *See, e.g.*, Restatement (Second) of Torts § 821B(2)(a) (1979).

20 *Id.* § 821B(2)(b).

21 *Id.* § 821B(2)(e).

In *Davis v. Shell Oil Co.*,[22] the district court reasoned that pollution caused by the defendant's activities were sufficient to maintain an action for nuisance. Like the plaintiff in *Davis*, the Mbanmirians have alleged facts sufficient to maintain an action for nuisance.[23]

By contrast, a private nuisance is created when the defendant's conduct interferes with the use and enjoyment of another's property.[24] Under the Restatement's formulation, one may be found liable for a private nuisance when (1) her conduct is the legal cause of the interference of the use and enjoyment of another's property; and (2) "the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise . . . negligent or reckless conduct, or for abnormal dangerous conditions or activities."[25] In some jurisdictions, contributory negligence may be asserted as a defense when the nuisance action is based on negligent conduct.[26]

In *Mowrer v. Ashland & Ref. Co.*,[27] a case that involved a defendant's use of land for oil and gas exploration, the Seventh Circuit affirmed the district court's decision holding the oil company-defendant liable for maintaining a private nuisance by causing crude oil to seep out and contaminate plaintiff's land. Similarly, as the alleged facts indicate, BUM's oil exploration and drilling activities caused the resulting pollution of the waters in Mbanmiri.

Under a private nuisance cause of action, the Mbanmirians must show that BUM's interference was either intentional, negligent, or abnormally dangerous.[28] For intentional acts, the rule requires that the defendant either "created or continued the nuisance with knowledge that harm to plaintiff's interests was occurring or was substantially certain to follow."[29] As discussed above, the defendant in *Mowrer* was held liable for maintaining a private nuisance by engaging in oil exploration that caused the plaintiff's harm.[30]

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22 795 F. Supp. 381, 384 (W.D. Okla. 1992).

23 *Id.*

24 RESTATEMENT (SECOND) OF TORTS § 822 (1979).

25 *Id.*

26 *See, e.g.*, Copart Indus., Inc. v. Consol. Edison Co., 362 N.E.2d 968, 973 (N.Y. 1977) (citing Judge Cardozo's opinion in McFarlane v. City of Niagara Falls, 160 N.E. 391, 392 (1928)).

27 518 F.2d 659 (7th Cir. 1975).

28 *See* RESTATEMENT (SECOND) OF TORTS § 822 (1979).

29 Ronald J. Rychalk, *Common-Law Remedies For Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 674 (1989) (citing W. PROSSER & W. KEETON, THE LAW OF TORTS 624-25 (5th ed. 1984)).

30 518 F.2d at 661 (finding that facts supported holding the defendant liable under private nuisance).

Similarly, the facts are sufficient to find that BUM created the conduct that subsequently interfered with the use and enjoyment of the Mbanmirians' land. By operating with improper and/or inadequately maintained equipment, BUM created and continued the nuisance in Mbanmiri. Further, as a Delaware corporation where similarly situated oil companies operate under various environmental regulations,[31] it would be difficult for BUM to claim that it had no knowledge that the resulting harm was substantially certain to occur.[32]

Also, activities analogous to the facts in this hypothetical, including those found in the cases cited above, have been held to constitute unreasonable interference.[33]

Contributory negligence would not apply here since none of BUM's tortious conduct can be attributed to any intentional act of the Mbanmirians.[34] Moreover, contributory negligence is not available where the defendant intentionally created the nuisance.[35]

2. *Trespass.* This cause of action exists when there has been a substantial invasion of the plaintiff's property interest by the defendant.[36] In the environmental torts context, an invasion of the plaintiffs' property by polluting substances generated by the de-

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31 *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6924, 6925 (1988) (stating standards for the handling and disposal of hazardous wastes); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

32 As a standard practice, oil companies are generally aware that failure to comply with the applicable regulations would often lead to consequences detrimental to the neighboring environment. *See, e.g.*, Arthaud, *supra* note 5, at 211 (discussing the consequences of oil exploitation in the *Oriente*). In response to the increased environmental disaster in oil producing regions, some commentators have called for environmental regulation covering the activities of American oil companies in foreign oil producing regions. *See, e.g.*, Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practice Act*, 17 ECOLOGY L.Q. 477 (1990).

33 *See, e.g.*, Chatham Steel Corp. v. Brown, 858 F. Supp. 1130 (N.D. Fla. 1994) (holding defendant liable for careless disposal of battery castings); Dickerson, Inc. v. Holloway, 685 F. Supp. 1555 (M.D. Fla. 1987) (holding United States liable for failure to ensure proper disposal of polychlorinated biphenyls (chemical waste)); Wood v. Picillo, 443 A.2d 1244 (R.I. 1982) (affirming decision holding defendant liable for private and public nuisance resulting from defendant's operation of a chemical waste dump site).

34 *See, e.g.*, Copart Indus., Inc. v. Consol. Edison Co., 362 N.E.2d 968, 970 (N.Y. 1977) (stating that contributory negligence is not available where the nuisance is based on defendant's intentional conduct).

35 *Id.; see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 461 (5th ed. 1984) [hereinafter PROSSER AND KEETON]; RESTATEMENT (SECOND) OF TORTS § 467 (1965).

36 *See, e.g.*, Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 857 F. Supp. 838, 844 (D.N.M. 1994) (citing Pacheco v. Martinez, 636 P.2d 308 (N.M. Ct. App. 1981) in defining trespass).

fendant would suffice as a trespass cause of action.[37] In a related case, *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*,[38] the district court opined that a trespass cause of action "contemplates actual physical entry or invasion."[39] Here, BUM's activities created the pollution that actually invaded and contaminated the waters in Mbanmiri.

In another case, *Wilson Auto Enters. v. Mobil Oil Corp.*,[40] the district court reasoned, in part, that a defendant may be held liable for the unauthorized invasion of another's property.[41] In that case, the plaintiff brought an action alleging, in part, that the defendant's activities in operating a retail gas station caused the release of hazardous chemicals that subsequently invaded and polluted the plaintiff's property.[42] Similarly, the toxin leaks from BUM's poorly built landfills that reached and contaminated the waters in Mbanmiri constitutes an unauthorized invasion of the Mbanmirians' property.

3. *Negligence.* Under the Restatement's formulation, one is liable for "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[43] To maintain a negligence action, the plaintiff must show that (1) the defendant owed her a legal duty;[44] (2) that the defendant breached that duty;[45] (3) that there is a causal connection between the defendant's breach and the plaintiff's harm;[46] and (4) that the plaintiff suffered actual injury.[47] Factual causation is also known as the "but for" test,[48] which requires that the plaintiff prove that the injury would not have occurred absent the defendant's conduct.[49]

The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff.[50] In *Kowalski v. Goodyear Tire*

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37 *See id.* at 844.

38 857 F. Supp. 838 (D.N.M. 1994).

39 *Id.* at 844 (distinguishing between trespass and nuisance causes of action); Cereghino v. Boeing Co., 873 F. Supp. 398, 400 (D. Or. 1994) (same) (citation omitted).

40 778 F. Supp. 101 (D.R.I. 1991).

41 *Id.* at 106 (citation omitted).

42 *Id.* at 103-04.

43 RESTATEMENT (SECOND) OF TORTS § 282 (1965).

44 *See, e.g.*, PROSSER AND KEETON, *supra* note 35, § 30; *see also* Eiseman v. State, 511 N.E.2d 1128 (N.Y. 1987) (holding that to prevail under the negligence theory, plaintiff must demonstrate that defendant owed her a duty).

45 PROSSER AND KEETON, *supra* note 35, § 30 at 165.

46 *Id.* § 30, at 165.

47 *Id.*

48 *See, e.g.*, PROSSER AND KEETON, *supra* note 35, § 41, at 266.

49 *Id.*

50 *See, e.g.*, Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (holding that

& Rubber Co.,[51] an employee and his wife brought an action against the defendant-tire manufacturer alleging that the employee's exposure to a harmful chemical caused the wife's bladder cancer.[52] The district court stated that the defendant's control over a hazardous substance carries with it a duty to protect foreseeable plaintiffs.[53] Here, BUM controlled the polluting chemicals that subsequently contaminated the waters and vegetation in Mbanmiri. Thus, like the defendant in *Kowalski*, BUM owed a duty to the Mbanmirians to minimize the risk of pollution.[54]

Once a duty has been established, the Mbanmirians need to show that BUM breached that duty.[55] As previously stated, BUM failed to use proper equipment and when proper equipment was used, there was a lack of adequate maintenance.

Often, the most litigated issue in a negligence action is whether the defendant's conduct was the proximate cause of the plaintiff's harm.[56] The pertinent question here is whether BUM's conduct created a foreseeable risk of harm to the Mbanmirians.[57] In *Palsgraf v. Long Island R.R.*,[58] the New York Court of Appeals concluded that the defendant had no way of knowing "that the parcel wrapped in newspaper would [eventually] spread wreckage through the [train] station."[59] Unlike the plaintiff in *Palsgraf*, however, the Mbanmirians were not so situated that BUM was not able to foresee their resulting harm.

In *Western Greenhouses v. United States*,[60] the district court con-

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defendant owed no duty to the plaintiff); Edwards v. Honeywell, Inc., 60 F.3d 484 (7th Cir. 1995) (citing *Palsgraf* in affirming decision holding that defendant owed no duty to the plaintiff); *see also* Eiseman v. State, 511 N.E.2d 1128 (N.Y. 1987).

51 841 F. Supp. 104 (W.D.N.Y. 1994).

52 *Id.* at 105.

53 *Id.* at 111.

54 *Id.*

55 *See, e.g.*, FOWLER V. HARPER ET AL., THE LAW OF TORTS § 19.1, at 2 (2d ed. 1986) (discussing proof of breach in negligence cases).

56 *See, e.g.*, Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (applying the proximate causation analysis).

57 *Id.* at 100 (articulating principles of the foreseeability test in stating that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . . ."); *see also* PROSSER AND KEETON, *supra* note 35, § 41, at 264 (stating that "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified by imposing liability"); Branstetter v. Gerdeman, 274 S.W.2d 240, 245 (Mo. 1955) (stating that "[a] causal connection must be established between the negligence charged . . . and the loss or injury sustained . . . . ").

58 162 N.E. 99 (N.Y. 1928).

59 *Id.* at 101.

60 878 F. Supp. 917 (N.D. Tex. 1995).

cluded that the defendant had no way of knowing that its waste disposal would subsequently contaminate plaintiff's property.[61] In that case, landowners were suing the government for contamination resulting from waste disposal from an adjacent Air Force base. The court reasoned that the industry's standard practice at the time of contamination was such that the defendant could not have anticipated the resulting harm.[62] Unlike the defendant in *Western Greenhouses*, however, the oil industry's standard of practice at the time when BUM started its oil exploration in Mbanmiri was such that BUM should have foreseen the resulting harm suffered by the Mbanmirians.[63]

For factual causation, the Mbanmirians must show that but for BUM's conduct the resulting harm would not have occurred.[64] The facts as alleged here are sufficient to meet the but for test.[65]

In jurisdictions that recognize contributory negligence, a plaintiff who contributed to his or her injury is completely barred from recovery.[66] Under comparative negligence doctrine, however, plaintiff's negligence would reduce any recovery only in direct proportion to her fault.[67]

4. *Negligence per se.* Where a defendant's conduct violates a statute set forth by the locality, negligence *per se* may be raised as a cause of action.[68] Also, where the defendant's non-compliance with the applicable statute caused the resulting injury, negligence *per se* can be used to impute liability.[69] In *Myers v. United States*,[70]

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61 *Id.* at 927.

62 *Id.*

63 The applicable standard here would be the standard for oil companies incorporated under the laws of the United States. *See supra* notes 31-32.

64 *See, e.g.*, PROSSER AND KEETON, *supra* note 35, § 41, at 266.

65 It should be noted that this Note does not attempt an in-depth analysis of a negligence action. For a discussion of negligence, see David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precaution*, 36 ARIZ. L. REV. 357 (1994).

66 *See, e.g.*, PROSSER AND KEETON, *supra* note 35, § 65, at 461; RESTATEMENT (SECOND) OF TORTS § 467 (1965).

67 *See* PROSSER AND KEETON, *supra* note 35, § 67, at 472 (discussing "pure" comparative negligence). There are three types of comparative negligence: "pure," "modified," and "slight-gross," *Id.* For a discussion of comparative negligence, see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

68 *See, e.g.*, Wendell B. Alcorn, Jr., *Liability Theories for Toxic Torts*, 1988 A.B.A SEC. NAT. RESOURCES & ENV'T 3; Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 857 F. Supp. 838, 847 (D.N.M. 1994) (stating the elements of negligence *per se*) (citation omitted).

69 *See, e.g.*, Martin v. Herzog, 126 N.E. 814 (N.Y. 1920); Osborne v. McMasters, 41 N.W. 543 (Minn. 1889) (applying negligence *per se* to impute liability on the defendant who violated a statutory provision that required proper labeling of drugs).

the Sixth Circuit stated that to rely on negligence *per se*, the plaintiff must show that the defendant owed her a duty.[71]

5. *Strict liability.* Viewed by commentators as one of the most sweeping causes of action for environmental torts,[72] strict liability as formulated in the Restatement states: "One who carries on an *abnormally dangerous activity* is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[73] Borrowing from the reasoning in the famous English strict liability case, *Rylands v. Fletcher*,[74] the Restatement outlines the following six factors to be considered in determining when an activity is abnormally dangerous: (a) the existence of a high degree of risk of some harm to a person, or the land or chattel of others;[75] (b) likelihood that the resulting harm will be great;[76] (c) inability to eliminate the risk by exercising reasonable care;[77] (d) extent to which the activity is not a matter of common usage;[78] (e) inappropriateness of the activity for the place where it is carried on;[79] and (f) extent to which the activities' value to the community is outweighed by its dangerous attributes.[80] The accompanying comment to this section of the Restatement states that the relevant question in determining how abnormally dangerous an activity is in relation to the community is whether the "dangers and inappropriateness for the locality [are] so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence."[81]

Here, the pertinent inquiry is whether BUM's conduct was an abnormally dangerous activity.[82] In *Darton Corp. v. Uniroyal Chemical Co.*,[83] the district court reasoned that the abnormal activity was

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70 17 F.3d 890 (6th Cir. 1994).

71 *Id.* at 899. The facts in this hypothetical do not raise any issues on negligence *per se*, thus further analysis of this doctrine is unnecessary.

72 *See, e.g.*, Richard J. Lippes, *Environmental And Toxic Tort Litigation*, C317 A.L.I.-A.B.A. 493, 502 (1988).

73 RESTATEMENT (SECOND) OF TORTS § 519(1) (1977) (emphasis added).

74 L.R. 3H.L. 330 (1868).

75 RESTATEMENT (SECOND) OF TORTS § 520(a) (1977).

76 *Id.* § 520(b).

77 *Id.* § 520(c).

78 *Id.* § 520(d).

79 *Id.* § 520(e).

80 *Id.* § 520(f).

81 *Id.* § 520 cmt. f.

82 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 519 (1977) (defining the general principles of abnormally dangerous activity).

83 893 F. Supp. 730 (N.D. Ohio 1995).

the defendant's disposal of waste, as opposed to the mere manufacturing of toxic chemicals.[84] Similarly, the abnormal activities here are BUM's handling of its waste products. As previously stated, the abnormal activities that BUM engaged in ranged from operating the poorly built landfills that resulted in toxin leaks, to the practice of cleaning its machinery in a swamp directly connected to Mbanmiri waters.

As noted, to determine when an activity is abnormally dangerous, the Second Restatement of Torts lays out six factors to be considered.[85] In a case brought by a landowner against a storage plant operator, *Buggsi, Inc. v. Chevron U.S.A., Inc.*,[86] the court could not find, as a matter of law, that activities at the petroleum storage and distribution plant were not ultrahazardous.[87]

Here, BUM may nevertheless argue that it had no way of knowing that there was a likelihood that the resulting harm from its conduct would be great. This argument, however, does not pass muster when viewed in light of the fact that, as a multinational corporation, BUM was on notice as to the standard of practice for similarly situated oil companies, and the resulting consequences for noncompliance.[88] In *Indiana Harbor Belt R.R. v. American Cyanamid Co.*,[89] the court reasoned that an activity presents a great risk of harm when the potential for harm from one mishap is so great and there is a probable risk of the mishap occurring.[90] Here, BUM's

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84 *Id.* at 740.

85 *See supra* notes 75-81 and accompanying text (outlining the six factors).

86 857 F. Supp. 1427 (D. Or. 1994).

87 *Id.* at 1432-33 (citation omitted). The court relied on the applicable statute which defined oil and other petroleum products/wastes as hazardous substances. *But see* Schwartzman, Inc. v. General Elec. Co., 848 F. Supp. 942, 945 (D.N.M. 1993) (finding that, under New Mexico law, the doctrine of strict liability does extend to "handling, transportation, storage or disposal of petroleum products" where the risks can be eliminated by exercising reasonable care).

88 *See supra* notes 31-32 and accompanying text. Indeed, one of the applicable statutes provides: "[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . . shall be subject to a civil penalty in an amount up to $25,000 per day of violation . . . ." 33 U.S.C. § 1321(b)(7)(A) (Supp. V 1993). Where such a regulation is available and readily enforceable in the oil producing regions outside of the United States, BUM and the like would be compelled to comply with the environmental standards. *See, e.g.*, Hanson Hosein, *UNSETTLING: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285 (1993) (proposing a mandated insurance scheme for international environmental disasters where the multinational corporations involved would be required to provide the funds to be used in compensating the victims of those disasters).

89 662 F. Supp. 635 (N.D. Ill. 1987).

90 *Id.* at 643.

improper disposal of toxic waste created a great risk of harm to the Mbanmirians.

Because BUM was duly licensed by the Nigerian government, it is likely that they will argue that Mbanmiri is an appropriate location[91] and that oil exploration in the village is a matter of common usage.[92]

In a case where a gas station owner sued an oil company for damages caused by gasoline leakage from underground storage tanks, the court declined to apply strict liability.[93] In that case, *Arlington Forest Assocs. v. Exxon Corp.*,[94] the court reasoned that gas stations are necessarily appropriate near residential areas, and are as a matter of common usage in the communities.[95] In reaching its conclusion, the *Arlington* court looked favorably on the benefit of the gas stations to the nearby residents.[96]

Unlike the residents and gas stations in *Arlington*, however, the Mbanmirians received no such benefit from BUM and improper waste disposal was not carried on by many in Mbanmiri. Thus, it was not common usage.[97]

Perhaps BUM's most predictable argument against strict liability would be that the harm resulting from its conduct can be eliminated by exercising reasonable care.[98] In *Arlington Forest Assocs. v. Exxon Corp.*,[99] the court declined to apply strict liability on the ground that underground storage of gasoline is not an abnormal

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91 *See supra* pp. 16-17 and accompanying notes.

92 *Id.*

93 Arlington Forest Assocs. v. Exxon Corp., 774 F. Supp. 387, 391 (E.D. Va. 1991).

94 *Id.*

95 *Id.* at 391 (quoting the Second Restatement of Torts in defining common usage as one that is carried on by many people in the community).

96 *Id.* (observing that gas station in residential areas is "widespread and routine").

97 *Id.* The political dynamic which allows some foreign governments to issue licenses to oil companies notorious for non-compliance with environmental regulations in oil producing regions outside of the United States, is beyond the scope of this Note. If the reader wishes to explore this and other related issues, however, the following should be helpful: Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542 (1985); Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849 (1991).

98 *See, e.g.*, Sprankle v. Borwer Ammonia & Chem. Co., 824 F.2d 409 (5th Cir. 1987) (finding that the dangers from ammonia can be eliminated through exercise of reasonable care); Philip Morris Inc. v. Emerson, 368 S.E.2d 268 (Va. 1988) (holding that where harm resulting from disposing toxic chemicals can be prevented by exercising reasonable care, strict liability would not apply). *But see* City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49 (N.J. Super. Ct. Law Div. 1976) (imposing strict liability on defendant for harm resulting from oil storage).

99 774 F. Supp. 387 (E.D. Va. 1991).

activity.[100] In reaching its decision, the *Arlington* court reasoned that strict liability would not apply where "reasonable precautions would have sufficed to prevent the harm."[101] The rationale here is to use strict liability to deter only those activities with risks that cannot be eliminated by exercising reasonable care.[102]

However, in a seminal strict liability case, *New Jersey State Dep't of Envtl. Protection v. Ventron Corp.*,[103] the New Jersey Supreme Court held that the dumping of toxic wastes is an abnormally dangerous activity.[104] In *Ventron Corp.*, the state's Environmental Protection Agency brought an action against several corporations for contaminating a community's river through their mercury processing activities.[105] As was the case in *Ventron*, the contamination in Mbanmiri waters resulted from dumped chemical wastes which created waters in which "fish no longer inhabit[ed]."[106]

BUM may further argue that the benefit of its oil exploration activities to the Mbanmirians outweighs any resulting harm from its waste disposal practices.[107] But, as previously stated, the abnormal activity in question is the improper waste disposal, as opposed to oil exploration per se.

In *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*,[108] the district court suggested, in dictum, that a court would be reluctant to apply strict liability against a defendant who is the only industry in the community.[109] Here, BUM is the only company in Mbanmiri that is engaged in oil exploration. Indeed, no other business entity in Mbanmiri compares in style, form, or substance.

In arguing its value to the community, BUM would likely define the community as covering the entire country of Nigeria. The rationale for such an argument would be that the company entered into an agreement with the Nigerian government, and paid its taxes and related fees to the Nigerian government. Therefore,

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100 *Id.* at 390 (applying the Restatement factors) (citation omitted).

101 *Id.* at 391.

102 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 520 cmt. h. (noting that other than the use of atomic energy, there is hardly any activity where the accompanying risk could not be eliminated by "exercising the utmost care").

103 468 A.2d 150, 160 (N.J. 1983) (concluding that toxic waste dumping is an abnormal dangerous activity).

104 *Id.* at 160.

105 *Id.* at 154.

106 *Id.*

107 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 520(f) (1977).

108 662 F. Supp. 635 (N.D. Ill. 1987).

109 *Id.* at 643 (citing the Second Restatement of Torts in discussing the extent of an activity's value to the community) (citation omitted).

BUM will argue that the burden on the Mbanmirians should be weighed against the company's benefit to the Nigerian government.[110] However, given the symbiotic relationship between executives of BUM and some power brokers in the Nigerian government, as alleged in the hypothetical facts, the community must be defined as one where the abnormal activities occurred.[111]

Under the Restatement's approach, all the factors discussed above need not be present to find an activity abnormally dangerous.[112] However, what is relevant here is that BUM polluted the waters and vegetation in Mbanmiri, and as one court has resolved, "[t]hose who poison the land must pay for its cure."[113]

The foregoing discussion looked at environmental tort actions that occurred in the United States. A foreign plaintiff would look to other avenues to bring an environmental tort action against a United States corporation, person, or entity for tortious conduct that occurred in a foreign country.[114] This practice of litigating or resolving common law disputes in a host[115] country for activities that took place in a foreign country has been referred to as extraterritorial adjudication.[116] However, under the rubric of international law,[117] an alien plaintiff suing a United States tortfeasor can bring such action under the Alien Tort Claims Act,[118] which provides that "the district courts shall have original jurisdiction of any

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110 The focus of this Note does not allow for a thorough examination of this particular issue. However, note 97, *supra*, intimates some of the reasons why such a system, though used here in a hypothetical context, continues to exist.

111 As previously stated, the dynamic of oil companies' symbiotic relationships with some officials of foreign governments is truly beyond the scope of this Note.

112 RESTATEMENT (SECOND) OF TORTS § 520 cmt. f. (1977).

113 New Jersey State Dep't. of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983).

114 The alien plaintiff would be precluded by jurisdictional issues. *See* David A. Soley, Comment, Hunt v. Galtieri: *A Hypothetical Scenario for Holding International Aggressors Civilly Liable in American Courts*, 33 EMORY L.J. 211, 217 (1984) (discussing some of the barriers to holding tortfeasors liable in the United States for a cause of action that occurred in a foreign country).

115 In this case, a host country would be one other than the country where the cause of action accrued. For example, in an exemplary case, Indian plaintiffs sued an American corporation in an American court for injuries sustained in India. *See In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 404 U.S. 871 (1987).

116 *E.g.*, *Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1609 (1991) [hereinafter *Extraterritorial*] (discussing extraterritorial regulation as it applies to international environmental law).

117 *See generally* Soley, *supra* note 114, at 217 (citing 1 RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REV.) 13 (Tent. Draft No. 1, 1980) defining international law as the binding set of rules regulating the international political system).

118 28 U.S.C. § 1350 (1988).

civil action by an alien for a tort only, committed *in violation of the law of nations* or a treaty of the United States."[119] Accordingly, under the Alien Tort Claims Act, the Mbanmirians can bring an environmental tort action against BUM.

Pursuant to relevant case law, the threshold question under the Alien Tort Claims Act is whether a defendant's conduct constitutes an actionable tort within the law of nations.[120] In *Xuncax v. Gramajo*,[121] the court stated that an act violates international law when: (1) the act is universally condemned, (2) there are established criteria to ascertain when the act violates international norm, and (3) the prohibition is "binding at all times upon all actors."[122] In *Xuncax*, the court held that "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable . . . under § 1350."[123]

To bring a claim under the Alien Tort Claims Act, an alien plaintiff is merely required to allege that a defendant committed a tort " 'in violation' of international law or a treaty of the United States."[124] Torture, along with cruel, inhuman, or degrading treatment, have all been recognized as being in violation of international law.[125]

III. Doctrinal Defenses and Forum Non Conveniens

Once a successful cause of action under the Alien Tort Claims Act has been pleaded, the plaintiff must overcome the following defenses traditionally raised by defendants.

1. *Comity.* This is the principle which allows the courts of

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119 *Id.* (emphasis added).

120 *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that "deliberate torture perpetrated under color of official authority" violates the law of nations); *cf.* Abiodun v. Martin Oil Serv., 475 F.2d 142 (7th Cir.) (holding that fraud is not an actionable tort under the Law of Nations), *cert. denied*, 414 U.S. 866 (1973). It should be noted that the Law of Nations is used synonomously with the term "international law." *See, e.g.*, Soley, *supra* note 114, at 217 n.25 (citing 1 J. Westlake, International Law 1 (1st. ed. 1904)).

121 886 F. Supp. 162 (D. Mass. 1995).

122 *Id.* at 184 (citation omitted).

123 *Id.* at 187; *cf.* Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995) (holding that fraud and breach of fiduciary duty do not violate the law of nations so as to be actionable under the Alien Tort Claims Act).

124 *Xuncax*, 886 F. Supp. at 180.

125 *Id.* at 184-86.

one state to defer to the laws and jurisdiction of another.[126] This principle is usually triggered when the court is considering the adequacy of procedural safeguards in another jurisdiction.[127] However, this may be inapplicable to the *Mbanmiri* case because this principle "is more frequently applied in cases of public regulatory law, such as antitrust, than in cases of private law, such as torts."[128]

2. *State Doctrine.* This principle protects the acts of foreign officials acting in their sovereign capacity.[129] In *Filartiga v. Pena-Irala*,[130] however, the Second Circuit suggested, in dictum, that illegal conduct by officials of sovereign governments will not be protected under state doctrine.

3. *Local Action doctrine.* Under this principle, when the tortious action relates to specific real property, the case must be resolved where the property is located.[131]

4. *Sovereign Immunity.* This doctrine, which is similar to state doctrine, has been codified in the Foreign Sovereign Immunities Act.[132] It provides: "[A] foreign state shall be immune from the jurisdiction of the courts of the United States. . . ."[133] An exception under this rule arises when the foreign state is involved in private commercial activities "carried on in the United States by the foreign state."[134] Also, in *Xuncax v. Gramajo*,[135] the court concluded that the Foreign Sovereign Immunities Act does not apply to foreign officials who acted beyond their scope of authority.[136]

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126 *See, e.g.*, Flynn v. General Motors, Inc., 141 F.R.D. 5, 9 (E.D.N.Y. 1992) (applying the principle of comity).

127 *Id.*

128 *Extraterritorial, supra* note 116, at 1628 (citing Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 749 F.2d 1378, 1384-86 (9th Cir. 1984) (examining "intrusion of U.S. antitrust laws on the economic policies of Honduras"), and other exemplary cases). International comity is not the focus of this Note. For a discussion of comity, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

129 *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897) (barring suit by a group of Americans against the Venezuelan head of state); Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964).

130 630 F.2d 876 (2d Cir. 1980).

131 *See, e.g.*, Mississippi & Missouri R.R. v. Ward, 67 U.S. 485 (1862) (applying local action doctrine).

132 28 U.S.C. § 1604 (1988).

133 *Id.* This statute generally provides the jurisdictional hook over foreign states. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (holding that Foreign Sovereign Immunity Act is the "sole basis for obtaining jurisdiction over a foreign state . . . .").

134 28 U.S.C. § 1605(a)(2).

135 886 F. Supp. 162 (D. Mass. 1995).

136 *Id.* at 175. *Cf.* Jones v. Petty-Ray Geophysical Geosource, Inc., 722 F. Supp. 343 (S.D. Tex. 1989) (holding that under the Foreign Sovereign Immunity Act the Republic of Sudan is immune from action resulting from the wrongful death of a Texas

5. *Forum Non Conveniens.* Perhaps the most onerous hurdle the Mbanmirians would have to overcome is the doctrine of forum non conveniens.[137] The statute codifying this principle states, in relevant part, that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[138]

A majority of tort cases, including environmental tort cases involving an alien plaintiff and a United States defendant, have been dismissed on the basis of forum non conveniens.[139]

A forum non conveniens analysis begins with the threshold question of whether an adequate alternative forum exists.[140] There is a strong presumption that generally favors the plaintiff's choice of forum.[141] The defendant can only overcome this presumption by showing that the balancing of private and public interests favors dismissing the case from the chosen forum.[142] In balancing the private interests, the factors considered include: (1) "ease of access to sources of proof";[143] (2) availability of unwilling witnesses; (3) cost of producing willing witnesses;[144] (4) the possibility of viewing the premises, where applicable;[145] and (5) "*all other practical problems* that make trial of a case easy, expeditious and inexpensive."[146] Additionally, the court considers whether any subsequent

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resident who was employed in the Sudan), *aff'd*, 954 F.2d 1061 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992).

137 *See, e.g.*, Arthaud, *supra* note 5 (observing that the doctrine of forum non conveniens continues to frustrate plaintiffs who are seeking relief in American courts for tort injuries that occurred in a foreign country).

138 28 U.S.C. § 1404(a) (1988).

139 *See, e.g.*, Arthaud, *supra* note 5; Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (outlining the factors to be considered in reviewing a forum non conveniens motion to dismiss); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (expanding on *Gilbert*); Jennings v. Boeing Co., 660 F. Supp. 796, 804 (E.D. Pa. 1987) (finding that balancing of private and public factors favored dismissing products liability case against a helicopter manufacturer); Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995) (holding, in part, that balancing of private and public factors favored dismissing case on ground of forum non conveniens).

140 *See, e.g.*, Jennings v. Boeing Co., 660 F. Supp. 796, 799 (E.D. Pa. 1987) (citation omitted).

141 *Id.* at 804; *see also* Flynn v. General Motors Inc., 141 F.R.D. 5, 11 (E.D.N.Y. 1992) (concluding that "[t]here is a strong presumption in favor of plaintiff's choice of forum . . . .") (quoting Piper Aircraft Co. v. Reno, 454 U.S. at 255 (1981)).

142 *Flynn*, 141 F.R.D. at 11 (citation omitted).

143 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (outlining the private interest factors).

144 *Id.*

145 *Id.*

146 *Id.* (emphasis added).

judgment can be enforced.[147]

The relevant public interest factors include concerns of whether the courts are being congested,[148] the burden of jury duty on a community with no "relation to the litigation,"[149] the local interest in having "localized controversies decided at home,"[150] and the interest "in having the trial of a diversity case in a forum that is at home with the state law that must govern the case rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[151]

The doctrine of forum non conveniens "seeks to promote convenience to the parties and ensure fairness of the trial."[152] However, the reality is that the doctrine has been disparately used against foreign plaintiffs.[153] In a recent case involving plaintiffs from twelve foreign countries who were injured from exposure to the defendants' products,[154] the court concluded that the balancing of private and public factors favored granting the motion based on forum non conveniens.[155]

If improper waste disposal and other chemical dumping practices are prohibited in the United States, corporations that are incorporated under the laws of this country should not be allowed to evade liability by pleading forum non conveniens after engaging in known abnormally dangerous activities. The courts should be more active in curbing intercontinental environmental torts that are being perpetrated by multinational corporations.[156] In balancing the parties' convenience, the courts should be cognizant of the fact that foreign plaintiffs are also often brutalized by their governments, especially where the defendant has developed a symbiotic

147 Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1366 (S.D. Tex. 1995) (citing Gonzalez v. Naviera A.A., 832 F.2d 876, 878 (5th Cir. 1987)).

148 *Gilbert*, 330 U.S. at 508.

149 *Id.* at 508-09.

150 *Id.* at 509.

151 *Id.*

152 *Extraterritorial*, supra note 116, at 1628.

153 *See, e.g.*, William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1691-94 (1992) (noting how foreign plaintiffs receive "disparate treatment" under the doctrine of forum non conveniens) (citation omitted).

154 Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995).

155 *Id.* at 1369-71.

156 As this Note demonstrates, the conduct of these multinational corporations has often been devastating to the people and their environment. *See, e.g.*, Lairold M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95 (1981).

relationship with the political leaders.[157]

IV. CONCLUSION

The absence of an international environmental tort cause of action[158] creates the need for foreign plaintiffs to use the Alien Tort Claims Act to seek relief in United States courts. Given the globalization of commerce and technology, and the emerging environmental justice movement,[159] international environmental tort practice is bound to mushroom within the next few years. As such, the practitioner should become familiar with the dynamics, as demonstrated in this hypothetical case, of the courts' balancing act with regard to forum non conveniens.

Perhaps, under the Alien Tort Claims Act, courts should recognize environmental torts analogous to BUM's conduct as a crime in violation of the law of nations. As the court suggested in *Xuncax v. Gramajo*,[160] conduct that is universally condemned should be recognized as being in violation of international law.[161] Also, within the boundaries of the established public and private interest factors articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*,[162] courts should take the initiative by engaging in a more equitable balancing of the parties' interests where, if the various policy issues are fully examined, the onus would not weigh so heavily on foreign plaintiffs. If the doctrine of forum non conveniens seeks to promote fairness,[163] it necessarily follows that the Mbanmirians of the world should be allowed their day in court.[164]

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157 This is especially true in the so called less developed countries. *See, e.g.*, Lippman, *supra*, note 97.

158 *Extraterritorial*, *supra* note 116.

159 *See, e.g.*, Marc Whitehead, *Toxic Tort Litigation: Developing Issues and Their Impact on Case Preparation and Presentation*, C921 A.L.I.-A.B.A. 525, 536 (1994) (noting that environmental justice movement "really began in 1982 at a demonstration in Warren County, North Carolina"); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993) (examining environmental racism); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Sitting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003 n.7 (1993) (observing that sites for "locally undesirable land uses" have a disparate impact on "people of color").

160 886 F. Supp. 162 (D. Mass. 1995).

161 *Id.* at 184.

162 330 U.S. 501, 508-09 (1947).

163 *See Extraterritorial*, *supra* note 116, at 1628.

164 While this Note presents a hypothetical scenario of an oil producing region reduced to near destitute, the issues raised are anything but fictional. *See, e.g.*, Dele Olojede, *A Shell Game*, N.Y. NEWSDAY, June 7, 1995, at A24 (reporting on the real life horrors of how one government used its military might to crush and literally annihilate the lives of the indigenous people of Ogoni, an oil producing region in Nigeria,

who dared to demand humane treatment from Shell Oil, a multinational oil company that has been drilling oil from this region for more than thirty-seven years). An effective United Nations involvement and/or initiative also is needed. The calling for such an analysis, however, is beyond the scope of this Note.