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IN MEMORIAM

KENNETH R. SIMMONDS

by Roger D. Billings, Jr.*

“Kenneth Simmonds bridged the cultural and legal worlds of the U.S. and Great Britain. He was a genuine asset to our law school as a visiting professor and afterward he continued to make professional and personal contributions to NKU personnel. It was a privilege for me to know him. I know the NKU legal community feels a keen sense of loss.”

Leon Boothe
President, Northern Kentucky University

On December 19, 1983, several Chase professors gathered around a table to interview Kenneth R. Simmonds for the position of distinguished visiting professor. Professor Simmonds had been contacted about the job opening, was already in the United States, and had agreed to make himself available for an interview. After being exposed to his personality that day, and noting his quick wit and extraordinary curriculum vita, the faculty voted to extend him an invitation.

That day a decade of friendship and intellectual inspiration began for all who were present and for others who met him when he returned to assume his duties in January 1985. Although he was a man of inestimable British decorum, he knew how to make everyone feel at ease. He laughed easily, shared his contacts with other distinguished scholars, discussed his accomplishments in a way that educated the listener about his dazzling world of the intellect, and never offended. He brought his

* Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. A.B., Wabash College; J.D., University of Akron.
Welsh wife and life companion, Gloria, to Northern Kentucky, and friends came to regard her as the epitome of the gracious woman.

Ken and Gloria seemed to fit into our community effortlessly and, after returning to England, stayed in close contact with their friends at the Chase College of Law. They had a party in London for their Chase friends during the American Bar Association convention in Summer 1985 at the historic Wig and Pen Club. And they kept on entertaining individuals who visited London right up to the last year of Ken's life. They also made several return visits to Northern Kentucky. Once, when Ken and Gloria were visiting in Northern Kentucky, Dean William Jones and his wife, Gerri, took them to Churchill Downs. It was a balmy afternoon with a cloudless sky, and they had reservations at the beautiful patio dining room late in the afternoon. The seating gave them a wonderful view of the colorfully planted infield, and they were enjoying an early dinner while watching the races. After a time, Ken turned to Dean Jones and in his impish way said, “My, you Yanks have come a long way in 200 years.”

Ken Simmonds was not just a distinguished author and professor. He was one of a kind. His specialization in the law of the sea attracted attention from officials who needed a trusted person to help settle border disputes between nations. Such work could not be publicized but had to be done quietly behind the scenes. As a member of the International Arbitral Tribunal, Ken regaled us with descriptions of his work on the Dubai-Sherjah Boundary from 1978-81 when he helped draw a line out into the Persian Gulf, which set the boundary between two tiny countries in a region where every foot could represent thousands of barrels of oil. At the suggestion of the Pope, he was hired to intermediate a border dispute between two South American countries, a dispute which dragged on for years, but at least did not lead to war. While Ken was in residence at Chase, officials of a Far Eastern country pleaded with him to spend one week with them (for a substantial fee) in order to have his opinion about a dispute with China and another nation about ownership of certain islands. Ken felt he did not have time and declined.

Ken's more public career consisted of being elected twice as dean of the faculty of laws at Queen Mary College. He was in demand as guest professor on a regular basis in Singapore, at the Sorbonne, in Amsterdam and at the University of Texas, to
name a few places. It is said that he once declined the presidency of a college at Oxford.

His publishing career marked him as a one-of-a-kind scholar. In the early 1970s, he was executive director of the British Institute of International and Comparative Law and was responsible for putting on conferences. It was an ideal position in which to acquire knowledge and contacts. Writing came naturally to him. He pioneered multi-volume treatises and collections of cases on the law of the sea, international commercial arbitration and the Common Market (now the European Union). These were published by Sweet and Maxwell and Oceana Publications. Ultimately, he became the trusted counselor to the founder of Oceana, Philip F. Cohen, and to Edwin S. Newman, executive vice president. How often we heard that Ken had left the Oast Barn in Kent to take up temporary residence at the Savoy Hotel in London because Phil Cohen was coming to town. At Chase Ken observed the English academic tradition of welcoming all comers into his office while the door was open. But when he occasionally closed the door, it was as if he had put up a “Do Not Disturb” sign. Usually, it was because he was writing an article for the Common Market Law Review, of which he was editor.

For many of us Ken was one of those people with whom we never could spend enough time. After he left Chase we seemed always to miss him, and, sadly, that state of mind is now permanent.
There's an oft-repeated saying, attributed (correctly, for all I know) to Bismarck, to the effect that there are two things in the world one should never watch being made: sausage and laws. To this short list of things best manufactured without too much public scrutiny, you may, by the time I have finished, wish to add a third item: judicial decisions.

Now, I know what the cynics among you are probably thinking: "Sure, it's better that the public not know, because the way judges really decide cases is to let their law clerks do it. The clerk writes the opinion, the judge either reads it or not, depending on whether he is a scholarly sort (or depending on whether she is a scholarly sort, if you want to be trendy and don't mind slandering female judges), and off the opinion goes to the printer."

Well, maybe it would be just as well if judges did function this way. We might get better decisions for one thing. For another, the 1994 Siebenthaler Lecture would now be over, and we could enjoy a longer cocktail hour starting a bit earlier than planned. But that, unfortunately, is not to be — for no judge of my acquaintance works this way. As far as I know.

(I do not mean to suggest that law clerks are potted plants, of course. I, for one, always ask the clerk who has worked on a case for me to let me know how he or she would decide the case — and far more often than not, I wind up agreeing with the clerk. And I think most appellate judges rely on law clerks, as I do, for much of the drafting of a good many opinions. But if the language of all opinions published these days by federal courts of appeals could be dusted for fingerprints, I think the judges would generally be found to be at least as guilty as the law

* United States Circuit Judge for the Sixth Circuit.

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clerks — and responsibility for how each case is decided is a responsibility that obviously cannot be delegated to anyone.)

The title of my remarks tonight, as you know, is "The Nature of the Judicial Process Revisited." Most of this title, like most of the rest of my current output, has been borrowed from another judge. Not an ordinary judge, in this instance, but one of the true masters of our craft — Benjamin Nathan Cardozo, who in 1921 delivered a series of four lectures at Yale Law School under the title The Nature of the Judicial Process. Cardozo's lectures, as supplemented by a series of three more lectures given at Yale in 1923 under the title The Growth of the Law, will form the backdrop for the more serious part of my remarks this evening.

Perhaps at the outset I should say just a word about Cardozo himself. By the time he spoke at Yale, Benjamin Cardozo had become the most highly respected judge, probably, on one of the most highly respected courts in the country: the Court of Appeals of the State of New York. His judicial hero was Oliver Wendell Holmes, Jr., to whose seat on the Supreme Court of the United States Judge Cardozo was to be named by President Hoover in 1932. Cardozo was a learned and cultured man, well versed in the classics and in the literature of his own time. And he had a wonderful ear for the English language.

Cardozo's literary model was Matthew Arnold, the great nineteenth century poet, essayist, critic and moralist. Matthew Arnold's graceful and urbane manner of expressing himself had a profound appeal for Cardozo, as it did for many others, and echoes of Arnold's Olympian prose resonate in the judicial opinions and other writings of his gifted admirer, Benjamin Cardozo. It is probably fair to say that Cardozo was the best writer of nineteenth century prose to sit on the Supreme Court in the twentieth century. (The best writer of twentieth century prose was Mr. Justice Jackson — but that's another story.)

What Cardozo undertook to do in his talks on the nature of the judicial process was to describe the methods, or some of the methods, that judges use in deciding cases at law and suits in equity. In so doing, Cardozo undertook to identify the "forces," as he called them, that determine how judge-made law develops. The common law has never been a totally static body of rules — nor has the law created by the Constitution or by Congress, for that matter — and Cardozo wanted to explain why the law changes and how.
It is now almost three-quarters of a century since Cardozo shared his thoughts on these matters with the audiences at Yale. A vast amount of law, both common and uncommon, has been made over the intervening period — Volume 999 of the Fed. Second Reporter came off the press last year, God help us, and Fed. Third is now beginning to overrun our library shelves like those kudzu vines they have down South — and I thought it might be profitable to revisit Cardozo’s account of what judges actually do and share with you my observations on whether judges still seem to be doing it.

Perhaps you will think this presumptuous of me — for I cannot pretend to anything approaching Cardozo’s cultivation of mind, breadth of knowledge, or power of analysis. But I doubt that Cardozo himself would have thought me presumptuous. “We may try to see things as objectively as we please,” Cardozo said, but “we can never see them with any eyes except our own.” My eyes may be growing a little dimmer as I approach the end of my first decade on the bench, but I can still make out words and phrases here and there. The stuff I look at and struggle with every day is pretty much the same sort of stuff Cardozo and his contemporaries had to deal with.

Cardozo suggested, first of all, that at least ninety percent of the cases judges decide do not call for the exercise of much creativity on the part of the judge. “Stare decisis is at least the everyday working rule of our law,” he wrote, and usually there will be a precedent — or a statute — pretty much on point. Usually the statute, if there is one, will make the answer pretty clear, and usually the precedent, if there is one, will have to be followed. Statutes and their regulatory offspring cover more territory now than they did in Cardozo’s day, of course. In theory, moreover, federal judges ought to have less opportunity to shape the development of common law principles than state court judges do. On my court, I think, Cardozo’s ninety-percent figure is probably on the low side.

As to the remaining fraction of the workload — the cases that cannot be said to be cut and dried, as it were — Cardozo sug-

1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921) [hereinafter CARDOZO, NJP].
2. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 20 (1924) [hereinafter CARDOZO, GOL].
gested a quadripartite division of the forces to be obeyed and the methods to be applied. “Our fourfold division,” he explained, “separates the force of logic or analogy, which gives us the method of philosophy[,] the force of history, which gives us the historical method, or the method of evolution; the force of custom, which yields the method of tradition; and the force of justice, morals and social welfare, the mores of the day, with its outlet or expression in the method of sociology.” That is how Cardozo explained the broad outline of his original set of lectures when he returned to the subject a year or two later in the 1923 lectures. He followed the same outline then — “in obedience to the law of parsimony of effort,” as he put it, “since it is easier to follow the beaten track than it is to clear another.”

Do you know Father Guido Sarducci’s little talk on “The Five Minute University?” In it, the good father reviews the entire curriculum of a four-year course of university study and distills from it what the graduate will actually remember about each course five years after leaving the hallowed halls. What the graduate will remember about economics, for example, is “supply . . . and demand.” That’s it. French? “Comment allez-vous.” And so on.

Well, Cardozo — who among his other attributes was one of nature’s true gentlemen — thoughtfully provided a similar one-sentence précis of his entire course of lectures at Yale. “My analysis of the judicial process comes then,” he said, “to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.” There you have it. If you remember that one sentence five years from now, you will remember the essence of what Cardozo had to say about the nature of the judicial process. Cocktails, anyone?

Just kidding. Cardozo did go into a little more detail, and I shall too.

Let’s turn to the first of the four methods that judges are said to use in deciding the more difficult cases, “the method of philosophy.” It sounds impressive, but what does it mean? Well, Cardozo uses the word “philosophy” to refer to the process of

3. CARDOZO, GOL, supra note 2, at 62.
4. Id.
5. CARDOZO, NJP, supra note 1, at 112.
reasoning by syllogism and by analogy. If there is no constitutional or statutory rule that is dispositive of the case at hand, Cardozo tells us, and if no decisive judicial precedent can be found, the judge often looks to see whether the case before him can be decided by following the logical implications of the decision in some prior case that arguably presented an analogous issue. "In the life of the mind as in life elsewhere," Cardozo says, "there is a tendency toward the reproduction of kind. Every judgement [meaning every judicial decision] has a generative power. It begets in its own image." 6

That's entirely right, of course; thus it always was, and thus it still is. Let me give you one recent example. Under Supreme Court doctrine now codified in statute and in the congressionally approved rules governing federal habeas corpus cases, a state prisoner who loses a federal habeas suit and then brings another such suit in which he asserts different grounds for relief, can be thrown out of court if the federal judge concludes that the prisoner deliberately withheld the newly asserted ground earlier "or otherwise abused the writ." 7 (That's a quote from the statute.) Orders denying habeas relief were not originally subject to appeal, and — perhaps not coincidentally — the doctrine of res judicata was not applied to bar successive petitions for habeas relief. As appellate review became available in this area, however, courts developed the "abuse of the writ" doctrine to deal with the problem of endless applications for habeas relief. The standard for determining when the writ had been abused remained unclear for some decades, although the statute seemed to suggest that the doctrine was not confined to instances of deliberate withholding of claims and might extend to situations where a claim was not asserted at the first opportunity because of inexcusable neglect, for example. Then two or three years ago, in a case called McClesky v. Zant, 8 the Supreme Court undertook to settle the issue.

6. Id. at 21.
How did it do so? By borrowing the standard developed for an analogous category of habeas cases—cases where the merits of the petitioner’s federal constitutional claim were not finally adjudicated in the state court system because of a procedural default there. The standard previously developed for determining whether federal constitutional claims may be considered by a federal habeas court notwithstanding a procedural default in the state system is one of cause and prejudice: can the petitioner show that the procedural default was attributable to some objective cause, external to the defense, and can the petitioner show that he suffered actual prejudice as a result? In McCleskey v. Zant, the Supreme Court noted that the procedural default doctrine and the abuse of the writ doctrine were “both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have an opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State’s interest in the finality of the criminal judgement.” These and other similarities were enough, the Court concluded, to justify the conclusion that the “cause and prejudice” standard should be used not only to determine whether a procedural default could be excused by a federal habeas court, but also to determine if the prisoner seeking habeas relief on a return visit to the federal courts had abused the writ through inexcusable neglect. And that, for better or worse, is an example of precisely what Cardozo was talking about when he spoke of the “method of philosophy.” It is still being used today, the same way it always has been.

Then there is the “method of history”—a method that sometimes competes with the method of philosophy. They say in England that if you put a legal question to a lawyer, he always responds with a history lesson. We may not be as bad in this country, perhaps because of the way lawyers are trained here, but the method of history still lives, and it still sometimes comes into competition with the method of philosophy.

Here’s an example drawn from my own recent experience. Under the federal drug laws, simple possession of five grams of crack cocaine is punishable by not more than one year in prison.

That makes it a misdemeanor. Simple possession of more than five grams, however, gets you a mandatory minimum sentence of five years and a maximum sentence of twenty years. That’s a felony.

Now ordinarily, under the current federal sentencing guideline scheme, the quantity of drugs possessed by the defendant in a drug case is viewed as a sentencing factor that’s to be decided by the judge rather than the jury. The jury determines whether the defendant possessed illicit drugs at all; if the jury says “guilty,” the judge determines the quantity possessed — and the length of the sentence is fixed accordingly.

But who decides what quantity was possessed by the defendant when, as in a case that came before our court last year, there is room for disagreement as to whether the defendant possessed more than five grams of crack or some lesser amount, and the defendant is guilty of a felony if he possessed more than five grams but only a misdemeanor otherwise? In that case, as in any other case, the quantity of drugs involved directly affects the length of the sentence, and the method of philosophy would seem to suggest that it ought to be the judge who determines the quantity. Historically, on the other hand, we have left it to juries to decide whether the defendant, if guilty of anything, is guilty of a felony or is only guilty of a misdemeanor. More than the length of the sentence turns on this; a convicted felon generally cannot vote or hold public office, for example, while a misdemeanant can.

Where, as in this example, the method of philosophy points to one conclusion and the method of history points to the opposite conclusion, which method is the judge to use? Cardozo does not really say. He recognizes that the question is an important one, and he suggests that there are some areas of the law — real property law, for example — where the force of history is likely to be an especially strong one, but he offers no à priori standard for resolving the question. Give consideration to all of the judicial methods in the armamentarium, he says in effect, and then make a decision using the soundest judgement you can muster. Just do what’s right, in other words. (What our court did, in the case I’ve described, was to opt for the method of history. We concluded that the historic role of the jury is so important,
among English-speaking people, that only a jury could find the defendant guilty of a felony.\textsuperscript{11)}

As to the force of custom and the method of tradition, Cardozo suggests that we turn to custom most often in trying to determine whether there has been adherence to or departure from established standards that are "general" in nature. That conforms again to my own experience.

One of the most "general" standards I've dealt with recently is found in section 107 of the Copyright Act,\textsuperscript{12} where Congress codified the common law principle that it is not an infringement of a copyright to make "fair use" of a copyrighted work. Our court heard an appeal a while back where the holder of the copyright on the song "Oh, Pretty Woman" sued the rap group "2 Live Crew" over a parody of the original work.\textsuperscript{13} Was the parody "fair use?" Two members of our panel concluded that it was not. I dissented, citing — you guessed it — a tradition of parody that can be traced back at least as far as Aristophanes. Certiorari was granted in this case, and the Supreme Court issued a decision sending the case back for further proceedings.\textsuperscript{14} Justice Souter, who wrote for the Court, seems to have thought that the method of tradition does have some utility in this context.

All of which brings me to the last and perhaps the most interesting of the four "forces" about which Cardozo wrote. That, in his words, is "the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology."\textsuperscript{15}

Sociology?!!

Well, this was 1921, remember, when the optimism of the progressive era was still more or less intact, when faith in the miracles that could be worked by people anointed as "social scientists" still flourished, and when the law of unintended consequences was less widely understood, perhaps, than it is today. Thus Cardozo was quite confident that the Federal Trade Commission — established less than a decade before he gave his lec-

\begin{footnotesize}
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\item \textsuperscript{11} United States v. Sharp, 12 F.3d 605 (6th Cir. 1993).
\item \textsuperscript{12} 17 U.S.C. § 107 (1988).
\item \textsuperscript{13} Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992), \textit{cert. granted}, 113 S. Ct. 1642 (1993).
\item \textsuperscript{14} Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994).
\item \textsuperscript{15} CARDOZO, NJP, \textit{supra} note 1, at 65-66.
\end{itemize}
\end{footnotesize}
tures — was "building up a body of precedent which will fix the proprieties of commercial usage." If he were alive today, I suspect, Cardozo might be somewhat less sanguine about the ability of the FTC to fix much of anything. And I doubt that he would choose to label the greatest of his four judicial methods "the method of sociology."

But this is not to say that Cardozo would disavow the thought behind his somewhat unfortunate label. I am sure he would not. His thought, simply stated, was that "[t]he final cause of law is the welfare of society." And if judges could always be counted on to discern where the welfare of society truly lies, I think that most people would hope that judges would always strive to shape the law in such a way as to promote "the welfare of society," acting within the limits imposed by the Constitution and by respect for precedent and our traditions and history. If criminal activity seems to be increasing, for example, and "the welfare of society" seems to call for judicial restraint in the creation of new rights for defendants in criminal cases, most people would probably hope to see — as I think they have seen in recent years — some increase in this type of judicial restraint. Judges are not and should not be Pavlovian dogs who begin to salivate at whatever bell society happens to be ringing most loudly at the moment, but it is inevitable, I think, that judges will be cognizant of and to some degree influenced by current societal conceptions of the public interest.

Cardozo was no flaming radical, and he was very conscious of the limits within which judges normally operate. "We must not throw to the winds the advantages of consistency and uniformity," he said, "to do justice in the instance. We must keep within those interstitial limits" — Cardozo got this from Holmes, who did not hesitate to say that "judges do and must legislate," but went on to say that "they can do so only interstitially; they are confined from molar to molecular motions" — "[w]e must keep within those interstitial limits," Cardozo says, "which precedent and custom and the long and silent and almost indefinable prac-

16. CARDOZO, GOL, supra note 2, at 126.
17. CARDOZO, NJP, supra note 1, at 66.
tice of other judges through the centuries of the common law have set to judge-made innovations."\textsuperscript{19}

In \textit{The Growth of the Law} Cardozo explicitly rejects the notion that "sentiment or benevolence or some vague notion of social welfare" would suffice to shape the law,\textsuperscript{20} and he always insists that "the judge in shaping the rules of the law must heed the mores of his day."\textsuperscript{21} A judge is simply not free "to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief."\textsuperscript{22}

But what happens if the mores of the day, as perceived by the judge, come in conflict with rules supplied by the Constitution or by statute? At the outset of his lectures, Cardozo gives a very clear answer. If the rule that fits the case is supplied by the Constitution or by statute, he says, "the judge looks no farther. The correspondence ascertained, his duty is to obey."\textsuperscript{23} There is sometimes room for interpretation of the rule, to be sure — especially when one is dealing with what Cardozo calls "the great generalities" of the Constitution\textsuperscript{24} — but where "the rule of constitution or statute is clear . . . then the difficulties vanish."\textsuperscript{25}

Well, perhaps they do not vanish entirely. What could be more clear, for example, than these words from article 1, section 10 of the Constitution of the United States: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." If I borrow money from a lending institution, giving a mortgage on a parcel of real property and agreeing that the lender may foreclose the mortgage if I do not pay my debt at a time fixed in the contract, may the state in which the property is situated subsequently pass a law barring foreclosure during a period of economic depression? One might think not, but one would be wrong. The state of Minnesota passed just such a law in 1933, during the Great Depression, and a year later the Supreme Court of the United States held that the law was constitutional.\textsuperscript{26}

\begin{itemize}
\item[19.] \textsc{Cardozo, NJP, supra} note 1, at 103.
\item[20.] \textsc{Cardozo, GOL, supra} note 2, at 60.
\item[21.] \textsc{Cardozo, NJP, supra} note 1, at 104.
\item[22.] \textsc{Id.} at 108.
\item[23.] \textsc{Id.} at 14.
\item[24.] \textsc{Id.} at 17.
\item[25.] \textsc{Id.} at 18.
\item[26.] \textsc{Home Bldg. & Loan Ass'n v. Blaisdell}, 290 U.S. 398 (1934).
\end{itemize}
Cardozo was a member of the Supreme Court by that time, and he concurred in the majority opinion written by Chief Justice Hughes. We now know that Cardozo wrote — but never filed — a separate concurring opinion. In it he acknowledged that upholding the Minnesota statute "may be inconsistent with things that men said in 1787 when expounding to compatriots the new written constitution," and upholding the statute "may be inconsistent with things that they believed or took for granted" in 1787. But, he continued, "[i]t is not in my judgement inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret 'in the light of our whole experience' the Constitution that they framed for the needs of an expanding future." That is "the method of sociology" with a vengeance!

The Constitution also says that no person shall be eligible for the office of President of the United States who has not attained the age of thirty-five years. The framers of the Constitution obviously were not thinking about the possibility that a woman might some day be elected President, and everyone knows that women mature faster than men. Would a thirty-three year old woman be eligible for President, then, if a judge thinks that the framers would want to lower the age for women if they were around today and had the power to do so? I'll let you be the judge of that one!

I do not mean to suggest, of course, that I think the results produced by the method of sociology are invariably indefensible. Clearly they are not. The greatest triumph of this method, undoubtedly, is Brown v. Board of Education. Perhaps a different legal analysis would have been more satisfactory in that case, but few would quarrel with the proposition that the out-


The reason Cardozo decided not to file his concurring opinion in the Minnesota mortgage moratorium case was probably not that he developed second thoughts about what he had said in it. The reason, rather, appears to have been that Chief Justice Hughes expanded his majority opinion to say much the same thing on behalf of the Court. See Blaisdell, 290 U.S. at 442-43.


come reached by the Court in Brown was absolutely right. One cannot say the same thing of the outcome of the Dred Scott case, \textsuperscript{30} however — and Dred Scott too, I am afraid, is a classic example of the “method of sociology.” So also is Roe v. Wade\textsuperscript{31} — and it would be interesting to know how Cardozo would have voted on that one had he been a member of the Supreme Court in 1973. Or now he would have voted on it in 1933, for that matter.

A contemporary example of “the method of sociology,” rather less prominent than Roe but an excellent illustration of how the method works, is Elrod v. Burns.\textsuperscript{32} There, as you may recall, the Supreme Court held that Republican employees of the Sheriff's Department of Cook County, Illinois could not be fired because of their political affiliation when the voters elected a Democratic sheriff to replace a Republican. The spoils system, for the most part, was thus ruled unconstitutional; the voters can still get rid of the rascals whose names are on the ballot, but no one can get rid of the little rascals whose names are not on the ballot — or at least cannot get rid of them wholesale. Wholesale patronage firings, wrote Justice Brennan in his plurality opinion in Elrod, produce “inefficiency,” and new-hires brought in on a patronage basis may not be any “more qualified to do the job.”\textsuperscript{33} Considerations of efficiency in the operation of the government clearly helped shape the decision on whether the operation of the spoils system violated the First Amendment rights of existing employees; the method of history was rejected in favor of the method of sociology.

The method of sociology can sometimes produce fairly dramatic results when applied to the interpretation of statutes. One of my favorite examples is Church of the Holy Trinity v. United States,\textsuperscript{34} a case decided by the U.S. Supreme Court more than a hundred years ago, when Cardozo was little more than a teenager. Congress had passed a statute making it unlawful to assist “any” foreigner in coming to the United States under contract to

\textsuperscript{30} Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
\textsuperscript{31} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{32} Elrod v. Burns, 427 U.S. 347 (1976). Our court's most recent analysis of Elrod may be found in Rice v. Ohio Dep't of Transp., 14 F.3d 1133 (6th Cir. 1994).
\textsuperscript{33} Elrod, 427 U.S. at 364-65.
\textsuperscript{34} Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
perform "any kind" of labor or service here, and the question before the Court was whether the statute prohibited a church from contracting to bring an English clergyman into this country to serve the church as its pastor. One might suppose that the "any foreigner" category would be broad enough to include subjects of Queen Victoria, just as one might suppose that "labor or service of any kind" would be broad enough to include labor in the vineyard of the Lord. And the Supreme Court conceded that the contract with the minister did indeed come within the letter of the statute. But the Court held — unanimously — that the contract was not subject to the statute "because not within its spirit, nor within the intention of its makers."

How did the Court know that the "spirit" of the statute and the intention of its makers were not accurately reflected in the statutory language? Well, for one thing, the Court understood that the impetus for passage of the law was a desire to prevent foreign workers of "the lowest social stratum," as a Senate committee report put it, from coming here to work for lower wages than American workers received. It was economic protectionism that Congress was concerned about, and protection against multiculturalism of a then unfashionable sort, not protection against spiritual improvement. "It was never suggested that we had in this country a surplus of brain toilers," the Court said, "and, least of all, that the market for the services of Christian ministers was depressed by foreign competition." And the Court went on to marshall a most impressive array of evidence attesting to the fact that "this is a Christian nation." Would the legislature of a Christian nation like ours make it a misdemeanor for an American church to hire a Christian minister from abroad? An Episcopalian, at that? Of course not! The Court found the notion ludicrous, and perhaps many members of Congress who voted for the statute would have found the notion ludicrous too. In any event, given a conflict between the Court's view of the spirit of the statute and the Court's view of the statute's actual text, the lesson of the Church of the Holy Trinity case is that the spirit wins. This is the method of spirituality, I

35. Id. at 458.
36. Id. at 459
37. Id. at 464.
38. Id. at 471.
guess — and if not identical to the method of sociology, it's a very close cousin.

Interpreting statutes on the basis of an unarticulated spirit can be dangerous stuff. Dangerous for a whole host of reasons. If judges can amend the text of a statute because it produces consequences not foreseen by some of the legislators who voted for it, what statute would not be subject to amendment by the courts — which is to say, amendment by judges who, if they are federal judges, have not been elected by the voters and cannot be retired by the voters? And who can possibly know what was or was not in the mind of every legislator who voted for passage? More to the point, perhaps, who can really tell how a majority of the legislature would wish to resolve a question to which the majority never gave a moment's thought when the statute was passed? Almost always, it seems to me, the proper course for the judge will be to follow the mandate expressed by the statute itself.

Cardozo breathed hot and cold on this — as every judge does, in truth, including me — but at least he left no doubt as to what he thought a judge should do when confronted with a statutory mandate reflecting what the legislature actually meant to say:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgement in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.39

Did the Supreme Court violate the law in the Church of the Holy Trinity case? Far be it from me to say. What I can say, with some assurance, is that the approach reflected in that case is far from dead today. A perfect example — and this will be my last one — can be found in a 1987 Supreme Court decision in a case called California Federal Savings & Loan Association v. Guerra.40

39. CARDOZO, NJP, supra note 1, at 129.
40. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). This case first came to my attention because a question parallel to that presented in Guerra was presented to a panel of which I was a member in Harness v. Hartz Mountain Corp., 877 F.2d 1307 (6th Cir. 1989).
The statute at issue there was the Pregnancy Discrimination Act of 1978. In that statute Congress amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination in employment on the basis of pregnancy and to provide that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected . . . " What Congress evidently intended to do, in this statute, was to tell employers to "treat a pregnant employee the same way you treat any other employee."

The statute, according to Justice White, "could not be clearer;" a mandate to treat pregnant employees the same as other employees means exactly that: treat everybody the same. But suppose the state wants to require employers to treat pregnant employees better than anyone else — by permitting pregnant women to take longer leaves of absence from work, for example. Can the state do that?

Citing Church of the Holy Trinity, among other cases, the majority of the Supreme Court answered "yes" in the Guerra case. A mandate to treat everybody the same means only that you cannot treat pregnant employees worse, the Court concluded; it does not mean that you cannot treat other people worse, even though everybody will not be treated the same, obviously, if you treat some people worse. Had Congress intended to prohibit preferential treatment for pregnant employees, the Court thought, such an intent would have been manifested somewhere in the legislative history. It wasn't — the legislative history was totally silent on the point — so the Court held that the statute did not mean what it clearly said.

Justice White, in dissenting, acknowledged that most members of Congress probably had not considered the possibility that someone would want to give preferential treatment to pregnant workers. But where does that leave you? It can be argued — as it was argued in Guerra — that "preferential treatment represents a resurgence of the 19th-century protective legislation which perpetuated sex-role stereotypes and which impeded women in their efforts to take their rightful place in the

42. Id. (emphasis added).
43. Guerra, 479 U.S. at 297 (White, J., dissenting).
workplace." Who knows where Congress would have come down on this policy dispute had its members focused on the potential existence of such a dispute? Justice Marshall, who delivered the majority opinion in Guerra, thought that he knew what Congress would have done, and his guess may have been right. Perhaps Cardozo would have thought the same thing, if he had been on the Court; perhaps he would have rationalized the result reached in Guerra in much the same way that he privately rationalized the result reached in the Minnesota mortgage moratorium case. But in doing so, I am afraid, he would have been moving pretty far away from the "interstices" to which Holmes said judicial legislation must be confined.

Let me return, finally, to the question I asked at the beginning: Do judges still decide cases the way Cardozo said they did in his lectures at Yale? The answer, of course, is obvious. It reminds me of the answer given some years ago by the learned Frenchman who was asked to identify the greatest writer produced by France in the nineteenth century. Without a moment's hesitation, the fellow replied "Victor Hugo, alas." And the answer to the question whether Benjamin Cardozo got it right in his lectures on the nature of the judicial process is that yes, he certainly did. Alas.

ARTICLES

IMPEDIMENTS TO GLOBAL PATENT LAW HARMONIZATION

by Anthony D. Sabatelli*

FOREWORD

by J.C. Rasser**

The following article deserves the attention of a broad audience. Although its focus is on harmonization efforts in the patent law arena, many of the points it raises contain important lessons for a wide variety of legal disciplines.

At the root of the current drive for patent law harmonization is the recognition that the existing fragmented system of national patent laws and patent offices creates roadblocks for international trade. The vision is one of a global village, which would allow an inventor to obtain a world patent by filing and prosecuting one patent application in one patent office. There are many impediments toward achieving this vision. The three most important ones are as follows:

1. The reluctance of national governments to give up their current systems which allow them to use their patent laws to favor domestic entrepreneurs;

2. The relinquishment of a portion of national sovereignty for the sake of a global system; and

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3. The reconciliation of the different national interests of the developing countries (i.e., the Third World) and the developed countries.

These impediments are by no means unique to patent law harmonization. They also arise in attempts to harmonize antitrust laws, environmental regulations, drug approval procedures, and government subsidy policies. Even though the guises in which these impediments appear may be different, the core issues will always remain the same. It is for these reasons that I strongly recommend anyone whose practice involves international trade to take a closer look at what is evolving in the world of patent law.

I. INTRODUCTION

This paper will focus on the impediments to global harmonization of the diverse patent laws currently existing in the world. As used in this paper, the term harmonization goes beyond its traditional meaning of the attempt to align the procedural and substantive patent laws of the global community. The term is used more broadly to encompass the long term vision of a single patent document that would be globally enforceable.

Multilateral negotiation efforts have been ongoing in an attempt to achieve global harmonization of intellectual property laws. These efforts have been targeted primarily on two fronts: the negotiation of a supplemental agreement to the 1967 Stockholm Revision of the Paris Union Treaty, which is administered by the World Intellectual Property Organization (WIPO); and the negotiation of an intellectual property treaty dealing with trade-related aspects of intellectual property rights (TRIPs) as part of the recently concluded Uruguay Round of the General Agreement on Tariffs and Trade (GATT).¹

Despite these multilateral attempts, true harmonization is a lofty goal. The dream of a single, globally valid and enforceable patent is probably not attainable in the future. Furthermore,

¹. The Uruguay Round of the GATT negotiations was concluded with the signing of the treaty on April 15, 1994. As of September 30, 1994, however, only 26 of GATT's 123 member countries had ratified the treaty. The United States ratified the GATT Treaty on December 8, 1994 when President Clinton signed the Uruguay Round Agreements Act into law. 140 CONG. REC. D1274 (daily ed. Dec. 8, 1994).
there is polarization between the developed and developing coun-
tries of the world, with the developed countries supporting the
harmonization treaty efforts and the developing countries seek-
ing to obtain special concessions favorable to them. There is a
concern, especially among the developed countries of the world,
about the lack of international enforcement remedies for in-
fringement. Developed countries see these defects as adversely
impacting international trade and technology transfers. In es-
sence, intellectual property matters have become inseparable
from international trade and technology transfer issues.

Impediments of global patent law harmonization will be ex-
plored in detail in view of the two major harmonization at-
ttempts, the WIPO and the GATT/TRIPs. As background, a re-
view will first be provided on patents in general and their impor-
tance to the modern international economy. This review will be
followed by a summary of the major treaties and organizations
which have attempted to address global and regional patent
harmonization. Next, an in-depth analysis will focus on the criti-
cal provisions of the WIPO treaty and the recent GATT/TRIPs
effort. Despite the significance of these two harmonization trea-
ties, many important issues are unaddressed, impeding harmoni-
ization. Arguably the most serious of these impediments is
whether the United States will adopt a first-to-file system to
conform with the rest of the world.

Finally, recommendations are provided on how patent law
harmonization efforts should be conducted to achieve meaningful
results. The United States must take a lead role in the current
negotiation efforts and should use the first-to-file issue as a quid
pro quo to obtain important concessions from the other parties.
The importance of this first-to-file concession will gradually di-
minish as more multinational United States corporations in-
creasingly operate under a de facto first-to-file system, and also
as the United States' share of international trade gradually di-
minishes. Therefore, the United States must proactively use its
first-to-file concession while it is still a valuable equity that can
be leveraged to accelerate current harmonization efforts and to
obtain important concessions from other parties to strengthen
international trade and technology transfers.
II. PATENTS AND THE NEED FOR GLOBAL HARMONIZATION

A. Some Aspects of Intellectual Property

Intellectual property law generally deals with the property rights of intangible forms of property in the industrial, scientific, and literary or artistic fields. Intellectual property has been defined by WIPO as "information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world."\(^2\) The intellectual property right is not in the tangible object itself, but in the information reflected by that object, or in the processes associated with the manufacture of the object.\(^3\) Intellectual property also has the unusual characteristic of not being depleted by use. For example, a potentially unlimited number of copies of the tangible object can be created, or a process for its manufacture can be repeated an unlimited number of times, based on the use of the underlying intangible intellectual property. This elusive characteristic of intellectual property has also made it susceptible to taking by others. It is the prevention of this taking which has led to national laws for the procurement and protection of intellectual property rights.

Intellectual property has traditionally been divided into the three areas of patents, trademarks and copyrights.\(^4\) The focus of this paper will be on patents, although many of the issues discussed herein are also relevant to the other branches of intellectual property.


One of the difficulties in dealing with patent harmonization issues is that harmonization is an international issue, while the underlying patent itself is the creation of a national entity. A

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2. INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 3 (Marshall A. Leaffer ed., 1990) (quoting WORLD INTELLECTUAL PROPERTY ORGANIZATION, BACKGROUND READING ON INTELLECTUAL PROPERTY 3 (1988)) (emphasis added) [hereinafter Leaffer].
3. Id.
4. See generally R.A. CHOATE ET AL., PAT. L. (3d ed. 1987). Other areas which come under the umbrella of intellectual property include trade secrets, mask works (a series of encoded images on a semiconductor chip), and unfair competition.
patent is defined as a "grant of some privilege, property, or authority, made by the government or sovereign of a country to one or more individuals."5 For example, in the United States, there is a specific constitutional basis for its patent system. The United States Constitution provides that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."6 Congress acted on this constitutional prerogative in 1790 by enacting the first Patent Act. The United States Patent and Trademark Office was established as an administrative body in 1836.7

The current patent statutes provide that "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent."8 This right to obtain a patent in the United States is provided to the inventor who is given a seventeen-year monopoly "to exclude others from making, using, or selling the invention throughout the United States."9

There are important policy reasons for a government to provide patent protection to its citizens. In the absence of intervention by a governmental entity, it would otherwise be difficult for an individual to practice an invention and to maintain rights to that invention without its unauthorized use by others, unless the invention is something that is difficult to reverse-engineer and copy. It is important for the governmental entity to provide protection to encourage innovation and investment. The purpose of patent protection is to serve the interests of society and to advance technology development by encouraging risk taking with the goal of leading to innovation and investment. Furthermore, those involved in technology development and their investors depend on the prospect of recovering such costs by the potential of reaping future profits under the umbrella of a temporary patent

8. 35 U.S.C. § 101 (1988). This section defines as patentable subject matter the four areas of processes, machines, manufactures, and compositions of matter.
9. Id. § 154. The patent term for plant and utility patents is 17 years but only 14 years for design patents. Id. §§ 154, 161, 173.
monopoly. Patent protection provides some certainty to those incurring research and development costs by providing a limited monopoly under which the inventor and his supporters can implement their technology to recoup their developmental efforts and to reap a financial benefit as an incentive to yet further development. However, such patent protection rights have generally stopped at national borders. The problem remains as to how to expand patent protection meaningfully beyond national borders. Therefore, patent laws which initially emerged as a territorial concern to meet the needs of the state have developed into an important subject of international scrutiny.

C. The Conflict Between National Patent Rights and International Trade Issues

There are inherently competing interests on both the national and international levels for providing patent protection. On the national level, there is the conflict between the rights of the inventor to his invention versus the public interest of promoting technological and economic development. On the international level, there are the conflicts which arise from the competing interests which the national entity has in providing national patent protection versus the interests of the international community in unrestricted trade and technology transfers.

As discussed above, patent protection and the patent grant itself derive from the sovereign as incidents of national law. The national government seeks to control its patent system because of the control it provides over technological and economic developments for its own country. Furthermore, there is a nationalistic and protectionist tendency to resist pressures for change from outside the national borders.

In today's world, goods and technology constantly flow across national borders. For example, as of 1991, it has been estimated

that approximately twenty-five percent of United States exports involve some form of intellectual property.\textsuperscript{14} The international impact of patents is ever increasing for three primary reasons: (1) commerce in intellectual property has become an even greater component of trade between nations; (2) world commerce has become ever more interdependent, thus establishing a need for international cooperation; and (3) piracy of intellectual property is ever increasing, particularly in the Third World, and underscores the increasing conflicts of the rights of intellectual property owners in the developed world with the economic goals of the developing world.\textsuperscript{15}

However, as world trade increases and multinational corporations grow, there is the problem of obtaining uniform patent protection which extends beyond national borders, namely international patent protection. This need for international patent protection is the primary impetus in the quest for patent law harmonization. For patent harmonization to be truly effective, it must encompass a number of areas, including the following: a uniform definition of patentable subject matter; uniform application and filing procedures; uniform examination and grant procedures; and uniform interpretation, remedies, and enforcement. All of these aspects of harmonization must be addressed in enforceable international treaties.

A major problem of a national patent grant is that it is only valid and enforceable within the territorial nation making the grant. In the absence of an international treaty, a nation is powerless to enforce a patent beyond its national borders. However, there have been unilateral attempts to achieve some extraterritorial control over patent enforcement. For example, 35 U.S.C. §§ 271(f) and (g) were enacted in response to the United States Supreme Court's decision in \textit{Deepsouth Packing Company v. Laitram Corporation}, which held that there is no patent infringement if all the parts of an accusing device are manufactured domestically but the final construction occurs abroad.\textsuperscript{16} These Code provisions are an attempt by the United States to exert

\textsuperscript{14} Register Oman's Address to the Atlanta Meeting of the Patent, Trademark and Copyright Section of the ABA, 42 Pat. Trademark \\ & Copyright J. (BNA) 427 (Aug. 29, 1991) [hereinafter Oman's Address].

\textsuperscript{15} Leaffer, \textit{supra} note 2, at 1-2.

effective patent enforcement extraterritorially. For example, section 271(f) prohibits United States-based entities from exporting offending components of a patented invention with the object of causing an infringement outside the United States.\textsuperscript{17} Section 271(g) prohibits importation of a product that has been made by the unauthorized use of a process patented in the United States.\textsuperscript{18} Furthermore, the United States has other trade laws which seek to place economic pressure on those countries which have either inadequate or inadequately enforced intellectual property laws.\textsuperscript{19} However, these attempts by the United States to achieve extraterritorial control and enforcement of intellectual property rights have been viewed as trade barriers by the international community.\textsuperscript{20}

Another aspect underlying the tension between national patent rights and international trade issues and technology transfer issues is that there are many differences among the patent laws of the countries of the world. Some of these differences are best exemplified by comparing the United States patent system with the rest of the world. For example, the question of what is patentable subject matter varies from country to country. In the United States patent protection is extended to "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement."\textsuperscript{21} This scope of patent protection has been extended to cover computer programs when entwined with a patentable process,\textsuperscript{22} genetically engineered non-human organisms\textsuperscript{23} and therapeutic methods of treating humans.\textsuperscript{24} However, many other countries of the world, both

\textsuperscript{17} 35 U.S.C. § 271(f) (1988).
\textsuperscript{18} Id. § 271(g).
\textsuperscript{20} Trade Laws Seen to Create Perception of Unilateral Action by United States, 10 Int'l Trade Rep. (BNA) 1178 (July 14, 1993).
\textsuperscript{22} See Diamond v. Diehr, 450 U.S. 175 (1981).
\textsuperscript{24} In re Scherer, 103 U.S.P.Q. (BNA) 107 (Patent Office Bd. of Appeals 1954).
developed and developing, do not provide such protection. For example, pharmaceutical products are excluded from patent protection in Argentina, Japan, Turkey, and Venezuela.  

Another major issue is the first-to-file controversy. The United States awards patents to the first-to-invent as opposed to the first-to-file a patent application. In contrast, essentially all other countries of the world operate on a first-to-file system. The difference raises the possibility that a patent for the same invention could be awarded to different parties in the United States versus other countries of the world. Another difference in patent laws is that in the United States, a patent application is examined for novelty and obviousness in a formal ex parte proceeding by the United States Patent and Trademark Office. In many other countries, the patent application simply publishes after a period of time and is never examined except as to non-substantive formalities. Countries such as Egypt, Italy, Spain, and Switzerland follow this latter procedure.

Some other important areas of international non-uniformity include the following examples which are chosen from a United States standpoint. First, in the United States there is a requirement for disclosing the “best mode” for making the invention that is known at the time of the filing of the patent. However, in most other countries there is no such best mode requirement, with the patent being required merely to disclose a single, but not necessarily the best, mode of carrying out the invention. Second, most countries provide for automatic publication of their patent applications eighteen months after filing. In the United States, all patent applications are currently kept secret, being prosecuted before the U.S.P.T.O. in an ex parte proceeding, and do not publish unless they are examined and allowed to issue.

25. AUGUST, supra note 13, at 609.
29. AUGUST, supra note 13, at 608.
31. AUGUST, supra note 13, at 607-08.
32. 35 U.S.C. § 122 (1988). However, the U.S.P.T.O. held a public hearing on
Third, in the United States, only the inventor can apply for a patent, although the patent later can be assigned. In most of the world, the assignee can also apply for the patent. Fourth, the United States provides for a twelve-month grace period after public disclosure of an invention during which the inventor can modify and optimize the patent application. The remainder of the world recognizes no such grace period. Fifth, the United States distinguishes between domestic and foreign prior art as a statutory bar to patentability. There is little uniformity in the rest of the world for dealing with this domestic/foreign prior art dichotomy. Sixth, interpretations and enforcement procedures vary widely from country to country.

D. The Need for Patent Harmonization

The need for global patent harmonization is underscored by the inherent conflict of the national entity versus the international community and the conflicting and inconsistent web of national patent laws currently in existence. Furthermore, the existence of separate, unharmonized national patent systems leads to duplicative and wasteful efforts in patent procurement on an international scale.

However, current harmonization attempts will probably be inadequate to achieve the goals of uniform, valid international patent protection. For example, the proposed patent harmonization treaty being promulgated by the WIPO is primarily focused on non-substantive procurement issues. This proposed treaty does not adequately address substantive pre-grant issues, such as substantive patent examination nor important post-grant issues such as patent claim interpretation, patent enforcement and remedies for infringement. Under the GATT, the TRIPs
treaty does recognize the importance of these post-grant issues and attempts to address them by coupling intellectual property protection to international trade and technology transfers.\textsuperscript{38} However, under the GATT/TRIPs it would remain to be seen whether an effective mechanism for enforcement could actually be achieved because implementation and enforcement would still be left to the discretion of each individual nation.\textsuperscript{39} A truly effective harmonization effort must therefore address both the pre-grant procedural issues as well as the more substantive post-grant issues.\textsuperscript{40}

The United States government recognizes the need for a harmonized world patent system. "[A] harmonized world patent system is essential because companies around the world are increasingly reliant on global markets; thus, the differences that exist today among national or regional patent offices may act as an impediment to inventors and hinder opportunities for greater trade among nations."\textsuperscript{41} The issue of obtaining global patent protection has increasingly become a subject of international concern for multinational businesses. The advancement of technology and access to international markets makes protecting foreign patent rights essential.\textsuperscript{42}

The flow of international trade is ever-increasing in the world, with intellectual property comprising an ever-increasing percentage of such trade.\textsuperscript{43} This increase in international trade in intellectual property-based goods and services has led to increasing problems of infringement and enforcement. Multinational corporations and those involved in international trade and technology transfers need the certainty and stability that effective
patent harmonization can bring. In the absence of harmonization, these problems will cause increasingly serious impediments to international trade and technology transfers. Furthermore, the increase in the percentage of international trade related to the advancements in electronics, computers and genetic engineering reinforces the need that these relatively new technology areas be adequately and uniformly protected on an international scale. \(\text{\textsuperscript{44}}\) It is recognized that intellectual property rights are critically important in preserving or regaining the competitive edge of a wide range of United States exports. This importance is underscored by the relatively high percentage of United States exports based on intellectual property, \(\text{\textsuperscript{45}}\) the serious distortion in international trade, and the threats to research and development activity threatened by infringement and piracy. \(\text{\textsuperscript{46}}\)

The foregoing discussion emphasizes the need for uniform and strengthened patent protection on an international scale. It is recognized that the goal of a global, truly international patent instrument is probably still relatively far off in the future. Despite the attempts at harmonization that have occurred and also those that are currently in progress, there are still many nations with diverse patent laws leading to non-uniform procurement and enforcement. In the interim, multinational corporations and others involved in international trade and technology transfers are forced to proceed at their own peril and create their own internal systems and patent strategies which attempt to overcome the problems of an unharmonized international patent system.

III. OVERVIEW OF THE MAJOR TREATIES AND ORGANIZATIONS RELATING TO PATENTS

A number of treaties and organizations attempt to address the issue of patent law harmonization. These international endeavors form an uncoordinated and somewhat confusing and tangled

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44. Afifi, supra note 10, at 466.
web. To date these endeavors are yet far from achieving the goal of a single, international patent document which can be validly and uniformly enforced across national borders. Most harmonization attempts have focused on non-substantive, pre-grant procurement issues. This section provides an overview of these treaties and organizations.

A. Paris Convention for the Protection of Industrial Property

The Paris Convention for the Protection of Industrial Property is the oldest international treaty dealing with intellectual property. The treaty was drafted in 1880, ratified in 1883, and became effective in 1884. The treaty has gone through six revisions, being last revised in Stockholm in 1967. The fields of industrial property covered by this treaty include not only patents, but also trademarks, trade names, industrial designs, unfair competition, and other areas of industrial property. One of the administrative organs of the Paris Convention is the WIPO, which was established in 1967 and will be discussed separately below. As of April 1992 a total of 108 countries were signatories to the Paris Convention.

The Paris Convention is based on the principles of national treatment, right of priority, and uniform rules or convention minima. National treatment is an agreement to reciprocity,
such that each member state is required to grant the same protection to the nationals of other member states as it affords to its own citizens. In other words, under the treaty a state cannot provide preferential treatment under its intellectual property laws to its own nationals at the expense of non-nationals.\footnote{53} The right of priority provides that an applicant for a patent application who files in any signatory state has a grace period of one year in which to file in any other member state and claim priority to the initial filing date.\footnote{54} This provision is important because a prior filing of a patent application would operate as a statutory bar to obtaining a later filed patent in most other countries and would necessitate the cumbersome procedure of filing in each desired country on the same day. As for convention minima, however, the Paris Convention is rather rudimentary and does not set any meaningful standards. For example, the Paris Convention does not define what is patentable subject matter, nor set the minimum term of patent protection, but instead leaves these important matters to the discretion of each nation.\footnote{55} Furthermore, it has been pointed out that a country may be in compliance with the provisions of the Paris Convention even though it may fail to provide protection to such important products as chemicals and pharmaceuticals.\footnote{56} However, an example of a minimum standard is that the treaty sets forth some limitations on compulsory licenses, the requirement to work a patent in the granting nation and conditions relating to forfeiture.\footnote{57} As to patent interpretation and enforcement, the Paris Convention does not address these substantive issues. There is an article dealing with the resolution of disputes in the International Court of Justice; however, this article has no real force. Not many international patent infringement disputes go before the court; when they do the ruling of the court can be ignored.\footnote{58}

\footnote{54. \textit{Id}. art. 4, 21 U.S.T. at 1586, 828 U.N.T.S. at 313.}
\footnote{55. MASTERS, \textit{supra} note 45, at 734.}
\footnote{58. \textit{Id}. art. 28, 21 U.S.T. at 1613, 828 U.N.T.S. at 364.}
A major shortcoming of the Paris Convention is that it leaves its implementation up to the discretion of each individual signatory nation rather than incorporating uniform implementation provisions. Under the Paris Convention, each state remains free to adopt its own patent granting procedures and substantive patent laws. In effect, the Paris Convention leaves great discretion to national legislators in determining how to protect industrial property rights. This weakness of the Paris Convention is illustrated by the fact that signatory countries are not required to adhere to uniform standards of patentable subject matter. For example, Argentina, Brazil and India provide inadequate patent protection for pharmaceutical products, chemical compounds and food stuffs. Furthermore, the provisions of the Paris Convention are very loosely interpreted as evidenced by the fact that Argentina has laws that do not conform to the convention and that India was actually invited to join the convention without being required to amend its offending laws. However, despite these shortcomings, the Paris Convention was and still is an important attempt toward establishing agreement and standards for intellectual property. Also, the Paris Convention was quite progressive at its inception in 1883. The Paris Convention is significant in that it spawned the WIPO organization with its important harmonization efforts.

B. World Intellectual Property Organization

The WIPO was established by a convention signed in Stockholm on July 14, 1967. WIPO ultimately became a specialized agency of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and is headquartered in Geneva,

59. Afifi, supra note 10, at 457.
61. Gutterman, Recent Developments, supra note 56, at 339.
Switzerland. WIPO was established to administer the major patent, trademark and copyright treaties and conventions such as the Paris Convention, the Patent Cooperation Treaty and the European Patent Convention. Also, WIPO is promulgating a major patent treaty harmonization attempt of its own. Other organizations and groups in turn operate under the auspices of WIPO. WIPO's charter is to promote the protection of intellectual property on a worldwide scale.

The WIPO convention established the governmental structure of the organization. Membership is open to any state that is a member of any of the treaties administered by WIPO or to any state that is a member of the United Nations. A total of 139 countries are members of the WIPO Convention.

C. Patent Cooperation Treaty

The Patent Cooperation Treaty (PCT) was negotiated in 1970 and enacted on January 24, 1978. Its main purpose was to create a union for cooperation in procedural and procurement matters such as filing, searching and examining patent applications. It did not, however, create an international patent instrument. A total of sixty-eight countries are signatories to the PCT.

The PCT has been an effective tool for simplifying and facilitating multi-country patent application filings. For example, the

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64. Leafier, supra note 2, at 13.
65. Id.
68. Id. art. 5, 21 U.S.T. at 1754, 828 U.N.T.S. at 12.
69. Id. supp. 64, at 1-4 (Aug. 1991).
71. Id. art. 1, 28 U.S.T. at 7649, 9 I.L.M. at 978.
72. Leafier, supra note 2, at 76.
PCT permits the filing of a single application with subsequent designation of the individual countries in which the patent is to be filed.\textsuperscript{74} After filing, the application is initially reviewed to check for compliance with filing formalities, and if in compliance, the application is given a filing date which serves as the priority date for the subsequent national patent filings.\textsuperscript{75} The application then undergoes an international search, and a report is sent to both the applicant and to the International Bureau of the WIPO.\textsuperscript{76} The application document is then published along with the search report on the eighteen-month anniversary of the filing.\textsuperscript{77} There are also provisions for a non-binding examination of the patent document; however, this examination option is not utilized by many of the PCT signatory states.\textsuperscript{78} On the thirty-month anniversary of the filing, the application will enter the national stage where it is formally filed with each of the designated states for prosecution and ultimate issuance by each of these states.\textsuperscript{79}

The PCT is purely administrative and procedural in that it was designed to deal with providing uniform filing procedures and facilitate the obtainment of an internationally valid priority date. The PCT is a small, but important, step toward harmonization. Its most important benefit has been in the convenience and time savings it has provided for those filing patent applications in more than a single country. Furthermore, because under the PCT system a patent application does not enter the individual national patent offices until thirty months after filing, the system provides a convenient procedure whereby an applicant can keep open filing options for up to thirty months instead of having to file initially in each desired country. This thirty-month period is extremely useful in providing the applicant time to evaluate the commercial viability of an invention and to determine whether widespread filing is warranted. The PCT is probably the most important of the in-force treaties by virtue of its practical and efficient filing procedure and track record for reliability.\textsuperscript{80}

\begin{itemize}
  \item \textsuperscript{74} PCT, \textit{supra} note 70, art. 9, 28 U.S.T. at 7656.
  \item \textsuperscript{75} Id. art. 11, 28 U.S.T. at 7656.
  \item \textsuperscript{76} Id. arts. 15-18, 28 U.S.T. at 7660-65, 9 I.L.M. at 981-82.
  \item \textsuperscript{77} Id. arts. 20-21, 28 U.S.T. at 7666.
  \item \textsuperscript{78} Id. arts. 31, 33, 28 U.S.T. at 7677-79.
  \item \textsuperscript{79} See Afifi, \textit{supra} note 10, at 469; Leaffer, \textit{supra} note 2, at 76-78.
\end{itemize}
PCT is not, nor was it ever, intended to address substantive patent law harmonization issues or provide a single, global patent instrument.

D. European Patent Convention

The European Patent Convention (EPC) was signed in Munich, Germany on October 5, 1973 and entered into force on October 7, 1977. The EPC sets up a regional system for the European community in filing a single international application. The EPC has two administrative bodies, the Administrative Council and the European Patent Office (EPO). The Administrative Council is comprised of representatives from each of the member states and has responsibility for overseeing the EPO. The EPO is located in Munich with a branch office at The Hague.

The EPC is similar to the PCT in that an applicant files a single patent with the EPO and designates the individual EPC countries in which protection is sought. After the application is allowed, the EPO will issue a European Patent that matures into a group of individual patents, each having national force, in the designated member countries. However, the European Patent is not a single patent providing uniform protection throughout the European Union (EU), formerly called the European Community (EC), because individual national patents so derived are governed by the laws of each individual state.

The EPC, like the PCT, is more procedurally oriented in that it facilitates filing in the EU, although an applicant may elect to proceed in only certain ones. However, the EPC goes further toward establishing substantive provisions for harmonization. For example, the EPC defines patentable subject matter and excludes from patentability certain classes of subject matter.

82. Leaffer, supra note 2, at 141-42; LETTERMAN, supra note 66, § 12.2, at 20-21.
83. EPC, supra note 81, art.7, 13 I.L.M. at 277.
84. Id. arts. 7, 26, 13 I.L.M. at 277, 281.
85. Id. arts. 75-86, 13 I.L.M. at 289-91.
86. Id. art. 64, 13 I.L.M. at 287.
87. Id.
88. Id. arts. 52, 53, 13 I.L.M. at 285-86.
Most notably the EPC excludes as patentable "[m]ethods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body."98 Also excluded from protection are "plant or animal varieties or essentially biological processes for the production of plants or animals."99

The EPC has been a very useful patent treaty throughout the member countries and represents a small, but significant, step toward a more substantive harmonized patent system. A shortcoming of the EPC is that it is only available to the member countries. An EPC patent is of the same force in each designated country as if the patent had been granted by that member country.91 Patent infringement and enforcement issues are determined according to the national laws of each member country through the individual national court systems.92

E. Community Patent Convention

The Community Patent Convention (CPC), or Convention on the Grant of European Patents, is an attempt to create a single patent instrument which would have uniform validity throughout the entire EU. In other words, the CPC is the logical extension of the EPC. The CPC was implemented in 1975 by the Luxembourg Treaty and was revised and amended in 1985.93 However, this treaty has not been enforced.94 The treaty would become effective after ratification by all members of the EU.95 To date, Ireland and Denmark have not ratified the CPC.96 The newer members of the European Union, such as Greece, Spain and Portugal, were required to commit to the Luxembourg Treaty when they became Union members.97 However, the trea-

89. Id. art. 52(u), 13 I.L.M. at 285.
90. Id. art. 53(b), 13 I.L.M. at 286.
91. Id. art. 2, 13 I.L.M. at 276.
92. Id. art. 64, 13 I.L.M. at 287.
95. Id. at 105.
96. Id.
97. Id.
ty is a separate independent contract under international law and is not part of the treaty establishing the original EC.98

The purpose of the CPC is to convert the European Patent (which ordinarily issues into a group of individual patents) into a single multinational patent for all the Union members.99 In other words, the CPC would abolish the necessity of further issuance of separate national patents for each of the member states. This European Patent would be granted under the auspices of the EPO, but would be uniformly valid throughout the Union.100 Significantly, under the Luxembourg Treaty infringement and validity would be adjudicated in any single Union country and would be binding on the remaining countries.101 The CPC also foresees the establishment of a multinational court of appeals,102 which would be essential in order to harmonize its implementation and interpretation.

Due to various technical and constitutional problems, the CPC has not as yet come into force. However, it would be the first multinational patent treaty to attempt to achieve true harmonization.103 The CPC, if implemented, will probably be closely scrutinized because it would be a microscopic version of a harmonized patent system designed to address both pre-grant procedural and post-grant substantive issues. The CPC is designed to take the EPC to its logical conclusion of true harmonization. In practice, however, it will be interesting to follow how infringement and patent validity issues will be enforced under the CPC or whether the system will lead to forum shopping among the Union members in search of the possibility of the most favorable decision to be binding among the remaining members.

98. Id.
99. Id.
100. Id. at 106.
101. Id.
102. Id.
103. A multinational patent treaty exists among the Scandinavian countries. The Nordic Patent Treaty provides that a patent obtained in any one of the Scandinavian countries is automatically given validity in the other Scandinavian countries. Aafi, supra note 10, at 459. However, the treaty does not establish a single Scandinavian patent administered by a central office; instead, it gives multinational force throughout Scandinavia to a national patent grant. Id.
F. WIPO Proposed Harmonization Treaty

The WIPO convened a series of meetings of experts beginning in 1985 to address the problem of improving and harmonizing the patent laws of countries worldwide.\textsuperscript{104} From these meetings a Patent Harmonization Treaty began to take shape and was prepared in draft form in 1987. In 1991, a diplomatic conference was convened to revise the treaty for final negotiations. The current draft treaty, called the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents are Concerned (WIPO Treaty), has a preamble and thirty-five articles and eight implementing rules.

The final negotiation rounds for the WIPO Treaty were originally slated for July 12-30, 1993.\textsuperscript{105} However, WIPO officials announced on April 22, 1993 that these July negotiation sessions would be postponed at the request of the United States.\textsuperscript{106} As of September 30, 1994, no new date had been set for the resumption of these negotiations. On October 7-8, 1993, the United States Patent and Trademark Office held public hearings in Washington to obtain public reaction to the proposed WIPO Treaty and to gauge the relative support or opposition to some of its more controversial provisions.\textsuperscript{107}

The proposed WIPO Treaty, if adopted by the United States, would require two fundamental changes in United States patent law. Article 9 of the treaty calls for awarding patents to the first inventor to file a patent application for a given invention.\textsuperscript{108} This provision is diametrically opposed to the United States patent laws which award a patent on the basis of first-to-invent. Some would even argue that a change to first-to-file is also at odds with the patent grant language of the Constitution.\textsuperscript{109} Article 15 of the treaty would require publication of all patent

\textsuperscript{105} See Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned, World Intellectual Property Organization PLT/DC/69 (Jan. 29, 1993) [hereinafter WIPO Treaty].
\textsuperscript{107} U.S. PATENT AND TRADEMARK OFFICE, supra note 104, at 113-15.
\textsuperscript{108} WIPO Treaty, supra note 105, at 50.
\textsuperscript{109} Don Banner & Skip Kaltenheuser, The Race Between First-To-Invent and First-To-File, LEGAL TIMES, Oct. 4, 1993, at 26, 41.
applications eighteen months after filing.\textsuperscript{110} This provision is at odds with the current United States practice whereby a patent application remains secret until it issues as a patent document.\textsuperscript{111} However, the United States will be implementing eighteen-month publication of patent applications commencing January 1, 1996.

The focus of the WIPO Treaty, however, is on the less substantive procurement procedures, in that the treaty does not provide for a multinational patent document nor for uniform rights and protections. In fact, the WIPO Treaty calls for patent procedures that are most similar to existing procedures used by the EPO.\textsuperscript{112} For example, article 19, which would have provided for the conferral of minimum rights of patent protection, has been removed from the current draft of the treaty, and the conferral of patent rights has been left to the discretion of each of the signatory states.\textsuperscript{113} Furthermore, "WIPO's harmonization negotiations are viewed primarily as a forum to resolve differences among patent systems of developed countries."\textsuperscript{114} For example, there is the real concern that the WIPO Treaty may only be accepted by the United States, the EU and Japan but not by the remainder of the world.\textsuperscript{115} The developing countries have not been as active in WIPO, although they had submitted proposals to the negotiations committee which would have abolished the requirement of a specific term of patent protection and which would have provided exceptions for patenting certain classes of technology.\textsuperscript{116}

Despite the attempt by WIPO to seek harmonization of world patent laws, the treaty raises many unanswered questions. However, it is an important step toward the goal of substantive patent harmonization.

\begin{footnotes}
\item[110.] WIPO Treaty, supra note 105, at 74.
\item[111.] Id. at 94.
\item[112.] Mendelowitz, supra note 41, at 2.
\item[113.] WIPO Treaty, supra note 105, at 74.
\item[114.] Mendelowitz, supra note 41, at 2.
\item[115.] Id.
\end{footnotes}
G. General Agreement on Tariffs and Trade (GATT): 
Trade-Related Aspects of Intellectual Property Rights

The GATT is an international commercial treaty signed on 
October 30, 1947 in Geneva, Switzerland.\textsuperscript{117} The GATT initially 
was conceived as a mechanism for removing unnecessary technical obstacles to trade, initiating large-scale negotiations to reduce tariffs and for agreeing on a code of conduct to help eliminate discriminatory practices in international trade.\textsuperscript{118} At its inception, the treaty was intended to provide a temporary means for implementing tariff concessions and regulating international trade until a permanent international trade organization could be established.\textsuperscript{119} This international trade body, the World Trade Organization (WTO), finally came into force on January 1, 1995.\textsuperscript{120} However, an interesting result of the forty-eight-year delay in establishing the WTO is that the GATT has continued to outlive its once temporary status and has become the premier international treaty addressing trade issues.

The GATT has grown to be an institution charged with conducting trade negotiations and settling international trade disputes among nations.\textsuperscript{121} It is a multilateral agreement aimed at expanding, liberalizing, and encouraging world trade and the transfer of technology. "The GATT is unique among international institutions in that its primary raison d'etre is to oversee the negotiation of international rules governing trade."\textsuperscript{122} The GATT also provides a forum in which countries can resolve trade disputes and negotiate resolutions on tariff and non-tariff trade barriers.\textsuperscript{123}

Since 1947, there have been eight major international conferences, or "rounds," for further modifying the GATT and addressing new international trade issues.\textsuperscript{124} The focus of the GATT

\textsuperscript{118}Kunz-Hallstein, supra note 60, at 266.
\textsuperscript{119}Gadbaw & Richards, supra note 62, at 42.
\textsuperscript{120}49 Pat. Trademark & Copyright J. (BNA) 492-94 (Feb. 23, 1995).
\textsuperscript{121}Gadbaw & Richards, supra note 62, at 48.
\textsuperscript{122}Id. at 29.
\textsuperscript{124}Harry B. Ensley, Intellectual Property Rights in the GATT, 15 NEW MATTER 1
has been expanded from removing tariff obstacles to international trade toward removing non-tariff barriers, including the abolition of restrictive and unharmonized intellectual property laws throughout the world.\textsuperscript{125} Also, the United States has been instrumental in moving the focus of the GATT toward non-trade issues, in that "The U.S. initiative to view intellectual property rights as a trade issue has added a new dimension to international perceptions of the importance of protection."\textsuperscript{126}

The eighth negotiation round of the GATT, also known as the Uruguay Round, began in September, 1986 and concluded on December 15, 1993.\textsuperscript{127} On April 15, 1994, the treaty was signed.\textsuperscript{128} As of September 30, 1994, only twenty-six of the GATT's 123 members had ratified the agreement. However, on August 3, 1994, Representative William Hughes of New Jersey and on August 5, 1994, Senator Dennis DeConcini of Arizona introduced legislation, House Bill 4894 and Senate Bill 2368, respectively, to implement the various provisions of the TRIPs Accord.

The Uruguay Round of the GATT is unique in that it establishes the WTO and a council for TRIPs.\textsuperscript{129} This TRIPs council is one of fifteen such groups dealing with various trade-related issues. For example, the other fourteen councils are devoted to topics such as agriculture, textiles, services, and investment issues. The TRIPs part of the GATT contains eight different sections dealing with separate fields of intellectual property.\textsuperscript{130} One of these sections deals specifically with patents, which in turn contains eight articles addressing various aspects of patent practice.\textsuperscript{131} The GATT/TRIPs seeks to establish minimum standards of patent protection and enforcement worldwide, although implementation and enforcement would ultimately be left up to each national entity.

\textsuperscript{125} Kunz-Hallstein, supra note 60.
\textsuperscript{126} Gadbaw & Richards, supra note 62, at 38.
\textsuperscript{127} The Uruguay Round was launched at the GATT Ministerial Meeting in Punta del Este, Uruguay on September 12, 1986.
\textsuperscript{128} GATT: Over 100 Nations Sign GATT Accord to Cut Barriers to World Trade, 11 Int'l Trade Rep. (BNA) 636 (April 20, 1994).
\textsuperscript{129} Gutterman, Recent Developments, supra note 56, at 375.
\textsuperscript{130} Uruguay Round, supra note 38, at 59-76.
\textsuperscript{131} Id. at 69-73.
Despite its attempt to link intellectual property and trade issues, the GATT/TRIPs fails to address important post-grant patent issues relating to interpretation and the exact enforcement mechanism. Furthermore, the GATT/TRIPs is skewed toward the developing countries. This slant could create additional impediments to uniformity in that these developing countries seek to both water-down and delay the implementation of various provisions. For example, there is an emphasis on recognizing the "special needs" of the least developed countries. This emphasis on the developing countries would cause problems in suggesting that a dispensation from compliance could be achieved to the detriment of the developed countries. Furthermore, there is hostility in the GATT toward the United States. For example, the United States' unilateral patent enforcement efforts under 35 U.S.C. §§ 271(f) and (g) have been highly criticized as impinging on international trade rights. Also, section 337 of the Tariff Act of 1930 and section 301 of the 1974 Trade Act and the 1988 Omnibus Act have been viewed as a unilateral attempt by the United States to unduly influence the intellectual property policies of other nations.

Despite the potential strength of the GATT/TRIPs, the primary aim of this treaty is on trade in intellectual property and not on the procurement of an international patent document nor on uniform patent rights. The TRIPs does attempt to address uniformity. However, the treaty defers to the 1967 version of the Paris Convention and WIPO treaties. The GATT/TRIPs is unique, however, in that it seeks to take the GATT model of rulemaking and dispute settlement and apply it to the intellectual property area. The GATT/TRIPs strives to: identify a set of internationally recognized standards for intellectual property protection to be incorporated into an international code; develop a consultation and dispute settlement mechanism; establish intellectual property rights as a fundamental part of GATT concessions; and make the failure to honor such rights legitimate grounds for withdrawal of GATT concessions. Yet, despite its

132. Id. at 87.
133. Trade Laws, supra note 20.
134. Id.
135. Uruguay Round, supra note 38, at 59.
shortcomings, the GATT/TRIPs provides another important road toward harmonization.

IV. CURRENT ATTEMPTS AT PATENT LAW HARMONIZATION AND IMPEDIMENTS TO THESE ATTEMPTS

The most significant efforts directed toward multinational patent law harmonization are primarily along two fronts: WIPO's Diplomatic Conference For The Conclusion of a Treaty Supplementing the Paris Convention As Far As Patents Are Concerned (the proposed WIPO Treaty), and the TRIPs undertaken in the context of the recently concluded Uruguay Round of the GATT.

There are a number of impediments blocking these treaties. Even if these impediments were overcome, neither of these treaties would provide for true harmonization of all aspects of patent laws and their enforcement. Full implementation of either or both of these treaties would not result in a global patent instrument validly enforceable throughout the international community. Both of these treaties fall far short of providing a unified system for dealing with all aspects of pre- and post-grant patent issues. These treaties do not provide the following essential elements of a truly harmonized patent system: a uniform definition of patentable subject matter; uniform filing procedures; uniform prior art searches and examination; uniform interpretation of the issued patent; and uniform remedies and enforcement in infringement actions. Yet despite these limitations, these two treaties are important, incremental steps toward achieving ultimate harmonization and should continue to be pursued because of their interim value until more comprehensive negotiation efforts can be undertaken.

A. The Proposed WIPO Harmonization Treaty

The WIPO Treaty represents a substantive attempt to fortify the 1967 Stockholm Revision of the Paris Convention of 1883. As discussed above, further negotiation of the WIPO Treaty has been suspended in deference to the United States negotiating team's request for additional time to evaluate the treaty and to formulate a final position. This request was granted in light of the appointment in 1994 of a new Commissioner of Patents and Trademarks under the Clinton administration and of the signifi-
cant concessions which would be required for the United States to ratify the latest draft of this proposed WIPO Treaty. The WIPO Treaty's harmonization negotiations are viewed primarily as a forum for resolving differences among the developed countries. It is anticipated, however, that the only countries that would be signatories to the treaty would be the United States, Japan and most European countries. The WIPO treaty would not provide the harmonization ideal of a single, globally enforceable patent instrument, but instead would provide benefits primarily on pre-grant filing and procurement.

A number of major impediments to patent harmonization stand in the way of the adoption of the WIPO treaty. Most of these obstacles are the very issues which prompted the United States negotiating team to ask WIPO for a temporary suspension of the treaty negotiations in the first place. Among the developed nations of the world, the United States would be the most drastically impacted by the WIPO treaty. Therefore, it is important to examine the WIPO treaty and the impediments to its ratification and implementation from the United States' perspective.

The most important issues which are interfering with final adoption of the WIPO treaty include: (1) the adoption of a first-to-file system for awarding a patent; (2) the automatic publication of all patent applications eighteen months after filing; (3) the granting of prior user rights to those in possession of an invention at the time of filing by another party; (4) the recognition of non-published foreign prior art as a statutory bar to patentability; (5) the adoption of the filing date as the effective date of a foreign patent application for prior art purposes; (6) the granting of interim patent protection rights for the period between the automatic publication date and the ultimate patent grant; and (7) the adoption of a uniform term of patent protection measured from the filing date of the patent application. These issues would need to be successfully resolved to implement the current version of the WIPO Treaty.

The issue of first-to-file is probably the most significant impediment to adoption of the WIPO Treaty because it will determine

138. Id.
whether the United States will ratify the treaty. Currently, the United States is the only developed country in the world which awards its patents on the basis of first-to-invent, instead of on a first-to-file basis.\textsuperscript{139} Article 9 of the WIPO Treaty would require that all patents be granted on the basis of first-to-file.\textsuperscript{140} Adopting this article would require the United States to amend its patent laws, such as 35 U.S.C. §§ 101 and 102.\textsuperscript{141} This would represent a major philosophical shift for the United States which has been on a first-to-invent system for two centuries.\textsuperscript{142} However, these concerns are mostly academic because most United States-based multinational corporations, as well as others who routinely file patent applications abroad, already operate under a \textit{de facto} first-to-file system to preserve their international patent rights. Despite this \textit{de facto} first-to-file practice by many United States-based applicants, the first-to-file debate has been and still is a topic of significant contention in the United States.\textsuperscript{143} The debate has become highly emotional, especially for opponents who believe that adopting a first-to-file system would mean the demise of the individual inventor. The opponents of first-to-file contend that such a system would abolish the grace period it effectively provides during which an inventor can perfect an invention, obtain additional capital, and determine the viability of the invention. Without such a grace period, it is argued that such inventors would be discriminated against because they would be unable to compete effectively with those having more resources. However, these opponents lose sight of the fact that increasing numbers of United States inventors are filing foreign patent applications, and that in view of the realities of widespread patent filings abroad, the United States' first-to-invent system is an anachronism. The opponents of first-to-file are unrealistic and reactionary in view of current patent practic-\textsuperscript{139} Schroeder, supra note 116, at 475.\textsuperscript{140} WIPO Treaty, supra note 105, at 50.\textsuperscript{141} 35 U.S.C. §§ 101, 102 (1988).\textsuperscript{142} Ned L. Conley, \textit{First-to-Invent: A Superior System for the United States}, 22 ST. MARY'S L.J. 779 (1991); Charles R.B. Macedo, \textit{First-to-File: Is American Adoption of the International Standard in Patent Law Worth the Price?}, 1988 COLUM. BUS. L. REV. 543 (1988).\textsuperscript{143} See, e.g., Conley, supra note 142, at 779; Bernard R. Pravel, \textit{Why the United States Should Adopt the First-to-File System for Patents}, 22 ST. MARY'S L.J. 797 (1991).
es. Besides, a first-to-file system would provide certainty of inventorship and avoid the expensive, complex and time-consuming interference practice of determining who is the first-to-invent, which is currently a part of the United States patent system. The current system has few advantages and should be abandoned in favor of a first-to-file system to provide conformity with the remainder of the world and to ratify the current practices of those United States applicants who file multinational patent applications.

More importantly, the United States should use the potential adoption of a first-to-file system as a significant bargaining chip in guaranteeing other important concessions from other parties in the WIPO patent harmonization negotiations. The value of this concession is ephemeral and will diminish in value for two reasons. First, there is already a move toward de facto first-to-file. Second, both the percentage of international trade conducted by the United States and the percentage of intellectual property held by the United States will diminish as other developed countries continue to grow and as the developing countries increasingly participate in the international economic community. Because of the diminishing of the first-to-file bargaining chip, it is imperative that the United States act in the near future. The United States should use this concession to press for harmonization on more substantive aspects of the patent law negotiations such as adoption of uniform standards of patentability, consistent patent interpretation standards, the adoption of meaningful patent enforcement procedures, and effective remedies.

Among the remaining six issues of specific concern to the United States, the automatic publication requirement of article 15 is probably the most significant. This provision would require that all patent applications automatically be published eighteen months after filing.¹⁴⁴ This would be another significant change for the United States where currently a patent application is kept secret by the United States Patent and Trademark Office until it is ultimately allowed and issued as a patent.¹⁴⁵ In contrast, most of the remaining countries of the world have an automatic publication procedure for patent applications whereby the

¹⁴⁴. WIPO Treaty, supra note 105, at 74.
application is published at some set statutory period, usually eighteen months in most countries, after filing. The policy reason for the secrecy of an unissued patent is that until a patent issues no patent monopoly benefit has actually accrued to the applicant and there is no corresponding requirement of disclosure to the public of the contents of the document. This issue of automatic publication must be resolved to achieve a harmonized world patent system. Additionally, automatic publication is another concession which the United States could leverage for gaining agreement to other important harmonization issues.

There are other substantive issues which the WIPO Treaty fails to address adequately and which raise additional impediments to patent harmonization. For example, neither article 3, section (1) nor its accompanying rule 2(l)(vi) would require that a patent application disclose the best mode for carrying out an invention. All that is required under the proposed treaty is that a single mode of carrying out the invention be disclosed, with the best mode disclosure being left as an option for each individual country to adopt or reject at its own prerogative. In the United States, for example, 35 U.S.C. § 112 requires that the inventor disclose the best mode of the invention known at the time of filing. The policy behind the best mode disclosure is that it advances international technology by requiring the inventor to provide the public with useful information for its technology base in exchange for the patent monopoly granted by the government. Therefore, the reluctance of WIPO to require a best mode requirement accentuates the weakness of many foreign patent systems which provide the patent grant without requiring full disclosure by the inventor and ignores an important means of uniformly strengthening the patent systems of the world.

The WIPO Treaty is also flawed and raises another obstacle to harmonization in that its original article 10 has been omitted from the latest draft. This article would have set the standard of requiring patent protection for all fields of technology. Its omission would continue to foster the undesirable status quo whereby each nation has complete control over defining

146. Id. § 112.
147. Fiorito, supra note 123, at 37; Compare WIPO Treaty, supra note 105, at 52.
148. See WIPO Treaty, supra note 105, at 52.
149. See AUGUST, supra note 13.
fields of patentable subject matter. There is currently little uniformity throughout the world concerning the definition of patentable subject matter, with the developed countries generally providing patent protection for important technological areas such as pharmaceuticals, chemicals and methods of treating humans. Article 10, which would have promulgated more uniform standards for patentable subject matter, was a serious point of contention for many of the developing countries. In fact, the developing countries presented WIPO's Committee of Experts with a counterproposal to article 10 in June, 1990. This counterproposal suggested permitting the contracting parties to have the power to exclude inventions in certain designated fields. Such a proposal would have been unacceptable because it would have provided little legal certainty to inventors and discouraged enterprises from making investments in countries which continue to enact statutes excluding certain fields of subject matter from patentability. Even though the counterproposal was not incorporated into the treaty, the developing countries have achieved a victory in that the WIPO committee did eliminate article 10, thereby leaving this very important harmonization issue unaddressed. Similarly, article 19 of the WIPO Treaty has also been omitted. Article 19 would have set standards for minimum patent protection. In effect, the elimination of articles 10 and 19 were backdoor concessions made in deference to the less developed countries in accord with their national practices which tend to limit the fields of patent protection available to the public.

The proposed WIPO Treaty is heavily focused on pre-grant procedural issues with less attention devoted to the substantive issues dealing with the rights of the patent holder under the issued patent. For example, Senator Dennis DeConcini, chairman of the United States Senate Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks, has remarked that, "[T]he absence of a meaningful system for the enforcement

150. Fiorito, supra note 123, at 37.
151. Id.
152. Id.
153. Id.
154. Id.; Compare WIPO Treaty, supra note 105, at 52.
155. Fiorito, supra note 123, at 49.
of minimum standards of intellectual property protection has left the U.S. intellectual property concerns disenchanted with WIPO. 156 This statement certainly sums up the frustrations with the proposed WIPO Treaty not only for the United States, but also for most other developed nations of the world.

The proposed WIPO Treaty, in articles 21 and 23, attempts to address the extent of patent protection, interpretation of patent claims and the enforcement of rights. 157 However, because article 21 is so broadly drafted and no substantive changes would be required by the vast majority of signatory parties to comply with it, article 21 essentially ratifies the status quo. Article 23 states that “[p]atent owners shall have the right to make a claim for an injunction and the right to obtain damages adequate under the circumstances.” 158 This provision for an injunction and damages is much too broadly stated because it does not provide for enforcement of this provision on an international level. Determinations of infringement and remedies would not be decided by any standard criteria but would be left to the discretion of each national entity. In essence, article 23 is a hollow provision which does absolutely nothing to strengthen patent protection in many of the developing countries where remedies and enforcement in infringement situations are virtually non-existent.

Furthermore, the WIPO Treaty has been weakened by the removal of articles 25 and 26 from the draft treaty. 159 Article 25 would have defined obligations to the right holder, and article 26 would have addressed the issue of remedial measures under national legislation. 160 These original articles raised much heated discussion because they attempted to provide some control over enforcement and rights.

The proposed WIPO Treaty leaves unaddressed many substantial issues of international patent law harmonization. The current draft of the treaty has been emasculated and fails to deal with the more problematic issues as it originally intended to do. The treaty leaves to the status quo of individual nations much of

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158. Id. at 106-13.
159. Id. at 116.
160. Fiorito, supra note 123, at 55-57.
current patent practice related to interpretation, enforcement and infringement remedies. The treaty fails to set uniform standards which could be relied upon by those involved in international business transactions and technology transfers. Therefore, numerous impediments would still block substantive harmonization. Despite these shortcomings, the WIPO Treaty is still an attempt to deal with patent law harmonization and should not be summarily dismissed because at least it would provide uniformity on many pre-grant patent issues. This treaty and the GATT/TRIPs represent the best attempts at harmonization currently in progress.

B. GATT: Trade-Related Aspects of Intellectual Property Rights

The other current major attempt at patent law harmonization is being conducted under the auspices of the GATT in the TRIPs council, which specifically seeks to address the trade-related aspects of intellectual property rights. The GATT/TRIPs provides an interesting counterpoint to the WIPO Treaty in that the GATT/TRIPs has attempted to couple international intellectual property issues with trade and technology transfer issues. The underlying theory for bringing intellectual property issues into the GATT is that the national web of intellectual property laws has effectively created non-tariff barriers that interfere with international trade and technology transfers. The rationale is that the GATT, because of its status as the premier international trade treaty, is an appropriate forum for examining and seeking to eliminate these barriers. The introductory section to the GATT/TRIPs treaty sets forth the lofty mission statement that it is a goal "to reduce distortions and impediments to international trade, and [to] take into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade." Article 8, section 2 reiterates the principle that the treaty is "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably re-

162. Uruguay Round, supra note 38, at 58.
strain trade or adversely affect the international transfer of technology."  

Another significant aspect of the GATT/TRIPs is that it is also linked to other intellectual property treaty efforts and seeks to be consistent with these efforts. For example, the introductory section of the GATT/TRIPs seeks to "establish a mutually supportive relationship between GATT and WIPO." Article 2 specifically recognizes the 1967 Stockholm revision of the Paris Convention by stating that the GATT/TRIPs "shall comply" with specific enumerated articles of this treaty and that "Nothing . . . shall derogate from . . . the Paris Convention." However, this desire to seek consistency and mutuality with the Paris Convention and WIPO is also a disadvantage for the GATT/TRIPs in that it could potentially strangle the efforts to abandon the status quo.

Despite this conformity to WIPO, the GATT/TRIPs has a very different focus and places more emphasis on and recognizes the special needs of the developing nations. Whereas WIPO is seen to be the treaty for the developed nations, there is the perception that the GATT/TRIPs is the treaty for the developing countries. The treaty in its introductory section states that the GATT/TRIPs seeks to "[r]ecogni[ze] also the special needs of the least-developed countries . . . in the domestic implementation of laws and regulations." However, such recognition can lead to diluted and ineffective provisions in response to demands by the developing nations.

A number of impediments stand in the path toward successful implementation of the GATT/TRIPs. Ironically, the most significant of these obstacles is the conflict over the scope of the TRIPs which exists between the developed and developing nations.

163. Id. at 61.
164. Id. at 58.
165. Id. at 59.
166. JAPAN, supra note 137, at 79-80.
167. Uruguay Round, supra note 38, at 58.
168. The debate over international protection of intellectual property rights as it relates to the developed and developing nations has been explored and is a source of tension in major negotiation efforts. See, e.g., Gutterman, North-South Debate, supra note 46 (noting that developing countries are reluctant to provide intellectual property protection for foreign inventions); Carlos A. Braga, The Economics of Intellectual Property Rights and the GATT: A View from the South, 22 VAND. J. TRANSNAT'L L. 243 (1989) (indicating that increased intellectual property rights protection will tend
A primary emphasis of the GATT/TRIPs accord is to promote the establishment of strengthened intellectual property protection around the world. However, there has been a long-standing resistance to strengthening the protection of intellectual property in many of the developing countries because of the fear that such strengthening would lead to economic domination by foreign investors and a flood of patented foreign goods. In succumbing to these short-sighted fears, many developing countries fail to recognize that strengthened and uniform patent laws are exactly what are needed to encourage economic investment in and technology transfers to their countries. For example, “the public policies of many developing nations explicitly or implicitly permit the unauthorized use of another's intellectual property.” These protectionist tactics are at odds with the GATT/TRIPs vision of having a less hindered flow of goods and technology.

As a result of the emphasis on the concerns of the developing nations, the GATT/TRIPs has been crafted to contain many exceptions and escape clauses which would make it more palatable for developing nations, but which have the untoward effect of weakening the GATT/TRIPs by impeding the way to harmonization. The following discussion, which analyzes some of the shortcomings of the GATT/TRIPs, should be viewed against this backdrop of the demands of the developing nations.

Article 1, section 1 of the treaty states that the “PARTIES shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.” Obviously, recognition of national sovereignty in a treaty is essential to its acceptance by the contracting parties. However, a weakness of this section of article 1 is that it sets the stage for a hands-off approach because it does not require that specific implementation procedures be adopted by the contracting states. The provision provides too much flexibility, allowing the developing countries to avoid the treaty provisions.

to generate a welfare loss in Third World countries); A. Samuel Oddi, The International Patent System and Third World Development: Reality or Myth?, 1987 DUKE L.J. 831 (1987) (suggesting developing countries pattern domestic systems to achieve goals of industrialization while not straying too far from traditional norms of protection).

171. Uruguay Round, supra note 38, at 59.
Article 6 is also a shortcoming in that it specifically states that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."\(^{172}\) This failure to address exhaustion issues is significant because it leaves open the potential for abuses against those developed nations who legitimately seek to expand the distribution of their goods and technology beyond their national borders.

The fifth section of the GATT/TRIPs is devoted to patents and comprises eight individual articles.\(^{173}\) Article 27 of this section attempts to define patentable subject matter in stating that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."\(^{174}\) However, this article would also explicitly allow a country to exclude patent protection for diagnostic, therapeutic and surgical methods for the treatment of humans or animals, and exclude plants and animals and biological processes for their production, although other protection for plants would be provided.\(^{175}\) Also, the article contains a broad escape clause which would permit each contracting nation to exclude from patent protection essentially whatever could be justified on the policy grounds of that contracting nation.\(^{176}\) The problem created by this article is that it arms the developing countries with grounds for excluding from patentability important technology areas such as pharmaceuticals, chemicals, agro-chemicals, computers, and electronics simply on the pretense of public policy. This exclusion is significant because many of the developing countries espouse the belief that patents on many of these technologies are per se against public policy.\(^{177}\) Article 27 represents a significant impediment to achieving harmonization in that it does little, if anything, to harmonize patentable subject matter throughout the world. Excluding these important areas of patentable subject matter from patent protection is tantamount to a non-tariff trade barrier because such exclusions tend to discourage enterprises

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172. Id. at 61.
173. Id. at 60.
174. Id. at 70.
175. Id.
176. Id.
177. Gutterman, North-South Debate, supra note 46.
from making investments in or shipping goods to countries enacting such exclusions.\textsuperscript{178} In essence, article 27 impedes effective patent law harmonization.

Article 29 of the GATT/TRIPs is also problematic because, like the WIPO Treaty, it fails to require that patent applications set forth the best mode for carrying out an invention.\textsuperscript{179} This article only requires that the parties "may" require disclosure of the best mode.\textsuperscript{180} As with the WIPO Treaty, the absence of a best mode requirement results in the grant of a patent monopoly to the inventive entity without a return disclosure of technological know-how to the society.

Article 30 is also a provision of the GATT/TRIPs that was incorporated in deference to the developing countries. This article states that the "PARTIES may provide limited exceptions to the exclusive rights conferred by a patent."\textsuperscript{181} Such a provision invites developing nations to carve out a multitude of limited exceptions for weakening patent rights.

Part III of the treaty, which consists of articles 41-61, deals with enforcement issues.\textsuperscript{182} At first blush, these provisions attempt to deal with substantive patent law issues. However, these enforcement articles are directed to implementing laws and procedures at the national level, primarily for resolving domestic disputes. These articles do not provide an explicit mechanism for handling the more significant patent infringement issues which can arise between two or more nations. For example, article 41 requires that each contracting party establish effective enforcement procedures against infringement.\textsuperscript{183} However, the emphasis of the article is solely at the domestic level. The article makes no attempt to deal with international infringement.

Part V of the treaty does, however, make the important attempt to address dispute prevention and settlement in articles 63 and 64.\textsuperscript{184} These provisions do not lay out the specifics for handling international intellectual property disputes, but rather refer to the main body of the GATT in articles XXII and XXIII,
dealing with GATT Rules and Procedures Governing the Settlement of Disputes.\textsuperscript{185} Obviously, the GATT/TRIPs seeks to take the significant step of coupling intellectual property disputes with the more formal GATT mechanisms. However, the TRIPs itself never directly deals with the specifics of how such potential disputes should be ideally resolved. Intellectual property practices can result in non-tariff trade barriers even though these barriers are very different from those traditionally handled through the GATT.

Developing countries have been heavily involved in the GATT/TRIPs and vocal in pushing for specific exceptions to rules for complying with the timing and implementation requirements. For example, Part VI of the treaty, namely articles 65 to 67,\textsuperscript{186} recite additional provisions which favor the developing nations. These articles essentially outline delayed implementation clauses and backdoor escape mechanisms for the developing countries. Article 65 provides that "[a]ny developing country PARTY is entitled to a delay for a further period of four years . . . of the provisions of this Agreement."\textsuperscript{187} Article 66, section 1 specifically recognizes the special needs and economic, financial and administrative requirements of the least-developed countries.\textsuperscript{188} However, it also provides for up to a ten-year delay in applying most provisions of the agreement.\textsuperscript{189} Article 67 essentially reiterates the principles of article 66, though it states the expectation that the developed countries will favor and assist the developing countries.\textsuperscript{190}

The GATT/TRIPs is overly conciliatory to the developing countries of the world. Even though it must be recognized that most developing countries have special needs and different policies regarding intellectual property and technology transfers, giving them special treatment at the expense of impeding international trade and technology transfers is not the answer. In essence, the GATT/TRIPs would permit the developing nations to practice their status quo while holding the developed nations to signifi-

\begin{thebibliography}{99}
\bibitem{185} Id. at 24-25.
\bibitem{186} Id. at 86-87.
\bibitem{187} Id. at 86.
\bibitem{188} Id. at 87.
\bibitem{189} Id.
\bibitem{190} Id.
\end{thebibliography}
cantly higher standards. This exacerbation of the dichotomy between the developed and developing nations impinges upon the possibility of successful patent law harmonization. This double-standard which the GATT/TRIPs perpetuates will result in a failure to increase the level of patent protection currently offered by many of the developing nations to standards comparable to those of the developed nations. If the developing nations expect to receive special treatment under the GATT/TRIPs, such special treatment should have only been provided in return for firmer time tables and standards of compliance.

A final issue related to the GATT/TRIPs is how the United States will ultimately fare under the treaty, especially because the United States has had a long history of implementing unilateral trade sanctions to achieve extraterritorial results.\textsuperscript{191} Congress has made efforts for at least fifty years to force the executive branch to take action on perceived trade barriers that are viewed as being harmful to United States' interests.\textsuperscript{192} Part of the reason for these unilateral actions is the quagmire of ineffective patent laws that exist in the international arena. The United States has taken action through the United States Trade Representative's Office. For example, in 1989 the United States Trade Representative implemented a procedure in which twenty-five countries were designated for special attention based on intellectual property practices or market barriers.\textsuperscript{193} Such procedures whereby the United States targets nations with which it has major trade or intellectual property disputes are authorized under section 301 of the Trade Act of 1974 and the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{194} Similar procedures are also used in section 337 of the Tariff Act of 1930.\textsuperscript{195} However, a 1989 GATT panel ruled that section 337 of the Tariff Act of 1930 violates the national treatment provision of article III, section 4 of the GATT.\textsuperscript{196} Also, both sections 301 and 337 have been criticized and have contributed to hostility in trade negotiations.\textsuperscript{197} However, in flexing its extraterritorial muscle, the

\begin{footnotes}
\item[191] Gutterman, \textit{North-South Debate}, supra note 46.
\item[193] \textit{Masterson}, supra note 45.
\item[195] Id. § 1337.
\item[196]\textit{Masterson}, supra note 45.
\item[197] \textit{Trade Laws}, supra note 20.
\end{footnotes}
United States has successfully obtained increased intellectual property concessions from countries such as Brazil, Taiwan and India.

Even though the recently concluded GATT/TRIPs leaves undressed many issues of international patent law harmonization and is overly conciliatory to the developing nations, it represents a significant attempt to couple intellectual property issues with international trade and technology transfers. Although the treaty raises impediments to patent law harmonization, the GATT/TRIPs, like the proposed WIPO Treaty, represents an important incremental step toward harmonization.

V. CONCLUSION: RECOMMENDATIONS FOR PROCEEDING TOWARD HARMONIZATION

A. Harmonization of World Patent Laws Is Needed

It is clear that world harmonization of intellectual property laws is needed because the impact of intellectual property on international trade and technology transfers is ever increasing in the modern world. As is recognized by the GATT/TRIPs, intellectual property concerns have become inseparable from trade and technology issues. However, a major difficulty in moving toward harmonization stems from the nationalistic and protectionist outlook of patent protection. Patent laws are a product of the national entity, though modern trade and technology issues are international in scope. In the developed countries of the world, there are strong public policy reasons for the patent grant. The patent is awarded to provide a temporary monopoly to inventors to foster technological and economic development in return for making the underlying technology available to society. Similarly, strong international patent policies supporting harmonization are needed to foster international trade and technology transfers.

B. The Developing Countries Must Recognize the Benefits of Strong Intellectual Property Rights

There are very different perceptions between the developed and developing countries on intellectual property rights and patents in particular. Strong, enforceable patent protection is generally provided in the developed countries, as opposed to
weaker and poorly enforced patent protection in many of the
developing countries. A major reason for this different focus is
that the developed countries are seeking to expand their markets
for patented goods and technologies, while many developing
countries seek to protect their borders from influx. Furthermore,
many technological areas, such as pharmaceuticals and foods,
are viewed by the developing countries as being in the public
domain and beyond patent protection.198 However, the develop-
ing countries will not be able to participate adequately in world
trade and encourage investment and technology transfers unless
the need for strong and effective international patent protection
is recognized. Initially, it may be difficult for the developing
nations to upgrade their systems to conform to those of the de-
developed nations. However, such conformity ultimately would be
in their economic best interest because of the economic invest-
ments that would be encouraged.

C. The Proposed WIPO Treaty and the GATT/TRIPs Are
Important Incremental Steps Toward World Patent Harmonization

The proposed WIPO Treaty and the recently concluded
GATT/TRIPs, despite their shortcomings, are important steps
toward achieving world patent law harmonization. The WIPO
Treaty is more focused on pre-grant procedural patent issues,
while the GATT/TRIPs seeks to link patent protection to trade
and technology transfer issues. Even though neither treaty pro-
vides a single unified patent document with global effect, these
treaties raise many of the issues which must be addressed and
resolved before achieving an effective harmonization strategy.
The WIPO Treaty's procurement emphasis and the GATT/TRIPs'
trade and enforcement emphasis must be integrated. These two
treaties should not, however, be left to proceed along divergent
paths. In the absence of other, more far-reaching harmonization
attempts, these two treaties represent the beginning of an incre-
mental process toward a more gradual harmonization. Neither of
these treaties should be diluted to the point where they merely
ratify the status quo, but rather should begin to address the
more difficult harmonization issues.

198. See AUGUST, supra note 13; Gutterman, North-South Debate, supra note 46.
D. The United States Should Leverage Its Potential Concession on the First-To-File Issue

The United States possesses a major bargaining chip in the harmonization debate with its potential concession of moving from its first-to-invent system to a first-to-file one. This allowance will diminish in value as the United States gradually loses its preeminent position in the world economy as its percentage share of international trade diminishes. Increasing numbers of foreign patent filers in the United States are already operating on a *de facto* first-to-file basis. The United States should leverage its potential concession to force concessions from other countries.

E. The Community Patent Convention Should be a Model for the International Community to Emulate

The CPC, even though it is currently not in force, seeks to establish a single patent instrument enforceable across the European Union Member countries. The implementation of this system should be closely followed because it could serve as a template for more widespread harmonization. It is likely that the CPC will go through a number of growing states, but the successful provisions of the system should be adopted on a wider international scale. A major hurdle that the system must overcome would be in its enforcement provisions. It will be interesting to observe how patent litigation will proceed under the CPC, whereby patent litigation in a single member country would ultimately be binding for all the members.
SQUEEZING THE JUICE FROM LEMON:
TOWARD A CONSISTENT TEST FOR THE
ESTABLISHMENT CLAUSE

by Carole F. Kagan*

I. INTRODUCTION

The Establishment Clause of the First Amendment is simple: “Congress shall make no law respecting an establishment of religion . . . .”1 Despite the tangle of the Supreme Court’s Establishment Clause jurisprudence, the Court has been consistent in articulating “the principle at the heart of the establishment clause:”2 “Civil power must be exercised in a manner neutral to religion,”3 neither favoring “one religion to another [n]or religion over irreligion.”4

Within the past decade, both Supreme Court justices and commentators have suggested that this interpretation overreads both the language of the Clause and the intent of the Framers of the Constitution.5 They contend that the Framers intended only that the government remain neutral among religious denominations and that it need not remain neutral between religion and irreligion.6

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1. U.S. CONST. amend. I.
3. Id.
6. See, e.g., Lamb’s Chapel, 113 S. Ct. at 2151 (Scalia, J., concurring).
Any suggestion that this point of view might command a majority of the current Court was put to rest last term by the Court’s six to three decision in Board of Education of Kiryas Joel Village School District v. Grumet. At the same time, the Court’s failure to garner a majority for any one opinion and the various Establishment Clause theories put forth suggest that the Court remains fragmented in its Establishment Clause analysis, though not in its ultimate goal.

This article yields to the temptation to seek a “Grand Unified Theory” of Establishment Clause jurisprudence. In articulating the goals which a majority of justices seem to share, it postulates that the much maligned three-pronged test enunciated in Lemon v. Kurtzman continues to provide a useful framework for Establishment Clause jurisprudence. The article examines the Court’s decision in Kiryas Joel, as well as some of the Establishment Clause cases which the Court has found most troublesome and suggests a modification of the Lemon test which would go far toward a consistent resolution of those cases and would best achieve the stated goals of a majority of the current Court. Instead of discarding Lemon, something useful can be extracted by narrowing its scope.

II. KIRYAS JOEL

The Court’s one Establishment Clause case of last term provides a snapshot of the Court’s current Establishment Clause alignment. If it is true that “hard cases . . . make bad law,” Kiryas Joel, which is not a hard case, proved an opportunity for the justices to reveal their views of the Establishment Clause.

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8. See id. at 2498 (O'Connor, J., concurring).
11. Kiryas Joel, 114 S. Ct. at 2481.
unencumbered by close questions. The Court's vote was six to three, with only a plurality signing on to the entire opinion written by Justice Souter.\(^\text{13}\)

The Village of Kiryas Joel is a religious enclave of Satmar Hasidim\(^\text{14}\) located in Orange County, New York,\(^\text{15}\) about one hour north of New York City. Until 1989, the village was part of the Monroe-Woodbury Central School District.\(^\text{16}\) However, the children of Kiryas Joel are educated in private, single-sex religious academies operated by the Satmar rather than in the public schools.\(^\text{17}\)

Under the federal Individuals with Disabilities Education Act,\(^\text{18}\) and New York state law,\(^\text{19}\) handicapped children enrolled in both public and private schools in New York state are entitled to special educational services.\(^\text{20}\) From 1984-1985, those services were provided to eligible Satmar children in an annex to a Satmar religious school for girls.\(^\text{21}\) When the Supreme Court's decisions in \textit{Aguilar v. Felton}\(^\text{22}\) and \textit{School District of Grand Rapids v. Ball}\(^\text{23}\) ruled such arrangements unconstitutional, Satmar children needing special educational services attended public schools in the Monroe-Woodbury Central School District.\(^\text{24}\) This arrangement proved highly unsatisfactory to the Satmars, who alleged that their children suffered emotional trauma from being

\(^{13}\) \textit{Kiryas Joel}, 114 S. Ct. at 2481.

\(^{14}\) Satmar Hasidim are adherents of a small, distinct sect of ultra-Orthodox Jews founded by Grand Rebbe Joel Teitelbaum at the beginning of this century. \textit{Kiryas Joel}, 114 S. Ct. at 2485. They adhere to a strict interpretation of the Torah, speak Yiddish, maintain a distinctive style of dress, and in general avoid assimilation into the modern world. \textit{Id.}

\(^{15}\) \textit{Id.} at 2484.

\(^{16}\) \textit{Id.}

\(^{17}\) \textit{Id.} at 2485.


\(^{19}\) N.Y. EDUC. LAW § 89 (McKinney 1981 & Supp. 1994).

\(^{20}\) See \textit{Kiryas Joel}, 114 S. Ct. at 2485.

\(^{21}\) \textit{Id.}


\(^{23}\) \textit{School District of Grand Rapids v. Ball}, 473 U.S. 373 (1985). In both \textit{Aguilar} and \textit{Grand Rapids}, the Court ruled that the placing of public school special education teachers in parochial schools violates the Establishment Clause because, under the Supreme Court's test in \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971), such action impermissibly entangles the state in religious activity.

\(^{24}\) \textit{Kiryas Joel}, 114 S. Ct. at 2485.
forced to mix with outsiders.25 By 1989, only one child from Kiryas Joel was attending Monroe-Woodbury public schools.26

To accommodate the Satmars, the New York legislature passed a statute which created a separate school district whose boundaries were coterminous with those of Kiryas Joel.27 In signing the law, Governor Mario Cuomo acknowledged "that the residents of the new school district were 'all members of the same religious sect' but said that the bill was 'a good faith effort to solve th[e] unique problem' associated with providing educational services to handicapped children in the village."28 The Kiryas Joel school district ran only one program: a special education program for handicapped children.29 The other children of Kiryas Joel remained in religious schools.30 "[S]everal neighboring school districts sen[t] their handicapped Hasidic children to the Kiryas Joel school district, so that two-thirds of the full-time students in the village public school [came] from outside" the village.31

Before the new school district began operating, an action was brought challenging the New York law creating the Kiryas Joel School District on the ground that the law violated the Establishment Clause of the First Amendment.32 The state trial court,33 the intermediate appellate court,34 and the New York Court of Appeals35 all ruled the law unconstitutional on the ground that its primary effect was to impermissibly advance religion.36

25. Id.
26. Id. at 2486.
27. 1989 N.Y. LAWS 748.
28. Kiryas Joel, 114 S. Ct. at 2486 (citing Memorandum filed with Assembly Bill Number 8747, App. 40-41 (July 24, 1989)).
29. Id. at 2486.
30. Id.
31. Id.
32. Id.
The Supreme Court, in a six to three ruling, agreed that the creation of the school district violated the Establishment Clause.\textsuperscript{37} Precisely because neither the decision nor the majority's legal reasoning was unexpected or remarkable, the numerous concurring and dissenting opinions provide a snapshot of the tangled state of the Court's current Establishment Clause jurisprudence.\textsuperscript{38}

The majority opinion was written by Justice Souter, in his first Supreme Court pronouncement on the Establishment Clause, and was joined in pertinent part by Justices Blackmun, Stevens, O'Connor and Ginsburg.\textsuperscript{39} The portion of the opinion which commanded a majority rests on the principle that "civil power must be exercised in a manner neutral to religion,"\textsuperscript{40} and that "government should not prefer one religion to another, or religion to irreligion."\textsuperscript{41} The New York statute failed on this count because it was created by a special act of the legislature to benefit one religious group.\textsuperscript{42}

In a portion of the opinion joined only by a plurality of justices,\textsuperscript{43} Justice Souter tracked closely the reasoning of \textit{Larkin v. Grendel's Den, Inc.},\textsuperscript{44} positing that "a State may not delegate its civil authority to a group chosen according to a religious criterion."\textsuperscript{45} Defining a political subdivision by a religious test results in a forbidden "fusion of governmental and religious functions."\textsuperscript{46} A majority would thus allow the state to delegate civil authority to a religious group (as was in fact done in the forma-

\begin{itemize}
  \item \textsuperscript{37} \textit{Id.} at 2481.
  \item \textsuperscript{38} See \textit{id.}
  \item \textsuperscript{39} \textit{Id.} at 2484.
  \item \textsuperscript{40} \textit{Id.} at 2491.
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{Id.} The Court's opinion intimated that, if the Kiryas Joel school district had been founded under a general law allowing groups to form their own school districts, such a district would not have run afoul of the Establishment Clause even though the boundaries would have been drawn identically and on the same religious lines. The Court noted that the Village of Kiryas Joel itself was incorporated under such a neutral statute designed to give groups of residents the right to incorporate. \textit{Id.} at 2491 n.7.
  \item \textsuperscript{43} Justices Blackmun, Stevens and Ginsburg.
  \item \textsuperscript{44} \textit{Larkin v. Grendel's Den, Inc.}, 459 U.S. 116 (1982) (using the three-part \textit{Lemon} test to strike down a Massachusetts statute which gave the governing bodies of churches and schools the power to veto liquor license applications).
  \item \textsuperscript{45} \textit{Kiryas Joel}, 114 S. Ct. at 2488.
  \item \textsuperscript{46} \textit{Id.} (citing \textit{Larkin v. Grendel's Den, Inc.}, 459 U.S. 116, 126 (1982)).
\end{itemize}
tion of the Village of Kiryas Joel) as long as the criteria set for such delegation of authority are not religious in nature. Although the state gave this power not to the Satmars per se, but to "the qualified voters of the village of Kiryas Joel," Justice Souter found that the overall context in which this delegation took place "ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result."

The Court's decision, while drawing on its historical Establishment Clause jurisprudence, is notable in that, like other of the Court's recent Establishment Clause decisions, it did not apply the Court's three-part test for Establishment Clause violations set forth in *Lemon.* Justice O'Connor noted as much in her concurring opinion and suggested that the Court has moved away from the test. Only Justice Blackmun wrote separately to say that the Court's decision rested squarely on the principles enunciated in *Lemon.* He noted that the jurisprudence on which the ruling was based, particularly *Larkin,* was explicitly premised on *Lemon,* and that the principles on which the Court based its conclusion are essentially the second and third parts of the three-part *Lemon* test.

Justice Kennedy concurred separately on the narrower ground that New York created a political boundary on the basis of religion. Because there was no evidence that the New York legislature would fail to grant the same accommodation to other similarly situated religious groups, he believed that the Court went too far in presuming that the legislature acted with discriminatory intent.

He noted that New York had adopted the scheme invalidated in *Kiryas Joel* because of the Court's decisions in *Grand Rapids*

47. *Id.* at 2488.
49. *Kiryas Joel,* 114 S. Ct. at 2490.
52. *Kiryas Joel,* 114 S. Ct. at 2498 (O'Connor, J., concurring).
53. *Id.* at 2494-95 (Blackmun, J., concurring).
54. *Id.*
55. *Id.* at 2505 (Kennedy, J., concurring).
56. *Id.* at 2503.
and Aguilar.\textsuperscript{57} Prior to these decisions, public school teachers had come into the village to provide the handicapped Satmar children in religious schools the same services as those provided to handicapped children in public schools.\textsuperscript{58} Aguilar and Grand Rapids had ruled that the placing of public school special education teachers in parochial schools violates the Establishment Clause because, under the Lemon test, such action impermissibly entangles the state in religious activity.\textsuperscript{59}

Justice Kennedy called for these cases to be reconsidered.\textsuperscript{60} He suggested that "a neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered."\textsuperscript{61} However, this did not in his view justify the drawing of political boundaries "on the basis of religion."\textsuperscript{62} Justice Kennedy viewed the means, not the ends, as problematic: "But for the forbidden manner in which the New York Legislature sought to go about it, the State's attempt to accommodate the special needs of the handicapped Satmar children would have been valid."\textsuperscript{63}

As in other Establishment Clause cases which have come before the Court in recent years, the deciding vote drawing the lines of the Court's jurisprudence belonged to Justice O'Connor.\textsuperscript{64} Justice O'Connor found it dispositive that the law singled out the Satmars for special treatment, noting that "[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{65} She thus joined in the portion of the Court's opinion

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57. Id. at 2505 (Kennedy, J., concurring) (citing School District of Grand Rapids v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985)). "But for Grand Rapids and Aguilar, the Satmars would have had no need to seek special accommodations or their own school district. Our decisions led them to choose that unfortunate course, with the deficiencies I have described." Id.

58. Kiryas Joel, 114 S. Ct. at 2496 (O'Connor, J., concurring).


60. Kiryas Joel, 114 S. Ct. at 2505 (Kennedy, J., concurring).

61. Id.

62. Id. at 2504.

63. Id. at 2501.


65. Kiryas Joel, 114 S. Ct. at 2497 (O'Connor, J., concurring) (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).
\end{flushright}
which struck down the law as created for the benefit of one religious group.\textsuperscript{66}

Justice O'Connor did not, however, join the portion of the plurality opinion that relied principally on \textit{Larkin}\textsuperscript{67} to find that the statute impermissibly granted political power based on religious criteria.\textsuperscript{68} She was troubled by the portion of that opinion which, in her view, reversed the presumption of constitutionality of the state statute, because there was no evidence that the benefit conferred on the Satmars would be denied to any other similarly situated religious group.\textsuperscript{69}

Justice O'Connor in her concurrence set forth her theory for judging Establishment Clause cases. She posited that a unitary test for Establishment Clause violations is not appropriate: "Different categories of Establishment Clause cases call ... for different" tests.\textsuperscript{70} She suggested that for cases which "involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits,"\textsuperscript{71} the government may not grant disparate treatment based on religion.\textsuperscript{72} "Cases involving government speech on religious topics [should focus] on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion."\textsuperscript{73} She suggested that other tests may be appropriate where the "government must make decisions about matters of religious doctrine and religious law,"\textsuperscript{74} or where there are "government delegations of power to religious bodies."\textsuperscript{75} Justice O'Connor indicated that such "delegations of power" may require a test stronger than that of government impartiality, but did not propose an alternative.\textsuperscript{76}

Like Justice Kennedy, Justice O'Connor criticized the decisions in \textit{Grand Rapids} and \textit{Aguilar} which had prompted New

\textsuperscript{66} \textit{Id.} at 2495.
\textsuperscript{68} \textit{See Kiryas Joel}, 114 S. Ct. at 2484.
\textsuperscript{69} \textit{Id.} at 2498 (O'Connor, J., concurring).
\textsuperscript{70} \textit{Id.} at 2499.
\textsuperscript{71} \textit{Id.} at 2499-500.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 2500.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.}
York to create the special district for Kiryas Joel and suggested that those cases be reconsidered.\textsuperscript{77} She observed that "[r]eligious needs can be accommodated through laws that are neutral with regard to religion."\textsuperscript{78} While accommodation does not in her view justify "discriminations based on sect"\textsuperscript{79} or a "legislatively drawn religious classification,"\textsuperscript{80} the "Establishment Clause does not demand [the] hostility to religion . . . or religious schools" she finds manifest in Aguilar.\textsuperscript{81}

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented on the ground that the majority misinterpreted this case as the delegation of state authority to a religious body.\textsuperscript{82} He did not accept that the boundaries of the school district were drawn on the basis of religion.\textsuperscript{83} He argued that the law was facially neutral, "created to meet the special educational needs of distinctive handicapped children."\textsuperscript{84} The district was nothing more than a political entity whose members "happened to share the same religion."\textsuperscript{85}

III. ANALYSIS

Although Kiryas Joel elicited a plethora of opinions, it revealed that a majority of the Court agrees on one consistent interpretation of the Establishment Clause: The state should "pursue a course of 'neutrality' toward religion,"\textsuperscript{86} "favoring neither one religion over others nor religious adherents collectively over nonadherents."\textsuperscript{87} The majority found that the state's action in Kiryas Joel ran afoul of this principle because it was specif-

\textsuperscript{77} Id. at 2496, 2498.
\textsuperscript{78} Id. at 2496. "The Satmars' living arrangements were accommodated by their right — a right shared with all other communities, religious or not, throughout New York — to incorporate themselves as a village." Id.
\textsuperscript{79} Id. at 2497.
\textsuperscript{80} Id. at 2498.
\textsuperscript{81} Id. See also Aguilar v. Felton, 473 U.S. 402, 421-31 (1985) (O'Connor, J., dissenting).
\textsuperscript{82} Kiryas Joel, 114 S. Ct. at 2506 (Scalia, J., dissenting).
\textsuperscript{83} Id. at 2511.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{87} Id. (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
ically designed to accommodate a religious sect. In trying to attain the goal of neutrality, however, the Court has not been able to enunciate any consistent test which would strike the proper balance. Justice O'Connor, in particular, has suggested that the Court abandon all efforts to fashion a unified, workable test. The Court's decision, however, leaves lower courts, local governments and school boards with little guidance on how to interpret the Establishment Clause in future cases. Given the importance of religion and religious freedom to the majority of Americans and the constant involvement of government in their lives, the lack of consistent guidance from the Supreme Court leaves a void which should be filled.

A. The Lemon Test

The only test for Establishment Clause violations that has been able to attract a majority of the modern Court is the three-pronged test articulated by Chief Justice Burger in Lemon. This test articulates the separationist view of the Establishment Clause that has informed the majority's thinking up to its decision in Kiryas Joel.

Lemon involved challenges to the constitutionality of Pennsylvania and Rhode Island statutes which provided state aid to nonpublic schools. The Rhode Island program provided for the payment of salary supplements to teachers of secular subjects in private schools, including parochial schools. The Pennsylvania statute allowed for reimbursement of private schools for teacher salaries, textbooks, and instructional materials used in the teaching of specified secular subjects. Under both programs, the state was given powers of audit and surveillance to ensure that the funds were used for secular purposes only.

88. Id. at 2492.
89. Id. at 2499-500 (O'Connor, J., concurring).
91. Separationist as opposed to accommodationist. See generally CARTER, supra note 9, at 124-35.
93. Lemon, 403 U.S. at 607.
94. Id. at 609.
95. Id. at 611.
The Court invalidated both statutes. 96 The majority first defined what it saw as the goal of the Establishment Clause: to avoid "sponsorship, financial support, and active involvement of the sovereign in religious activity." 97 Drawing on its past Establishment Clause jurisprudence, the Court set forth a three-part test to determine whether government action would be consistent with this goal: "First, the statute must have a secular legislative purpose; 98 second, its principal or primary effect must be one that neither advances nor inhibits religion; 99 finally, the statute must not foster 'an excessive government entanglement with religion.'" 100

On the basis of the legislative history of the two statutes, the Court found that the first prong was satisfied in both cases: the statutes were intended to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws." 101 The Court hedged on the second prong. While it acknowledged that the states had taken legislative precautions to guarantee that state aid would flow only to secular functions, the Court did not analyze whether the primary effect of the statutory schemes was to advance religion by strengthening the curriculum in parochial schools or, instead, to enhance the quality of the secular education of its citizens. 102

The Court evaded analysis of this difficult question (and in doing so left its intended meaning of this prong of the test in doubt) by resting its decision on the third prong, finding that both statutory schemes provided an excessive entanglement between church and state. 103 In its analysis of the third prong, the Court first recognized that "[s]ome relationship between government and religious organizations is inevitable." 104 Whether that relationship is "excessive entanglement" depends upon "the character and purpose of the institutions that are

96. Id. at 606.
97. Id. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
98. Id. (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
99. Id.
100. Id. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
101. Id. at 613.
102. Id. at 613-14.
103. Id. at 614-24.
104. Id. at 614 (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952); Sherbert v. Vernon, 374 U.S. 398 (1963) (Harlan, J., dissenting)).
benefitted, the nature of the aid provided by the state, and the resulting relationship between the government and the religious authority." 105

The Court found several dangers in the statutes at issue: first, that because parochial school teachers are frequently charged with interweaving religious training into the teaching of secular subjects, the state supplement would sponsor the teaching of religion; 106 second, that the state would need to interfere unduly in the affairs of the religious schools to ensure that its funds were spent only for secular purposes; 107 and third, that the appropriation process necessary for continued funding of these programs would breed political divisiveness along religious lines. 108 The major factor upon which the Court focused was whether the program would "entangle the state in details of administration." 109

B. Current Status of the Lemon Test

"Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again." 110 Justice Scalia was right in suggesting that, despite the seeming aimlessness of the Court's Establishment Clause jurisprudence and Justice O'Connor's call to discard the Lemon test, 111 the basic framework of Lemon still informs the majority's Establishment Clause jurisprudence. 112

The majority of the Court continues to see the Establishment Clause as separationist. Kiryas Joel illustrates that the vote

105. Id. at 615.
106. Id. at 618-19.
107. Id. at 620-21.
108. Id. at 622-23.
109. Id. at 615 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970)). The Court's opinion also contained dicta on the hazard of politically divisive activity along religious lines necessitated by church demands on the state system. Given that this hazard is endemic in drawing lines between permissible and impermissible state involvement, it seems ingenuous to believe, even in dicta, that any Court application of the First Amendment can or should prevent this.
112. Id. at 2515 (Scalia, J., dissenting).
upon which the Court’s Establishment Clause majority rests belongs to Justice O’Connor. If one is to take her concurring opinion at face value, hers is the fifth vote needed by Justices Rehnquist, Scalia, Kennedy and Thomas to discard the Lemon test. However, to Justice Scalia’s evident frustration, Justice O’Connor has consistently sided with the separationists even as she calls for Lemon’s demise.

The Court, as Justice O’Connor noted, has never repudiated Lemon, and it is apparent from the decision in Kiryas Joel that it has found no substitute test. Lower courts have not been reluctant to apply the three-part test to Establishment Clause cases. Indeed, the New York Court of Appeals did so in Kiryas Joel. Rumors of Lemon’s death have been, in Mark Twain’s words, “greatly exaggerated.” Even where, as in Zobrest v. Catalina Foothills School District, the majority failed to cite Lemon “except in recounting the decision below,” it is evident that “Lemon’s progeny represented their parent” as a foundation of analysis.

113. Id. at 2494-2500 (O’Connor, J., concurring).
114. Justice Scalia observed: “Justice O’Connor ... expresses the view that Aguilar should be overruled. I heartily agree that these cases, so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity; but meanwhile, today’s opinion causes us to lose still further ground, and in the same anti-accommodationist direction.” Id. at 2515 (Scalia, J., dissenting) (citations omitted).
115. See, e.g., id. at 2495-500 (O’Connor, J., concurring); Lee v. Weisman, 112 S. Ct. 2649 (1992).
122. Id.
C. Sour Grapes From Lemon

The *Lemon* test has been much criticized from both the left and the right as not providing a useful framework for Establishment Clause analysis.\(^{123}\) The Court has been unable to apply the test in a consistent fashion.\(^{124}\) However, much of the Court's difficulty with the test lies not in any defect or want of reasoning in the test itself, but in the Court's refusal to adequately define it and to apply it where consistency with the Court's articulated goal of neutrality would lead to seemingly awkward results.

The Court's nonapplication, malapplication, and misapplication of *Lemon*, respectively, in the following three areas demonstrate how the Court has strayed in practice from its consistently articulated goal of neutrality: (1) the application of a "historical" test to validate state actions with a primarily religious purpose and intent in *Marsh v. Chambers*;\(^{125}\) (2) the manipulation of the *Lemon* test to allow the display of religious symbols when part of a "secular" Christmas display in *Lynch v. Donnelly*\(^{126}\) and *County of Allegheny v. American Civil Liberties Union*;\(^{127}\) and (3) the misuse of the "entanglement" prong to invalidate the provision of remedial assistance to parochial school children by public school teachers in *Meek v. Pittenger*\(^{128}\) and *Aguilar*.\(^{129}\)

1. The "Historical" Analysis of Marsh v. Chambers

The Court entirely abandoned *Lemon* for a "historical" analysis in *Marsh*.\(^{130}\) *Marsh* involved a challenge to the constitutionality of government sponsorship of a legislative chaplain.\(^{131}\) Because the Court found historical evidence that framers of the First Amendment did not find the funding of chaplains unconstitutional, the majority found that the practice did not violate

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\(^{123}\) See, e.g., supra note 9.

\(^{124}\) See *Zobrest*, 113 S. Ct. at 2473-74 (Blackmun, J., dissenting).


\(^{131}\) *Id.* at 785.
the Establishment Clause. The Court did not apply the Lemon three-pronged test; nor did it attempt to explain how sponsorship of a Christian minister had anything other than a religious purpose. The Court did not try to distinguish Lemon and offered no guidance on when to apply Lemon to Establishment Clause cases and when to apply an "intent of the framers" analysis.

2. The Christmas Cases

The Court added a historical refrain to its Lemon analysis in considering the constitutionality of the public sponsorship of Christmas holiday displays. In Lynch, the majority allowed the public funding and display of a Christmas creche as part of a holiday display containing reindeer, Santa Claus, and other seasonal symbols. The Court returned to the Lemon test in ruling that public sponsorship of a creche, in conjunction with other holiday displays, had a secular purpose and effect and involved no entanglement with religion. The Court also invoked the historical analysis by comparing the holiday display to other historically permissible displays having religious significance, such as museum exhibits with religious content.

The result has been much criticized, not because the Lemon test was an inappropriate vehicle with which to decide the case, but because the majority's application of the test was so patently strained. In what has come to be known as the "two plastic reindeer" test, the majority ruled that the display of a creche

132. Id. at 787.
133. See Justice Brennan's dissent which acknowledged that the majority "made no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured [the Court's] inquiry under the Establishment Clause." Id. at 796.
135. Id. at 671-72 (Burger, C.J.).
136. Id. at 683-84.
137. Id. at 669.
138. For discussion on the origins of this phrase, see Daniel Parish, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253, 260 n.52 (1994); Joshua D. Zarrow, Comment, Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols, 35 Am. U. L. Rev. 477 (1986). The test was so named because the Court's application of the Establishment Clause would validate public display of a creche if placed between two plastic reindeer, but not if placed alone.
with other secular symbols of the holiday season, such as Christmas trees, reindeer and Santa Claus, passed muster under *Lemon* because the display's primary purpose and effect were to engender seasonal goodwill, not to endorse Christianity.\(^{139}\)

The "two plastic reindeer" analysis was further extended in *County of Allegheny*.\(^{140}\) That case involved several forms of holiday display.\(^{141}\) The Court struck down as an establishment of religion the display of a creche, standing alone, in the "Grand Staircase" of a Pennsylvania county courthouse.\(^{142}\) The Court allowed, however, the display of a Chanukah menorah standing near a Christmas tree and a sign proclaiming general good will for the season.\(^{143}\) The Court relied on *Lynch* to rule that the menorah, while a primarily religious symbol like the creche, had a secular purpose when displayed next to the Christmas tree in a general seasonal display.\(^{144}\)

*County of Allegheny* highlights the Court's dilemma in grappling with Christmas displays. This dilemma is not indicative of the Court's discomfort with any particular test, nor does it signal a general movement away from a separationist theory of the Establishment Clause. As Justice Brennan observed in dissent in *Lynch*, "[T]his case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable."\(^{145}\)

The "Christmas problem" is a real one under any consistent Establishment Clause theory which advocates government neutrality toward and among religions. To acknowledge the pervasiveness of the holiday's religious significance would force the Court to invalidate any government sponsorship of the holiday as an establishment of Christianity. Such practices as designating Christmas as a federal holiday, government-sponsored Christmas parties (although they are most frequently denominated as "holiday parties") and the singing of Christmas carols in schools would all be brought under scrutiny. This awareness is at the

\(^{139}\) *Lynch*, 465 U.S. at 680.


\(^{141}\) *Id.* at 578.

\(^{142}\) *Id.* at 598-613.

\(^{143}\) *Id.* at 613-21.

\(^{144}\) *Id.* at 613-14.

heart of the Court's opinions, and its tortured use of the *Lemon* test in *Lynch* may be understood as an attempt to apply the Court's precedents without reaching an unpopular result.

Of course, it is counterintuitive, as well as offensive to religious Christians, to think of a Christmas creche holding the infant Jesus as having a primarily secular, rather than religious, purpose, regardless of the context in which it is placed. Yet Justice O'Connor's conclusion that the creche does not convey a message of endorsement of religion because it does not "send a message to nonadherents that they are outsiders"146 is based on just this premise. To suppose otherwise would force a result the majority finds unpalatable: the elimination of publicly sponsored references to the religious significance of Christmas and of government support for events surrounding the Christmas holiday. As has been noted, the majority seems unwilling to analyze the constitutionality of such support from any viewpoint other than that of "the reasonable Christian."147

This analysis seems peculiarly confined to the celebrations surrounding the winter solstice. One suspects that the Court would not countenance government display of a crucifix to commemorate the Easter holidays, even if the crucifix were surrounded by Easter bunnies and colored eggs.

The exclusivity of the "Christmas dilemma" was underscored by the Court's decision in *Lee v. Weisman*,148 which ruled that the offering of a prayer by a religious official at a public school graduation constituted an impermissible state coercion of religious observance.149 It is somewhat surprising that Justice Kennedy's opinion cited *Lynch* and *County of Allegheny*, two cases seen as accommodation rather than separationist, for support in ruling that under the Establishment Clause the sponsorship of a nondenominational graduation prayer constitutes an impermissible establishment of religion.150 Thus, the lesson of the Christmas cases seems to be that government may sponsor observance of holidays of religious origin only if they have been

146. *Id.* at 688 (O'Connor, J.).
149. *Id.* at 2661.
150. *Id.* at 2655.
sufficiently stripped of religious meaning.\textsuperscript{151} The analytical framework of those cases does not extend to any other state sponsorship of religion or religious symbols.

3. Assistance to Sectarian Schools

A troublesome area in the Court's application of the \textit{Lemon} test has been the extent to which the Establishment Clause allows state aid to parochial schools. The Court has had difficulty reconciling the \textit{Lemon} test with its holding in \textit{Board of Education v. Allen,}\textsuperscript{152} which upheld a New York law providing for the loan of state-supplied textbooks to nonpublic schools.\textsuperscript{153} The Court has attempted to draw a distinction between providing neutral benefits, which is permissible, and providing aid which would support a religious message.\textsuperscript{154} This distinction has proven difficult in practice.

Justice Blackmun has described the discrepancies encountered in trying to draw the line on government aid to parochial schools:\textsuperscript{155} The state may pay for buses to transport parochial school students to school, but not to field trips; textbooks, but not instructional materials such as slide projectors, tape recorders, or record players; diagnostic tests by state-paid speech and hearing therapists, but not the services of state-paid remedial teachers and counselors.\textsuperscript{156}

Two cases considering the permissibility of aid to parochial schools, \textit{Meek v. Pittenger}\textsuperscript{157} and \textit{Wolman v. Walter,}\textsuperscript{158} enhanced the confusion and set the stage for a tension of analysis between the two school funding cases preceding \textit{Kiryas Joel: Aguilar,}\textsuperscript{159} in which the Court misapplied the \textit{Lemon} test in reaching a much criticized\textsuperscript{160} result, and \textit{Zobrest,}\textsuperscript{161} in which

\begin{enumerate}
\item[\textsuperscript{151}] See generally TRIBE, supra note 147, at 1294-97.
\item[\textsuperscript{152}] Board of Education v. Allen, 392 U.S. 236 (1968) (cited with approval in Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).
\item[\textsuperscript{153}] \textit{Id.} at 238.
\item[\textsuperscript{154}] See, e.g., Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462, 2473-74 (1992) (Blackmun, J., dissenting).
\item[\textsuperscript{155}] \textit{Id.} at 2469.
\item[\textsuperscript{156}] \textit{Id.} at 2473-74.
\item[\textsuperscript{157}] Meek v. Pittenger, 421 U.S. 349 (1975).
\item[\textsuperscript{158}] Wolman v. Walter, 433 U.S. 229 (1977).
\item[\textsuperscript{159}] Aguilar v. Felton, 473 U.S. 402 (1984).
\item[\textsuperscript{160}] See, e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S.
LEMON TEST

the Court apparently determined to steer clear of Lemon to avoid the problems stemming from its analysis in Aguilar. This tension precipitated the Court's fragmentation in Kiryas Joel.

In Meek, the Court voided Pennsylvania's provision of state personnel to parochial schools and the furnishing of certain equipment, such as projectors and tape recorders, "which from its nature [could] be diverted to religious purposes." Following Meek, the Court struck down Ohio's provision of state-funded transportation for field trips conducted by nonpublic school teachers in Wolman. The Court reasoned that the teachers who conducted the field trips might, as employees of sectarian institutions, use the field trips to foster religion. In both Meek and Wolman, the Court feared that the public school authorities would be unable to ensure that the funds would be used for secular purposes without close supervision of the teachers.

With Meek and Wolman in mind, the Court misapplied the Lemon test in Aguilar. Aguilar involved New York City's method of using federal funds received under Title I of the Elementary and Secondary Education Act of 1965. The program authorized federal "financial assistance to local educational institutions to meet the needs of educationally deprived children from low income families." The statute specified that students in private elementary and secondary schools who fit the statute's definition of "educationally deprived," were entitled to the

Ct. 2481, 2496-98 (1994) (O'Connor, J., concurring), 2505 (Kennedy, J., concurring).

163. Id. at 367-73.
164. Id. at 355, 357, 362-66.
167. Id. at 253-54.
168. Id. at 254; Meek, 421 U.S. at 369-72.
171. Aguilar, 473 U.S. at 404.
172. See 20 U.S.C. § 3804(a), repealed by Elementary and Secondary Education
special educational services funded by the program. The programs were to be administered by local and state authorities.

The City of New York provided the services to private school students by assigning public school teachers to teach remedial classes on parochial school premises. The content of the instruction was identical to that provided in the public schools.

Justice Brennan's opinion for the majority struck down the program. Using the Lemon test as interpreted in Meek, the majority found that allowing public school teachers to teach on parochial school premises violated the entanglement prong of the test. The Court assumed that the same supervision necessary for granting aid to parochial schools in Lemon, where the teachers were parochial school employees, was required to prevent public school teachers from inculcating religion merely because they were teaching in parochial school classrooms. The Court likewise found undue entanglement because the aid was being provided in "a pervasively sectarian environment." The Court assumed that placing public school instructors in parochial schools, in itself, created an enhanced risk that those public school teachers would inculcate a religious message.

Neither the Court nor the record in the case explains why this is so. It was specified in the record that the curriculum taught in the religious schools was identical to that taught in the public and private schools participating in the program, and that the

Block Grant, ch. 51, § 1003(a), 102 Stat. 293.


175. Id.

176. Id. at 406. In School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), decided concurrently with Aguilar, the Court invalidated, under the same analysis, a similar Michigan program in which public school teachers taught remedial classes in trailers owned by and on the grounds of parochial schools.

177. Aguilar, 473 U.S. at 404.

178. Meek v. Pittenger, 421 U.S. 349 (1975). In Meek, the Court invalidated a program under which public employees offered guidance, testing and remedial and therapeutic services on parochial school premises. Id. (cited in Aguilar v. Felton, 473 U.S. 402, 412 (1985)).

179. Aguilar, 473 U.S. at 413.

180. Id.

181. Id. at 412.

182. Id. at 413-14.
teachers were selected by the state, not the parochial school system. 183 Given these facts, there seems to be no foundation for the Court’s assumption that any special monitoring is necessary in order to ensure that the public school teachers do not impart a religious message merely because they are delivering that message on the grounds of a religious rather than a secular school. The danger that a state-paid teacher may impart a religious message is no less great when that teacher is on public school premises. 184

Justice O’Connor recognized this in her dissent, noting that “[i]t is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school.” 185 Her remedy was to suggest abandoning the notion of “entanglement” in general, stating that she believed that the purpose and effects prongs of Lemon furnish an adequate basis for decision. 186 She hypothesized that the problem of “pervasive institutional involvement of church and state” may be blended into the “effect” inquiry, but would allow a state to use a certain amount of institutional monitoring to ensure that its funds are used only for secular ends. 187 She analogized this type of monitoring to that which the state performs to ensure that religious schools comply with state certification and health and safety requirements. 188 No other justice joined her opinion.

While the Court misapplied the Lemon test in Aguilar, the majority avoided direct application of the test in deciding the validity of a state program providing a state-funded sign language interpreter to a deaf student attending a parochial

183. Id. at 406-07.
184. See, e.g., Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990). In Roberts, a fifth grade public school teacher kept a Bible prominently placed on his desk and read it to himself on occasion in front of students during a “silent reading period.” Id. at 1049. Two other religious books for children were kept in a classroom library of over 200 books. Id. A religious poster was also displayed in the classroom. Id. The Court of Appeals sustained the school district’s proscription of such activity as consistent with the Establishment Clause. Id. at 1058.
186. Id. at 429-30 (O’Connor, J., dissenting).
187. Id. at 430.
188. Id. (citing Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting)).
school. The Court in Zobrest instead made use of its precedents in Mueller v. Allen190 and Witters v. Washington Department of Services For The Blind,191 which, under the second prong of Lemon, permitted federal funding which directly benefitted parochial school students, rather than parochial schools, so long as the state statute was neutral on its face.192 The Court stated that the Establishment Clause did not absolutely preclude the placement of public employees in parochial schools,193 a result that seemed to be at odds with Meek194 and Wolman195.

The five-member majority in Zobrest looked at the purpose and primary effect of the statute as a whole,196 not, as in Aguilar and Meek, at the statute as applied to a particular religious institution. Because one of the Zobrest majority197 is no longer on the Court, and because Justice O'Connor refused to address the constitutional issue in that case,198 it remains to be seen whether a majority of the current Court would find the Establishment Clause to permit government programs which neutrally aid students, rather than schools, even if those students attend sectarian schools.

Kiryas Joel suggests that this position may now command a majority. It signifies that a majority has emerged to overturn Grand Rapids199 and Aguilar,200 which, under the entanglement prong of Lemon, struck down two programs supplying publicly funded teachers to teach remedial subjects in nonpublic schools.201 The Court's retreat from the reasoning of two cases explicitly decided under Lemon might be seen to signal a repudi-
ation of *Lemon* and may explain the majority's refusal to rely on the test in *Kiryas Joel*.

Much of the Court's discomfort with the *Lemon* test appears to stem from the application of the entanglement prong in *Aguilar*.202 *Aguilar* requires that desirable public benefits unrelated to religion be denied to children solely because they have chosen to enroll in religious schools. Instead of arguing that the test was wrongly applied, however, the Court seems to accept that the test requires the result reached.

This view has been shared by commentators as well. The discontent of some commentators is attributable to a view of the Establishment Clause that does not embrace neutrality as a goal.203 However, commentators who embrace the goal of neutrality have criticized the *Lemon* test as hostile to religion.204 They argue, rightly, that, in an effort to avoid entanglement with religion, religious bodies are discriminatorily denied public benefits which would otherwise be available.

The damage done by this type of discrimination to the principle of state neutrality is increasingly being recognized. Professor Stephen Carter argues that *Lemon*'s interpretation of the Establishment Clause has resulted in state avoidance of and/or discrimination against the religious component of our society.205 "The potential transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism raises prospects at once dismal and dreadful."206 Carter also criticizes the test because the Court has refused to apply it.207 This seems backwards. The cases he has cited in support of this theory, *Marsh*208 and *Lynch*,209 were, as dis-

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203. See, e.g., Bork, supra note 5, at 23-26; Lupu, supra note 9, at 763-64.
204. See, e.g., CARTER, supra note 9, at 111-13 (citing Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that religious motivation of the supporters of Louisiana statute requiring the teaching of creationism in public schools rendered the statute invalid under the Establishment Clause)).
205. See id. at 111-15, 120-23.
206. Id. at 123.
207. Id. at 113-14.
209. *Lynch* v. Donnelly, 465 U.S. 668, 685 (1984) (allowing government sponsorship and display of a Christmas creche among other "holiday" displays because it has the "secular" purpose of "engender[ing] a friendly community spirit of good will in keeping with the season").
cussed above, wrongly decided. But criticism of these decisions should be aimed squarely at the inconsistencies of a Court which is unwilling to apply its own jurisprudence because it yields an undesirable result. *Marsh*\(^{210}\) and *Lynch*\(^{211}\) do not reveal any infirmities in the *Lemon* test itself. As Professor Laurence Tribe has observed, the results in these two cases "could not be justified under any meaningful neutrality theory."\(^{212}\)

Unlike the dissenters in *Kiryas Joel*,\(^{213}\) a majority of the Court now believes that the government should maintain a position of neutrality between religion and irreligion, as well as among religions. It is true that *Marsh, Lynch,* and perhaps *Aguilar* are not in accord with these principles. But instead of criticizing the principles, to which at least four current members of the Court adhere and which are likely to command a majority of the current Court,\(^{214}\) the Court should be ready to declare the results of these three cases inconsistent with its Establishment Clause jurisprudence and to overturn them.

### D. Lemon Retains Validity

Carter, while criticizing *Lemon* as "impossible to apply," acknowledges that "even if the Court's *Lemon* test is insupportable, it is far from clear what should be put in its place."\(^{215}\) If *Kiryas Joel* signals anything, it is that there is no consensus among the current Court for any other test. Even Justice O'Connor, in her eagerness to repudiate the test, throws up her hands in surrender at the idea of proposing an alternative test that would give lower courts guidance in Establishment Clause cases.\(^{216}\)

The *Lemon* test should not be so easily discarded. The lesson of *Lemon* is that government should stay out of the religion business, avoiding both endorsement and interference. The Supreme


\(^{212}\) Tribe, *supra* note 147, at 1201.

\(^{213}\) Chief Justice Rehnquist and Justices Scalia and Thomas.

\(^{214}\) Justice Breyer, while sitting on the U.S. Court of Appeals for the First Circuit, was not reluctant to apply *Lemon*. See, e.g., New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940 (1st Cir. 1989).

\(^{215}\) Carter, *supra* note 9, at 114.

Court's recent Establishment Clause cases, particularly *Kiryas Joel*, demonstrate that a majority endorses these principles. They also demonstrate that the Court has been unable to formulate another test which would assure that the government remain neutral, but not hostile, to religion.

IV. A MODIFIED LEMON TEST

The test suggested focuses on the majority's stated goal of neutrality toward religion. It proposes a version of the three-part *Lemon* test which retains a broad reading of the first two prongs and retains the entanglement prong, but reads it narrowly.

All three prongs of the test should require consideration of the statute or other governmental action as *a whole*, not as applied to any particular situation. An "as applied" analysis would lead to an unwarranted conclusion that the first and, in particular, second prongs would advance religion in a challenged case. A statute conferring benefits generally, when applied in any particular instance to a religious entity, necessarily has some effect arguably enhancing religion. To proscribe every such state action solely on account of the entity's religious character would enshrine the very disparity between religion and irreligion forbidden the government under the Establishment Clause.

A. Purpose and Effect

The first prong, a primary purpose which is secular in nature, is not difficult to apply. With the exceptions of *Marsh* and the Christmas cases, the Court has had little difficulty applying this prong, even when the primarily religious purpose of a state action is somewhat obscured.

218. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994).
221. See Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down Alabama's "moment of silence" statute on the ground that its primary purpose was to advance prayer).
The second prong, a primary effect which neither advances nor inhibits religion,222 should be carefully scrutinized, but with regard to the governmental action as a whole. The state program should not be gauged solely by its effect on religious institutions, but in light of the goals of the program in toto. This is particularly true where the state’s action may indirectly support the propagation of a religious message, as was the case in Zobrest.223 In Zobrest, however, it was clear that the primary effect of the statute as a whole was to provide assistance to all handicapped students, not to aid religion or religious schools per se.

This point was missed in Aguilar. The primary effect examined in Aguilar was whether “state aid to parochial institutions . . . ha[s] the primary effect of advancing religion.”224 The primary effect of the state’s action in establishing a program to provide Title I funding to parochial school students is to provide remedial education to all its children, without regard to religious affiliation. To look at primary effect in a specific situation where a religious body is involved colors the question in a way which obscures the true purpose and effect of the program. The result is to discriminate against the involvement of religious bodies in worthwhile programs which have considerable secular benefit.225

The greater the chance that a religious message will be subsidized by the state’s action, the more searching the Court’s scrutiny of both purpose and effect should be. A statute which allows a government to furnish buses to nonpublic schools for field trips to locations of governmental or civic interest, as in Wolman,226 requires less scrutiny as to primary effect than a similar statute which allows a state to furnish tape recorders and record play-

222. Id. (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
225. The Court will have a chance to reexamine this issue this term when it reviews the Fourth Circuit’s decision in Rosenberger v. Rector & Visitors of Univ. of Va., 18 F.3d 269 (4th Cir. 1994) (upholding the University of Virginia’s denial of funding to a student Christian magazine because of its religious content, while granting funding to other student magazines). In that case, the Fourth Circuit looked at the primary effect prong of Lemon with regard to the funding program’s effect on the Christian magazine, not the effect of funding a diversity of student voices. Id. at 281.
ers, because the secular purpose for furnishing materials which may be used to convey a religious message is less clear. However, the incidental conveying of a religious message in a situation where the purpose of the statute is clearly secular, such as that in *Zobrest*, should not in itself invalidate the government’s action.

**B. A Narrowed Entanglement Prong**

Where the state provides a neutral benefit to its citizens without regard to religion, the purpose and effect prongs of *Lemon* and its progeny should be satisfied. Purpose and effect alone, however, are not sufficient to ensure neutrality where the possible transmission of a religious message is involved. A bedrock principle of the Establishment Clause is to avoid “active involvement of the sovereign in religious activity.” The decisions in *Kiryas Joel* and *Lee* demonstrate that a majority of the Court has not abandoned this principle.

Where aid to religious entities is involved, the avoidance of the sovereign’s active involvement under *Lemon* presents a dilemma: In ensuring that its aid is sufficiently distanced from the religious message, the state may draw too near to the religious entity to avoid excessive entanglement. The *Lemon* court itself recognized this quandary. It identified two dangers from the aid program in that case: that teachers “under religious control and discipline” would inevitably foster religion even while teaching secular subjects, and that the state, in order to prevent its funds from being spent on the propagation of religion, would have to involve itself unduly in the affairs of a religious institution. Monitoring the religious institution, as in *Lemon*, might ensure that public funds are not used to transmit a religious message. Yet monitoring for such a purpose is itself “active

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227. *Id.* at 249.
involvement\textsuperscript{233} solely on account of religion and can hardly be neutral.

This dilemma suggests that the Lemon's entanglement prong is necessary and should be retained, but that its scope should be limited. Excessive entanglement should be found only when the government's involvement is not, to borrow a phrase from another aspect of First Amendment law, "content neutral."\textsuperscript{234} No Establishment Clause analysis should allow a government action that requires the state to inquire into a religious message. The goal is to allow government involvement with religious entities only where it may treat those bodies no differently from similar private entities for Establishment Clause purposes.

This analysis would preclude the type of inquiry necessary in Lemon, where the statutes provided for state-sponsored monitoring of the messages conveyed in order to ensure that the state was not sponsoring a religious message.\textsuperscript{235} On the other hand, state inquiry into religious bodies which is based primarily on factors other than religion, such as health and safety or tax monitoring, should not violate the entanglement prong because the inquiry is based upon neutral factors applied to all bodies equally, rather than upon the religious message conveyed.

The question of political entanglement should not enter into this inquiry.\textsuperscript{236} The idea of government neutrality toward religion does not permit the views of religious bodies and religious people to be excluded from the democratic process, even where public funding is involved, as long as the public funding is other-

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\textsuperscript{234} See, e.g., Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2459 (1976) (Stewart, J., dissenting) (citing Police Dept. of Chicago v. Mosely, 92 S. Ct. 2286 (1972)).
\textsuperscript{235} As indicated, this sort of monitoring was not necessary in Aguilar, because there was no record evidence of an increased likelihood that public employees would convey a religious message merely because they were on religious premises. Aguilar v. Felton, 473 U.S. 402, 424 (1985) (O'Connor, J., dissenting). Under the test proposed here, the majority of the scheme in Aguilar would be upheld. Only that portion of the statute which provides for state monitoring of a religious message would be found unconstitutional. In Lemon, on the other hand, the state funds went to teachers who were employees of the religious institution, and the secular purpose to which the funds were to be put could not be ascertained without monitoring of the religious message. See Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). The result in Lemon would therefore remain the same under this test.
\textsuperscript{236} The Lemon Court noted in dicta a concern with political entanglement. Lemon, 403 U.S. at 622-24.
\end{footnotesize}
wise constitutional. Although the Court has never voided governmental action strictly because of political entanglement, it has not directly repudiated the notion of political entanglement. If given the opportunity, it should do so.

C. How It Works

This test would find Establishment Clause violations in the state's sponsoring of religious exercises, including graduation prayers and Congressional chaplains, because their purpose is not primarily secular. It would, however, permit certain types of aid to parochial schools, if that aid could be convincingly shown to have a primarily secular purpose and primary effect and would not necessitate state involvement in a religious message. Such an analysis should not gloss over the policy decisions that led to the state's undertaking the aid: Is the primary purpose to give children benefits they would not ordinarily get and which the state wishes to provide, or is it to lift burdens on parochial schools and to pay for items the school would ordinarily provide?

Courts must carefully scrutinize the government's purpose where it provides benefits which go directly to parochial schools, rather than to students. The inquiry should be particularly searching when the aid at issue consists not of special services traditionally provided by the state, such as remedial services, but ordinary school supplies such as books, tape recorders and computers. This type of inquiry makes distinctions based not on whether a religious message may be conveyed by the supplies, but on the state's motive for providing the aid. Thus, the primary purpose and effect are more apparent in a case like Zobrest, where the motive is clearly to assist deaf children by providing interpreters, than in a case where the state provides tape recorders or books which are normally supplied by the sectarian schools.

Once it is found that the state's motive is secular, none of the above forms of aid should present involvement that might violate

237. See Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("[T]his Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct."). See also Tribe, supra note 147, at 1278.
Lemon's entanglement prong as it is framed here. No religious message is being given by the state or with the state's endorsement. Such an analysis avoids the result criticized by Justice Burger in Meek:

To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children only because they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.241

There will be cases, however, where aid to parochial schools involves too much entanglement in the religious message. This is true where the state pays the salaries of parochial school teachers, for the state is directly subsidizing a religious message in doing so. Thus, the scheme in Lemon would violate the entanglement prong and the Establishment Clause; the scheme in Aguilar, where public school teachers were sent into parochial schools, should not.242

V. CONCLUSION

The search for a consistent Establishment Clause test should not be abandoned. The three-part test set forth in Lemon v. Kurtzman provides a useful blueprint if narrowly and consistently applied to maximize governmental neutrality among religions and between religion and irreligion.

241. Meek, 421 U.S. at 386-87 (Burger, C.J., concurring in the judgment in part and dissenting in part) (emphasis added).

242. The Pennsylvania scheme invalidated in Aguilar provided for monitoring of the public school teachers to ensure that they were not teaching religion. While such monitoring would violate the entanglement prong as defined in this article, the monitoring was not necessary to ensure neutrality. Without the monitoring the scheme would pass muster.
SPECIAL ESSAY

AMERICAN LEGAL POPULISM:
A JURISPRUDENTIAL AND HISTORICAL NARRATIVE,
INCLUDING REFLECTIONS ON CRITICAL LEGAL STUDIES

by John Batt*

I. INTRODUCTION

This is an essay in macro-jurisprudence. In this work, the vision of a particular jurisprudence, American Legal Populism, will be linked to matters of adjudication, litigation, legislation, administration and legal education. As a matter of intellectual strategy the wide-screen effect is sought. Presentation of the relevant full field (the jurisprudential context) is stressed while motion in the direction of theoretical particles is suppressed. The above approach has been selected so that nonspecialists will not find themselves reflexively alienated from the jurisprudential ideas, images and arguments presented in these pages. The isolation of jurisprudence from the vital center of legal experience (especially legal education) is, I believe, due in large measure to the specialists preoccupation with technical jurisprudential vocabularies, the failure to stress value conflicts and the emphasis on small matters.

My view is this self-imposed exile of the legal philosophers impacts negatively upon all of us who do our work in the law. The truth is theory not only allows us to organize and understand the myriad phenomena of law and its connected social context, but is the true basis for informed practice. Practice in

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2. Nonspecialists have also transgressed by dismissing jurisprudence as of little relevance to legal reality.

the fields of policy making, legislation, adjudication, rule making, litigation, alternative dispute resolution, client counselling and legal education is always significantly shaped by advances in theory. Put pointedly: jurisprudence matters. But so much for the prelude, let us consider the specific content of this paper.

Primary concentration will be on a category of jurisprudence that I call American Legal Populism but certain other jurisprudential views will be considered. As the name indicates, ALP is a jurisprudence of the people, by the people and for the people. It stands in opposition to the jurisprudence of special interest. Until now, this class of legal thought has remained unidentified. However, there can be no doubt it exists. Over the last several years I have traced the course of this people’s jurisprudence from its recent comprehensive statement in Gerry Spence’s brilliant 1989 publication With Justice For None: Destroying An American Myth, back through American legal history to the work of that multitalented lawyer/statesman/politician/philosopher/savant, Thomas Jefferson. Jefferson came to the law in the second half of the eighteenth century. The most succinct statement of his people’s jurisprudence can be found in his draft of The Declaration of Independence. Jefferson’s jurisprudence is best described as a “rights-of-man” system. It is rooted in natural law and Anglo-Saxon concepts of liberty. Homo sapiens (the people) stand at the earthly center of this Jeffersonian system, and moral philosophy and natural science are wedded to the legal tradition to promote positively the lives of human beings. Jefferson was an unabashed advocate of law in the service of public and private happiness.

Connective figures linking Jefferson and Spence include Andrew Jackson, James Madison, John Taylor, Martin Van

5. The word “populism” is derivative of the Latin “populus,” meaning “people.” The term “populism” as used in this article should not be connected to any particular political party existing in the past or in the present.
9. Seventh President of the United States. Jackson will be discussed at length in this paper.
10. Fourth President of the United States. Madison is well-known for his work on

11. Taylor was a Virginian Planter and political thinker who was a true "original." He was an extraordinarily principled man and not nearly as pragmatic as Jefferson. Taylor's writings on states' and peoples' rights had a significant impact on such early Jeffersonians as John Randolph of Roanoke. See H.H. Simms, THE LIFE OF JOHN TAYLOR (1932).

12. Eighth President of the United States. A lawyer/politician, Van Buren was an ardent supporter of Andrew Jackson's populist program.

13. Twenty-eighth President of the United States. A lawyer/politician/statesman, he was a true heir of Jefferson's values and ideas. He will be considered at length in this paper.

14. Twenty-sixth President of the United States. A lawyer/politician who perhaps most personified the courage of the dedicated legal populist. A leader of compassion and spirit.

15. A people's advocate as a lawyer and enemy of corporate monopolies. Louis Dembit Brandeis was appointed to the U.S. Supreme Court in 1916. His civil liberties opinions are landmarks.

16. Thirty-second President of the United States. A lawyer and lead architect of the New Deal. Litigation involving economic legislation sponsored by the Roosevelt Administration brought the president into conflict with a U.S. Supreme Court majority which held jurisprudential values very different from those of the President.

17. Frankfurter was a Harvard law professor, New Deal lawyer and a U.S. Supreme Court Justice. He is perhaps best known as an advocate of "judicial restraint." Frankfurter took the view that law making was the main task of the legislature, not the judiciary.

18. A corporate lawyer, New Deal lawyer, federal judge and legal philosopher, Frank was a leading legal realist. See JEROME FRANK, COURTS ON TRIAL (1971).

19. A Yale Law School professor, New Deal lawyer and controversial member of the U.S. Supreme Court. An outdoorsman, environmentalist, and civil libertarian.


22. Yale Law School professor, one of the greats of international law and a preeminent figure in Law, Science and Policy jurisprudence.


25. Thirty-fifth President of the United States and strong proponent of civil rights.

26. Thirty-sixth President of the United States and architect of Great Society
As previously indicated, American Legal Populism is a people's jurisprudence. It is democratic. Government is by the people — supreme power is vested in them. The people exercise this power directly or through their lawfully empowered representatives. Authority, that is the power of the government to legislate, to sanction, to judge and so forth, derives from the will of the people. The people are pre-eminent. Furthermore, this populist jurisprudence asserts social opportunity is a fundamental goal. Critical values are to be widely distributed through law-assured opportunity. For example, access to education is to be made

social programs and legislation.

27. Thirty-ninth President of the United States and dedicated advocate of national and international human rights.
28. Former Attorney General of the United States and a private practitioner who has fought many significant civil liberties and human rights battles.
29. Like Earl Warren, an Eisenhower appointee to the U.S. Supreme Court. An ardent supporter of citizens' rights.
31. Judge of the United States Court of Appeals, District of Columbia. Author of the court's opinion in Durham v. U.S. 214 F.2d 862 (D.C. Cir. 1954). This brilliantly conceived opinion galvanized the "great debate" over the legal issue of criminal responsibility (insanity). Judge Bazelon was a brilliant and innovative legal thinker.
32. Former Harvard Law School professor, currently a member of the New York University law faculty and a long-time warrior who fights on behalf of civil rights.
33. Former Yale Law professor, appellate advocate and First Amendment expert.
34. Long-time Senator from Massachusetts and a social legislation and civil rights activist.
35. U.S. Supreme Court Justice appointed by Lyndon Johnson. Head of the NAACP Legal Defense and Education Fund during the years of its greatest legislative successes. A true justice for the people.
36. Values for the purpose of this article may be best defined as preferences.
freely available. Access is not to be determined by factors such as social class or income, and it is a task of the law to keep open the channels of opportunity. Now American Legal Populism stands not only for social opportunity, but also for juridical equality.\textsuperscript{37} For the jurisprudential populist, it is a given that all persons are equal before the law. Moreover, all women, men and children possess certain fundamental rights that the government is required to promote and protect. This preference for fundamental rights is the product of American Legal Populism's natural rights\textsuperscript{38} orientation. It should be noted the rule of law has a very high value to the proponents of this form of jurisprudence, for it is through the law that fundamental rights are promoted and protected.

Central to this philosophy of law, being and society is the idea of civil liberty. Every person is entitled to power over her or his life. Insofar as it is possible within the ambit of organized society, the individual is to be self-governing. Autonomy is a fundamental value. American Legal Populism stresses self-determination,\textsuperscript{39} because it holds that human dignity is maximized by empowering the person. To empower the person, the law must guarantee certain essential rights. People must be assured of freedom of thought, freedom of conscience, freedom of expression and the freedom to act. Moreover, under the law, they must be secure in their persons and habitations. There must exist the right to be let alone.\textsuperscript{40} American Legal Populism forcefully expresses the view that this right has special significance in relationship to the powers of government.\textsuperscript{41} History's teaching has

Values are "acquisitions" that enhance one's security, self-esteem, social standing and so forth. Well-being, enlightenment, respect, skill, affection, wealth, rectitude and power are examples of "values" as the term is used here. The ultimate jurisprudence of values is the Law, Science and Policy system of Myres D. McDougal and Harold D. Lasswell. See Harold P. Lasswell & Myres S. McDougal, Jurisprudence for a Free Society: Studies in Law, Science and Policy (1992).


38. In the legal populist tradition, man/woman is seen as possessing certain rights that are grounded in the fact of human existence. For example, "all persons are created equal" would be a natural rights norm accepted by legal populists. This statement would, of course, be related to a much more complex philosophical rationale.


41. See James MacGregor Burns & Stewart Burns, A People's Charter: The
made it clear that those in power can act from corrupt motive and seek to put an end to the rights and the authority of the people. By law we must restrict this tendency to totalitarianism. Without such restriction democracy is endangered. It is clear that American Legal Populism advocates a jurisprudence based on the realities of politics and power. Law exists in a political field and is influenced by political factors. However, this people's jurisprudence extends its interests beyond the political and civil. The partisans of this philosophy hold political and civil rights must be complemented by economic rights.\(^\text{42}\) They energetically stress matters economic. They hold everyone has the right to work and the right to a safe workplace. People are to be protected in their employment. Moreover, employees have the right to form associations and act under the law to protect their interests. Rights related to employment are viewed as fundamental because income not only sustains being, but places one in a position to assert civil and political rights. In addition to employment rights, people's jurisprudence stresses the person's right in his or her individual property.\(^\text{43}\) American Legal Populism supports the right to engage in business. It should, however, be noted that American Legal Populism strongly opposes the law being used to aid in bringing about the concentration of vast amounts of wealth and economic power. The advocates of this juridical populism vigorously oppose those intellectual descendants of Alexander Hamilton who view government and law as primarily a vehicle for the advancement of highly concentrated corporate, financial, commercial and industrial interests.\(^\text{44}\)

In anticipation of the possible reflexive reaction of certain readers, I emphasize that American Legal Populism has nothing to do with Soviet economic thinking pre-the thaw of 1990. Moreover, it should not be equated with the easy liberalism of the academic seminarian. American Legal Populism is, in a Jeffersonian sense, nativist, critical and activist. It seeks always to change the American system so as to promote plain folk democracy. It stands for life, liberty, economic opportunity and the

\[^{42}\text{Id. at 262-64.}\]
\[^{43}\text{See Arthur M. Schlesinger, Jr., The Age of Jackson (1953).}\]
\[^{44}\text{See George B. Tindall, America: A Narrative History 312-13 (2d ed. 1988).}\]
quest for a decent life as a free human being. Above all, it is a jurisprudence of being as opposed to a jurisprudence of objects and acquisitiveness. Certainly there is much more to say by way of explication, but that task will be delayed for the moment. Further information on American Legal Populism will be provided when this paper focuses on specific populists such as Gerry Spence, Thomas Jefferson, Earl Warren, Andrew Jackson, and others. This attention will occur in just an intellectual/spatial moment. However, a few final introductory words must be said.

The next section of this paper provides an in-depth look at the legal populism of Gerry Spence. He is a pre-eminent trial attorney, author and media analyst of significant legal events (for example, the O.J. Simpson trial). Spence is dealt with at some length because he is such an accessible, widely known and brilliant exponent of populist jurisprudence. After having developed the populist philosophical paradigm by using Spence’s work as an exemplar, I narrow our focus and concentrate on legal education from the point of view of American Legal Populism. I do this because scholars of jurisprudence have been far too little concerned with the critical matter of legal education. The reality is that legal education is jurisprudence in action. What and how people are taught is determined by the jurisprudential vision of those who hold power over legal education. In this part of the paper, I compare Spence’s ideas regarding legal education to those of Jefferson, Myres McDougal, Harold Lasswell, William O. Douglas, Felix Frankfurter and others. The reader will note that I begin with Jefferson’s ideas and those of other American Legal Populists and then present Spence’s views on legal education. The views of Jefferson and others are introduced to demonstrate that American Legal Populism is not monolithic in regard to pedagogy, but rather that proponents of American Legal Populism are definitely not devotees of the traditional case method. Moreover, these views are put forth to provide context for Spence’s thoughts. Having dealt with issues of legal education, I turn to the task of discussing the place of legal populism in American legal history. This section of the paper makes clear the incredible role that ideas about law play on the American political/historical stage. This part of the paper should demonstrate to the reader that American Legal Populism has often prevailed in the White House and on the U.S. Supreme Court. It has truly been a force on the national scene. Following this foray into
political history, I shall take up the special case of Critical Legal Studies. Critical Legal Studies is the bête noire of those who support legal formalism, traditional legal education and the sanctity of neutral principles. Critical Legal Studies challenges the formalist view that legal reasoning is a "chaste" technical process unrelated to the economic and political processes of power.\(^{45}\) This variety of legal thought instead insists that the law floats in a power medium. To reveal its truths, Critical Legal Studies makes extensive use of deconstruction,\(^{46}\) which is a method of critical analysis, to reveal the political and economic infrastructures and forces that produce the laws of our culture. Deconstruction is a process that resembles the investigative approaches in psychoanalysis and geology.\(^{47}\) The visible is intensively scrutinized to allow access to what is initially invisible. The quest is for hierarchies, systems, motives and the allocation of values. The "text" (the surface) is cannibalized to reveal its fissures, contradictions and so forth. This work leads the critic to the hidden forces that gave rise to the text. Critical Legal Studies' favorite text for deconstruction is the appellate case containing system-approved legal concepts and analysis. Following the thinking of theoretical physics, Critical Legal Studies stresses the law is largely indeterminate.\(^{48}\) In addition, participants in the Critical Legal Studies movement make it clear the contemporary legal, economic and social systems are so malfunctioning, corrupt, a-human and anti-democratic that they must be replaced with new human, intellectual, political, economic and operational systems.\(^{49}\) All champions of Critical Legal Studies

\(^{45}\) Katherine T. Bartlett, *Feminist Legal Method*, 103 Harv. L. Rev. 829, 862-63, 878 (1990). Professor Bartlett demonstrates how consciousness raising is the connection between law and politics and how it is done through a new legal method.


\(^{47}\) In these two disciplines, what is beneath the "surface" is mined to provide deep structure which allows the examiner to comprehend the real significance of the visible — that is the significance revealed through establishing zonal relationships. For example, psychoanalysis is the relationship between the conscious, pre-conscious and unconscious mental systems.

\(^{48}\) Indeterminacy in this context refers to our inability to predict case outcomes by reference to a particular rule of law. This idea is subversive to traditional views of the utility of "legal reasoning."

hold a large number of contemporary legal educators act along with other institutional participants loyal to "the Hamiltonian system" to ensure the preferred status quo is preserved. Consequently, legal education must be reformed to serve the interest of the people.

This author's argument will be that Critical Legal Studies is in fact, a strain of American Legal Populism. Critical Legal Studies is, of course, aesthetic, academic and postmodern. However, it will be stressed and, I believe, established that Critical Legal Studies is neither a foreign Marxist philosophy of law nor in truth the phylogenetic heir of legal realism.

II. GERRY SPENCE AND THE JURISPRUDENCE OF THE OPPRESSED

The central figure in this section's explication of American Legal Populism is Gerry Spence — one of our greatest trial lawyers. Spence is no academic. He styles himself as a frontier lawyer. In Stetson hat, fringed jacket and cowboy boots, he looks like a good old cowboy made for the trail drive — not the federal courthouse. United States prosecutors bought this image when Spence showed up in New York City to represent Imelda Marcos at her racketeering and fraud trial. They made a fatal mistake. The Samurai cowboy karated the prosecution so badly that the jury acquitted Mrs. Marcos of all charges. They should have known it was coming. Over the years, Spence has piled up an incredible number of big wins at trial, including a 1979 jury award of $10.5 million against Kerr-McGee Corporation for the mishandling of plutonium in one of its plants and the resulting death of worker Karen Silkwood. The truth is that Gerry

50. Postmodern refers to modes of thought, intellectual and affective paradigms, styles in art and literature, and technologies and the end of the Industrial Age. This age began in the 18th century and was on the wane by the 1950's. See JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984).

51. It will later be argued that Critical Legal Studies is a very domestic legal "science."

52. Folksy Lone Ranger Lawyer Ropes Another One, USA TODAY, July 3, 1990, at 3A; Marcos is Cleared of All Charges in Racketeering and Fraud Case, N.Y. TIMES, July 3, 1990, at A1.

53. SPENCE, supra note 6, at 70-79. An outstanding film directed by Mike Nichols titled Silkwood was released in 1983. The film dealt with the events leading to Karen Silkwood's death.
Spence is far more than a cowboy trial lawyer. His periodic appearances on public broadcasting television programs on the law long ago made it clear to me that he is erudite, intellectually gifted, psychologically sophisticated, street savvy and an absolute bane to those law professor moderators who decide to match wits with him.

Reading Spence’s books has confirmed my view that he possesses very high-order cognitive, critical and creative abilities. This man has a first-rate mind and a narrative talent seldom found in law practitioners, judges, legislators or professors. Although he undoubtedly would deny it, he is a legal intellectual writing people’s books of jurisprudence for those who believe justice is critical to the life of a democratic society. Spence’s work is exceptionally accessible and is read by all types of people: journalists, school teachers, media workers, retirees, university students, political scientists, secretaries, novelists, politicians, law professors, trial lawyers, sociologists, judges, businessmen and women and others. Certainly, the accessibility of Spence’s outstanding work makes it important. However, I concentrate on his version of people’s jurisprudence because his With Justice For None: Destroying an American Myth is the premier contemporary statement of the American Legal Populist position. It is a sweeping, inspired populist treatise. In addition, Spence’s work serves the purposes of this paper by helping to demonstrate the connection between American Legal Populism and Critical Legal Studies. Let us at this juncture consider Spence’s jurisprudence of the oppressed.

With Justice For None articulates a clear-cut statement of the author’s fundamental position, namely that the American legal system rarely delivers justice to the people. Justice is more illusion than a reality. People continually seek it, but it only infrequently makes its presence felt. Moreover, Spence states the system has never provided the mass of citizens with

55. See GERRY SPENCE, FROM FREEDOM TO SLAVERY (1993).
56. SPENCE, supra note 6.
57. Id.
58. Id. at xiii.
more than a scintilla of justice. Justice under the flag has always been largely maya. There is an explanation for this, and thirty-five years of trying cases involving individuals suing corporations has taught Spence the reason behind this legal reality. It is all very simple: the American system is a money system! If you cannot pay, you get very little play. 59 Spence states categorically the “money game” continues to destroy the hope of justice in the United States. In our system, money determines economic, social, political and legal outcomes. The megacorporations (and their affiliated institutions, e.g., political action committees) have achieved hegemony. They have become the power plant of our system. They own the engines, the lines and the dynamos, and they can turn the current of social, economic and political behavior on and off as they choose. The Galbraithian 60 arena of countervailing powers no longer exists. We are dominated by the new corporate state.

This new state has turned our institutions, our workers, our students and lawyers, our judges and our individual (noninstitutional) litigants into commodities. They are all “things” that exist in the milieu of the marketplace. 61 Spence produces substantial evidence to support his positions. His chapters on corporate crime, 62 the insurance industry, 63 workers as slaves and people as property are convincing. 64 There exists much independent corroboration of his views that our system has been perverted by the power of money. 65 Although it is clear Spence has

59. Id. at xii.
60. John Kenneth Galbraith is an outstanding economist and was Ambassador to India under President John Kennedy. For his theory of countervailing power, see JOHN K. GALBRAITH, AMERICAN CAPITALISM 108-34 (1962). Reduced to its essence, the theory is that when power becomes “extremely” concentrated in our society, oppositional forces develop their power value position to restrain segments of the society and economy that have become so powerful that they threaten to destroy the American System.
61. SPENCE, supra note 6, at xiii.
62. Id. at 198-217.
63. Id. at 181-97.
64. Id. at 162-80.
done his research (his footnotes make this clear), he does not flood us with data. He selects another approach. He makes us look at the justice system as if we were "children taking a watch apart"—that is, he deconstructs it for us. Like Jacques Derrida, the eminent French philosopher/literary critic, Spence adopts a critical method that allows him to move beyond the rhetoric of the official system. Like Derrida, Spence has learned that the authorized approaches of formal logic, the use of reason without adequate factual information and linguistic analysis seldom withstand close scrutiny. Through his version of deconstruction, Spence penetrates the facade of the official story and explores the deep structure of the system. Western jurisprudence has been obsessed with abstract language, and Spence finds this tradition to be debasing. He seeks the power hierarchies that exist beyond the words. The official rhetoric is "justice for all." Spence takes this idea and grounds it; he places it in context. He refuses to obsess over the language that makes up official legal discourse, but instead seeks the elements of the functioning system. He is interested in systems analysis. Of course, his focus is on human systems rather than on mechanical systems. Therefore, he explores who gets what, when, how, from whom, and why.

Spence identifies the various relevant systems of courts, juries, law schools and others and then examines the relationships, actions and interactions that exist between and among the participants who operate in these arenas. In the conduct of this project, he refuses to be bound by the perimeter of any one discipline. He flows across boundaries making use of legal, economic, sociological, political and narrative approaches to reveal the realities of the justice system. However, Spence is at his best when he works within the tradition of narrative jurisprudence. His stories of men and women in jeopardy before the


66. SPENCE, supra note 6, at xiii.
68. Here I have borrowed from HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN HOW (1958).
law are compelling. These stories deal with life, death, trauma, disease, love, money and power. Spence’s life as a trial lawyer has taught him the remarkable power of story to instruct and move people emotionally. He knows people respond affirmatively to the skilled use of the classical elements of character, conflict, climax, exposition (beginning), development (middle) and resolution (ending). However, Spence has arrived at an additional truth. He has learned that narrative has the power to deconstruct. The official story, juridical rhetoric and empty symbols quickly give way in the face of a well-crafted narrative. Traditionally, deconstruction has been used by literary academics to deconstruct narratives. However, Spence performs an interesting rotation. In his skilled hands, narrative becomes the weapon rather than victim. Let us consider one of Spence’s narratives. We turn to the saga of Karen Silkwood.

Silkwood is a trial story told originally through opening statement, direct examination, cross examination and closing statement. Every trial is a chain of narratives. The audience is the jury. In With Justice For None, Karen Silkwood’s story is much condensed. However, even in the reduced form it has a compelling content. The Trial Story: Karen Silkwood — just an ordinary woman. Had her kids, had her troubles, had her bills, had her friends and had her job. Workin’ folk. Had a little Honda. Drove it to the plant everyday. Workin’ for the man. Workin’ for the Kerr-McGee. Big-money company. Corporate America. Big plant, big executives, big bucks, big political power — workin’ for the big boys. Just like everybody out there in America, workin’ and payin’ the bills. But, people of the jury, there’s a problem. The plant where Karen works is a pig pen. It’s a filthy mess. But it’s not dirt we’re talking about. It’s not garbage. You walk through the front door and you can hardly breathe. Ammonia fumes cut through your lungs. And everywhere all over the place there’s this atom bomb stuff. This cancer-making material. The place is littered with uranium. Radio-

71. SPENCE, supra note 6, at 70-84. The following trial story is derived from Spence’s book.
72. SPENCE, supra note 6.
73. Id. at 71-84.
active spills occur over and over. This plant is in the nuclear business. Less than one pound of this death-dealer material can eradicate the total population of the world. Every single human being! But there is more to this story. Forty pounds of plutonium are gone, missing! The company can't find it.

Over time, Karen came to see how dangerous things were at this plant. She studied the dangers of plutonium. She saw eighteen- and nineteen-year-old workers risking their health and lives around this stuff. They didn't know how deadly exposure could be. And the company was not protecting them. Over and over the company allowed workers to be exposed. Kerr-McGee records show 575 incidents of employee contamination. Seventy times the federal government cited the company for the violation of federal safety regulations. A sign in front of the plant says “SAFETY PAYS.” Karen knew this was pure public relations. The company cared little about safety for its employees.

Karen contacted a reporter for the New York Times, David Burnham. She was going to expose Kerr-McGee. She and Burnham set up a meeting. But Karen never made the meeting. Her Honda was found crushed against a concrete culvert. The car was just down the road from the plant and she was in it — dead. One of her fellow workers says she had a file of evidence against Kerr-McGee with her when she went to meet the reporter. The file has never been found and some people believe she was run off the road to shut her up.

And now here we are, men and women of the jury. Bill Silkwood, Karen's father, has brought suit on behalf of her children. Damages are sought for injuries his daughter suffered in her lifetime. She, like others, had been contaminated by Kerr-McGee's plutonium. Plutonium gets its name from the god of the dead, Pluto. Now damages are also sought to “assure society” that Kerr-McGee will take appropriate steps to protect their workers and the community from the dangers of its plutonium.

From the legal point of view, we are concerned about the law of inherently dangerous substances. The law is that if the inherently dangerous stuff escapes from the owner, she or he is re-

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74. Id. The reader is here reminded that the narrative contained in the pages of this paper is based on the narrative put forth in Spence’s book. Although I have condensed the narrative, great pains have been taken to retain the flavor of Spence’s presentation.
sponsible. If it gets out of the owner's possession and damages people, the owner of the substance is responsible. Let's put it on the blackboards. "IF THE LION GETS AWAY, KERR-MCGEE MUST PAY." In this case, the lion belongs to Kerr-McGee. It is Kerr-McGee's plutonium. Think of it this way: a lion tamer brings his lion into town in a cage. He's got the cage locked, but somehow that lion gets away. The law states that he is responsible if the lion attacks and injures someone. It makes no difference how that lion got out of the cage. And in this case, the lion got out! Folks, it went right into town. Workers contaminated at the plant went into town to eat. They walked into a restaurant and contaminated a restaurant where townspeople eat. Think of it. Customers coming and going. Employees doing their jobs. Think of how many people were exposed. Later at the plant, the workers were decontaminated. But no one from plant "safety" every went to the restaurant to check on the employees or find out what people had been in to eat.

Now here is the testimony on Karen Silkwood's contamination with this deadly substance. Karen would exit the Kerr-McGee plant clean. The next day when she checked in for work, she would have as much as ten times the Atomic Energy Commission's "acceptable" readings on different parts of her body. The readings kept going up. When her apartment was checked by the company "safety" people, there was plutonium everywhere. It was in the bedroom, in the refrigerator, in her sheets, even in her food. The Kerr-McGee story was that she planted the plutonium in her apartment and exposed herself. But other witnesses contended that she had cooperated with the Oil, Chemical and Atomic Union workers to unionize the plant. These witnesses testified union opponents in the plant were responsible for the contamination. They were out to discredit and terrorize Karen Silkwood.

Through the proof, attorney Spence emphasized the critical trial story point — the "LION GOT AWAY!" Consider the testimony of plaintiff's witness, Dr. John Gofman, a physician and specialist in nuclear chemistry. Kerr-McGee had alleged a little plutonium won't hurt you. According to Dr. Gofman:

This is so absurd one wonders how anyone can think it. Expecting that an alpha particle will go through a cell and not do horrible damage is like ramming an ice pick through a fine Swiss watch,
or shooting a machine gun through a television set and saying it will function just fine.\textsuperscript{75}

On the stand he made it clear — a "thousandth of a thousandth of a thousandth"\textsuperscript{76} of a pound of plutonium loose around human beings puts their life and health in jeopardy. Consider forty pounds lost!

Dr. Gofman testifies there is no safe amount of this material. The Atomic Energy Commission hasn't told we-the-people the truth. The agency's permissible dose is "a license to give you a poison that can kill you".\textsuperscript{77} Karen Silkwood, says Dr. Gofman, contained 1.3 times the amount of plutonium needed to give her lung cancer. And this was at her autopsy. At the time of exposure she would have had much more present in her body. Her fate was sealed. Cancer! "She was married to cancer" testifies Dr. Gofman. Dr. Gofman's bottom line on Kerr-McGee's failure to inform and train its workers: "clearly and unequivocally negligence."\textsuperscript{78} Proof of the failure to inform and train the workers was yanked out of a company witness via cross-examination. Cross-examination reveals much relevant information had not been made known to the workers. Moreover, much of what was made available to the workers was cast in scientific language that meant little to them. The language of the plant safety manual never contained the word "cancer."

For three months the jurors heard the proof. They listened to the witnesses and observed their demeanor. After three days of deliberation, the jury came in with a verdict for the plaintiff. The award: $500,000 for the actual damages and $10,000,000 in punitive damages. The jury's verdict: "THE LION GOT AWAY, KERR-MCGEE must PAY." The verdict got headlines! People in the nuclear business took notice. The jury had spoken. Vindication through our sacred right of trial by jury.

Hold on. Just a minute. Kerr-McGee appeals to the United States Court of Appeals for the Tenth Circuit.\textsuperscript{79} And unbelievably — the judges reverse the case. The appellate court decides that the state of Oklahoma does not have the legal right to pun-

\textsuperscript{75.} Id. at 71.
\textsuperscript{76.} Id.
\textsuperscript{77.} Id. at 72.
\textsuperscript{78.} Id.
\textsuperscript{79.} Id. at 78.
ish Kerr-McGee. The $10 million in punitive damages cannot stand because the federal government had preempted the right to regulate the nuclear industry. The Oklahoma jury has invaded the province of the Nuclear Regulatory Commission (formerly the AEC). The appellate court does not even make reference to the fact that the NRC had done nothing to punish Kerr-McGee for its numerous violations. The court never mentions the workers’ right to be protected from the horrors of plutonium. As for Karen Silkwood, the court decides her injury was job derived and she was barred from suing by the state worker’s compensation act. In the end, the court demonstrates it cares more about the theory of jurisdiction than it does about the rights of working people. Several more years of appeals follow. Finally, seven years after the end of the trial, the case is settled for just a little more than a year’s interest on the original $10,000,000 amount awarded by the jury. 80

Now Spence (in his discussion of the Silkwood case) has given us a carefully crafted tragic narrative. It is a well-plotted tragedy. A heroic figure steps forward to seek justice for her people. She engages the forces of darkness, fights the true battle, but ends up dead on the plains of ethical combat. Vindication is sought in the people’s temple — the courtroom. All goes well; the jury rises up to protect the people. All is right in the heaven of democratic justice. But there is the dramatic reversal. A deus ex machina appears in the form of the appellate court. The gods are not on the heroine’s side. Divine authority descends from the mount not to favor the people, but the forces of death and despair. It is a “classic” work, tragically Greek. This form is time-tested in the Western world. Spence knows it works — it hooks our central nervous system. It creates a nexus of identification and prepares us to receive the narrator’s ideas about law, responsibility, power, social values and social structure.

It is unmistakable that Spence uses narrative as a deconstructive device. Narrative as employed by Spence is a political/philosophical instrument. 81 Moreover, the story of Karen Silkwood is definitely ideologic. The story is told from the vantage point of American Legal Populism. The principal pop-

80. Id. at 79.
81. See JONATHON CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982).
ulist idea presented in the Silkwood saga is that a Hamiltonian system driven by a money ethic will not dispense justice to ordinary people in civil cases. Ordinary Americans cling to the idea that a trial before a jury of their peers will produce just compensation for an injury unjustly inflicted. Gerry Spence's message is that the people's system — the jury system — has been short-circuited by the antagonists of democracy. His reference in his book to Thomas Jefferson's pro-jury position\textsuperscript{82} indicates the early origins of American Legal Populism's preference for jury justice and demonstrates Spence's allegiance to the populist tradition. The Silkwood narrative sends us a very specific Jeffersonian message: we the people are in jeopardy. The judges are in charge. The people's power has been usurped. Jefferson's experience with the English judges and their commercial preferences and their antihumanist decisions made him wary of a legal system dominated by judges whose allegiance is to the economic aristocracy.\textsuperscript{83} Spence's thirty-five years as a litigator have produced in him a similar attitude.

In \textit{With Justice For None},\textsuperscript{84} Spence iterates time and again that justice in a democratic society can only be produced by systems and institutions dominated by the people. He takes the position that when decision-making is removed from the substantial influence of the people, the results will never be justice. In his chapter entitled "Juries: The Great American Myth,"\textsuperscript{85} which discusses the Silkwood case, he indicates justice through trial by jury is undermined not only on appeal (as in the Silkwood case), but in several other ways. Spence points out that justice is endangered even at the trial level owing to the powers of the trial judge.\textsuperscript{86} The trial judge acts as a gatekeeper. She or he can prevent the case from even going to jury. This phenomenon is possible because the judge has the power to decide whether or not the quantum of evidence presented is sufficient to warrant jury consideration.

\textsuperscript{82} \textit{Spence}, \textit{supra} note 6, at 75.
\textsuperscript{83} \textit{See} Morris R. Cohen, \textit{American Thought: A Critical Sketch} 149 (1962).
\textsuperscript{84} \textit{Spence}, \textit{supra} note 6.
\textsuperscript{85} \textit{Id.} at 67-91.
\textsuperscript{86} \textit{Id.} at 85.
Spence argues this reality means that judges have the power to trash good cases. Furthermore, he points out that even if there is a trial by jury, judges have the power to “shape” the case. This opportunity to sculpt the proceeding derives from the power of the judge to make numerous rulings. Judges can rule on the procedures to be followed, the admissibility of evidence, the law to be followed, the arguments that counsel can make and the length of counsel presentation. Again, the role of the jury is diminished. However, Spence has something more fundamental to say about our judges. His experience has been that all too often, judges possess “attitudes and prejudices and personal philosophies . . . at violent variance with those of the injured citizen.” Put directly, Spence’s view is that judges have a condescending, class-determined attitude toward ordinary people. But, more on this in a moment. In his chapter on the myth of the jury, Spence points out that other features of our system considerably reduce the role of the jury in civil cases. As he puts it: “Over 90 percent of all civil jury cases are settled before trial, and the great stall is a standard part of the game.”

When the ordinary individual seeks personal injury compensation from a company defendant, there will be no swift justice. In fact, there will probably be no justice because the company knows it can stall and starve out the plaintiff. The injured plaintiff has bills and with the passage of time the financial pressures will produce a cheap settlement. Moreover, the longer the company hangs on to the money that should be paid to the injured party, the more interest the company collects. This is the game. The result in the vast majority of cases is “peanuts” for the injured party.

If the preceding insults to people’s justice were not enough to bear, Spence points out that workers’ compensation systems also subvert the jury system. Under these laws, workers give up their right to sue their employers for job-related injuries. Instead, they are compensated under an administrative system. According to

87. Id. at 86.
88. Id. at 85.
89. Id.
90. Id.
91. Id. at 68.
92. Id.
Spence, the problem is that such a system can produce substantial injustice. For example, under a workers' compensation system, the loss of a leg might be worth $45,000, while an adequate jury award would be in the hundreds of thousands of dollars.\footnote{Id. at 70.} Recall that in the Silkwood case the appellate court took the position that her case did not belong in court because a claim related to her employment should be processed under the Oklahoma workers' compensation statute.

Without doubt, the Silkwood narrative aims at the production of critical political consciousness. Spence, like other American Legal Populist notables such as William O. Douglas, Franklin Delano Roosevelt and William Brennan, has faith in the intelligence of ordinary people. They can understand the legal system. American Legal Populists believe that if the information and ideas are made available to the people, they can mount the necessary critique of the system. Once this is done, we are on the road to mobilization, action and the restructuring of systems so as to promote democratic values and conditions.

It should be noted that through his presentation of the Silkwood story, Spence links the law to politics, economics and social structure. Like Critical Legal Studies, American Legal Populism takes the position that law cannot be separated from politics, economics and class structure. The law does not run in neutral gear. It is driven by other determinative culture structures. This is strongly emphasized in the Silkwood narrative and the commentary that surrounds it. The Silkwood material makes clear the prevailing power hierarchy. At the bottom of the hierarchy are the people (i.e., Karen Silkwood, the jurors and the general public); above them are the judges and the federal regulatory agency; and at the top of the system are the more affluent and politically powerful corporations who dominate the system with their wealth and political power. In the Silkwood story, Kerr-McGee plays a didactic symbolic role and stands as an exemplar of the corporate class. It is clear that Spence, through his use of the Silkwood narrative, faults not only the justice system but also the corporate system. We are continually told through mass media that business is the American way. That the corporations serve our society. That business is responsible. Spence's narra-
tive, however, clears our minds of these absolutes, for it introduces us to a corporation that deals in an inherently deadly material and that fails to take the necessary steps to protect the people who work in the plant and those who live in the community. So much for PR talk of responsibility! Profit is the prize! Moreover, the narrative makes it clear that the power is with the corporation—not the jury. The NRC goes through the motions of regulation—but it does very little. Scratch another myth. The governmental agency does not exist to protect we-the-people. It exists to produce the appearance of protection. The message is that corporations, with their wealth, power and influence, crack the whip over the regulators.

An attentive reading of the Silkwood narrative informs the reader that the American system is not a people's system. It is a class system divided into two basic groups. The first group, which dominates our system, consists of those who control economic conditions (corporate leaders and others) and their junior partners (e.g., judges and regulators). The second group consists of people who do the everyday work: the people who man the assembly lines, the office machines, the cash registers, the classrooms, the mops and so forth. They are treated as though they were "things" by those who run the system. In a very real sense, they are viewed as biobased robots. If they are "broken" on the job or injured through company negligence, that is just a production problem. The system's goal is to do as little as possible for them. Cut the costs. Make the profit! I call the people who comprise the first group Hamiltonians. Like Alexander Hamilton, they believe in rule by the economic aristocracy. They do not believe in democracy. Listen to the words of Mr. Hamilton:

All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. . . . Can a democratic assembly who annually revolve in the mass of the people be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy.94

94. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 95 (1980).
Hamilton held that the country was best governed by both a President and Senate installed for life.

Parents and children. Big people and little people. The big people are entitled to the big money but there can only be little money for the ordinary people says Gerry Spence. Just ask the Silkwood children. At this point we turn from the power of narrative jurisprudence to the power of the American judiciary. I shall be expanding upon those views expressed by Spence in his rendering of the Silkwood case.

Spence's view on judges is part Jerome Frank and part Fred Rodell. Like Frank, Spence is certain that judges are human beings. Like Frank he refuses to view the judges as priests divinely ordained by Themis herself. Moreover, Spence knows, as did Frank, that these humans are influenced by psychological, social, economic and cultural forces. As a consequence, their decision outputs are affected by these forces. Spence and Frank see the rules of law as operating (in the mind of the judge) within the "totality" of the aforementioned forces. Therefore, a judge is a human being-in-society who is influenced by her/his experience over a life cycle lived in a particular society.

As a stylist and people's "orator," Spence resembles Fred Rodell. Rodell certainly shared many ideas with Frank and Spence. But unlike Frank, Rodell was less impressed by the human sciences, their relationship to law and the need to pour such knowledge into one's work. In truth, Rodell was a brilliant political writer and an heir to the tradition of Thomas Paine. Spence's plain-speak chapter on judges is very much in the Rodell style. Fascinating, caustic and political! Listen to populist advocate Gerry Spence:

Who are these judges who wield such power over us, a power reserved for God? Who are these mere humans with the power to wrest children from mothers and to condemn men to death or to cage them like beasts in penitentiaries? Who possess the power to strip us of our professions, our possessions, our very lives?

95. Spence, supra note 6, at 81.
96. Id. at 92-111.
97. Frank, supra note 18.
98. Rodell, supra note 23.
99. Spence, supra note 6, at 92.
Spence's view is the judges have been given and have claimed enormous power. Their jurisdiction is everywhere. Their "tentacles" stretch out into every community area — university, hospital, workplace, home, elementary school, abortion clinic and so forth. The question to be asked, according to Spence, is "To whom have we carelessly granted that power? Are they the kind who would understand you, who from their experience would know something of the fears and struggles you have faced? Will they care about you or about justice?"  

Note that unlike Robert Bork, Spence places no stress on judges and "neutral principles." Spence's thrust is not upward into the stratosphere of theoretical abstraction and derived principles. Spence is existential in his orientation. Like Albert Camus, Spence is engaged with human existence. His philosophy of justices emerges from his encounter with men and women in the human context. Spence knows that if we want to understand justice we are best advised to focus on human reality rather than empyreal elements that have no nexus to the concrete quotidian aspects of existence. Consequently, he is little concerned with the "theory" of judging. He goes after the facts on the human actors. This approach is squarely within the tradition of American Legal Populism.

What Spence has learned is of great interest — especially to the nonspecialist reader. The unalloyed truth is that the judiciary is composed largely of people who are essentially alike. The data reveals that American judges are in the main white, male, Protestant, fifty something years old, and political end products of a business-oriented large law firm practice. They have had very little experience representing the poor, the injury victims and the people charged with misdemeanors or felonies.

Spence points out the emphasis of presidents who appoint judges is on who they are and what they have done. Of course, the emphasis is on who these persons are politically and what

100. Id.
103. SPENCE, supra note 6, at 93.
they have done politically. Presidents do not separate the law from the politics of the judges, and neither do American Legal Populists. Spence and his conferees, along with the presidents, stress the experiential realities of American history and politics.\footnote{104. See Michael Pertschuk & Wendy Schaetzel, The People Rising: The Campaign Against the Bork Nomination (1989).}

To illustrate his point, Spence presents information on the work of one president. By early in his second term, President Ronald Reagan had appointed more than one-half of our 744 federal judges. Over 90\% were white, over 90\% were male and 89.5\% were Republicans. More than 60\% were Protestant. Most of them came from large law firms and over one-half of them had been prosecutors. The majority of them received their legal education at elite Ivy League schools or other private colleges. The vast majority of these judges had substantial financial assets.\footnote{105. Spence, supra note 6, at 93.} Spence's opinion is that these people are not people's judges. They are not people who will see justice from a democratic point of view. They will, instead, fact favor megabusiness and intrusive government. Put in a slightly different way, they are in all probability Hamiltonians who prefer "trickle down" and rule by the economic elite to democracy and the wide distribution of opportunity, income and influence. In fact, says Spence, the Reagan administration sought to screen out jurisprudential democrats:

Before they were approved for appointments, the Reagan judges were "shook down and wrung out" like crow bait being bought by a horse trader. The candidates were required to answer a ten-page questionnaire, followed by a day-long personal interview. A special administrative committee made further inquiries into the candidate's attitude toward abortion, school prayer, criminal procedure, and affirmative action; then, finally, the prospective judge had to pass muster with the attorney general himself. With few exceptions, those who received the administration's nod were not especially renowned for their fondness of the people or the people's rights. Only three of the appointees were black and four Hispanic. Elaine Jones of the NAACP says "[Reagan's judges] will just be hitting their stride in fifteen years. In any question that
pits the rights of the individual against the power of the state, we are going to see individual rights suffering.106

Spence expands his commentary on politics and judging by pointing out that in states where governors appoint judges, the candidates are often judged by Hamiltonian political criteria. Moreover, says Spence, nominating committees that provide the names of candidates are very frequently under the sway of special interests. However, Spence does indicate that it is possible to get people's judges — if they are elected by the people themselves. However, as long as the "Power"107 is able to dominate the process of judicial selection, the judges who don the robes will do very little to protect and promote the people's inalienable rights. They will serve the new industrial power clique.

In With Justice for None,108 Spence is particularly critical of the juridical condition. The reader turns to his chapter on practicing lawyers109 hoping to hear a different story — to learn about women and men who place a high value on democratic values and constitutional rights. The message is to the contrary. Spence tells us that people's rights-oriented lawyers such as Thomas Jefferson, Abraham Lincoln, Clarence Darrow, Martin Garbus and Ralph Nader are in extraordinarily short supply. In fact, Spence says that to a great extent, the legal profession is made up of hucksters, hustlers and hawkers. In addition, there is no lack of antisocial types — see the convict lawyers involved in the Watergate adventure. In his discussion of lawyers, Spence chronicles in some detail the change in his perception of the legal profession.

Spence recalls as a law student in Wyoming he and the other students held "the local Laramie attorneys in consummate awe."110 Lawyers had his respect. When he became a lawyer he was proud of his profession. But Spence holds that over time America changed and so did its lawyers. Today, says Gerry Spence, the new lawyers "are everywhere"111 and they are truly

106. Id. at 93-94.
107. Id. at 110. As used by Spence, "power" refers to the economic and political elite.
108. SPENCE, supra note 6.
109. Id. at 27-41.
110. Id. at 33.
111. Id. at 39.
a different breed of professional. He describes them as in the
main dedicated to pecuniary gain. They do not care about the
people they represent. These law practitioners chase success.
This means they stress the big money and the social
entitlements that go with it. Moreover, as the big money can be
made primarily representing big business, they prefer corporate
practice.

Spence argues these Hamiltonian lawyers have no real con-
cern for the rule of law and the rights of citizens. Spence is espe-
cially critical of the youngest members of the profession:
The new lawyers flock to our large cities, descend in hordes on
Wall Street and Washington, D.C. There many will spend their
lives dotting i's and crossing t's in high-floor cubbyholes — human
sacrifices to the profit gods of their corporate employers. Already
only a fortnight past puberty, they scorn such idealisms as jus-
tice.112

Spence presents a very unflattering view of the legal profes-
sion. He draws heavily on the results of public opinion surveys.
The survey results show that the public's view of lawyers is very
negative.113 Lawyers are seen as arrogant, greed-driven, ethi-
cally suspect and interpersonally offensive. Spence admits this
image of the profession has troubled him: "I hated to be hat-
ed."114

Furthermore, his writing on lawyers demonstrates a certain
ambivalence about their position in the American system. This
ambivalence in regard to the legal profession is, in fact, a juris-
prudential trait that characterizes American Legal Populism.
The populist negative view of lawyers can be traced back to the
American colonial period.115

However, a quite positive public reaction existed early in our
history in regard to certain lawyers of democratic persua-
sion — e.g., Thomas Jefferson, James Madison, George
Wythe,116 and Martin Van Buren. In truth, the image of the

112. Id.
113. Id. at 28.
114. Id. at 31.
115. See HENRY S. COMMANGER, THE AMERICAN MIND: AN INTERPRETATION OF
116. Wythe was a brilliant lawyer, judge and law professor during the Colonial
period. He was one of the original legal populists; Jefferson and Henry Clay were
two of his students. See Paul D. Carrington, The Revolutionary Idea of University

lawyer in the minds of the legal populists is split. There are basically the good and the ugly. Lawyers in the minds of these populists (including Spence) do not seem to exist along a continuum. Examples of the ugly are the railroad lawyers who helped the Morgan/Rockefeller empire spread its lines of power across the continent; the land lawyers who helped mineral and timer interests monopolize critical resources; the lawyers who aided the stock associations in their takeover of public land in the West; the lawyers who promoted the position of a limited number of entrepreneurs who acquired monopolies through patents; the Whig lawyers who appeared to exist to serve only the interests of the business class; the business lawyers who fought New Deal legislation claw and fang; the convict lawyers who surrounded lawyer Richard Nixon and the Solicitor General's lawyers who served the ideological agenda of the Reagan Administration.

Examples of good lawyers would be the democratic lawyers who supported the American Bill of Rights; those lawyers who promoted Jacksonian democracy; those lawyers who participated in the progressive law reform movement of the Theodore Roosevelt era; the “Brain Trust” lawyers who were pivotal in creating New Deal law and policy; the lawyers who helped mount the civil rights revolution; those government lawyers who resisted the Watergate cover-up; those crusad-


118. Id. at 58-62.


122. Thomas Jefferson and James Madison are examples.

123. See SCHLESINGER, supra note 43, at 57-78.


125. See SCHLESINGER, supra note 120, for mention of such lawyers as Jerome Frank, Robert Jackson, W.O. Douglas, Thurman Arnold, Hugo Black and Benjamin Cohen.


127. See 3 JAMES MACGREGOR BURNS, THE AMERICAN EXPERIMENT: THE CROSS-
ing lawyers who have worked with Ralph Nader to protect the people from corporate crime and fraud\textsuperscript{128} and the lawyers who have served the human rights movement.\textsuperscript{129}

Put candidly, the American Legal Populist view is that it is the good lawyers who serve the values of a democratic society and the bad lawyers who serve the gods of profit and megapower. At the ideologic and Jungian archetypal levels,\textsuperscript{130} this stand is acceptable. However, at the level of phenomenal scrutiny, the good/bad split does not always tell the whole story. Those of us who support the populist position should keep in mind that William O. Douglas was a Wall Street lawyer, Jerome Frank was a Chicago corporate lawyer, William Kunstler was a New York corporate lawyer, Thurman Arnold was a Washington, D.C. power broker lawyer and that Gerry Spence, at one time was a lawyer for the insurance companies.\textsuperscript{131} Perhaps the Hamiltonian law practice serves to ground the populist in the operational realities of the American political and economic system. Therefore, a business law experience could be important in the making of a knowledgeable legal populist.

In any event, legal populists should be aware that law practice related to the worlds of commerce, finance and industry does not keep one from becoming a proponent of people's jurisprudence. I believe that Spence is right about the movement of too many lawyers away from the values of civic responsibility and inalienable rights. One interesting example of the rush to the money ethic is provided for us by lawyer/drug smugglers and money launderers who have all too often turned up on the police blotter.\textsuperscript{132} The litigation world of the S&L's and Milken bonds provides us with other examples of lawyers whose values are at best derived from the scribblings of the sociopathic Darwinists. While

\textsuperscript{128} \textit{RALPH NADER ET AL., TAMING THE GIANT CORPORATION} (1976).
\textsuperscript{129} There is no available list of these lawyers. However, an excellent text referring to their work is \textit{AMNESTY INTERNATIONAL, VOICES FOR FREEDOM: AN AMNESTY INTERNATIONAL ANTHOLOGY} (1986).
\textsuperscript{130} The reference here is to the analytical psychologist C.G. Jung. Here, "archetypal" is used in the Jungian sense as a fundamental symbol built up by culture but based on the nature of humanity. See VALADYR WALTER ODAJMYK, \textit{JUNG AND POLITICS} 16-17 (1976).
\textsuperscript{131} \textit{SPENCE, supra} note 6, at 62.
Spence’s views on the worldly lawyers is truly attention adducing, his words on law schools (law factories)\textsuperscript{133} and law students (spare parts for the machine)\textsuperscript{134} are of special interest to legal educators.

With respect to the matter of legal education, it is important to note American Legal Populism has always been critical of approaches that are preoccupied with logical manipulation, wedded to verbalism, enamored of legal metaphysics, libidinized by the lure of rational principles, dedicated to the separation of law and politics, contemptuous of the teaching of law in relationship to other arts and science, without real concern for human rights, addicted to stressing private economic interest over public welfare, dedicated to elitist professionalism and advertising the lawyer as in the main, an agent of the economic elite. Individual advocates of legal populism have had different views on what the specific educational paradigm should be; however, all agree that the study of law should emphasize the lawyer’s civic responsibility and the rights of the people. At this point, a synopsis of legal populist views on legal education will be presented to set up my discussion of Spence’s position in regard to the conduct of the academic task.

III. LEGAL EDUCATION FOR A DEMOCRATIC SOCIETY

We begin with Thomas Jefferson. Jefferson completed his undergraduate studies at the College of William and Mary in 1762 and set out to study the law.\textsuperscript{135} Unlike many other Southerners, he chose not to cross the Atlantic to study at the Inner Temple, and instead remained in Virginia. Because no academic instruction in law was available in Virginia at the time, Jefferson had to creatively craft his own educational plan. He considered the apprenticeship method of learning but rejected it. Jefferson believed it was a bad bargain for the student because one gave much in time and energy, but seldom received high-quality instruction from the practitioner. Jefferson decided to study with that great legal talent and distinguished humanist, George

\textsuperscript{133} Spence, supra note 6, at 54.
\textsuperscript{134} Id. at 42, 64-65. Spence uses the term “spare parts” to discuss the approximately 675,000 American lawyers and their current employment conditions.
\textsuperscript{135} See DUMAS MALONE, JEFFERSON: THE VIRGINIAN (1948).
His daily program consisted of four hours of reading in the classics of the law and additional hours devoted to reading ethics, politics, history, literature, criticism and other subjects that provided a broad intellectual context for his legal studies. In a very real sense, Jefferson was an early American recruit to the "law, science and policy approach." In addition, Jefferson spent many hours in dialogue with Wythe. This tutorial experience was supplemented by an active social life that brought him into frequent contact with the legal and political notables of Williamsburg. This Williamsburg experience of five years duration did much to influence Jefferson's ideas about how law should be learned. His practice of law, his participation in the legal/political life of Virginia and his reading of the works of the English, Scottish and French proponents of the enlightenment fleshed out his views on legal education.

By the time he became governor of Virginia (1779), Jefferson held very specific ideas about learning law. He believed legal education was essential to the promotion of a government predicated on democratic principles. Serious law study served to prepare one to legislate, adjudicate, administer and advocate in the public interest. Moreover, a proper legal education sensitized one to the role of fundamental American rights and freedoms.

In 1779, Governor Jefferson brought about the reorganization of education at the College of William and Mary. As a part of this reorganization, a chair of "Law and Police" was established at William and Mary. "Law and Police" can best be re-phrased as "Law, Policy and Humanistic Studies." The purpose of this program was to teach legal materials in relationship to allied disciplines. This was to be no guild education, but a broad intellectual experience aimed at producing enlightened decision-makers. George Wythe was appointed to teach this curriculum. Wythe, who was a lawyer, judge, classicist and anti-slavery advo-

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136. Id. at 68.
137. McDOUGAL ET AL., supra note 1. Law, science, and policy is, of course, the interdisciplinary decision-making jurisprudence created by McDougal and Lasswell.
139. Carrington, supra note 116, at 528.
140. Id. at 527.
Wythe proved to be an outstanding choice. Wythe's best known students were John Marshall and Henry Clay. A lesser-known Wythe student, George Nicholas, went on to spread the Jefferson/Wythe approach west to Kentucky. George Nicholas was appointed to a law professorship at Transylvania University in 1799. This university, located in Lexington, Kentucky, was a hot-bed of intellectual free thought as well as a first-rate academic institution. In 1830, it was the largest university in the country. Several other Wythe students followed Nicholas to Transylvania. These men perpetuated the Jeffersonian tradition of legal education as the predicate for dedicated public service. Worth noting is the fact that William T. Barry, a Transylvania law professor, became a member of Andrew Jackson's cabinet. Jackson, of course, is a leading figure in the history of American Legal Populism.

In my opinion, the Jeffersonian approach stressing legal education as training for civic responsibility played a very important role in the shaping of legal education below the Mason-Dixon Line not only during the nineteenth century, but into the 1970's. This was not generally the case in the North, where Hamiltonians found the Jeffersonian paradigm to be subversive to their preferred values. In their minds, legal education existed to produce private practitioners dedicated to serving commerce, finance and industry. Wealth, profit, power and prestige values surely would not be maximized by a Jeffersonian legal education. They felt it better to teach a curriculum stressing legal reasoning, the principles of law, and the business ideology.

142. Carrington, supra note 116, at 535.
143. Id.
144. Id. at 557.
147. This conclusion is based on my lengthy sojourn in legal education and experiences above and below the Mason-Dixon Line. However, in the 1990s, Southern law schools are largely dominated by faculty Hamiltonians.
Of course, a Jeffersonian resistance has existed in the North. The most successful challenge to the Hamiltonians has been posed by the McDougal and Lasswell group at Yale Law School. The Law, Science and Policy enterprise is, of course, now a global rights-of-man venture. It is worth pointing out that Myres McDougal is the consummate Southern scholar, lawyer, and statesman. He and his associates have spread his post-quantum Jeffersonianism nationally and internationally. In addition to the Southerner Myres McDougal, Yale Law School was for a time to have that fully credentialed legal populist William O. Douglas — a Westerner raised on the wrong side of the socioeconomic tracks in Yakima, Washington. Douglas' small town — almost frontier — early life experiences made him acutely aware of social, political and economic realities. At the S.E.C. and during his tenure on the U.S. Supreme Court, Douglas' support of the rights and interests of the people became legend. As a law professor he was no purveyor (in class) of ideology. However, his research (bankruptcy, corporations, and so forth) and teaching records demonstrate a strong concern for the public interest, the rule of law, and the validity of functional and interdisciplinary approaches to legal education. Although diplomatic enough not to arouse the ire of his Hamiltonian colleagues, it is clear Douglas was on the Jeffersonian path at Yale. Another Westerner, Thurman Arnold from Wyoming, promoted the Jeffersonian educational position while on the Yale Law faculty. Arnold traditionally is viewed as a legal realist. My belief is that when applied to Arnold and many other pre-1950s jurisprudential thinkers, the legal realism label is misleading. It stresses their "deconstruction" of the "official" juridical story. The focus is on the intellectual critique of legal traditionalism. Treating a figure like Arnold as a legal realist leaves much unsaid. Such an approach ignores the political significance of his work and his stressing of the use of economics, psychology and politics

149. McDOUGAL ET AL., supra note 1.
151. Id. at 96.
152. ARNOLD, supra note 24.
153. The term "legal realism" is misleading. It does not point to the political "values" position of the majority of the legal realists. The term legal realism creates a false sense of value neutrality.
in the study of law. In fact, the label “legal realism” allows us to evade value issues and politics. As a legal scholar and educator, Arnold mounted the critique of a particular legal structure rooted in a particular social system. This system was dominated by the Hamiltonians. By 1929, this system was rotten with monopoly practices, speculation, predatory acquisitiveness and destructive competition. Recall that Arnold was appointed to head the Antitrust Division of the Department of Justice. For five years (1938-1943) he used the legal and political processes to carry out an effective antitrust program.\footnote{154} In addition, as a member of the firm of Arnold and Porter, Arnold contributed over a million dollars in free legal services to defend the Johns Hopkins University Chinese scholar Owen Lattimore against the McCarthyites attack.\footnote{155} Throughout his academic, judicial and practice careers, Arnold fought to protect our inalienable rights and to promote the vision of the Jeffersonians. He knew that law did not exist above the fray of politics, but was forever bound to it. Arnold’s brand of juridical politics was legal populism. McDougal, Lasswell, Douglas and Arnold were all Yale professors, but Harvard Law School has not been without its anti-Hamiltonians who stressed the importance of training lawyers to serve as actors in the public interest and to be supporters of fundamental rights. Felix Frankfurter was clearly one of these people.\footnote{156} At Harvard Law School, Frankfurter followed Pound’s sociological lead and produced course materials that combined traditional legal materials with those from the social sciences.\footnote{157} Furthermore, Frankfurter combined teaching with legal services work. He acted as counsel to the NAACP and the ACLU. He involved his students in his “clinical” efforts. In addition, he was active in the fight to stamp out the exploitation of child labor and to establish minimum wages through legislation.\footnote{158} At Harvard, Frankfurter led by example both in and out of the classroom. His approach was clearly within the Jefferson/Wythe tradition. Like Douglas and Arnold, Frankfurter

\begin{footnotes}
\item[155] ELLEN W. SCHRECKER, NO IVORY TOWER 166 (1986).
\item[156] Infra note 172; DOUGLAS, supra note 154, at 21-22.
\item[158] Id. at 32.
\end{footnotes}
played an important role in New Deal law and policy making. But so much for historical background, we now turn to the present and Gerry Spence’s views on legal education.

There can be no doubt that Gerry Spence is the most caustic modern critic of legal education.\textsuperscript{159} By comparison, Jerome Frank and Fred Rodell are but courtly commentators. Spence sees nothing redeeming in our modern system of legal education. As far as he is concerned, it is a vulgar factory system dedicated to programming a privileged class of one-dimensional young people to become worker-drudges in service to the blue-blood law firms. His political position is that law schools are controlled by the ABA’ers, the ETS’ers, the power firms, and the fussy savants, i.e., the tenured elitist faculty. He portrays law schools as pedagogical nightmares!

Spence’s description of law school conjures up the image of an ivy-covered assembly line housing approximately 1,500 students. As many as 500 of these students are first-year students. All too often, classes are composed of 100 or more anxious neurotics packed into a room with one professor. It is clearly not a John Hopkins University graduate school education with three faculty members and twelve students debating the jurisprudential and political impact of critical legal studies.

The center of attention is a spiritual heir of Langdell armed with a seating chart and an obese casebook. We recall Professor Kingsfield. This “fussy savant”\textsuperscript{160} or, better yet, narcissistic popinjay, is in possession of a much modified Socratic method and the dusty learning of the library. He drills the raw recruits. Sometimes sadistic, sometimes unctuous — depending upon the professor’s social character — but still the drill master. A “reactionary” curriculum\textsuperscript{161} is taught abstractly, inefficiently\textsuperscript{162} and in a manner calculated to produce intellectual dependency and guaranteed to deaden even the most highly aroused central nervous system.

These students are not learning to be the advocates of the people’s rights and stewards of their interests. They are being

\textsuperscript{159} SPENCE, supra note 6, at 42-66.
\textsuperscript{160} Id. at 58.
\textsuperscript{161} Id. at 51.
\textsuperscript{162} Id.
brainwashed\textsuperscript{163} by the pedagogical technicians of the corporation-dominated legal system. Those students who are idealistic, creative, empathetic and concerned with social justice either drop out or “adjust” enough to get their degree. The classroom is not a learning matrix but a power system, and the power is in the professor. He has the seating chart, he constructs the questions, he singles out the victims and he controls the answers with his power to discount, dismiss or ridicule. All eyes are on the professor — he is the power and the glory. There is no give and take. The system is basically authoritarian. The student obeys the traffic lights (programmed by the professor) or he/she gets a ticket to ride. The range of inquiry is strictly controlled. The individual student is but a molecule in the galaxy ruled by the professor, who is a truly mythical beast.

Spence argues this brand of legal education narrows the mind and produces rhetoricians without a hint of how to prepare a case for trial.\textsuperscript{164} This is not the practical experience of medical education. This is not hands-on professional instruction but training in how to think like a law professor. No wonder the trainers seldom have any real “in the pits” (trial) practice experience.\textsuperscript{165} Most of them have spent their limited practice careers as library researchers and document makers. Furthermore, says Spence, this educational experience alienates the student from the world of ordinary people and creates the illusion the legal system is meant to be the chess board for the use of the monied/propertied class. In addition, it produces graduates who are unable to understand that client problems are always emotional matters for the client. Reading cases, briefing cases and answering questions about the “best interests” child custody opinions in a casebook will not prepare one to deal with a real-life custody battle — not even if the client and child are from Palm Beach. It does not even prepare one to deal with Wall Street criminal defendants and their stress-filled legal situations. Spence makes it clear that law schools, along with their professional co-conspirators (judges, corporate lawyers and so forth), are responsible for the failure of the American justice system. Gerry Spence, like Jefferson, Wythe, Lasswell and McDougal\textsuperscript{166} and other legal

\textsuperscript{163} Id. at 52.
\textsuperscript{164} Id. at 51.
\textsuperscript{165} Id. at 53.
\textsuperscript{166} See Harold D. Lasswell & Myres S. McDougal, \textit{Legal Education and Public
populists, holds it is "The duty of the American law school . . . to train lawyers for the good of society."\textsuperscript{167}

As far as Spence is concerned, such training is required if the American justice system is to promote and protect the rights of individuals. Spence holds the American justice revolution "must begin in the law school."\textsuperscript{168} It is the law schools that can deliver our justice system from the Hamiltonian curse. Of course, the academy must be the first institution liberated. Spence believes that the Critical Legal Studies group has made a start,\textsuperscript{169} and he makes it clear that he is with them in their project. In addition, in \textit{With Justice For None},\textsuperscript{170} he provides us with his version of the new legal education. Let us briefly examine his ideas on the new revised program.

Spence takes the position that over time the "fussy-savants" will be replaced by experienced practitioners.\textsuperscript{171} These seasoned lawyers will make up the new faculty. In addition, judges will be drawn to the new centers of learning. They, of course, will offer the students the wisdom of their experience. And the students — they are to be a new breed. They will not be the test-taking (e.g., LSAT) specialists drawn from privileged backgrounds.\textsuperscript{172} They will be a people's student body. Elitist criteria will not be used to determine admission. Life experience, commitment to human justice, creativity, person-to-person skills and whole-brain\textsuperscript{173} intelligence will be the basis of selection. LSAT numbers and grade point averages will not determine admission.\textsuperscript{174} Candidates will be interviewed in depth to find out how they stack up as human beings who can serve the people of America.

The coursework will be the anti-curriculum that is the antithesis of the Kingsfield experience. In the new law school, students

\begin{itemize}
  \item \textsuperscript{167} SPENCE, \textit{supra} note 6, at 235.
  \item \textsuperscript{168} \textit{Id.} at 238.
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} SPENCE, \textit{supra} note 6.
  \item \textsuperscript{171} \textit{Id.} at 245.
  \item \textsuperscript{172} \textit{Id.} at 224.
  \item \textsuperscript{173} For the most part, law school educates the left hemisphere of the brain, which is primarily logical, linear and verbal. However, this hemisphere is largely incapable of creative, synthesizing, holistic and simultaneous operations. \textit{See} Batt, \textit{supra} note 69.
  \item \textsuperscript{174} SPENCE, \textit{supra} note 6, at 231.
\end{itemize}
acquire knowledge and experience by doing. Education is pragmatic. The new law school will be a "sublimated" law office and the students, like medical interns, will acquire their art/science on the job.\textsuperscript{175} In the very first days of law school, the students will be assigned to real cases instead of shackled to casebooks. They will be members of teams led by practicing lawyers. They will work with real clients.\textsuperscript{176} Focus will be on fact gathering, fact analysis and fact marshalling, as well as on legal concepts, statutes, cases and regulations. The jury system will receive a great deal of attention. In addition, the students will be given a crash course on how to use the law library. Their research will relate to their real-life case assignments. There will be in-class discussions of the work the students are doing and there will be continuous person-to-person feedback. Gone will be the anonymity of the giant class and the pseudo-Socratic experience. The students will prepare motions and perhaps actually argue them in court. Emphasis will be on becoming advocates for the people. This is not training for the practice of corporate law! Furthermore, these fledgling lawyers are not to be schooled in professorspeak, but will learn the advocate's art of plain talk. They will learn to think and talk like advocates in the real world. However, additional instruction will occur. Students will read about and discuss major issues such as responsibility, negligence and justice, but in an environment where they have opportunity to express their personal positions.\textsuperscript{177} Real freedom of thought and expression are to prevail. And always the academic is to be related to the "actual" cases to which the students have been assigned.

After two years of the above outlined program, the students enter a third-year course of study designed to flesh out their knowledge base. They will take compressed courses in a number of subject areas. This work will help prepare them for practice and the new bar examination. The new bar examination will do away with the computer approach of the M.B.E. and will stress the advocate's understanding of the law system and the student's work in the new law school.

\textsuperscript{175} Frank, \textit{supra} note 18, at 225-33.
\textsuperscript{176} Spence, \textit{supra} note 6, at 248.
\textsuperscript{177} Id.
After admission to the bar, the new lawyers will do a trial practice residency of at least one year’s duration. This residency, added to their law school experience, will ensure a population of young lawyers ready to pursue the people’s interests in the courtrooms of our nation. But, so much for Spence’s critique and his “promised land” visions of the new academe. At this point I offer certain reflections on Spence’s ideas.

It is here emphasized Spence is not an “insider” with long experience in the labyrinth of legal education. This fact will cause many to dismiss his views as uninformed. However, this would be a great mistake. Spence is a serious investigator, and he has spent substantial time de-briefing law students, conversing with faculty, thinking about the law school experience and surveying the literature of legal education. The truth is, he has many things right. His outsider’s position has provided him with an anthropological advantage. Unlike we professional participants in the cultural environment of legal education, Spence is not subject to being addled by immersion.

When I shift my stance from participant to that of observer and suspend my capacity for rationalization, I must admit things are not optimal in our academic arena. The truth is our law schools do too much resemble factories. Enrollment has gotten out of hand. The faculty/student ratio is not conducive to a high-quality educational experience. We do not do our work in a Platonian grove. Sartrean nausea is a common condition among post-first year students. Too many faculty types have fallen in love with money, influence, politics, compulsive “productivity” and prestige. All in all we seem less wise, more neurotically compulsive, less human and more narcissistic than we once were.

Furthermore, our pedagogy is not up to date. We have yet to truly import the wisdom of psychology, communications, neuroscience, education science and others and use it to produce an approach that teaches the whole human brain. We need a new Langdell! As Spence suggests, the curriculum is shaped too much by the influence of the corporate firms and the business power elite. Publicly financed universities should stress the public in-

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178. *Id.* at 252.
179. The reference is to Jean-Paul Sartre, who is well-known for his existential pessimism.
terests aspects of law far more than they do. Taxpayers' monies should not be generously dedicated to support a program that largely neglects the law of "ordinary" people. My belief is there is a link between the heavy business orientation of the curriculum and the raw power of money in our culture. Significant alumni contributions do not come from small firm practitioners, public defenders, environmental defense fund types, the lawyers employed by administrative agencies, consumer groups and "ordinary" citizens.

Of course, private university law schools are entitled to pursue whatever paths they choose. However, public university law schools should not be imitating private schools displaying the Hamiltonian preference. Public university law schools certainly must teach corporate law, but the curriculum must be balanced.

I do not fully agree with Gerry Spence regarding the students. To me, they do not all seem to be the robots described by Spence in his book. Many of them are truly inquisitive and ready to consider new perspectives. They come to law school willing to learn. My view is that many of them are quality representatives of America's middle class. However, in agreement with Spence, I hold that we could use much more student diversity. Our approach to admissions, which stresses test numbers, does not produce a vital cultural mix. Moreover, our faculties should be more heterogeneous. Hiring paradigms used over the last dozen years have not produced faculties that are representative of America's diversity of background, talents, and experience. But let us turn from the personal perspective to the more philosophical.

In expressing his ideas on legal education, Spence reveals himself to be a pragmatist (originally called "practicalist"). To me, he seems very much a Deweyian. Theory, abstraction and speculation are not stressed in his pedagogical scheme. Thinking and learning are to be solidly rooted in existential reality (e.g., litigation). Education is to be directed at the production of results in reality. Instrumentalism is the dominant theo-

181. The reference is to Columbian University professor and philosopher John Dewey, who is the father of American Pragmatism as a philosophy of self in society. Id. at 98-100.
retical position. The reality, Spence stresses is, of course, that of the courtroom. Spence sees legal traditionalists as "fussy savants" — that is ivory tower verbocentric types. They inhabit the world of syllabic fantasy and educate students in theoretical irreality. Spence holds this education to be virtually useless. It makes no contribution to the pursuit of the people's rights in the pit of reality. Admittedly, Spence does approve of the views of Roberto Unger and the Critical Legal Studies movement.¹⁸² He is aware of and approves of the Critical Legal Studies effort to create the conditions of pedagogical liberation. However, the Critical Legal Studies pedagogy does not appear to be incorporated into Spence's new law school. Although faculty traditionalists certainly would not approve of Spence's pragmatic views, it is certain he would receive support from a large number of lawyers. Many, many public defenders, legal aid lawyers, civil rights attorneys, Naderian public interest advocates, private criminal law practitioners, family law negotiator/lawyers, personal injury attorneys, medical malpractice specialists, prosecutors, solo practitioners, trial judges and others would speak approvingly of Spence's law school curriculum.

There is, however, no doubt that Spence's beliefs in regard to the preferred curriculum are in conflict with those of Jefferson (and many contemporary populist law professors). From the strict Jeffersonian perspective, Spence is too much the practicalist/clinician. Both Spence and Jefferson stand as guardians of the democratic grail, but their value correspondence does not lead to agreement on the matter of the lawyer's education. Jefferson's university law school program of study is wholly academic/theoretical/intellectual. The humanities, history and politics — a multiplicity of discipline areas — are united with the study of cases, statutes, and regulations in the Jeffersonian academic experience. Jefferson believed that the university law college should produce enlightened lawyers who could make wise law and policy.¹⁸³ They were to be the community's, the state's, the country's and even the world's leaders. Certainly, they would become men of affairs, but they first would be incredibly well-educated in the wisdom of mankind. Jefferson's belief was that

¹⁸². SPENCE, supra note 6, at 237-39.
¹⁸³. MALONE, supra note 135, at 62-74.
on-the-job learning would not produce the quality lawyer/leader that the academic university experience could bring into being. Unlike Spence, Jefferson had little concern for an education directed at competency in the trial arena. Jefferson appears to have believed that practice skills could be absorbed outside of the university setting and were not nearly as significant as the academic subject matter and intellectual experience that accompanies transaction within the community of scholars.

Jefferson saw the graduates of the university law school as people trained to be the guardians of law and liberty in a democracy. To perform this function, they must understand the lessons of the past and the emerging knowledge of the present. They must be trained to possess the comprehensive legal, historical and social perspective. Clinical experience could never produce the depth of understanding and breadth of vision required of men who champion the public interest. Jefferson wanted lawyers trained to understand the macrocosm or law-in-culture-context. His view was that without such learning (continually updated by study), one could not champion the rights of citizens and the American democratic system.

It is my belief that Jefferson's position on legal education was determined by his beliefs in regard to those functions he had found to be pivotal to the project of maximizing democratic values. To Jefferson it appeared that legislative, executive and judicial functions with their attendant policy-making opportunities were more important than the trial advocate's activities; the macro in matters of governance being held to be of far more importance than the micro matter of the trial of the individual case. In addition, Jefferson valued highly the role of the politically active citizen/lawyer. University-trained lawyers, even though having no official governmental position, would serve as bellwethers. With their special education and their acquired experience in worldly matters, they could successfully help promote democratic values, policies and programs.

Fundamental to the Jeffersonian education is the study of jurisprudence. This intellectual venture aims at the study of first matters. Critical questions to be asked are:

1. What is the fundamental nature of law?
2. What are the purposes of the legal process of decision?
3. How does law relate to morality, ethics, freedom, human dignity and social justice?
4. What historical, social, economic and psychological forces produce changes in the law?
5. What are the limits of the law's influence?
6. Under what circumstances does a legal order become oppressive and deserving overthrowal?
7. Who should be empowered to make legal decisions?
8. How do we create a rule of law that serves the values of a democratic society?
9. Etc., etc. 184

It is here emphasized that this Jeffersonian jurisprudence does not stress a pure intellectual ballet. The Jeffersonian jurisprudence is an enlightened jurisprudence that sees the pursuit of jurisprudential wisdom as the precursor of wise decision-making in the world of human existence. Given this reality, the study of jurisprudence makes use of ideas, concepts, paradigms, narratives, modes of thought and information from any number of disciplines. Wisdom requires real intellectual exposure. The narrow limits of formalist legal philosophy serve as intellectual barriers to the development of true jurisprudential intelligence. The study of the Jeffersonian variety of jurisprudence is calculated to generate creative, imaginative and real solutions to the dilemmas of law and politics.

In our time, the pedagogical approach that best embodies the Jeffersonian essence is the policy-oriented jurisprudence of the New Haven School. The originators of this nontraditional theory of law are Myres S. McDougal and Harold Lasswell.185 Highly critical of the law-as-rules approach Law, Science and Policy holds that law is best understood by viewing it as a process of decision. In this process, rules-in-themselves are not determinative. They are viewed as inputs. Those working in Law, Science and Policy, like those working in Critical Legal Studies, know that there exists a universe of "competing" rules. Law, Science and Policy practitioners hold that decision-makers are moved in great measure by forces that exist beyond the available genre

184. Hutchins, supra note 3, at 18.
185. See Lasswell & McDougal, supra note 166.
rules. In fact, decision-makers exist in a “full” field of human and institutional forces that cannot be ignored. They exist in a social context. The social context can be made up of municipal, state, regional, national and/or transnational “fields”. The decision-process goes on within the surroundings of the relevant social process. Decisions are produced in the social context. Moreover, the decision-maker is compelled to make choices between and among competing interest positions. Decision-makers are therefore engaged in choices related to the value preferences of their society. Decision-makers are not mere circuits through which pass the “neutrally” charged principles of law. The reality is the decision-makers are policy makers deciding who gets what, when, how, from whom, with what consequences and why. Or in the alternative who does not get what, when, from whom, etc. It is clear that Law, Science and Policy people, along with Jefferson, stress the decision-making importance of those in social roles other than that of judge. Law, Science and Policy honors those performing legislative, executive and bureaucratic functions and those who possess power and influence but operate outside the formal channels of government.

Law, Science and Policy study, like the university law program proposed by Jefferson, emphasizes interdisciplinary work. The social sciences (e.g., political science, anthropology, economics and sociology), dynamic psychology (Freudian and post-Freudian), modern psychiatry and the physical and biological sciences/technologies all find a place within the Law, Science and Policy-oriented curriculum. For example, an associate of McDougal and Lasswell would not think of teaching criminal law without drawing heavily on sociology, philosophy, psychology and psychiatry. If this teacher of criminal law taught a course segment on controlled substances (drugs) and the law, appellate cases on distribution, possession and conspiracy offenses would be placed within the relevant social context. The course materials would inform the students in detail as to the identity of the important “participants” (e.g., Colombian Cartel members, wholesalers and money launderers) who made up the system of production, distri-

bution, profit-making and use. Their roles, rituals and behaviors would be evaluated with the "goals" they sought (e.g., wealth, power, respect, influence and well-being). Enforcement and official policy-making participants (e.g., DEA, FBI, Drug Czar and President) and their behaviors would be subject to scrutiny. Their preferred values would be sought out and evaluated in relationship to the values and goals of a democratic society. In addition, the drugs and their actual effects (physiological, psychic and social) on human beings would be considered. This matter is important in establishing the existence or nonexistence of harm. Statutes would be examined to determine if they rested on a solid reality-oriented policy foundation. Enforcement activities would be specifically examined to determine their impact on critical democratic rights, such as the right to be free of unwarranted government intrusion into home and life pattern and the right of individual autonomy. Public attitudes regarding drug matters as drawn from opinion surveys would be studied as relevant inputs.

In addition, the cost of enforcing controlled substance laws would be evaluated in the light of other societal needs. Of course, at all times the question of what we ought to do about the drug situation in a democratic society would be central to the intellectual task. What I am describing here would not be an academic fly-by accomplished in twenty pages of reading and two hours of discussion. The Law, Science and Policy experience would require much, much more in terms of the course reading done and the time allocated to class work. After all, in our modern criminal justice system, drug cases make up more than fifty percent of the criminal case load.

In addition, this author points out that the Law, Science and Policy approach stresses the development of imagination, creativity and originality of thinking to their highest possible levels. This jurisprudence encourages the importation into law of thought paradigms from many disciplines. Traditional skills of legal analysis are held to be of importance, but they are to be only a part of a whole-brain approach. In Law, Science and Policy, many systematic modes of thought are used in conjunction with intuitive and holistic mental approaches. Traditional legal

analysis is largely verbal, linear and Western logic focused. In other words, it is left-hemisphere anchored. Law, Science and Policy seeks to involve both left and right hemispheres and all other brain systems (such as limbic and R-complex modules) in the policy science jurisprudence endeavor.

Unlike Jefferson, the McDougal and Lasswell group believes that certain clinical skills should be taught in the university law school.\textsuperscript{188} For example, witness interviewing, preparation of experts, jury selection and other trial-related skills do find a place in the Law, Science and Policy program of study. However, the policy-making/decision-process-oriented curriculum would not devote anything like the bulk of the program to the Spence project of trial advocacy. Law, Science and Policy holds that training for a multiplicity of relevant decision-making tasks critical in our time means that taking instruction directed at learning the art of advocacy must make up only a limited part of the whole of legal education.

This author is in basic agreement with the McDougal/Lasswell view. However, it seems to me that the Spence model has much to recommend it when applied to the education of students who wish to “major” in trial advocacy. My view is that after receiving two years of what could be called Jefferson/McDougal/Lasswell university training, two more years following the Spence curriculum would produce an outstanding pool of young people’s advocates. Perhaps the two curricula could even be integrated over all four years of study.

Now we have considered two of American Legal Populism’s primary educational paradigms; it is clear that there exists a division of thought on the proper pedagogy. I hasten to add that American Legal Populism is in no way a “system” without room for diversity of viewpoint. After all, diversity of viewpoint is quintessential to the democratic philosophy. But at this juncture, let us exit the arena of the academy and track American Legal Populism into the arena of American political history.

\textsuperscript{188} Lasswell & McDougal, supra note 166, at 209-10.
IV. AMERICAN LEGAL POPULISM AND AMERICAN POLITICAL HISTORY

Since the second half of the 18th century, American Legal Populism has manifested itself in the political form. Its operations have had significant political, social and historical consequences. In a very real sense, American Legal Populism has been a "jurisprudence of the streets," as legal populists have invariably sought to act politically to achieve their preferred political outcomes. Moreover, they have viewed legal institutions as instruments to be used to promote the democratic agenda. In this section, I will discuss legal populism in the American political context. Attention will be paid to such figures as Thomas Jefferson, Andrew Jackson, Theodore Roosevelt, Woodrow Wilson, Franklin Delano Roosevelt, Harry S. Truman, Jimmy Carter, Thurgood Marshall, Lyndon Baines Johnson, John F. Kennedy and Earl Warren. These individuals, of course, have real political histories, but it is here stressed that each is of "transcendent" jurisprudential significance. My purpose is to demonstrate that the existence of the legal populist tradition is a fundamental part of our political/juridical history. We begin with Jefferson and extend what has been said in the preceding section of this paper, for Jefferson is the original populist.

Jefferson is a legendary figure in Virginia legislative history. In 1776, Jefferson as a legislator successfully fought to abolish entail in Virginia.189 In addition, he was a prime mover in the abolition of primogeniture. His efforts were directed at a democratic goal—the undoing of feudal forms of tenure. His aim was to strike at the position of the land-gobbling aristocracy and establish a tenure system compatible with democratic values. Moreover, he fought vigorously for freedom of religion and helped pass legislation that enshrined personal conscience and reason as barriers against clerical forces that would seek to rule the minds and lives of the people.190 Prizing the power of the enlightened mind, Jefferson campaigned for a broad-based system of public education.191 He constantly worked to promote human rights.

190. Id. at 133.
191. Id. at 145.
As a Congressman and Secretary of State (under Washington), and then Vice-President and President, Jefferson used a multiplicity of political processes to promote and protect democratic interests and people's rights. Perhaps his greatest contribution was his opposition to the politics, plans, policies and programs of Alexander Hamilton and his commerce-oriented allies. As historian Saul K. Padover said, "[Hamilton and] [T]he men of business were not interested in liberty or equality. What they wanted was the help of the government in making money." 192 Hamilton had fixed on the dominance of the Federal Government by the economic elite as essential in making business master of the people. Well-schooled in business and finance, an experienced lawyer for business interests, possessor of substantial intelligence, a certain charisma and great energy, Hamilton was a powerful political figure. As Secretary of the Treasury under Washington, Hamilton was instrumental in producing passage of a bill that established the Bank of the United States. 193 It was the opinion of Jefferson, Madison and others that this fiscal institution was meant to serve the interest of those who played the paper economy games. It would be the tool of those who speculated in stocks and collected heavy interest on the public debt. The public was taxed to enhance the financial position of these players of the games of finance. Jefferson's view was that such people did not create new capital but ensured that capital was not used to enhance economic productivity.

Hamilton, active on the administrative front, turned the Treasury into an office 194 devoted to protecting and promoting the interests of the manufacturing/commercial/financial classes. In addition, one of his earliest achievements was bringing about the passage of an excise tax on distilled liquors. 195 This tax primarily affected the nonaffluent agrarian population and made them forced contributors to a treasury operated to benefit the Hamiltonian expansion of manufacturing and trade. Hamilton demonstrated no enthusiasm for the taxation of the business classes. The "people" were meant to pay, but if Hamilton would have his

192. Padover, supra note 7, at 83.
194. Id. at 435-36.
way, they would be dispossessed of any say in where the money went. Anglophile, lover of the upper classes, antidemocrat and the ultimate "economic man," Hamilton was the natural foe of Jefferson and his political allies.

The political war between Jeffersonians and Hamiltonians was conducted in various gazettes, over private dinners, in taverns and virtually anywhere politicized people gathered.\(^{196}\) Defamation of character was often the weapon of choice. By the summer of 1791, the political conflict was intense. In a true coup, Jefferson and his allies invaded Hamilton's home state of New York and recruited George Clinton and Aaron Burr to join the war against Hamilton and his supporters.\(^ {197}\) This resulted in the forging of an alliance between New York and the South that eventually led to the electoral triumphs of the Jeffersonian Republicans and Jefferson's installation as President. This battle between Jeffersonian legal populists and Hamiltonian legal "monarchists" who deemphasized the Bill of Rights and stressed the powers of the executive and judiciary has continued up to the present.

As President, Jefferson continued his efforts to transform the democratic vision into governmental policy and practice. Of the opinion that a substantial public debt threatened the freedom of the people by placing them under the whip of the financial community, Jefferson immediately set out to reform the public economy.\(^ {198}\) Borrowing was dramatically reduced and repayment of interest and principal to creditors was made a priority matter. Holding that federal taxes were an unreasonable burden on the people and economically counterproductive, Jefferson worked to bring about a major tax reduction. An early student of Adam Smith, he held that money was most productive when available to those operating in the free market. A government grown fat upon the profits earned by the people could not be trusted to serve the common good. One of Jefferson's earliest acts of tax reform was spearheading the repeal of Hamilton's excise tax on distilled liquors.

As President, Jefferson sought to enlarge the influence of the agrarian democratic view of America. In Virginia he had fought

\(^{196}\) Peterson, supra note 138, at 471.
\(^{197}\) Padower, supra note 7, at 85-86.
\(^{198}\) Peterson, supra note 138, at 687.
to make land ownership available to a large number of citizens. He believed that land ownership, which was a productive asset, provided people with economic freedom. He believed that economic security (independence) was essential to the establishment of a democratic political and legal system. Jefferson was, in truth, an advocate of free land for the many. The wide distribution of land ownership during this historical period brought voting rights to many people.\textsuperscript{199} The Louisiana Purchase, which was engineered by Jefferson, dramatically increased the territory of the nation and opened up new lands for settlement. Via the Louisiana acquisition, Jefferson intended to ensure the existence of an independent, liberty-loving nation of democrats.\textsuperscript{200} It was a way of protecting America from the reactionary anti-rights-of-man classes who sought to turn the people into dependent laborers under the thumb of industrial and commercial enterprises.

During his White House tenure, Jefferson — under the threat of war with European powers — would be forced to adjust his agrarian vision of the new nation. In order to export products and defend American interests against foreign aggression, nonagricultural economic development had to occur. Manufacturing, financial and related operations had to exist. Geopolitics demand that this be so. Jefferson was forced to move with the tide of history. However, he was never happy with this reality. However, being the pragmatic political leader that he was, he did what had to be done. Development must occur, but Jefferson was always wary of its impact on democracy. He knew that democracy always has enemies and its existence depends on its ability to protect itself.\textsuperscript{201} Although Jefferson was certainly not the saint that some admirers seek to present him as being, it is beyond doubt that throughout his political career and thereafter, he remained an advocate of human rights, democracy and legal populism.

From the political perspective, American Legal Populism flourished under Jefferson, but during the era of Andrew Jackson, its impact on society became so enormous as to reach the level of critical significance. Democratic attitudes, ideas and actions appeared all over the nation. The populist fervor of this period is

\textsuperscript{199} See Richard Hofstadter, \textit{The American Political Tradition} 32-33 (1973).
\textsuperscript{200} Peterson, \textit{supra} note 138, at 771-73.
\textsuperscript{201} Hofstadter, \textit{supra} note 199, at 39-43.
usually described as a frontier phenomenon, but the reality is that the egalitarian agenda carried the day among the working people of the cities and towns of the Eastern part of the nation, as well as people in remote regions. The “people” — those without substantial property — were becoming an important political force.

Andrew Jackson grew up in North Carolina and was educated in the Jeffersonian philosophy. It is arguable that his democratic vision was more radical than that of the maestro, Jefferson. Nevertheless, Jackson had that variety of experience that lends one to the populist persuasion. Born in poverty, reared on hardship and educated in the school of harsh reality, Jackson grew up to be an enemy of social and economic oppression. In his early years he read law, practiced law, and became a trader in the furs, hides, land and cotton he received as compensation for his legal services. In 1798, he found himself the victim in a commercial transaction involving a Philadelphia merchant. Later on he would learn that Eastern businessmen called the commercial tune for the country and that their often monopolistic practices could make his assets worthless. In addition, his experience with creditors who showed no mercy left its mark on him. There is no question that Jackson had very direct experience of those who prefer profit to equality and liberty.

In 1828, Jackson scored a landslide election victory and became President of the United States. Clearly, he came to this office determined to enhance the economic position of the “people” and provide a countervailing force that reduced the power position of the Eastern economic establishment. Jackson did not make members of that affluent business class Washington officeholders. Instead, he installed men who sympathized with agriculture and labor. A number of them were journalists of the Jeffersonian persuasion, such as the former Kentucky newspapermen, Amos Kendall and Francis Preston Blair. Jackson understood that the newspapermen were vital to the project of spreading the democratic philosophy of government, economics

202. NEVINS ET AL., supra note 195, at 167-68.
203. HOFSTADTER, supra note 199, at 51-52.
204. NEVINS ET AL., supra note 195, at 166.
205. SCHLESINGER, supra note 43, at 57-73.
206. Id. at 67.
and law. Of course, Jackson has been charged with pioneering a "spoils system." However, this pejorative label is a false term. What Jackson did was substitute one socioeconomic class for another. A populist leader surely does not want to be surrounded by economic and social "monarchists."

As President, Jackson waged war against the politically influential financial and business establishment. He was an inveterate foe of monopolies. He opposed legislatively created monopolies of all kinds. The practice prior to the Jackson era was to create by charter corporate monopolies for turnpikes, ferries, bridges, banks, and so forth. The wealthy always received the charters. Less affluent small capitalists were de facto barred from competing in these areas. The monopoly that most drew Jackson's ire was the Second Bank of the United States. This bank was under the control of private interests but had a unique relationship with the federal government. It had received a Congressional charter and was immensely powerful. It was the place of deposit for federal funds and the federal government provided a substantial part of its capital. It could loan federal funds on deposit and borrowers paid no interest to the United States. 207

The bank was a financial octopus that suppressed banking competition at the state and local level. But, in Jackson's mind, its great defect was that it was the tool of the Eastern financial elite and it, in fact, regularly loaned them interest-free money for their ventures. 208 Furthermore, the bank was not averse to converting its fiscal advantage into political power and throwing its support behind the opponents of democracy.

Jackson took the position the existence of the bank was a violation of the U.S. Constitution. He vetoed a bill for the rechartering of the bank in 1832. 209 A year later, he withdrew U.S. government deposits from the bank and placed them in state banks. With the aid of Amos Kendall, Roger B. Taney and other members of his brain trust, he took his antibank monopoly message to the people. Jackson's democratic system had no place for such an institution of privilege. The people agreed and the bank slipped into the abyss of history.

207. Id. at 74.
208. HOFSTADTER, supra note 199, at 60.
209. NEVINS ET AL., supra note 195, at 169.
In the state legislatures, newly elected Jacksonians followed the lead of their legal populist president and passed incorporation statutes that allowed small business people the advantages of the corporate form of doing business. The business of state banking was freed from monopoly at the state level. Through word, deed and his role in the law-making process, Andrew Jackson made the world of business activity available to the many. Like Jefferson, he understood the vital relationship between economic opportunity and a democratic society operating under a rule of law.

Legal populism achieved its political acme during the Jacksonian period. However, in the years after Jackson the heirs of the republican rights tradition were to find that the forces of the opposition were still powerful. For twenty years the democrats and their opponents fought to a political draw. Then the great conflict between South and North erupted. At the end of the war, the South was smashed — militarily, economically, educationally and politically. The South was converted from a cultural region to a colonized zone. Its fate was reconstruction under the direction of the political and military leaders of the North and eventual cultural integration into the emerging new nation state. Several generations of Jeffersonians and Jacksonians either died in the war or were entombed via political isolation in the postwar South.

By the 1890s, the Northern industrialists and their Hamiltonian partners had achieved economic hegemony. With Southern democratic leaders eliminated from the national political arena for a protracted period of time, Hamiltonians maximized their political position. Industry, banking and commerce were able to exert enormous influence on national political institutions.

The Congress, the executive and the federal courts all too frequently responded to the demands of megabusiness. At the state political level, megabusiness also exercised more than substantial influence. Of course, during the last twenty-five years of the 19th century, working people organized and fought for better hours, wages and working conditions. Small capitalist sought to compete with the economic monopolies. Some gains were made, but through its financial and political power, megabusiness was

210. Hofstadter, supra note 199, at 60.
able to stop all efforts at serious political and juridical reform. As the twentieth century opened, it was clear that the America of Jefferson's vision was not in correspondence with social and economic reality. It appeared that democracy, equality of economic opportunity, the rights of the people and with them, the dream of legal populism, had been mauled by the forces of materialism. Dark history, harsh reality.

Our governmental/political system fortunately, however, has historically demonstrated a tendency toward functional homeostasis. By the coming of the twentieth century, the system—from the perspective of a substantial number of people—had become dysfunctional. As a consequence, the robber barons, the "malefactors of great wealth" (Theodore Roosevelt's term), and their bureaucratic and professional allies found themselves faced with a new democratic challenge. A group of middle class "specialists" in the art and science of democracy appeared on the scene. Almost all of them were well educated and saw governmental (legislative, judicial, executive and administrative) careers as noble callings. These people believed in the tradition of civil responsibility, public service and a government that met the needs of all of the people rather than the needs of the special interests. They believed in the level playing field, economic opportunity for small entrepreneurs and workers, the legal protection of employees from exploitation and the necessity of legally restricting the powers of economic monopoly. These people placed ethical, moral and governmental issues high on their agenda. Usually labelled by historians as the "progressives"—they were middle and upper middle class "democrats" and legal populists. The vast majority of them would have been quite at home with Jefferson and his Virginians. These people found socialism an unacceptable political approach, but took the position that substantial reform was required. Two of the most brilliant legal populists of the early twentieth century were Theodore Roosevelt and Woodrow Wilson; there is no doubt that they were effective practitioners of populist jurisprudence.

At this juncture we consider the case of Theodore "Teddy" Roosevelt. Born to relative affluence, but not great wealth, Roosevelt grew up in a home where reading and travel were valued

211. NEVINS ET AL., supra note 195, at 328-35.
as the essentials of psychological and social development. His parents encouraged him physically as well as intellectually and, as is well known, he overcame early health handicaps by the practice of the robust life, taking part in such activities as boxing, hiking and rowing. Roosevelt had a first-rate intellect, insatiable curiosity and real creative capacity. He made the most out of the scholastic rigidity of the Harvard of the 1870s, emerging as a well-read young lad with literary talent. Roosevelt was clearly offspring of the upper middle class, but personal tragedies (the deaths of his mother and wife), exposure to the squalor of tenement life in New York City and hard time spent in the hellish Badlands with the denizens of the western frontier sensitized him to the truth of the human condition.

After Harvard, he went to Columbia Law School. Within two years, he exchanged the quietude of the law library for the action of the New York General Assembly. Law school had not pleased him for he gained the impression that justice was but a remote concern of "the law."

The life of an elected legislator was much more to the liking of this legal activist. Not that Roosevelt had clear-cut detailed views on the specifics of justice. He was a very young man. But it is certain he had been brought up to respect the athlete's canon of fair play: no gouging, no head butting, no thumbs to the eye — playing the game by the rules — not taking unfair advantage of the other players. My opinion is that this character ingrained "jurisprudential" trait would do much to determine Roosevelt's views on justice in America. When he encountered economic and social reality, it would be evaluated from the "fair play" perspective. The inculcation of the canon of fair play has led many members of the upper-middle class to defect from the Hamiltonian army and join the people in their quest for equality and democracy.

Appointed to a legislative investigating committee, young Theodore Roosevelt was thrown into the cesspool world of the New York sweatshops. He learned a great deal about the truly marginal existence of the tenement class. His legislative field

213. Id. at 46.
214. Id. at 57-58.
215. Id. at 56.
research was to alter substantially his view of industry and business in our society. He became a supporter of legislation regulating child labor, the working hours of women and occupational safety.\footnote{216. HOFSTADTER, supra note 199, at 220.} Although Roosevelt abhorred the violence associated with certain strikes, he was a staunch advocate of improved labor conditions. His conviction was such that some of his friends saw his position as bordering on socialism.\footnote{217. Id.} He, of course, was not a radical. Through his life contacts with people from all social strata, Roosevelt was becoming a man of the American people, not simply a man of the college class. His political rise was meteoric. There is no question that his “Rough Rider”\footnote{218. See THEODORE ROOSEVELT, THE ROUGH RIDERS (1903).} exploits against the Spanish in Cuba acted as a quantum propellant. At age forty he found himself Governor of the State of New York. He had moved from legislative law making into the executive arena.

In the governor’s house he increased his support of the working people. He lobbied hard to produce the passage of anti-sweatshop legislation. He supported legislation establishing an eight-hour day for workers employed by state contractors. “Social legislation” had become an important part of Theodore Roosevelt’s populist approach to law.\footnote{219. HOFSTADTER, supra note 199, at 225-28.}

By 1901 Theodore Roosevelt was in the White House, where he would serve two terms as President. As chief executive, Roosevelt proved to be an activist legal populist. His position was that the industrialization of America had fundamentally altered basic legal, economic and social relations. His legislative and executive experience had made it clear to him state law making bodies and personnel by themselves could do little to protect the interests of workers, small business people, the socially dependent and the young in a society where wealth and economic power had become heavily concentrated. Although no enemy of business per se he realized that megabusiness must be subject to regulation. It was Roosevelt’s view that to maintain our democratic society, the federal government must use its power to halt the abuse of our society by industrial zealots whose practices threatened to turn the country into an arena of economic and
social conflict. Note here that there is a major departure from
the Jeffersonian path. Jefferson and his followers fought to keep
the federal government free from Hamiltonian control. They
were most interested in restraining the activities of the govern-
ment in Washington. They believed that the conditions of liberty
and democracy would be maximized by keeping the influence of
the capitol at a minimum. But Theodore Roosevelt and kindred
spirits realized things had changed. Democratic ideals and prac-
tices could be promoted and protected only if America's public
servants could harness the power of Washington so as to serve
the American dream. Although I am here emphasizing
Roosevelt's philosophy in regard to the regulation of
megabusiness, I hasten to emphasize that he viewed radical so-
cialism (especially when it resorted to violence) as a clear and
present threat to American democracy.220 Roosevelt's "regulato-
ry" approach from his point of view was the rational middle
course.

Early in Roosevelt's first term, it became evident to him that
executive action against a major trust would optimize his power
position. He sought to build up public support and show the
industrialists they would be challenged when they acted against
the law with wanton disregard for the interests of the public.
Without consulting anyone other than Attorney General Knox,
Roosevelt made his move. In February of 1902 he ordered the
Attorney General to take legal action against the Northern Se-
curities Company.221 This entity was a true target of opportu-
nity. Federal jurisdiction existed because of the interstate opera-
tions of the railroads controlled by the holding company. More-
over, the company had a bad public image because three of the
company's principals, E. H. Harriman, J. P. Morgan and James
J. Hill had waged a stock war that nearly produced a Wall
Street panic.222 Their conflict ended when the Northern Securi-
ties Company was formed to control certain major railroad oper-
ations. The antitrust action made its way through the federal
courts. Finally, in March 1904, the U.S. Supreme Court conclud-
ed that the company had been formed in violation of the

220. Id. at 220.
221. PRINGLE, supra note 212, at 253.
222. TINDALL, supra note 44, at 951-53.
Sherman Anti-Trust Act. Theodore Roosevelt had made it clear that the power of the federal government was there to challenge megabusiness run amok.

Roosevelt followed this venture by throwing his support behind legislation that gave the Interstate Commerce Commission power in regard to the control of railroad rates. He further extended his position as populist advocate by lobbying Congress to pass new taxes on the affluent, child labor legislation, a workers compensation act and a law controlling corporation financing of political parties. Although Congress failed to do most of what he pressed on them his message gained him popular support.

When not lobbying Congress, he took the opportunity to chide the lower federal courts for their abusive issuance of injunctions against labor in disputes with management.

In addition, Roosevelt took the position that state court decisions overturning social legislation ought to be subject to recall. Furthermore, he championed referendum and direct democracy approaches. In sum, Theodore Roosevelt used his significant intelligence, political creativity, charisma and great energy to demonstrate that democracy in the modern era was at core dependent upon economic opportunity. Like other leading legal populists, he understood that economic democracy and political democracy were inextricably united.

In 1913, Woodrow Wilson, a Southern legal intellectual and former professor of jurisprudence and politics at Princeton, took office as President of the United States. Like Roosevelt, Wilson was a firm believer in democracy. Born in 1856, Wilson spent the first eighteen years of his life in Virginia, Georgia and North Carolina. He was to be the only American president who saw the Civil War and Reconstruction from inside the South. After a year of college at Davidson, he enrolled at Princeton and received an undergraduate degree. He then returned to Virginia and studied law at the University of Virginia. It was clear that he was an heir to the Jefferson, Wythe, Transylvania tradition of law study as the route to a career of public service.

223. Id. at 262.
224. Hofstadter, supra note 199, at 228-32.
225. Id. at 229.
226. Id.
227. Tindall, supra note 44, at 965.
As early as his undergraduate years, Wilson had cards made up styling himself as Senator from Virginia. After a year of Atlanta law practice (1882-1883), Wilson enrolled in the Johns Hopkins University graduate program to deepen his knowledge of political theory and political practice. He received his Ph.D. and quickly became a prominent academic. In 1902 he was designated president of Princeton University. In 1910 he became the New Jersey Democratic Party’s gubernatorial candidate and ran as a reform candidate. He was elected. Although Wilson was no enemy of business he was ready to clash with mega-enterprise when its leaders violated the law or committed outrages against the public interest. He saw himself as a trustee of the public interest. In fact, his passionate advocacy of the people’s interest almost amounted to a religion of secular rectitude. Moreover, Wilson was possessed of significant political courage. While governor of New Jersey, he championed legislation directed at the strict regulation of big oil — the famous Seven Sisters of the petroleum industry. The legislation passed and the oil companies eventually sought corporate homes in Delaware. He fought for other progressive legislation, for example, a worker’s compensation statutes, electoral reform laws, statutes regulating public utilities and a corrupt practice act. Wilson also turned out to be a political friend of children and women; he helped to pass protective legislation related to their employment. His reform record as chief executive of New Jersey brought him to the attention of Southern and Northerner progressives. Wilson quickly became a leading presidential candidate. His campaign of 1912 (with a leading role played by women groups) stressed that Wilson’s progressivism was a “revival of Jeffersonian democracy.” From a jurisprudential perspective, it is clear that Wilson the lawyer/scholar/politician/statesman was in all substantial ways a modernized version of Jefferson the legal populist. Wilson is perhaps the only American president whose range of abilities and capacities came close to paralleling those of Jefferson.

228. Id. at 966.
230. TINDALL, supra note 44, at 966.
231. SMITH, supra note 229, at 338.
Like Jefferson, Wilson believed that democracy and the people's legal rights could not survive if the federal government were under the control of special interests whose core values were power and wealth. Like Theodore Roosevelt, he took the position that the federal government must be used to promote political and economic democracy. As historian Richard Hofstadter has said the Wilsonian movement was "an attempt of the middle class with agrarian and labor support, to arrest the exploitation of the community, the concentration of wealth, and the growing control of politics by insiders, and to restore as far as possible competitive opportunities in business."232

With Wilson's election, Southerners once again were placed at the very center of the national and international policy-making process.233 Since the Civil War they had lived in near policy-making exile. Many of Wilson's cabinet members and advisors were sons of the South. William Jennings Bryan became his Secretary of State. Bryan, a lawyer and Jeffersonian agrarian (although a Midwesterner), was extremely popular in the South.234 Furthermore, a number of Southerners serving in Congress were quickly recruited by the Wilson group. This Southern axis would play an instrumental role in law making directed at serving the interests of the people. They would be joint venturers in Wilson's "New Freedom" enterprise.

During Wilson's time in the White House, populist policy was turned into legislative reality. Wilson, sympathetic to the position of the farmers — especially those in the West and South — supported legislation that set up federal institutions specializing in providing credit to farmers. A number of Federal Land Banks were established throughout the country to provide farmers long-term loans at extremely low rates of interest.235 For the first time, farmers had access to sums of capital and interest rates that substantially alleviated their economic plight. Another pro-farmer piece of "New Freedom" legislation backed by the president was the Federal Highways Act.236 This matching grant program promoted state highway development. As a conse-

232. HOFSTADTER, supra note 199, at 337.
233. TINDALL, supra note 44, at 969.
234. Id.
235. Id. at 976.
236. Id. at 977.
quence, farmers had enhanced opportunity to move their product to urban markets. Jefferson's agrarian types now had real allies in Washington.

Financial reform, however, was not limited to the farm sector of the economy. The Wilson administration and its partners in Congress were the progenitors of the Federal Reserve Act of 1913. It was Wilson's goal to expand credit and prevent the concentration of cash in those parts of the country dominated by the giant banks. He took the position that ultimate control of the banking system must be public. Under the control of Hamiltonian interests, the banking system had always been a vehicle easily turned to the advantage of the wealthy and powerful. Wilson, like Jefferson and Jackson, sought to open the money system to small and midsize business and the "ordinary" individual. The Federal Reserve Act produced a decentralized system that did much to achieve this goal. The bankers of the industrial Northeast no longer possessed monopoly power over the money system.

As President, Wilson continued his attack on the trusts. With the guidance of Louis Dembitz Brandeis whom he would nominate for a seat on the U.S. Supreme Court, Wilson and his associates put together an antitrust program. The legislative outcome of their work was the Clayton Anti-Trust Act of 1914. This law struck at one of the mechanism essential in uniting the various megamonopolies into a giant web of wealth, power and influence — the so-called interlocking boards of directors. The Clayton Act set forth a very direct prohibition: interlocking boards could not be used to build economically subversive overarching superpowers. An important side effect of this legislation was that journalistic attention to it made many members of the general public aware of the existence of directorates that unified the field of monopoly. Furthermore, the Clayton Anti-Trust Act prohibited price discrimination and tying agreements. There is no doubt that the Clayton Act is a consequential offspring of populist jurisprudential thought. Moreover, with the support of Wilson, there was populist progress on the labor legislation front. A worker's compensation law covering federal

237. NEVINS ET AL., supra note 195, at 389.
238. Id. at 390.
employees was passed in 1916. In the same year, Wilson signed into law an act that barred from interstate commerce goods produced by child workers who had not reached age fourteen. In addition, the President gave his support to The Adamson Act of 1916, which established the eight-hour day for railroad workers.239 Of course, Woodrow Wilson's presidency came to ruin with the Treaty of Versailles.240 He failed to apply the economic lessons he had learned at home to the world at large. And it is true that African-Americans were not much benefited during his presidency. However, it is beyond question that Wilson, the legal populist, did act vigorously to extend the Jeffersonian plan.

During the Wilson administration, legal populist jurisprudence, program and practice had done much to further the people's juridical, economic and social interests. But the groups that rallied behind Wilson ultimately fell out with each other. Labor and farmers came into conflict over their comparative economic shares. Middle class elements under the sway of the business mind-set went their own separate way. Academics and intellectuals came into conflict with the working class and the farmers over Darrow, Darwin and the evolution issue. Wilson's health failed after the vicious battle over the Treaty of Versailles and his status as lodestar soon faded. Moreover, no new pro-people's leader stood ready to replace him. In 1920, Warren G. Harding, Republican, was elected President of the United States by a total of sixteen million votes to nine million for Democrat James Cox.

The old Guard was again in control and megabusiness once more had the ear and the heart of the executive. Over at the Treasury, Andrew Mellon "the greatest Secretary of the Treasury since Alexander Hamilton"241 made money policy. His views were pure Hamilton — make sure the wealth is in the hands of the rich. Put the three branches of the government at their disposal and "trickle down" economics would take care of America's problems.242 The Harding administration, of course, is well-known as being one of extraordinary corruption. Influence peddling and other profitable delicts were widespread. The Teapot

239. TINDALL, supra note 44, at 978.
240. HOFSTADTER, supra note 199, at 357-66.
241. TINDALL, supra note 44, at 1075.
242. Id.
Dome oil scandal is well known to all students of American history.\(^{243}\)

After the Harding administration, Calvin Coolidge and Herbert Hoover guided the country until 1933. Under these two presidents, megabusiness received preferential treatment and farmers, industrial workers and white collar employees and others were, for the most part, ignored in law and in fact. However, by 1929 the Hamiltonian system was spinning into an economic blackhole. The Florida land bubble had burst. Tax cuts for the affluent, stock purchases on margin, the psychology of personal greed and the absence of government regulation had turned Wall Street into a time bomb. Over thirty percent of all personal income was in the hands of five percent of the population.\(^{244}\) Business had held wages down but had not cut prices. Demand was rapidly contracting. Production declined and underemployment and unemployment were upon the nation. On October 23, 1929, the stock market fell apart. Things only grew worse.

By 1933 the economy had dropped into the abyss. A federal government enamored of the Hamiltonian vision had done nothing of significance through policy and law to protect the national interest. Once again the "classical" business system had failed the American people. Our greatest economic crisis had produced bread lines, soup kitchens, suicides, despair and a people with little hope. However, American political, economic and legal history were about to be made. The greatest American legal populist of the twentieth century had been elected President of the United States.

Franklin Delano Roosevelt, a patrician, experienced as a New York legislator, New York state governor and Assistant Secretary of the Navy, would launch a populist political/legal/economic revolution against the "economic royalists" and their supporters. At Columbia Law School, Roosevelt had found that the traditional positivist curriculum had little to offer him. He did poorly in his courses and happily departed the academy.\(^{245}\) He read law, passed the New York bar and became a "casual" lawyer, but a dedicated man of politics. As a legislator, governor and periodic

\(^{243}\) Id. at 1077.
\(^{244}\) Id. at 1100.
\(^{245}\) HOFSTADTER, supra note 199, at 416.
practitioner of the law, he learned first-hand the realities of legal realism. Judges did make law and often their results favored the economically entrenched. Legal language was made up of semantic counters which could readily be arranged to facade over particular policy outcomes. In addition, Roosevelt learned that in matters of importance, policy won the race over stare decisis and legal logic. He was undoubtedly a confirmed legal skeptic by the time he came to the presidency.

Politically, Roosevelt had been a strong supporter of Wilson and would, during his own administration, compare himself to Jackson. Such a person was clearly not over-identified with the titans of industry, finance and commerce. Not that he was a devotee of Marxist economics and jurisprudence — after all he was a truly “Natif” American politician and a patrician by virtue of family. In fact, those who called Roosevelt a socialist could not have been more wrong. He was a pragmatic “democrat” and very much a Jeffersonian and jurisprudential populist.

During the first phase of his administration, Roosevelt presented Congress with a plenitude of major statutory plans for the reform of the American system. Congress did its job. Legislation dealing with emergency relief for the destitute was enacted. A banking moratorium was declared by law and the banking system was saved. Emergency relief for mortgage debt endangered farmers was passed. Additional statutes were enacted to stimulate and increase severely deflated agricultural commodity prices. The securities market was reformed by legislation requiring complete disclosure of information about new securities. A public power authority (Tennessee Valley Authority) was created as a paragon of government planning to promote the interests of developing industries, agriculture and individual electric power consumers. A loan act to aid mortgagors in the refinancing of their homes became law. A national industrial rehabilitation plan emphasizing collaboration between business and government was legislated by the Congress. Congress by law gave the President the power to increase the money supply and took the country off the gold standard. Keynesian concepts had found their way into democratic legislation. Roosevelt and his

246. Id. at 44.
legislative and administrative supporters knew that private enterprise, the states, counties and municipalities were incapable of coping with the pervasive and widely ramifying economic and social calamity. It was clear that the federal government would have to lead the reclamation project.

Roosevelt's legal populist program of national rehabilitation found support with an open-minded Congress, but the federal judiciary was another matter. Harding, Coolidge and Hoover had appointed a total of 140 federal judges.248 These men appointed by the above megabusiness-oriented presidents made up over two-thirds of all federal judges. Consequently, the specter of Alexander Hamilton roamed the federal courthouses ready to derail Roosevelt's programs for reform. The battle between the New Deal lawyers and these federal judges is well documented249 and, as all students of constitutional law know, the U.S. Supreme Court became a special target of Roosevelt's wrath. By 1927 the Court had ruled against New Deal legislation in "seven of the nine major cases it reviewed".250 Roosevelt responded with his famous "court packing" plan that would have added new members to the U.S. Supreme Court and fifty additional federal judges to lower federal courts. For better or worse, the plan failed. However, the stratagem selected by Roosevelt made clear his legal populist disdain for judges who did not support legislation designed to promote the people's best interests. Like Jefferson, Roosevelt was no believer in the myth of the men in black. He took the position that judicial analysis and interpretation must be rationally related to the democratic needs of a nation in crisis. Political, economic and social context must be taken into account when deciding questions of fundamental significance. Law must be made to meet human needs in the human context of a society that prizes democratic values.

Although the Supreme Court had not been kind to the President, the people stood behind his brand of politicized jurisprudence. In 1936 Roosevelt achieved an incredible victory over Alfred M. Landon. Roosevelt buried Landon — 27,480,000 votes to 16,675,000 votes. This was a patrician president who was truly the people's constitutional leader. Over time, the "Nine Old

249. Id.
250. Tindall, supra note 44, at 1137.
Men” gave way to Roosevelt appointees and, even the Supreme Court began to participate in the revolution of populist jurisprudence. By the time of Roosevelt’s election in 1936, many additional fundamental pieces of legislation had been made law at the president’s urging.251 By statute, labor’s rights to organize and engage in collective bargaining had been secured. A comprehensive social security scheme aimed at protecting people from the traumas of unemployment, aging without personal income and physical dependency was enacted into law. Roosevelt, who was a victim of infantile paralysis, had learned through living that the legislative expression of empathy was critical to the practice of democracy.

On the revenue front, the administration steered new progressive taxation legislation through Congress. Tax rates were substantially increased on incomes over $50,000.252 Corporate tax rates were increased. Although the defenders of the rich raged, the reality was that the impact of these taxes was not nearly so great as they pretended. New banking legislation aimed at increasing government control of the money supply (as opposed to private banking control) became law. These legislative achievements added to those of the first phase of the New Deal left no doubt that American legal populism was paying a critical role in altering American economic and social reality. A socioeconomic safety net was now in place. The minimum conditions of existence were insured by law. Labor was empowered. The federal government had become a real force in itself. Its role as a potent force for homeostasis had been demonstrated to all citizens. Megabusiness had been given notice that government regulation was to be taken seriously. In addition, millions of Americans had learned through the New Deal’s conflicts with the federal judiciary that polities and law were frequently inseparable companions. Legal traditionalism and economic royalism had suffered major defeats in the realms of law, economics and politics. A system of countervailing power had been enacted into law. This was truly the apogee for American legal populism. The Jeffersonian “persuasion,” recrafted to meet modern conditions, had become the political and juridical philosophy for the nation. It was fitting

251. Id. at 1129-33.
252. Id. at 1132.
that it was Roosevelt who would lead American democracy in the battle against the Axis powers, for he was truly the living symbol of the democratic way.

The Roosevelt era ended on April 12, 1945, when he suffered a cerebral incident and died. Nevertheless, legal populism was to continue as the juridical spirit of the White House. Harry Truman, Roosevelt’s Vice-President, became the 33rd President of the United States. Although not a lawyer, Truman had been a two-term judge in his home state of Missouri and had been elected to the U.S. Senate in 1934. A descendant of Southern pioneers, Truman was no patrician but was instead the son of ordinary folk. He owed his career to the so-called Pendergast Machine of Kansas City. When he moved into the White House the enemies of the New Deal breathed a sign of relief. He was surely not Roosevelt. This was true. But it is appropriate to compare him to Jackson. Both men were able decision-makers, capable of working well with people of talent, sprung from the soil and bound to the people's interest. By September of 1945 anti-New Dealers were made aware of Truman's commitment to the rights of the people. In an ambitious program forwarded to Congress, Truman demonstrated his intent to move beyond the corpus of New Deal jurisprudence. Truman informed the Congress and the people that he was initiating the Fair Deal. Truman argued for:

1. An extension of social security.
2. A federal housing program for the poor.
3. Increased crop supports.
4. Economic planning to secure full employment.
5. A replication of the TVA model on other major rivers.
6. A higher basic wage rate.
7. A general program of fair employment legislation.
8. Special fair employment legislation that would insure African-Americans in their employment rights.

Traditional conservatives and run-away Southern democrats provided substantial opposition in Congress, but much of the

253. *Id.* at 1234.
255. *Id.* at 472; TINDALL, *supra* note 44, at 1235.
President's program became federal legislation. As the keeper of the New Deal grail and for his efforts to promote the legal position of African-American citizens, Truman deserves to be considered an important practitioner of populist policy jurisprudence and constitutional leadership. To this day, ordinary Americans hold him to be the living proof of the political talents of the so-called ordinary citizen.

The Truman presidency gave way to eight years of an administration led by President Dwight D. Eisenhower. Any objective evaluator of Eisenhower must admit he was an able man, politically moderate and certainly popular with the people. His leadership during World War II was of extreme importance to the national security. However, he was no American legal populist. However, all legal populists should remember him fondly, for it was Eisenhower who appointed Earl Warren to the U.S. Supreme Court. For this reason, it is appropriate to consider Eisenhower an honorary legal populist.

Perhaps Earl Warren would have made a great American president. He came close to being nominated. But as Jack Harrison Pollack has said: "As Chief Justice, Warren changed America profoundly more probably than he would have if he had been President."

Dwight Eisenhower clearly nominated Earl Warren to the U.S. Supreme Court because of Warren's position in and activities on behalf of the Republican Party. As a three-term governor of California, Warren had developed a solid reputation, a significant power base and a fund of critical political experience. Furthermore, Warren passed muster with Eisenhower on ideological grounds. However, Eisenhower and his advisors certainly would have been on firmer decision-making ground if they had been students of psychoanalytic jurisprudence, particularly the works of Harold Lasswell, Albert Ehrenzweig and Jerome Frank. As we all know, Earl Warren would mount a

257. Id. at 13.
259. Id. at 149-50.
262. Ehrenzweig, supra note 260.
263. Jerome Frank, Courts on Trial: Myth and Reality in American Justice,
constitutional populist jurisprudential revolution while on the
court. Eisenhower was not happy with the turn of the law during
Earl Warren’s chief justiceship. 264

The Warren case is a marvelous study in the making of a legal
populist. It contains considerable insights for foes and friends of
people’s jurisprudence. A short review of Warren’s life and learn-
ing experiences prior to his selection by Eisenhower are indica-
tors of something other than a propensity to hold fast to an ide-
ology and jurisprudence rooted in the juridical primacy of owners-
ship, acquisition and privilege.

Earl Warren grew up in Bakersfield, California in an environ-
ment dominated by the Southern Pacific Railroad.265 His father
was a true “railroad man” — a thirty-year veteran of working for
railroads. Warren’s father was involved in a labor strike and was
dropped from the Southern Pacific payroll. As a boy, young Earl
went to work for the Southern Pacific Railroad as a “call boy”.
His job was to round up train crews so that they kept to the
railroad schedule. In his memoirs, Warren calls his work experi-
ence on the railroad as extremely “meaningful because I was
dealing with people as they worked for a gigantic corporation
that dominated the economic and political life of the communi-
ty”.266 He went on to say that:

I saw that power exercised and the hardship that followed in its
wake. I saw every man on the railroad, not essential for the op-
eration of the trains laid off without pay and without warning for
weeks before the end of a fiscal year in order that the corporate
stock might pay a higher dividend. I saw minority groups brought
into the country for cheap labor paid a dollar a day for ten hours
of work only to be fleeced out of much of that at the company
store where they were obliged to trade. I helped carry men to the
little room called the emergency hospital for amputation of an
arm or leg that had been crushed because there were no safety
appliances in the shops and yards to prevent such injuries. I knew
of men who were fired for even considering a suit against the
railroad for the injuries they had sustained. There was no com-
pensation for them and they went through life as cripples. I wit-
nessed crime and vice of all kinds countenanced by corrupt gov-

264. POLLOCK, supra note 256, at 262.
266. Id. at 30.
ernenment as I learned the habits of a large part of the railroad
men with whom I was thrown in contact.
The things I learned about monopolistic power, political domi-
nance, corruption in government, and their effect on the people of
a community were valuable lessons that would tend to shape my
career throughout life, although I did not then foresee any such
results.267

Very early in life, Earl Warren had encountered the realities
of existence for working people. He saw what concentrated eco-
nomic and political power did to specific people under concrete
circumstances. He learned of the stigmatization and abuse of
members of minority groups. He saw that human well-being was
all too often sacrificed for the advantages of enhanced wealth.
Earl Warren learned that justice for all had to be fought for,
because those who primarily valued power and wealth had very
little interest in seeing justice widely distributed. An empathic
youth such as Earl Warren would never forget the lessons of his
early experiences.268 The roots of his legal populism can be
found in his early exposure to the above described social, politi-
cal and economic circumstances. Other evidence of Warren's
tendency to deviate from the establishment line is revealed in
his law school history. At “Boalt Hall,” the name applied by its
students and graduates to the University of California Law
School, Warren encountered a faculty who fetishized the case-
book method269 and, like many other legal populists (e.g.,
Franklin Roosevelt and Jerry Spence), he found the method
lacked a great deal when it came to the providing of skills train-
ing and clinical experience. Warren made two interesting re-
sponses to this pedagogical experience. First, he refused to en-
gage in Socratic dialogue with his professors.270 He believed
that this dialogue method would not prepare him to practice law
and as a result he was not going to participate in the Socratic
transaction. Dean William Carey Jones called Warren to his of-
office and lectured him on his failure to participate.271 Warren
defended himself and argued that there was no official require-

267. Id. at 30-31.
268. Id. at 23.
269. Id. at 42.
270. WHITE, supra note 258, at 16.
271. Id.
ment that a student participate in class. Moreover, Warren informed the dean that he would pass his written examinations, which were the formal academic requirements. It was clear that Earl Warren was already on his way to being a good lawyer and in addition, that this young man would score high on any test of that trait known as autonomy. His interaction with the dean establishes that Warren's character was such that he was not afraid to stand up to those authority figures who possessed power that might be used against him. Warren did not shrink from taking a stand. Believing in the rightness of his position, he was willing to challenge the law school on a matter of great significance to the faculty and the administration. On the U.S. Supreme Court, Justice Earl Warren's character was critical in his ability to champion positions that were not acceptable to many of American's powerful. 272

Warren's second response to his Boalt Hall educational experience was to violate the faculty's role against taking outside employment. A violator of this rule could be dismissed from law school. 273 He took a clerking job in a Berkeley law firm. 274 Here he served papers and did all those things that — at the very least — give the law clerk a nexus to "living" legal institutions and those things involved in the daily lawyer tasks of interviewing, advising, arguing motions, preparing witnesses, trying cases, preparing appeals and drafting legal instruments. Again, Warren's behavior reveals an independence of mind and level of self-confidence that are surely predictors of something other than an inclination to conform.

Other University of California experiences hint at the stance Warren would assume as a Supreme Court Justice. During his university years (pre-law and law school) Warren showed a predilection for a particular brand of politics known as progressivism. 275 Progressivism was a reform politics, which in California, focused critically on the monopoly of political power held by the Southern Pacific Railroad. The progressive movement featured a politics of values stressing the public interest over special interest and calling for the democratization of the

272. POLLOCK, supra note 256, at 195-96.
273. WHITE, supra note 258, at 16.
274. WARREN, supra note 265, at 43.
275. Id. at 17.
political process. To promote a democratic political process, progressives advocated the use of recall, initiative and referendum. Furthermore, they called for direct primaries and cross-filing. The fundamental progressive idea was that concerned citizens without special interest connections ought to act as facilitators to bring the strength of the general public and the public interest to bear upon the political and governmental systems. During his Berkeley years, Earl Warren cast his lot with this group of citizens. He went to work for the vice president of the progressive Lincoln-Roosevelt (Theodore) League in 1909. This man was Hiram Johnson, a well-known prosecutor and enemy of political corruption. Johnson, running as a Republican, was elected governor of California. Warren's affinity for Johnson and for the progressivism of this period are indicative of his emerging ideas about justice, law and society. Moreover, the lessons learned from his pro-labor Scandinavian father and from his employment with the Southern Pacific Railroad led naturally to his interest in progressivism. Of course, all of these matters relate to Earl Warren's later manifested populist jurisprudence. Surely these matters would cause a careful observer to view Warren as something other than a potential judicial conservative. Two other matters add support to the above position. The first relates to his practice of law. The second relates to Warren's adult political career in California. In regard to the practice of law, Warren spent very little time on the private side of practice. He early on worked for the law department of the Associated Oil Company in San Francisco. He resigned from this job because the legal department demonstrated no concern for his or others' "human dignity." Warren thereafter spent some time with the firm of Robinson and Robinson in Oakland. But then he and some friends decided to open their own firm. However, World War I interrupted this project. Upon returning from military service, Warren took a job as clerk of the California legislature's judicial committee. By

276. Id.
277. WHITE, supra note 258, at 18.
278. Id. at 17-18.
279. Id. at 18.
280. Id. at 21.
281. Id. at 22.
282. Id. at 23.
1920, he had moved to the Alameda County district attorney’s office.\footnote{283}{Id. at 25.} Within eleven years after taking this job, he was the district attorney in charge of the office. Warren did an outstanding job as district attorney and, running on a solid record of achievement, was elected California’s Attorney General in 1938. By 1943, five years after becoming Attorney General, Earl Warren was elected governor of California.\footnote{284}{Id. at 86.} He served three terms as an active, innovative and popular executive. From this post he went on to serve as Chief Justice of the U.S. Supreme Court. If we count Warren’s tenure on the Supreme Court, he spent fifty years in the public legal arena. This certainly is a possible indicator of an inclination toward the legal populist persuasion, especially if the person being evaluated has a strong preference for issues involving persons rather than business matters. Obviously, by itself, the existence of a public career is not determinative. But such a career is useful evidence when combined with a person’s early psychosocial experience, their political behavior, their character style and their value preferences (e.g., Warren’s deep concern for “human dignity”). It is interesting to note that Warren displayed no significant interest in the accumulation of wealth, control of business operations or management of business entities. In fact, when it came to business, his dominant interest was antitrust. He was opposed to combinations that permitted vast amounts of power to be accumulated to the detriment of the average person’s interest.\footnote{285}{Id. at 281.} As governor, Warren focused on such matters as health care, prison reform, new highways, death penalty administration and education.\footnote{286}{Id. at 280; WARREN, supra note 265, at 189-98, 211-15.}

At this point, I want to stress that the preceding discussion of the pre-Supreme Court life of Earl Warren has had a didactic as well as an expositional purpose. In a short form “case narrative,” I have sought to trace the evolution of Earl Warren’s legal populism. There is no question he is in the tradition of Thomas Jefferson and Jerry Spence. My goal has been to demonstrate that careful historical\biographical evaluation can expose values and character-related stances and behaviors that allow one to detect
the existence of a philosophical and action-oriented essence that enables us to predict with reliability the probability that a person will be a legal populist, or to verify the belief that the person has been a practicing legal populist. At this point, I shall consider Earl Warren as a legal populist in the position of chief justice of the U.S. Supreme Court. This discussion, which could cover volumes, will here (by necessity) be reduced to a very compacted product.

From the above evidence it is clear that the infrastructure of Earl Warren's populist jurisprudence existed at the time he became Chief Justice on October 5, 1953. In completing this section of this paper I must — owing to space limitations — avoid dealing with his Supreme Court opinions in detail. My comments will be more in the realm of general truths — philosophical "venties". I first refer to Warren's vision of civil liberties. For Warren, civil liberties were the bedrock of our American way of life. Civil liberties enshrined ideas, concepts and procedures that maximized human dignity and the freedom of the person. They act as a check on the agglomerated powers of government. For Warren, the law of civil liberties was to be found in the Bill of Rights. 287 The Bill of Rights stands as the repository of the natural rights of man, and Warren, like Jefferson, believed that these natural rights were largely found enshrined in the English common law. 288 With some modification, these natural rights were included in our Bill of Rights. Of course, problems arise for judges because changing social, economic, scientific and other conditions create situations where decisions must be made as to whether or not a particular set of facts is to be covered by any part of our Bill of Rights.

Warren held that the Bill of Rights enacted a collective "sense of justice." 289 The provisions of the Bill of Rights were particularized manifestations of this "sense of justice" — which is ethical. Note that Warren's jurisprudence bears resemblance to McDougal and Lasswell's "human dignity" jurisprudence stressing the promotion of democratic values. 290 Ethics looms large. According to Warren, the Bill of Rights ethical commands had to

287. WHITE, supra note 258, at 223.
288. Id.
289. Id.
290. Batt & Short, supra note 186, at 232-34.
be imaginatively interpreted so as to ensure that justice was served.\textsuperscript{291} Note that Warren is no stargazer after precedents or seeker of neutral principles. He does not opt for "technical" solutions. Instead his quest is for justice in a Western bill of rights society. Warren saw his role as a justice as one in which he made law from the accumulated ethical wisdom of our culture. To some significant extent, Warren's approach to judging was based on the creative function and the ability to act with imagination. Earl Warren did not confine himself to traditional legal analysis as he worked toward a decision.\textsuperscript{292} Like McDougal and Lasswell, he sought to understand the participants, the historical conditions, the available outcomes, the impact of specific decisions and the values that were at stake. Put pithily, he asked: who did what to whom under what circumstances with what outcomes and what is the just disposition of this case? His basic method was informed, empathic\textsuperscript{293} and introspective.

In his book, \textit{Earl Warren: A Public Life},\textsuperscript{294} G. Edward White says that in deciding U.S. Supreme Court cases, Earl Warren would place himself in the shoes of the individual involved.\textsuperscript{295} A Warren clerk has said that Warren imaginatively stepped into the position of the person affected by an activity or interpretation of a legal norm.\textsuperscript{296} Through this act of empathy and the use of introspection, Warren would assess the justness or fairness of the situation. When one reads \textit{Brown v. Board of Education},\textsuperscript{297} the public education desegregation decision, one should keep this in mind. In writing about the separation of African-American children from their white age peers, Warren refers to the possible effects of this separation on the "hearts and minds" of these African-American children.\textsuperscript{298} Warren portrays this separation as generating "a feeling of inferiority"\textsuperscript{299} that

\begin{footnotesize}
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\item \textsuperscript{291} WHITE, supra note 258, at 224.
\item \textsuperscript{292} Id. at 230.
\item \textsuperscript{293} On empathy, see HEINZ KOHUT, THE RESTORATION OF THE SELF 308 (1977). Kohut, a psychoanalyst, states that empathy is important in the production of informed explanations in regard to human situations and interpersonal conditions.
\item \textsuperscript{294} WHITE, supra note 258, at 138-53.
\item \textsuperscript{295} Id. at 228.
\item \textsuperscript{296} Id.
\item \textsuperscript{297} Brown v. Board of Education, 347 U.S. 483 (1954).
\item \textsuperscript{298} Id. at 494.
\item \textsuperscript{299} Id.
\end{itemize}
\end{footnotesize}
will erode the motivation to acquire knowledge, impede cognitive mental development and hinder the opportunity to accrue the advantages attached to interacting with children from other backgrounds.\textsuperscript{300} I have no doubt that these insights are based on Warren's empathic/introspective method. Warren is focusing on the human situation. The words "hearts," "minds," and "feelings of inferiority" surely point to Warren's empathic/introspective approach. To support his position, Warren cites relevant psychological literature in the famous behavioral science footnote number 11.\textsuperscript{301} In the text preceding the footnote he writes: "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern (psychological) authority."\textsuperscript{302}

Warren, I submit, penetrated the psychological situation of the segregated African-American students and deduced the impact of the segregated condition on these young people. Note that he involves himself with the human here and now and not the legal norm of the turn of the century.\textsuperscript{303} The holding in Plessy and the conditions of the country in the post-Civil War era are not controlling for Warren. His interests were justice, equality and opportunity in the America of the 1950s. His view was that a desegregated education is an essential in contemporary times. To deny it is to "deprive (children) of the equal protection of the laws guaranteed by the Fourteenth Amendment."\textsuperscript{304} For Warren, the ethical "oughts" of a constitutional democracy can produce no other results. American democracy cannot exist if something as fundamental as education is not free of racism.\textsuperscript{305}

In summing up this discussion of Earl Warren's legal populism, I wish to emphasize certain critical matters. Warren's jurisprudence has its roots in his early life experience. It was not acquired in law school but in his family and from lessons learned in the economic, social and political surroundings of his community. Warren's empathic/introspective approach to judging undoubtedly derives from a familial and social setting that nur-

\begin{itemize}
\item \textsuperscript{300} Id.
\item \textsuperscript{301} Id. at 495.
\item \textsuperscript{302} Id. at 494.
\item \textsuperscript{303} See Plessy v. Ferguson, 163 U.S. 537 (1896).
\item \textsuperscript{304} Brown, 347 U.S. at 495.
\item \textsuperscript{305} On Warren's position that there is a fundamental right to education, see White, supra note 258, at 226.
\end{itemize}
tured emotional involvement in human matters. Furthermore, no

Taboo on the utilization of the affective regions of the central nervous system in the making of decisions was imprinted on Earl Warren. After all, cases do involve people who are complex beings—not units of technology. Furthermore, Warren's interest in public area problems indicates that he developed a maturity of personality that allowed him to take a serious interest in matters affecting community interest. He was not obsessed by problems of the self or addicted to things of significance only to those in his immediate small group setting. In addition, he was a person of great social skills who spent his life dealing with the affairs of city, state and nation. His energy was devoted to improving life for millions of people. I stress these matters because much of the above is characteristic of all legal populists. In a very real way, Warren is a living paradigm for all legal populist. Obviously, most populists are not as effective in the public arena as was Earl Warren. But most legal populists do resemble Warren in "legal style," social interests and values. Again, I emphasize that the careful study of Warren's personal evolution sheds light on how to diagnose and predict the jurisprudential preferences of the legal populist.

Earl Warren's tenure as Supreme Court justice overlapped with not only the presidential era of Dwight Eisenhower but with those of John F. Kennedy and Lyndon Johnson. As politics would have it, both Kennedy and Johnson were legal populists. With Warren on the Supreme Court and Kennedy and Johnson in the White House, American Legal Populism reached its political zenith. Following our chronological line we now consider John Fitzgerald Kennedy as legal populist.

The Kennedy era reality is that tragedy cut short what surely would have been two terms of legal populism in action. Omens of the future could be divined in certain Kennedy administration-backed social legislation proposals that Congress converted into law before Kennedy's life was taken. This legislation included:

1. An increase in the minimum wage.
2. The extension of the minimum wage to an additional three million workers.

306. "Affective" is a psychoanalytic term for emotional.
3. An increase in benefits under Social Security.
4. Provision of aid to "distressed" areas of the country.
5. A five billion dollar urban renewal package.\textsuperscript{307}

The above certainly evidenced an anthropocentric populist perspective. It was Bentham-like in its widespread economic benefit to the many. However, Kennedy's record on behalf of African-American equality is the populist position for which he should be most honored. As historians Allan Nevins and Henry Steele Commanger have stated:

No issue meant more to President Kennedy than civil rights; as a descendant of the Irish he knew something of the history of persecution, as a Catholic he had met and fought a prejudice not greatly different from that which was the daily experience of every Negro. He had too, a lively sense of history and he knew that the United States was in danger of forfeiting her moral leadership in large parts of the globe by her injustices to her Negro citizens.\textsuperscript{308}

Furthermore, President Kennedy was capable of feeling real outrage at the terrorism directed at African-Americans and their supporters in certain areas of the South during the 1960s. At a news conference on September 13, 1962, Kennedy was obviously personally incensed by recent church burnings and armed attacks on individuals directed at preventing African-Americans from voting. He said:

The United States Constitution provides for freedom to vote, and this country must permit every man and woman to exercise their franchise. To shoot, as we saw in the case of Mississippi, two young people who were involved in an effort to register people, to burn churches as a reprisal, with all of the provisions of the United States Constitution — at least the basic provision of the Constitution guaranteeing freedom of worship — I consider both cowardly as well as outrageous. The United States now has a number of FBI agents in there, and as soon as we are able to find out who did it, we'll arrest them and we'll bring them before a jury, and I'm sure that they'll be appropriately dealt with. But let me say that nothing, I think — and I'm sure this is the view of the people of the States — the right to vote is very basic.

\textsuperscript{307} TINDALL, supra note 44, at 1356.
\textsuperscript{308} NEVINS ET AL., supra note 195, at 552.
If we’re going to neglect that right, then all of our talk about freedom is hollow, and therefore we shall give every protection that we can to anybody seeking to vote. I hope everybody will register in this country. I hope they will vote. I commend those who are making the effort to register every citizen. They deserve the protection of the United States Government, the protection of the State, the protection of local communities, and we shall do everything we possibly can to make sure that that protection is assured and if it requires extra legislation and extra force, we shall do that.\footnote{309} 

Under the young President, the Civil Rights Division of the Justice Department substantially picked up the pace of its activity in the South.\footnote{310} Robert Kennedy, Attorney General, and Burke Marshall, head of the Civil Rights Division, went on a mission. President Kennedy had directed that cases be pushed and they did push them. The Kennedy Administration had great success in “enforcing the Civil Rights Acts of 1957 and 1960 [and] . . . by June, 1964, 40 percent of the more than five million eligible black voters in the eleven Southern states were registered to vote.”\footnote{311} 

During Kennedy’s presidency, the Justice Department set a new standard for the enforcement of civil rights on behalf of African-Americans. Through executive action, real success was achieved on the civil rights front. Moreover, President Kennedy put together a legislative program which made up the core of the Civil Rights Act of 1964, which was passed under the Johnson administration.\footnote{312} This package contained fair standards for determining literacy for purposes of voter registration, technical aid to school districts to hasten school integration and an increase in the powers of the U.S. Civil Rights Commission.\footnote{313} 

Another important populist cause promoted by John Kennedy was health insurance for the aged.\footnote{314} Kennedy recommended

the enactment of appropriate legislation in 1962. Legislation providing such aid to the aged was not passed until Lyndon Johnson became President. Kennedy saw health insurance for the aged as a natural extension of the retirement, disability, death and unemployment programs that earlier populists such as Franklin Roosevelt and Harry Truman had championed.

In a 1962 message to Congress he said:

Private health insurance has made notable advances in recent years. But older people, who need it most but can afford it least, are still unable to pay the high premiums made necessary by their disproportionately heavy use of health care services and facilities, if eligibility requirements are to be low and the scope of benefits broad. Today, only about half of our aged population has any health insurance of any kind — and most of these have insufficient coverage.

Kennedy had a Brandeis-like grip on the facts. At his direction the health issue had been carefully studied. His position was that a comprehensive program of social security must take into account the health of the people. Morally and ethically there could be no other position. The legal populism advocated by John Kennedy stressed the democratic distribution of well-being to all citizens. Kennedy's personal experiences with Addison's disease and a painful spinal injury had taught him that health is vital to a person's existence.

My guess is that today, John Kennedy would stand with the Clinton administration on the matter of health security. However, in 1962 he was compelled to push a more limited program that had a political probability of success. He was not a populist given to Quixote-like endeavors. In spite of his tragedy-shortened political career, his impact on legal populism and its progress was extraordinary.

Opponents of the democratic advances brought about by the Kennedy Administration's legislative and law enforcement activities were optimistic about the presidency of Lyndon Johnson.

317. Id. at 166.
They obviously did not know the heart and mind of Lyndon Johnson, for the new president would turn out to be the most ardent legal populist to inhabit the White House in the modern era.

Lyndon Johnson was elected to the Congress of the United States as a young man of twenty-nine.\textsuperscript{319} His campaign was based almost completely on his demonstrations of faith in the leadership of President Franklin Delano Roosevelt. In fact, Johnson campaigned against his opponents by making it clear that he, unlike them, was even for Roosevelt's plan to increase the number of U.S. Supreme Court justices from nine to fifteen.\textsuperscript{320} In truth, Johnson was a dedicated follower of Roosevelt. Johnson had met the Great Depression face to face in rural Texas and knew the very real plight of the working people and their families. He saw the antipopulist Nine Old Men\textsuperscript{321} of the Supreme Court as unwilling to support legislation and programs absolutely necessary to prevent the destruction of human life, health and economic welfare. The new Congressman had empathy for the people, which explained his affinity for the humanitarian Roosevelt. However, a preference for populism had been a family tradition long before Lyndon Baines Johnson had entered politics. As he said years later:

\begin{quote}
When I thought about the Congressman I wanted to be... I thought about my populist grandfather, and promised myself that I'd always be the people's Congressman, representing all the people not just the ones with money and power. My grandfather taught me early in life that neither misery or squalor is inevitable so long as the government assumes the positive role of eliminating the special interests that cause most of our problems in America...\textsuperscript{322}
\end{quote}

This statement by Lyndon Johnson is a lucid declaration of the faith of a populist legislator. He never jettisoned his populism. However, in the House and Senate he did learn that the human element is critical.\textsuperscript{323} When brought into the arena of

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\textsuperscript{320} Id. at 87.
\textsuperscript{321} Widely popular pejorative language for the then members of the U.S. Supreme Court.
\textsuperscript{322} GOODWIN, supra note 319, at 91.
\textsuperscript{323} Id. at 121.
\end{flushright}
\end{center}
action, his philosophy was subject to pragmatic modulation owing to his very real understanding of the psychology of the human self. Johnson avoided making enemies and consequently was able to convert much of his ideology into law and program. Lyndon Johnson became not only a great populist legislator, but without a doubt the most social-agenda-ambitious legal populist to ever serve as president of the United States. Here, I will briefly consider the fundamental philosophical position of this legal populist.

Looking at his words as quoted above, one can see that Johnson defines his legislative role in relationship to the needs and rights of the general population. Lyndon Johnson will represent the people. He is “of the people,” “by the people,” and “for the people.” Those members of the economic elite who stress the power and wealth values were not going to get preferential treatment from this legislator. The American trust Johnson administered was one for the benefit of the whole of the people. Moreover, Johnson’s position was that “special interests” warping the distribution of income, assets and opportunity do much to create the wretched circumstances under which so many men, women and children are forced to live. Note the fact that Johnson emphasized the activist role of government with respect to protecting the people from powerful special interests. For this legal populist, his legislative and later executive power is to be used to enhance the overall well-being and economic position of the people. He was an unabashed believer in progress for people.

If certain persons had not come to understand that Johnson as a legislator was moved by populist impulses, they were to receive graphic instruction when he became John Fitzgerald Kennedy’s successor in the White House. In the election of 1964 Johnson crushed Barry Goldwater. Johnson received sixty-one percent of the votes cast. President Johnson was well aware as a populist president he would draw a great deal of fire from the political right. Johnson intended to use his presidential power to transform the American economic and social condition. He told White House aides, “[E]very day I’m in office, I’m going to lose

324. Johnson’s understanding certainly was not academically based, but he did have great intuitive capacity that allowed him to make accurate psychological evaluations.
325. TINDALL, supra note 44, at 1366.
votes. I'm going to alienate somebody . . . . We've got to get this legislation fast. You've got to get it during the honeymoon. And Johnson did move unhesitatingly. Johnson's Great Society program was beyond ambitious. It included:

1. Grants for those burdened by poverty.
2. Civil rights for African-Americans.
3. Increased benefits for the unemployed.
4. Tax rebates for business entities and persons.
5. Medical care for the elderly.
6. Aid to elementary and secondary education.
7. Free food for those deprived of that necessity.
8. Rehabilitation services for the handicapped.
9. Enhanced educational aid to Native Americans.
10. An increased minimum wage.
11. Public housing for those without adequate dwellings.
12. Conservation programs to protect public lands for public use.
14. Farm subsidies.
15. Vocational training programs.
17. Fair labeling regulations.
18. A "Head Start" program (educational, medical and dental) for disadvantaged children.
19. Etc., etc. In 1965 alone, Johnson sent sixty-five documents to Congress calling for the enactment of particular legislative components of the Great Society program. For most presidents, twelve to twenty-four such transmissions per year was the norm. However, Johnson's ideal was the democratic distribution of well-being and human dignity. He was obsessed with bringing this distribution into being. I here elaborate briefly on one facet of this "democratic distribution."

326. Id. at 1367.
327. GOODWIN, supra note 319, at 217, 210-50.
328. Id. at 217.
329. Id.
In April of 1965, President Johnson signed an elementary and secondary education act and thus established a strong federal financial foundation under a system of public education operated at the state level. Johnson, a former teacher, saw bringing education to the disadvantaged youth of the nation as a top priority on his list of populist projects. His position was that "education is the only valid passport from poverty." The opinion of this legal populist was that law could substantially increase real opportunity for the people by guaranteeing all children and youth a significant educational experience. Equality of opportunity is, of course, a fundamental principle of legal populism. Education meant the ability to earn a living and the learning of those values and skills relevant to participation in the democratic endeavor of our America. These things were fundamental to a decent and participatory existence in our society — the society which was on its way to greatness. In his remarks to the members of Congress, President Johnson said: "I think Congress has passed the most significant education bill in the history of the Congress. We have made a new commitment to quality and to equality in the education of our young people." He went on to illustrate the shift in emphasis being brought about by the act:

I hope the people of America can realize that we now spend about $1,800 a year to keep a delinquent youth in the detention home; we spend $2,500 for a family on relief; we spend $3,500 for a criminal in a State prison . . . but we only spend $450 a year per child in our public schools.

Well, we are going to change that.

The President continued to press forward on the matter of the significance of education:

Health is important. So is beautification, civil rights, agriculture, defense posture, but all of these are nothing if we do not have education.

331. SCHORR, supra note 315, at 217.
333. Id. at 415-16.
I will never do anything in my entire life . . . that excites me more or benefits the Nation I serve more, or makes the land and all of its people better and wiser and stronger . . . .

No legal populist since Thomas Jefferson has better understood the role that education plays in justice, freedom, democracy, and opportunity than Lyndon Johnson. The real American Education President of the 20th century is Lyndon Baines Johnson.

John Fitzgerald Kennedy is well-known for his commitment to civil rights. However, Lyndon Johnson's dedication to the cause of civil rights for African-Americans has been questioned. The reality was that in: "speeches, legislation, and continuing proposals, Johnson took the most advanced position on racial issues of any president in American history; appearing, at times, ahead of the civil rights movement itself . . . ." Johnson believed in the rights of man and woman without regard to race. His father had been active against the Ku Klux Klan in Texas and young Lyndon was taught to abhor bigotry. It was President Johnson who ordered the FBI to control Klan hostilities directed against African-Americans. Furthermore, it was Lyndon Johnson who appointed Thurgood Marshall to the U.S. Supreme Court.

In a speech before Congress a short time after his 1964 election to the Office of President he said:

There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem. And . . . we are met here as Americans to solve that problem. This was the first nation in the history of the world to be founded with a purpose. The great phrases of that purpose still sound in every American heart, North and South: "All men are created equal" — "government by consent of the governed" — "give me liberty or give me death." Well, those are not just clever words, or those are not just empty theories. In their name Americans have fought and died for two centuries, and tonight around the world they stand there as guardians of our liberty, risking their lives.

334. Id. at 416.
335. GOODWIN, supra note 319, at 230.
336. Id. at 232.
337. Id. at 231.
338. Id.
339. Id. at 306.
Those words are a promise to every citizen that he shall share in the dignity of man. This dignity cannot be found in a man's possessions; it cannot be found in his power, or in his position. It really rests on his right to be treated as a man equal in opportunity to all others. It says that he shall share in freedom, he shall choose his leaders, educate his children, and provide for his family according to his ability and his merits as a human being.

To apply any other test — to deny a man his hopes because of his color or race . . . is not only to do injustice, it is to deny America and to dishonor the dead who gave their lives for American freedom. 340

President Johnson's words were backed up by effective executive political action. 341 Thousands of others did their share to help the President and the Congress bring into being "the Civil Rights Act of 1964 . . . the first really effective civil rights bill in almost a hundred years." 342

The act:

1. Prohibited racial discrimination in public accommodations (e.g., restaurants and hotels)
2. Barred discrimination in employment and labor union activities.
3. Outlawed discriminatory practices aimed at preventing racial minorities from participating in federal elections.
4. Provided that federal funds could be withheld from school districts that failed to desegregate. 343

This was truly landmark legislation. It has changed the course of American history. Without this human rights package much of our country would have remained in the muck of American apartheid. Lyndon Johnson, a populist for all people, fought to make human rights a reality for our African-American people. His role in this human rights project should never be forgotten.

As already indicated, it was Johnson who appointed Thurgood Marshall to the U.S. Supreme Court. For those of us who sup-

342. NEVINS ET AL., supra note 195, at 553.
343. Id.
port the cause of legal populism, Johnson's choice was an excellent one. Moreover, not only was Marshall extraordinarily well qualified to carry the torch of legal populism on the court, he was truly a unique choice.

For this author, the most intriguing legal populist figure of the modern era is U.S. Supreme Court Justice Thurgood Marshall. Marshall, unlike his colleagues on the Supreme Court, was on face-to-face terms with the realities of injustice in America. Marshall, as they say, had "walked the walk." He had investigated lynchings, fought for fair trials for African-American defendants and had been threatened with violence because of his legal work as counsel on behalf of those seeking equal justice. As a fourteen-year-old growing up in the first part of the twentieth century in the urban Upper South (the highly segregated metropolis of Baltimore, Maryland), Marshall had experienced the person-to-person hostilities of racism. On one memorable occasion, he was called a "nigger" by a white man and grabbed by him. A fight followed and Marshall and the white man were soon hauled off to the police station. Fortunately, the officer who took the two combatants into custody was no bigot and Marshall was released without being charged. For over fifty years Marshall engaged in his battle against oppression and sought justice through law. Only now after his death is Marshall receiving the attention he deserves. The invisible man is now made manifest!

Carl T. Rowan's masterful Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall has done much to demonstrate that Thurgood Marshall was truly a great American human rights leader. With this brief introductory comment behind us, we turn to Marshall's populist perspective.

In United States v. Kras, appellee Robert Kras, an indigent, had filed a voluntary petition seeking a discharge in bankruptcy. The applicable law required the payment of a $37.00 referee's fee, a $3 fee for clerk's services, and $10 compensation

345. Id. at 40-41.
for the trustee. The total amount was $50. Kras challenged the fees on "Fifth Amendment grounds." The district court held that the provisions for such fees in the case of an indigent violated that person's due process and equal protection rights. After evaluating Kras' personal financial situation, the U.S. Supreme Court held that the fee provisions did not deny an indigent equal protection (or due process) as bankruptcy is not a fundamental right subject to the "compelling interest" doctrine and that the fee requirements clearly passed the applicable "rational basis" test.

In his dissenting opinion, Justice Marshall pointed out that appellee along with his petition had submitted an affidavit in which he indicated that he would be unable to cover the fees even by paying in small installments. Kras had supported his claim by providing the court with the detailed specifics of his economic situations. His affidavit was not challenged at the district court level. Appellee's factual claims were accepted by the judge as true. Justice Marshall stated that it was clear that: "The majority seems to believe that it is not restrained by the traditional notion that judges must accept unchallenged, credible affidavits as true, for it disregards the factual allegations and the inferences that necessarily follow from them."

A stern technical rebuke—but the real lesson was yet to come. The Court had taken the trouble to articulate its own mathematical view of Kras' economic condition and had stated that on a nine-month payment plan, Kras could pay off the $50 fee at the rate of $1.28 per week. The court pointed out that this sum was "less than the price of a movie and little more than the cost of a pack or two of cigarettes." It is here pointed out for the reader that Kras was unemployed though continually seeking employment, had debt of over $6,000 and was a head of

348. Id. at 436.
349. Id.
350. Id.
351. Id. at 446-50.
352. Id. at 458.
353. Id.
354. Id. at 459.
355. Id.
356. Id.
357. Id.
household with a wife, his mother and three children.\textsuperscript{358} His eight-month-old son had cystic fibrosis and was receiving hospital care at the time Kras’ affidavit was filed.\textsuperscript{359}

Justice Marshall, speaking out of empathy and experience, preached the reality principle to the majority. He told the court that the poor live a dramatically different life.\textsuperscript{360} Saving less than $2 per week for them could be a substantial burden.\textsuperscript{361}

He put it this way:

It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have, like attempting to provide some comforts for a gravely ill child, as Kras must do.

It is perfectly proper for judges to disagree about what the constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.\textsuperscript{362}

At the end of his dissent, Justice Marshall enunciated the view that the case was not about the right to a discharge via bankruptcy, but it in fact involved the right of access to the judicial arena and the right to a hearing when one puts forth legal claims.\textsuperscript{363} For him it was a matter of juridical empowerment and this empowerment is not to be abridged because one is without substantial financial resources.

The \textit{Kras} case is engaging from a jurisprudential point of view, because it allows us to generate some propositions that give us particular insights into Marshall’s version of legal populism.

\textsuperscript{358} \textit{Id.} at 451.
\textsuperscript{359} \textit{Id.} at 451-52.
\textsuperscript{360} \textit{Id.} at 460.
\textsuperscript{361} \textit{Id.} at 459-60.
\textsuperscript{362} \textit{Id.} at 460.
\textsuperscript{363} \textit{Id.} at 462-63.
First, the saga of Robert Kras is a story that Justice Marshall develops to serve his didactic purposes. This approach reveals to us something very basic to the Marshall philosophy. For Marshall, the judge is not simply a specialist in decision-making, she/he is, in addition, an educator and interpreter. This is so because Marshall's jurisprudence is very much sociological and democratic in its orientation. Furthermore, Marshall's philosophical position is that law is a social institution that has discernible effects upon people in society. Law impacts upon life. Through law, decisions are made about who gets what from whom under what conditions. As a judge, Marshall saw his role in large part as one of making explicit the relationship of law to society. Moreover, he saw legal behaviors as social practices entailing material and ethical consequences whose real meaning could be known by placing them in the larger apposite social context.

Marshall was surely not the descriptive legal scientist, for he assumed a didactic role and in this role he carried out acts of ethical advocacy. He sought to expound the canon of human dignity. Cases and controversies were for Marshall the stuff of demonstration. They were meant to be used to teach the curriculum of democracy. Marshall, in fact, found the Constitution itself to be far from an ideal bill of rights, liberties and freedoms. In his opinion it was a document that needed to be perfected in order to produce equal justice for all people. His was an evolutionary view of constitutional law. Originalism held no attraction for this man whose maternal great-grandfather had been a Maryland slave.

Perhaps Thurgood Marshall's most important populist undertaking occurred while he was director and counsel for the

365. This sociological orientation was undoubtedly modelled for Justice Marshall by law teacher and mentor, Charles Hamilton Houston. Houston earned his S.J.D. from Harvard and had learned well the teachings of Roscoe Pound and Felix Frankfurter. Houston viewed litigation as an engine of social engineering. His view was that it was through litigation that African-Americans could gain their civil rights. See Leland Ware, A Difference in Emphasis: Charles Houston's Transformation of Legal Education, 32 HOWARD L. J. 479-92 (1989).
366. DAVIS & CLARK, supra note 344, at 370.
367. Id. at 30.
NAACP Legal Defense and Educational Fund. This project focused on a critical legal populist value—equal opportunity. The arena of special attention was primary and secondary public education. Marshall, whose mother was a teacher and whose father possessed a fine analytical mind and prized education, helped Thurgood realize that education was critical to African-Americans achieving equality, justice and economic success. At times Marshall had been a rebellious student, but his parents views were not lost on him. He did graduate first in his class at Howard Law School — after being denied admission to the University of Maryland's Law School because of his race.

In the early 1950s, Marshall, his NAACP colleagues and a select group of law professors and others including the great Johns Hopkins Southern historian C. Vann Woodward and the brilliant sociologist Kenneth Clark formed a dream team to bring about the desegregation of the nation's public schools. This litigation project came to be known as Brown v. The Board of Education of Topeka. The class actions in this case originated in Kansas, Virginia, South Carolina and Delaware and through this litigation minor African-American plaintiffs sought admission to public schools on a nonsegregated basis.

Thurgood Marshall quarterbacked the endeavor, worked on the briefs and participated in the oral arguments before the Supreme Court. As we all know, the critical legal challenge was to the Plessy doctrine of "separate but equal." The cultural challenge was to racism. Under Marshall's leadership, the team developed detailed legal and historical arguments in support of the position that the Fourteenth Amendment was created to insure equality of opportunity for African-Americans. However, Marshall realized that very little had been done since the amendment took effect in 1868 to desegregate public education. In fact, the District of Columbia's schools subject to the law-making power of the U.S. Congress had been segregated since

368. Id. at 17.
369. Id. at 37-39.
370. Id. at 47.
372. DAVIS & CLARK, supra note 344, at 18.
374. DAVIS & CLARK, supra note 344, at 19.
1864. As Michael D. Davis and Hunter R. Clark put it: "If Congress had intended for the Fourteenth Amendment to outlaw segregation, then why had Congress itself not abolished school segregation in the District after the amendment was passed?"

Marshall felt that the Court might well order desegregation but historical arguments alone would not win the case. Taking his cue from the sociological jurisprudence of Charles Hamilton Houston, his law school mentor, Marshall saw to it that a mammoth 235-page brief incorporated the social science findings of Kenneth B. Clark and others. These findings demonstrated that school segregation deeply disturbed the self esteem of African-American children and produced numerous negative (e.g., self-defeating) personality characteristics. Thirty-five first-rate social science experts verified Clark's position. Their endorsement was used as an appendix to one of the briefs filed by Marshall's team. Clark's research, backed up by that of others of distinction, would make up in large part the contents of the Court's famous Footnote Eleven. This footnote to the Brown opinion cites nothing but social science material.

A close reading of the Brown opinion with the preceding in mind demonstrates Marshall's remarkable prescience. In his opinion for the Court, Chief Justice Earl Warren stated:

We cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

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375. Id. at 20.
376. Id.
377. ROWAN, supra note 346, at 190-91.
378. DAVIS & CLARK, supra note 344, at 158.
379. Id.
383. Id. at 492-93.
The Chief Justice's emphasis is today. History is viewed as being of far less significance than current conditions. Warren and his empathic/introspective method was compatible with Marshall's approach. Warren pointed out that education is of enormous significance in a democratic society.\(^\text{384}\) It prepares us to practice democratic values, to take our place in the economy, to be responsible and to serve our country. In his opinion, the Chief Justice went on to state that segregation in the public schools — even when facilities and other "tangible" factors\(^\text{385}\) are equal — deprives minority children of equal educational opportunity. Segregation, which separates minority children:

from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . Whatever may have been the extent of psychological knowledge at the time of \textit{Plessy v. Ferguson}, this finding is amply supported by modern authority.\(^\text{386}\)

As all of us learned in our constitutional law course, the Court decided that "separate but equal" had no place in modern constitutional jurisprudence. Segregated schools denied equal protection of the laws to minority children. The school segregation case decision was, of course, of signal significance. It was truly an historic act of judicial liberation. Its role in impelling our society toward a new era in civil rights development is beyond debate. For Marshall it was a career event without equal.

Marshall's activity in the production of the \textit{Brown} result\(^\text{387}\) provides us with further insights into his people's jurisprudence. Marshall clearly stressed opportunity, equality and human dignity. For him, these goals were democratic essentials. In addition, Thurgood Marshall's dedication to task in the school desegregation project is indicative of the high value he placed on generativity.\(^\text{388}\) Generativity refers to one's interest in actively supporting younger generations. It is a life position that is demonstrative of a person's humanity and their well-developed men-

\(^{384}\) \textit{Id.} at 493.

\(^{385}\) \textit{Id.}

\(^{386}\) \textit{Id.} at 494.

\(^{387}\) \textit{Id.}

\(^{388}\) \textit{See} \textit{ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE} 103 (1980).
tal health. Those who are generative are capable of protectively identifying with the young and in a mature manner supporting them in their progress toward adulthood. Marshall, the teacher's son, had learned the validity of his position from a mother whose job involved providing such support for large numbers of children. I would argue that Marshall understood in depth the social science testimony of Dr. Kenneth Clark and others because generativity was a virtue he had absorbed during the course of his evolution to adulthood. Generativity appears to be a virtue shared by a number of American Legal Populists.

Like Professors McDougal Lasswell and associates, Thurgood Marshall's work in the Brown case reveals a preference for the fusion of law and the man-centered sciences. Marshall, like many other populists, demonstrated a preference for the proof of human experience over the legal positions of authorities from other eras.

Thurgood Marshall retired in 1991. He had entered Law school in 1930. That was the beginning of his legal career. During the years 1930 through 1991, he was a law student, law clerk, private practitioner, counsel to the Legal Defense and Educational Fund of the NAACP, Solicitor General of the United States, Judge, Second Circuit Court of Appeals and U.S. Supreme Court Justice—an incredible life in the law. In my discussion of Justice Marshall's legal populism, I have only been able to hint at his significance in American law. I would hope that any reader with a real interest in the life and work of truly great men of law, justice and American history would read any or all of the books on Justice Marshall that I have cited in this section of this paper. Thurgood Marshall is surely one of our greatest.

Although American Legal Populism was well represented on the U.S. Supreme Court during the 1960s and 1970s, there was no such representation at the White House during the Nixon years. In fact, the battle over the Watergate tapes put even middle-of-the-road Republicans on the Court at odds with the President and his staff. Justice Potter Stewart was "worried that Nixon was intending some subterfuge with which to ultimately

390. DAVIS & CLARK, supra note 344, at 48.
To his credit, President Nixon did comply with the Court's decision and, seventeen days after the decision on the tapes, Nixon resigned. Gerald Ford succeeded Nixon as President. Ford, a Yale-trained lawyer, was in all essential ways a Hamiltonian and legal traditionalist. He was far from being a populist, but he did restore respectability to the office of President. However, the election of 1976 would place another Southern Populist in the White House.

Jimmy Carter had been a naval officer and peanut farmer before entering politics and was, at the time of his election, a born-again Baptist. He was without doubt a person of moral integrity and social conscience. In order to win the presidency, Carter had bolted together a constituency of urban labor, African-Americans, Southern whites of a New Deal persuasion, politically liberal professionals, academics and idealistic young people.

Carter's working political paradigm very much resembled those of Roosevelt and Truman. His messages were populist in nature and his appeal was predominantly to those without power elite or special interest credentials. He emphasized an America where basic rights and liberties were protected securely under law. Furthermore, he took as his fundamental mission the broad distribution of opportunity and equality through legislation and public programs.

Carter was particularly concerned about the rights position of African-Americans. In Georgia he had observed at close range the day-in-day-out maltreatment and malevolence directed at African-Americans. Once in power, the Carter administration worked diligently in regard to civil rights law enforcement. The Equal Employment Opportunity Commission was given increased powers. The Justice Department stepped up the pace of civil rights prosecutions. The Office of Federal Contracts Compliance Programs used its power to compel federal contractors to

392. Id. at 301.
393. Id. at 347.
394. This conclusion is based in part on personal experience. Also see TINDALL, supra note 44, at 1432.
395. NEVINS ET AL., supra note 195, at 62.
engage in affirmative employment action. In addition, the Carter administration acted to provide the Department of Housing and Urban Development with cease and desist powers in order to prevent housing discrimination.\textsuperscript{397} Moreover, Carter made a real effort to place African-Americans in positions of power. For example, he picked Patricia Harris as Secretary of Housing and Urban Development and sent civil rights activist Andrew Young to the United Nations as ambassador from the United States.\textsuperscript{398}

Carter also sought to lend his support to the cause of equal opportunity for women of all races. In 1978, Carter had worked with members of Congress to extend the time for ratification of the Equal Rights Amendment until 1982.\textsuperscript{399} He publicly pledged to support the ratification project. He went on record with these words:

This is not a battle that we can afford to lose. I am determined to win... The Amendment will do nothing more — nor less — than provide equality to more than one-half of America's population... I urge you to join the effort to provide women, at long last, with equal rights under the law.\textsuperscript{400}

Under Carter's leadership, numerous top administrative posts went to women. Many were placed in positions never before filled by a woman. Furthermore the Carter administration worked to:

1. Strengthen enforcement in regard to equal employment opportunities for women.
2. Increase access to child care, housing and medical care so as to aid women.
3. Develop business opportunities for women entrepreneurs.
4. Place more women on the federal bench.\textsuperscript{401}

In addition, Carter directed significant effort at improving the lot of the handicapped, Native Americans and others who had been

\textsuperscript{397} Id. at 143.
\textsuperscript{398} See ZINN, supra note 94, at 551.
\textsuperscript{400} Id.
\textsuperscript{401} Id. at 144.
discriminated against.\textsuperscript{402} However, President Carter's most remarkable achievement of a juridical policy nature related to the global arena.

Jimmy Carter became a planetary human rights force of the first magnitude. As Arthur M. Schlesinger, Jr. has said, the Carter administration "institutionalized the role of human rights in American foreign policy."\textsuperscript{403} The consequences have come to loom large in the international affairs of this country. Carter's emphasis on human rights did not derive from a jurisprudence of positivist realpolitik but from his spiritual and philosophical commitment to an American future:

[S]ecured in a world founded on decency, justice and compassion.

The effort to make human rights a central component of our foreign policy comes from our deepest sense of ourselves as a humane and freedom-loving people. We do not make our standards the precondition for every relationship we have with other countries; yet human rights can never be far from the focus of our thinking or we violate our own best values.\textsuperscript{404}

The Bureau of Human Rights, established in the State Department, stressed that financial assistance to foreign nations would be evaluated in relationship to human rights conditions. Of course, strategic concerns might dictate the outcome in particularly critical cases. But the reality was that American embassies in foreign countries did attend to the human rights actions and policies of the host countries. The policy of the Carter administration dramatically enhanced the position of human rights advocates and victims of human rights violations around the world. Moreover, the Carter policy strengthened the bond between the American people and millions of people in both hemispheres. This human rights populist philosophy did much to positively affect political and civil rights conditions in Argentina, Indonesia, South Korea, the Philippines, Chile, Brazil and the Soviet Union.\textsuperscript{405}

\textsuperscript{402} Id. at 144-45.
\textsuperscript{403} See ARTHUR M. SCHLESINGER JR., THE CYCLES OF AMERICAN HISTORY 103 (1986).
\textsuperscript{405} SCHLESINGER, supra note 403, at 103.
President Carter's words well describe the results of the undertaking:

We believe our efforts have contributed to a global awakening: thousands of political prisoners have been freed; in several countries, torture of prisoners has been significantly reduced or eliminated and trials are more often open to the public; open advocacy of human rights has occurred in nations where the concept was heretofore forbidden; international organizations such as the UN and the OAS now have vigorous human rights commissions for the investigation and airing of human rights violations and the Commission on Security and Cooperation in Europe has helped to make human rights an institutionalized part of the international agenda on both sides of the Atlantic; in a number of key nations around the world, democratic institutions are being strengthened as democratic values are reasserted.406

Jimmy Carter indisputably spread the democratic philosophy of rights around the globe. When he went to Argentina after his failed bid for reelection, he was honored for having saved the lives of many, many Argentineans who had been viciously oppressed by the military and its collaborators.407 His ideas, exhortation and actions had not had simple academic impact. This humanist populist saved human lives.

At this point we shift away from our consideration of individuals "historically" identifiable as American Legal Populists. This section of the paper has sought to instruct by reference to the philosophical views and actions of legal populists known to scholars from a multiplicity of disciplines and even widely known to the general public. We shift now to the consideration of a primarily academy-recognized group of thinkers who are seen by most as a divergent order of anti-law theorists. I speak here of those devoted to Critical Legal Studies. In the next section of this paper I seek to refute the current general thinking in regard to Critical Legal Studies and place the movement within the American Legal Populism tradition.

407. SCHLESINGER, supra note 403, at 103.
V. CRITICAL LEGAL STUDIES RECONSTRUCTED

The Critical Legal Studies movement over the last twenty years has been an animated oppositional force dedicated to confronting jurisprudential traditionalism within the walls of the academy. Contrary to the impression created by some critics, "the crits" (as the proponents of Critical Legal Studies are sometimes called) are not at the barricades. They stay at home. The political reality is that they are true denizens of the university. Of course, they are formidable intellectual opponents who do not flee from verbal combat. They are fabled for the high level of antipathy they can generate in their opponents. That they are here considered as part of the American Legal Populist endeavor may come as a surprise to Critical Legal Studies people and to those who would place themselves within the tradition of Jefferson, Warren, Marshall and Spence. However, in this section I shall seek to demonstrate that Critical Legal Studies is a mesmerizing mutation of populist jurisprudence. I contend that we have not recognized the true nature of Critical Legal Studies because our critical intelligence has been derailed owing to audience obsession with performances, personalities, styles and even the dress of certain proponents of Critical Legal Studies.

At this point let me engage in some necessary exposition. My goal is to provide the reader with reliable information in regard to the major aspects of Critical Legal Studies jurisprudence. This is an important undertaking because much of a very misleading nature has been written with reference to Critical Legal Studies. For example, some law professors have portrayed Critical Legal Studies people as "dangerous Marxists" bent on a nihilism-driven attack on traditional legal education, time-honored theories of law and contemporary legal institutions. Time and time again law faculty people have expressed these views to me in an analogous or somewhat more modulated manner. In the 1960s and 1970s I heard similar things said about Earl Warren, William O. Douglas, Jerome Frank and Fred Rodell. Of course, the speakers turned out to be quite wrong. But let us save the specif-

409. Kahlenberg, supra note 408, at 159-68.
410. Id. at 8.
ic Marxism/nihilism matter until later in this discussion and focus on specific Critical Legal Studies jurisprudential matters. The reader should keep in mind that this concise portrait of Critical Legal Studies cannot do justice to the richness and diversity of the movement. Of necessity, I have stressed generally agreed upon ideas.

From an overarching perspective it is clear that Critical Legal Studies scholars are devoted anti-Hamiltonians. Legal traditionalists, on the other hand, are usually very much enamored of Alexander Hamilton's views. The respective philosophic positions of pro and anti-Hamilton are basic to the conflict that rages between Critical Legal Studies people and legal traditionalists. This is not obvious to the readers of either traditionalist scholarship or Critical Legal Studies writing because Hamilton is very nearly never mentioned. However, the writers discussed in publications on both sides of the battle are, upon careful scrutiny, readily identified as residing with or against the Hamiltonian philosophical position. But to the specifics of the matter the philosophical descendants of Alexander Hamilton champion the causes of manufacturing, finance and commerce. They clearly prefer the values of wealth and power. Their interest is very much captured by the activities engaged in by securities dealers, bankers, venture capitalists, insurance companies, pension funds, multinational corporations, technology researchers, defense contractors, visionaries of free market ideology and so forth.

When it comes to law teaching, traditionalists prefer to educate students in that part of the curriculum derivative of the basics of property and contract, often to the exclusion of other relevant areas of the law. Politically, most legal traditionalists (read Hamiltonians) favor a strong central government and most would prefer that the powers of the president be broadly interpreted (e.g., foreign affairs). In addition, they are not approving of sizeable quanta of power residing in the hands of Congressmen and the "people back home." Moreover, Hamiltonians are

411. TINDALL, supra note 44, at 309.

412. The supporters of the Hamiltonian legacy are usually opponents of the extension of the Warren human rights revolution, employment rights, consumer protection, anti-trust legislation and laws stressing environmental protection.

413. Unger, supra note 408, at 568-69.
antitax policies that are against the pecuniary interest of megabusiness and industry. Hamiltonians, generally prefer that government (even though centralized and strong) be subject to the hegemony of powerful segments of the private sector (megaindustry, finance, and commerce). 414

In regard to the topic of human rights, it is apposite to note that Hamiltonians do not support the expansion of the rights package so as to increase the individual and social leverage of the people. In the main, Hamiltonians wish to repeal the Warren Court rights revolution. Further, contemporary legal traditionalists who are Hamiltonians much more often than not present the law as a "scientific" objective system built on an infrastructure of respect for precedent, the determinacy of legal outcomes by reference to legal norms, the neutrality of legal principles, the objectivity of legal reasoning and the distinction between law and politics. 415 Let us address first this matter of the distinction between law and politics as it is fundamental to the creation of the rift between legal traditionalists and Critical Legal Studies advocates.

Basic to the wisdom of Critical Legal Studies is that all that is social is political. For example, Critical Legal Studies scholar Roberto Unger in his book, False Necessity, states: "The explanatory theory of False Necessity takes sides decisively with those who say it is all politics. But in taking sides the argument of the book asserts that we can develop the everything-is-politics idea into a comprehensive set of explanatory conjectures and explanatory practices." 416

Unger and his associates hold that law exists as part of a political field. For them, law is "the expression of a particular vision of society." 417 It is an expression of political values and preferences. Members of the Critical Legal Studies movement are of the opinion that American law schools 418 and many

415. See Unger, supra note 408, at 565-73; KAHLLENBERG, supra note 408.
417. Unger, supra note 408, at 563.
418. KAHLLENBERG, supra note 408, at 162.
American legal professionals “disguise” the political character of legal institutions and legal norms. The result is that the established political power structure is “perpetually” reproduced. Scholars of Critical Legal Studies argue that law is one of the basic “structures” used to hold the bulk of the people and the state “hostage to a faction.” The control of the law by an economic and political elite (power elite) results in the hegemony of property backed power elites over democratic forces. Proponents of Critical Legal Studies argue that the current status quo that exists for the benefit of the privileged is preserved by the myth of an apolitical legal system. Critical Legal Studies proponents say that, in a sense, law is a “Halcyon” for the people. Critical Legal Studies people take the position that the law is currently a vehicle useful in the domination of the “ordinary people” by Hamiltonian forces and those post-New Deal liberals who advocate a tepid variety of equality, opportunity and liberty. Along with the post New Deal liberals mentioned above, Critical Legal Studies people would, in all probability, group the “new democrats” associated with the presidency of President Bill Clinton.

Exponents of Critical Legal Studies urge as an antidote to the current political/legal system (the established order) a “radical democracy.” This radical democracy embraces economic and political rights. For example, most champions of Critical Legal Studies would support a right to economic security, a broadly construed right to employment, and much direct democracy. In fact, they would call for a cultural revolution founded upon a transformation in human personal relations. The ideal is man/woman in community rather than the individual as an entrepreneur in the acquisitive quest for material wealth and power. This cultural revolution would produce a very different distribution of the values of wealth, power, security and well-being than that of the current system.

Assuredly, contrary to what some have said, the Critical Legal Studies thinkers are not “dangerous Marxists.” This term, of

419. Unger, supra note 416, at 371.
420. Kahlenberg, supra note 408, at 163.
421. Unger, supra note 416, at 595.
422. Id. at 556.
423. Kahlenberg, supra note 408, at 8.
course, suggests a favorable view in regard to Soviet-style economics, ideology and institutions. Such is not the case. Marx the intellectual has been mined for tools of intellectual analysis by Critical Legal Studies scholars; however, Soviet institutions have not been viewed favorably by Critical Legal Studies thinkers.\textsuperscript{424} Furthermore, in reading Critical Legal Studies literature, I have found no advocacy of philosophical nihilism. Critics of Critical Legal Studies seem to confuse criticism of our current system with nihilism. The reality is that Critical Legal Studies blossomed in “the post-Vietnam era.”\textsuperscript{425} Although moving vigorously on to the jurisprudential stage several years after the days of Vietnam and Watergate, Critical Legal Studies, in all probability, draws its vigor from the field of forces that energized the American New Left.\textsuperscript{426} Like the New Left, Critical Legal Studies has never been sympathetic to state socialist systems.

The roots of the New Left were in the 1960s activities of civil rights workers, university free speech protestors, those who called for eradication of poverty in our society and the “opposition” (especially the students) who challenged those who directed the war in Vietnam. Many young people who would end up as legal educators took part in or closely observed these enterpris-
es.\textsuperscript{427} I here stress that nearly all Critical Legal Studies activists have their socioeconomic roots in the upper middle income or more affluent “strata” of American society. A large number of them are graduates of the “prestigious” American law schools. Virtually all of them had a first-rate academic experience as undergraduates. It is suggested that what they learned in undergraduate history, literature and political science courses and through the “unofficial” curriculum was critical in their developing models to be used in evaluating the “slippage” of opportunity and participatory power prevalent in our society. Mark Tushnet, a leading Critical Legal Studies scholar, has suggested that the progressive tradition in academic American history and its focus

\begin{itemize}
\item \textsuperscript{424} Unger, supra note 416, at 115-24.
\item \textsuperscript{425} Surya Prakash Sinha, Jurisprudence: Legal Philosophy in a Nutshell 296 (1993).
\item \textsuperscript{426} See John Patrick Diggins, The Rise and Fall of the American Left 218-76 (1992).
\item \textsuperscript{427} Roberto Unger, a Brazilian, did not have the 1960s and 1970s U.S. experience. However, Brazil had its own political experiences that were educational analogs. Unger has long been a student of radical democracy in Europe.
\end{itemize}
on economic/political interests has been an important influence. Tushnet specifically mentions the work of Charles Beard and Vernon Parrington, who are widely read penetrators into the heart of domestic reality. Tushnet is certainly correct in part. Based on my experience with the literature of the "radical democrats" in the 1960's and 1970's, I would suggest that the radical Freudian philosopher/political scientist Herbert Marcuse's work did more than any intellectual force to shape the orientation and the human community-focused ideological aspects of those who came to Critical Legal Studies.

Marcuse's particular achievement was to unlock psychoanalysis from Freud's social conservatism and use it to indict "modern" civilization and put forth a program for human and social liberation. Marcuse revered Marx as a brilliant scholar. He especially admired Marx's work on the alienation of man/woman under modern social/industrial conditions. However, he never confused Soviet totalitarianism with Marx's wish for a new human society. Marcuse (like Unger and others in Critical Legal Studies) stressed human contact, community and personal participation in the stream of economic, political and social life. He specifically emphasized the role of the aesthetic in cultural and political liberation. To Marcuse, art, narrative, drama, film and music were modalities relevant to expressing the importance of the multidimensional human "spirit" in the one-dimensional society of West and East. Of course, Critical Legal Studies is well known for infusing its jurisprudence with aesthetic elements.

In a very real sense Marcuse had used psychoanalysis, philosophy, political science and the arts to "deconstruct" contemporary society and its dehumanized state of consciousness. Even if par-

430. See Herbert Marcuse, One Dimensional Man 11 (1966). It is clear that Marcuse is drawing on Marx's concept of alienation.
431. Critical Legal Studies writers often demonstrate an interest in narrative, literature, art and so forth. See Tushnet, supra note 428, at 516. Tushnet's reference here is to the world of rights and its Kafkaesque (indeterminate) value. Franz Kafka, novelist and short-story writer, clearly understood the "social physics" of indeterminacy.
ticular Critical Legal Studies people have not read Marcuse, they cannot have failed to be affected by his ideas. Let me suggest that much has been absorbed through “osmosis.” Marcuse's ideas have circulated widely in those circles dedicated to the creation of a democracy in which all values are widely distributed and law and justice are identified with the political, economic, social and cultural needs of the people. I here note that the jurisprudential skepticism of the American Legal Realists is an “attitude” that has influenced the thinking of Critical Legal Studies scholars. However, that is a matter of such common knowledge I shall not develop the point.\textsuperscript{432} Instead, let us at this juncture turn to Critical Legal Studies utilization of a hallmark technique — one that is foreign to those who are wedded intellectually to traditional modes of legal reasoning. This approach to analysis is, of course, “deconstruction.”\textsuperscript{433} Deconstruction is anathema to traditionalists because it is used in an effort to reveal the non-neutrality of legal concepts and to disclose the actual distribution of juridical and political power in society. For example, deconstruction might be used to “break down” the law of rape so as to make it apparent that rape statutes have historically been the products of a patriarchal cultural system that viewed women as either property or second class citizens. Such a use of deconstruction would serve to “decenter” the law of rape and place it within the jurisprudential context of “gender and freedom.”\textsuperscript{434}

Deconstruction should not be viewed as though it involved the use of traditional devices, e.g., canons of statutory construction, to criticize legal decisions. Deconstruction is not an “accessory” approach; it is an elevated, grand scale approach. It is “ultimately a political practice, an attempt to dismantle the logic by which a particular system of thought and, behind that, a whole system of political structures and social institutions maintains its force.”\textsuperscript{435}

\textsuperscript{432} Tushnet, supra note 428, at 505-07.
\textsuperscript{433} NORRIS, supra note 67. Jacques Derrida, philosopher, is the dean of “deconstruction.”
\textsuperscript{434} Bartlett, supra note 45, at 878.
\textsuperscript{435} MADAN SARUP, AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM 60 (1989).
As an intellectual power in the United States, deconstruction can be dated from French intellectual Jacques Derrida's conference appearance at John Hopkins University in 1966.\textsuperscript{436} Madan Sarup of the University of London has called Derrida's philosophical practice "one of the most important avant-garde intellectual movements in France and America."\textsuperscript{437} Note that Sarup refers to deconstruction as a movement named for a poststructuralist philosophical procedure.\textsuperscript{438} It is here stressed that deconstruction as used by Critical Legal Studies scholars places their critical work well within a major American and European intellectual movement. One of my difficulties with some critics of Critical Legal Studies is that they have not exposed themselves to poststructuralist or postmodern philosophical paradigms.

Derrida has made it clear that deconstruction is not about logic tricks or semantic hair-splitting. It is most relevant to ascertaining the "possibilities of the law"\textsuperscript{439} and the legitimacy of authority. It is not used for petty purposes. It is used to raise "questions relative to the state, the substructure and the future of discourse as it concerns the rights of man..."\textsuperscript{440} Intrinsic to the law-focused deconstruction project is the explication of the power configuration and the values of the court and the others who play parts in the legal drama. For example, a court decision refusing to admit specific evidence of past spousal battering on the issue of defendant wife's criminal culpability (e.g., regarding a homicide charge) might be deconstructed to reveal that the court has a preference for male "home rule" with power held only by the male. Women who use violence to counter male violence are seen as disturbers of the patriarchal peace and are to have the law construed strictly against them. In this article, I do not have time to carry out a Critical Legal Studies-type deconstruction. However, to aid the reader I shall provide germane background material.

Jacques Derrida's deconstructive method derives from Freud's psychoanalytic psychology. Critical Legal Studies scholars seem
to be largely unaware of this or unwilling to acknowledge Freud as antecessor. Derrida has acknowledged the debt to Freud.\(^\text{441}\) Let us here focus on some similarities between a particular psychoanalytic process and deconstruction. The psychoanalytic process to be considered is dream analysis.\(^\text{442}\)

Sigmund Freud viewed the dream as an entity that consisted of a manifest content and a latent content.\(^\text{443}\) The manifest content was “visible” in that it was recalled consciously by the dreamer. In a certain sense, the manifest content is an opinion “published” by the dreamer. Note that it is reported in words. Jacques Lacan, the renowned French psychoanalyst, has referred to the dream as a text (read opinion).\(^\text{444}\) Assuredly, it is appropriate to treat the verbal report of the dream as a language-encased text. Freud’s position was that the manifest content of the dream acted to screen psychological reality from the view of the analyst. It concealed the real meaning of the dream. The case was that the dreamer was not willing to express herself directly. Of course, what the manifest content of the dream concealed was the dreamer herself — from herself and others. The manifest content shielded the dreamer’s wishes, buried memories, unacceptable experiences, and so forth.\(^\text{445}\) Freud and his followers developed techniques to lift the screen of the manifest content. For example, the analyst might focus on the most vivid element of the dream or on a portion stressing auditory content.\(^\text{446}\) Then the analysand (person-in-therapy) would free-associate to the portion of the dream under scrutiny. The free-association method is one in which the analysand “tells just what comes into his mind, quite uncensored . . . .”\(^\text{447}\)

Freud’s assumption in regard to this procedure was that the dream was determined by some mental system. According to

\(^\text{441}.\) SARUP, \textit{supra} note 46, at 49.
\(^\text{442}.\) My discussion of this matter owes much to the explanation of PAUL ROAZEN, \textit{FREUD AND HIS FOLLOWERS} 97-99 (1975) and A.A. BRILL, \textit{BASIC PRINCIPLES OF PSYCHOANALYSIS} 163-67 (1960).
\(^\text{443}.\) BRILL, \textit{supra} note 442, at 163.
\(^\text{444}.\) SARUP, \textit{supra} note 46, at 18.
Freud, because the analysand was not consciously directing his thoughts, the dream "was determined" by the unconscious. Thus the method of free-association takes us beyond the everyday conscious mind into the realm of the unconscious where, Freud believed, dreams were created.\textsuperscript{448} Keep in mind that the manifest dream content was viewed by Freud as a facade that served to screen off the contents of the unconscious.

Let us now compare deconstruction as used by Critical Legal Studies scholars to the psychoanalytic matter outlined above. Such a comparison will enhance our understanding of deconstruction. Note that Critical Legal Studies scholars treat the published opinion of the court as a "manifest content." The Critical Legal Studies viewpoint is that the opinion is a "false appearance," a dissemblance. It is as it is with the dream. The opinion "itself" leads us away from the important jurisprudential and political realities.\textsuperscript{449} This legal manifestation is social system-serving. It seeks to prevent revelations related to the real nature of the system that exists beyond the paper containing the opinion. The opinion uses and cites to principles of law and precedents, but the Critical Legal Studies scholar regards these things as elements of propaganda. According to proponents of Critical Legal Studies, legal concepts, legal reasoning and citations are the components of an authorized juridical rationalization. Critical Legal Studies scholars do not indicate to what extent this rationalization is determined by unconscious as opposed to conscious forces.

Following Derrida,\textsuperscript{450} these scholars argue that the meaning of the text (opinion) is not discernible from the "typical reading" of its words. "Meaning," as it relates to matters significant, is not accessible through this approach. Instead, the deconstructionist "plays with" the opinion, teases the parts, opens up "the field of vision," tests the logic and searches for petards left behind by the author of the text.\textsuperscript{451} The deconstructors look for inconsistencies, allusions to the values of the author, false conclusions of fact and overprotestation of neutrality. Further, the deconstructionist may rearrange the factual narrative and often

\textsuperscript{448} Id.
\textsuperscript{449} Tushnet, \textit{supra} note 428.
\textsuperscript{450} SARUP, \textit{supra} note 435, at 35.
\textsuperscript{451} \textit{Id.} at 34-62.
makes use of intuitive responses to determine the latent content of the opinion. What the Critical Legal Studies deconstructionist hopes to reveal is a picture of society's power hierarchy, the distribution of power between economic/social/gender/ethnic groups, the treasured values of the power elite, the allocation of opportunity, the rights enjoyed by and denied to particular people(s), the quality of life enjoyed by people of different socioeconomic classes, the possibilities of political participation, the access to legal institutions and the dominant social myths. Of course, deconstruction is subject to the multiplier effect of the scholar's fund of legal, historical, political, cultural, economic, sociological and art-derived paradigms and data quanta. Deconstruction does go on within an intellectual context provided by the deconstructors. There is always a theoretical backdrop to the method of deconstruction. Progressive historiography, feminist theory, the critical social theory of the Frankfurt School and others are examples of intellectual funds that might be used to offer a critique of the current legal orthodoxy.

Before turning from Critical Legal Studies, I believe it is necessary to stress the strong attachment of the Critical Legal Studies scholars to the academic environment. They are philosophers (and propagators) who spread their ideas and visions through the use of academic outlets such as the classroom, publications and conferences. Their impact is on the students who sit in their classes, those who read their articles, and those who join them to confer. In the classroom they stress the critique (emphasis on deconstruction). They seek to reveal the congruency between law and politics, illuminate the power hierarchy and challenge students to opt for the politics of radical democracy. Their scholarship, of course, is directed at other law professors and legal intellectuals not affiliated with the law schools. Again, the didactic aim is as it is with the students. As far as conferences go (and having never attended a Critical Legal Studies gathering), I can only assume that they are similar to other such gatherings, only the preoccupations are different. In closing this section, I will

452. KAHLENBERG, supra note 408, at 160-65. Kahlenberg is no friend of Critical Legal Studies, but the above pages are a useful example of the points made in my text.

now link Critical Legal Studies to the American Legal Populism Tradition.

Critical Legal Studies practitioners demonstrate a very close kinship with others who have engaged in the American Legal Populist endeavor. Like their counterparts, Critical Legal Studies scholars vigorously stress that law exists in a political field of forces. Critical Legal Studies scholars and all other American Legal Populist proponents agree that the barrier erected between law and politics exists primarily to aid in the implementation of the political program of those who erect and maintain this barrier. This barrier makes it possible for many law professors, law students, politicians, judges, administrators, law practitioners and others to avoid questions related to the political, social, cultural and economic effects of legal decisions and, in addition, to perpetuate myths about the nonexistence of a wealth- and power-based hierarchy that influences legal outcomes. The Critical Legal Studies activists, like other legal populists, advocate a people’s jurisprudence that emphasizes the authority of the people and the broad distribution of liberties, rights and opportunity throughout the population of our society. Like Gerry Spence, Thurgood Marshall, Lyndon Johnson and other legal populists, the Critical Legal Studies scholars are opponents of the Hamiltonian philosophy of government, law and economics. Exponents of the Critical Legal Studies vision are opposed to a “Hamiltonian” society divided into a dominant privileged elite and a dependent, subordinate general population. Like other legal populists, they see such a “system” as thoroughly antidemocratic.

Like other American Legal Populist masters, Critical Legal Studies activists stress the process of demystification. In his classic book, Law and the Modern Mind,454 Jerome Frank brilliantly applied psychoanalytic insights to demonstrate that the traditional view of the judicial process was virtually “infantile” in its simplicity. In addition, Frank revealed the social dangers derivative of such an underdeveloped view of judging. Myres McDougall and Harold Lasswell have used a policy science decision-focused model to rebut the prevailing mythology of legal decision-making.455 Gerry Spence has used narrative to uncov-

454. JEROME FRANK, LAW AND THE MODERN MIND (1930)
455. Lasswell & McDougal, supra note 166.
Critical Legal Studies people demystify through the use of deconstruction (and sometimes through narrative). We, of course, have already considered this procedure at some length. In addition, Critical Legal Studies, like its jurisprudential siblings, is strongly interdisciplinary. Earl Warren drew on social ethics, American constitutional history, and criminology, among other things, for inspiration. McDougal and Lasswell immersed themselves in anthropology, psychology, political science and other relevant disciplines to enrich their work on decision making. Thurgood Marshall was a pioneer in the use of sociological materials in civil rights litigation. Critical Legal Studies people have drawn on contemporary philosophy, American history, Marxist social theory, literature and many other things to form this vision of the law. Furthermore, Critical Legal Studies scholars, like other makers of populist jurisprudence, demonstrate a strong interest in legal education. The focus, however, is largely on judicial opinions. They have not stressed altering the content of contemporary teaching materials as have people such as Myres McDougal, Harold Lasswell, Jerome Frank and Gerry Spence. Neither have the Critical Legal Studies people generally emphasized the importance of clinical education, although Duncan Kennedy and others hold it to be important. Like Thomas Jefferson the "Crits" are not interested in disturbing the academic project by importing the world of legal practice into the classroom.

From the above comparative comments, the reader can readily discern the American Legal Populist core of Critical Legal Studies. However, it should not be forgotten that Critical Legal Studies possesses its own unique qualities. Nevertheless, in the end, Critical Legal Studies proponents stand with Jefferson rather than Hamilton. They reject the ideological monarchy.

VI. CONCLUSION

In the preceding sections of this article, the writer has put forth the thesis that there exists a jurisprudential movement best denominated as American Legal Populism. It has been stressed that this movement has played a major role in the shaping of American law, legal institutions and our political condi-

456. SPENCE, supra note 6.
tion. This populist position stands in opposition to that variety of legal traditionalism that is dedicated to the implementation of the Hamiltonian philosophy. This latter viewpoint stresses the role of law and legal institutions in facilitating the plans, desires and practices of grand scale finance, industry and commerce. American Legal Populism, however, affirms the primacy of the best interests of the people. Laws, legal institutions, political practices and so forth are always scrutinized to determine how they affect the general welfare — not merely the economic and social interests of an affluent minority. It should be clear from reading this article that I hold in the grand jurisprudential scheme of things we operate under the influence of two powerful traditions — American Legal Populism and Hamiltonian "traditionalism." The contention is that our legal philosophy universe is essentially binary. I believe this condition does much to explain the often heated conflicts that have arisen between such groups as New Dealers and the Nine Old Men, the Yale Law, Science and Policy warriors and the great Harvard traditionalists of the 1950s and 1960s, the friends of antitrust and the foes of the regulation of business, the psychoanalytic jurisprudes and the neutral principles people and, of course, the Harvard "conservatives" and the Critical Legal Studies scholars. At the source, the split is Legal Populism v. Hamiltonian traditionalism. As this paper has emphasized the populist perspective, let me stress that school of thought throughout the remainder of this conclusion.

The history of American Legal Populism can be traced from the American Colonial Period to the present. Herein I have gone from Jefferson to Gerry Spence, and included the many important persons who have done their work in historical time that dates from the then of Jefferson to the now of Spence. My position is that the intellectual evidence as adduced in the pages of this article supports the view that American Legal Populism is founded on an infrastructure of specific principles, which are:

1. The people's interest is primary.
2. Democracy is to be idealized.
3. Democratic values are to be widely distributed under the law.
4. Education, opportunity and equality must be enshrined in the law.
5. Human dignity is a primary jurisprudential goal.
6. Ethics and morals ought to strongly influence the law.
7. The neutrality of legal principles is a myth.
8. Law ought to be a vehicle for educating citizens in the Bill of Rights tradition.
9. Human rights are to be broadly defined to include social and economic rights as well as political and civil rights.
10. Law exists in a political field of forces. This fact is to be explicitly articulated.
11. African-Americans, Native Americans, women, children and others are all persons before the law. Thou shall not discriminate.
12. Creativity, empathy, imagination and policy analysis are all basic to "democratic" legal thought.
13. The law is to be demystified. The power hierarchy must be identified.
14. Legal education should promote the American democratic tradition.
15. Legal education ought to make use of the best ideas, paradigms and techniques developed in other intellectual disciplines. Legal wisdom is derivative of a "renaissance" vision.

In this article, the articulation of and the commenting upon the above principles has been my primary endeavor. This effort hopefully has been a successful exercise in the elucidation of a most important jurisprudential point of view. The reader is here reminded that jurisprudence is the "informing" dynamic of all serious law making. Sound practice is always preceded by authentic theory.
BOOK REVIEW

LEARNED HAND: EVALUATING A FEDERAL JUDGE
reviewed by James A. Thomson*

LEARNED HAND: THE MAN AND THE JUDGE
by Gerald Gunther**

ENCOMIUM: Learned Hand... really was a great Judge.¹

DEPRECIATION: [O]nly a small number of [Learned Hand's] opinions are [in 1970] of interest to legal practitioners, and this number will decrease with each passing year .... When scholars get around to evaluating Hand's contribu-

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tions to law and jurisprudence, they probably will conclude that his impact was less than his reputation would lead us to expect. . . . [Although] Hand contributed mightily to the development of American law. . . . [y]et on the basis of available evidence, there are good reasons for predicting that the ultimate evaluation of Hand’s influence will be lower than what it has been over the past quarter of a century. . . . In sum, opinion about Learned Hand may be nearly reduced to the proposition that he was great because he was reputed to be great.²

AMBIVALENCE: Quote Learned, but follow Gus.³

2. MARVIN SCHICK, LEARNED HAND’S COURT 154-56 (1970) (footnotes omitted). However, Schick seems to conclude that, if scholarly re-evaluation occurs without obscuring legendary myths, Hand “will most likely . . . be regarded as a remarkable and great judge. [Hand’s] position as one of the United States’ greatest judges is secure . . .” Id. at 187. Unfavourable reviews of Schick’s book include Archibald Cox, More Learned Than Witty, 7 HAR. C.R.-C.L.L. REV. 501 (1972); Henry Friendly, Book Review, 86 POL. SCI. Q. 470 (1971). In some respects, Felix Frankfurter originated the Schick assessment.

 Learned Hand is heading straight for the glory and dangers of a legend. The glory needs no gilding. The dangers may be lessened by exposure. Legends too readily enlist laziness of thought and weaken the influence that comes from critical appreciation. It is important for American law and letters that Judge Hand remains a mentor and not a memory . . . In time, hundreds of [Hand’s] specific rulings will cease to have interest for the most avid legal archaeologist. Felix Frankfurter, Judge Learned Hand, 60 HARV. L. REV. 325-26 (1947). Subsequently, Frankfurter predicted that Hand’s “actual decisions will be all deader than the Dodo before long, as indeed at least many of them are already.” Felix Frankfurter, A Great Judge Retires, 37 A.B.A. J. 502, 503 (1951).

3. Apparently, Robert H. Jackson in a New York Bar Association dinner speech related that this was what, “as a young country lawyer in upstate New York, he had been taught” to do. GERALD GUNther, LEARNED HAND: THE MAN AND THE JUDGE 647 (1994) (reproducing this slogan as “quote Learned, but cite Gus”); JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT: A HISTORY OF THE UNITED STATES COURTS IN NEW YORK, CONNECTICUT, AND VERMONT, 1787 TO 1987, at 142 (1987); Shanks, supra note 1, at 4; Posner, supra note 1, at 521, 528 n.56 (suggesting that this slogan’s origin may have been in the circumstances requiring an opinion with “no quotable passages” and, therefore, Augustus (not Learned) Hand wrote the court’s opinion in United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934)). See Posner, supra note 1, at 540 (suggesting that, as a statistical matter, the slogan should be “Quote Learned, and follow Learned”).
I. INTRODUCTION

Who was Hand? Photographs, portraits and sculptures reveal the changing physical dimensions. Cerebral impulses are less easily captured. Here, assistance can be garnered from Hand's own words: letters, speeches, legal scholarship, and judicial records.

4. Billings Learned Hand, born, Jan. 27, 1872; sworn in as a federal district court judge on April 30, 1909; sworn in as a circuit court judge on Dec 29, 1924; Senior Judge and Chief Judge (1939-1951); retirement from "regular active service" as a federal judge on June 1, 1951; died, Aug. 18, 1961.

5. Reproductions of photographs are on the dust jacket of GUNTHER, supra note 3, and in id. between 232-33, 424-25; GRIFFITH, supra note 1, opposite title page; SCHICK, supra note 2, opposite title pages; The Spirit of Liberty: The Learned Hand Centennial Exhibit, at ii (Harvard Law School, Sept. 5, 1972). The Hand portrait by Gardiner Cox is at the Harvard Law School and its photographic reproduction is opposite 75 HARV. L. REV. 1 (1961). Eleanor Platt's bronze bust of Hand is at Harvard Law School. GUNTHER, supra note 3, at 573, 781 n.80. Its photographic reproduction is opposite 60 HARV. L. REV. 325 (1947). Other photographs (including Hand's ancestors, homes, and law office) also exist. Talk, supra note 1, at 46. Also, Hand's voice may still be heard. For references to recordings see, Jerome N. Frank, Some Reflections on Judge Learned Hand, 24 U. CHI. L. REV. 666, 675 (1957); Felix Frankfurter, Learned Hand, 75 Harv. L. Rev. 1, 3 (1961); Posner, supra note 1, at 512 ("Hand's . . . oral memoir for the Columbia Oral History Project").

6. (Hand] "was a stocky, barrel-chested man with a square head accentuated by stiff, gray hair, thick bushy eyebrows, and large, piercing eyes"). GUNTHER, supra note 3, at xv. He had a "massive, square, magisterial face, with strong bones and corresponding crags and gullies, and . . . overhanging shelves of thick eyebrows. [H]is height [was] only five feet and seven inches." Frank M. Coffin, Reclaiming a Great Judge's Legacy, 46 MAINE L. REV. 377 (1994) (book review). But see GUNTHER, supra note 3, at 653 ("five feet ten inches").

7. Even so, their influence may be important, perhaps decisive. After comparing Hand's "irrepressible scepticism and doubts and . . . congenital distrust of true believers" and Felix Frankfurter's "enthusiasms," Professor Gunther considered that: reading [the Hand-Frankfurter] correspondence [made him] wonder more than ever whether problems of personality and temperament are not also relevant in discussing the theory and practice of restrained judicial review . . . [S]ome temperaments find judicial self-limitation more congenial, more capable of consistent execution, than others. And some of the differences between Hand and Frankfurter suggest . . . that Hand's personality was one intrinsically better suited to practice what both he and Frankfurter preached.


8. "Learned Hand's private correspondence, manuscripts, and court papers [are] in the Learned Hand Papers at the Harvard Law School Library." GUNTHER, supra note 3, at 681. They contain "nearly 100,000 documents" (id. at xviii) "including no
cial opinions in the United States District Court for the Southern District of New York and Court of Appeals for the Second Circuit. Scholarly analyses provide further dimensions.

9. A very small fragment of Hand's voluminous correspondence has been published. See, e.g., Gunther, supra note 3; Alpheus T. Mason, Harlan Fiske Stone: Pillar of the Law 181, 300, 331, 341, 347, 350, 384, 385, 391-92, 570, 630, 777 (1956); The Spirit of Liberty: Papers and Addresses of Learned Hand xcv, 300 (Irving Dillard ed., 3d ed. enlarged 1960); Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935, at 159 n.2 (Mark DeWolfe Howe ed., 1953); Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 755-72 (1975); Frederick Kellogg, Learned Hand and the Great Train Ride, 56 Am. Scholar 471, 480-81 (1987); Talk, supra note 1, at 46; In Commemoration of Fifty Years of Federal Judicial Service by the Honorable Learned Hand 15 (1959) (reprinted in 264 F.2d. (1959) (extract of 1913 letter in Department of Justice's file on Hand)); The Learned Hand Centennial Exhibit, supra note 5, at unnumbered pages following 21 (exhibit items 48, 61). For a commentary on one aspect see Gunther, supra note 7. That Hand-Frankfurter correspondence, for its longevity (1911-1961), its volume (id. at 1) ("well over 1,000 letters") and importance (see id.), has a central role in Gunther, supra note 3. See, e.g., id. at 665-72 (letters' influence on Hand's Holmes Lectures); infra note 191 (role of precedent in First amendment free speech cases). Hand also had extensive correspondence, for example, with Walter Lippmann, Harlan Stone, and Bernard Berenson. See, e.g., Gunther, supra note 3, at x, xvii; Schick, supra note 2, at 160 n.17.

10. See, e.g., Dillard, supra note 9; Learned Hand, The Bill of Rights (1958); In Commemoration, supra note 9, at 26-29.


12. How many opinions did Hand write? Some suggest 4,000. See, e.g., Gunther supra note 3, at xv; Morris, supra note 3, at 140; Coffin, supra note 6, at 378 ("1,000 district court opinions, and nearly 3,000 circuit court opinions"). Others suggest 3,000. See, e.g., Schick, supra note 2, at 154; Shanks, supra note 1, at 2; Posner, supra note 1, at 513, 521 n.38 (suggesting even 3,000 is "misleading, because it includes a great many very brief per curiam opinions and brief, ephemeral concur-
Learned Hand: The Man and the Judge\(^4\) significantly adds to and, hopefully, will engender more "learned" historiography.\(^5\) Professor Gerald Gunther,\(^6\) even after a thirty-seven year Hand odyssey,\(^7\) would no doubt be delighted.\(^8\) Continuing
and expanding publications, including biographies, which have been devoted to federal judges\textsuperscript{19} would be a further legacy. Of course, that can proceed without detracting from or denigrating the usefulness of the overwhelming academic and scholarly concentration on the United States Supreme Court\textsuperscript{20} and its justic-
es. Given the relative numerical paucity of U.S. Supreme Court decisions compared with all other federal judicial cases, federal courts — district courts and courts of appeal — cannot, at least on a quantitative basis, be ignored. Indeed, Learned Hand and biographical exposes of other federal judges clearly indicate their significance in and for American law. Within that panorama Learned Hand — the book, the man, and the judge — must be assessed.

How should such evaluation proceed? Even if attainable, definitiveness is not vitally important. Arousing intellectual curiosity, which the best biographies accomplish, is a much higher priority. Factual accuracy — the substance from which interpretative adventures must proceed — remains an essential prerequisite. Here, correctness, not comprehensiveness, is a crucial criterion. Questions which, regardless of responding answers, test the adequacy of a judicial biography have already been postulated. For example:

[I]s there a solid basis for the belief that Hand was . . . a great judge or . . . is [it] just a piece of professional folklore or Harvard piety, what [did] his greatness (if he was great) consist[ ] in, how [does] he . . . compare[ ] with judges who sat on different courts or in different eras, what . . . was [it] in [Hand] or in his environment that can explain his achievements, what [can] other judges . . . learn from his career, and what [can] that career . . . teach


21. Bibliographies of Supreme Court Justices' biographies are in Thomson, supra note 7. See also THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY (Melvin I. Urofsky ed., 1994). One result of the quantitative disparity (compare supra notes 19-21) is the lament that "it is regrettable that to so many legal academics [in the 1990s], a Supreme Court Justice is the typical judge and the rest of the judiciary is invisible." Posner, supra note 1, at 514 (emphasis in original).


24. Of course, in this context, state courts and judges are also important. See, e.g., ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed 1993); James A. Thomson, State Constitutional Law: Some Comparative Perspectives, 20 RUTGERS L.J. 1059, 1090 n.181 (1989) (literature on State Supreme Courts); Thomson, supra note 7, at 130 n.33 (providing biographies of state judges).
us about the larger questions of jurisprudence and legal process.

Even more specifically, Professor Gunther suggests that:

Hand's personality, character, and career raise a number of intriguing questions. Why is it that a man of [Hand's] national renown was never appointed to the Supreme Court...? How is it that an individual so torn by self-doubt, so prone to seeing all sides of the question, could escape paralysis and produce such an enormous body of influential work? How did Hand reconcile his participation in political controversies with his deep belief in apolitical judging? How does his vigorous enforcement of First Amendment norms when he was a trial judge go along with his extreme reluctance later on to strike down legislative decisions threatening individual rights...?26

Against such questions and standards, how does Learned Hand emerge?

II. THE MAN

Within an eighty-nine year life (1872-1961), Learned Hand was a federal judge for fifty-two years (1909-1961).27 Among a family of lawyers — Augustus Cincinnatus Hand (1803-1878),28 Learned's grandfather; Samuel Hand (1833-1886),29 Learned's...

26. GUNTHER, supra note 3, at xvii.
27. See supra note 1.
28. Biographical details are in GUNTHER, supra note 3, at 13-15; Shanks, supra note 1, at 3. On earlier antecedents, including John Hand, Nathan Hand (Learned's great-great-grandfather), and Samuel Hand (Learned's great-grandfather) see GUNTHER, supra note 3, at 12-13; Shanks, supra note 1, at 3.
29. Biographical details are in GUNTHER, supra note 3, at 5-10, 15-17, 22; Shanks, supra note 1, at 4. Hand's father was, in 1878, a judge on the New York Court of Appeals. Would Hand's father (if he had not died in 1886) have been appointed in 1895, by President Cleveland, to the Supreme Court? Learned Hand uttered an affirmative response. GUNTHER, supra note 3, at 8. Ironically, Justice Peckham (whom Cleveland appointed in 1895) wrote the majority opinion in Lochner v. New York, 198 U.S. 45 (1905) (New York labor legislation unconstitutional violation of the Fourteenth Amendment's due process clause). Two aspects produce that irony. First, Hand's "contempt for Lochner persisted throughout his life." GUNTHER, supra note 3, at 8. On Hand's contempt see text accompanying infra notes 75-92. Secondly, would Samuel Hand have taken a different view in Lochner to Peckham? Gunther suggests that Learned Hand would have responded affirmatively. Id., at 8. If so, the 5-to-4 Lochner majority would have been reversed. In such circumstances, the substantive due process "Lochner" era may not have engendered such condemnation. On Lochner, see, for example, OWEN M. FISS, TROUBLED BEGINNINGS OF THE
father; Clifford Hand, the eldest son of Augustus; Richard Hand, the youngest uncle of Learned; and Augustus Noble Hand (1869-1954), Richard's son and Learned's cousin — most accolades flowed and continue to flow to Learned Hand. Continuation with family tradition required Learned's name to be Billings Peck Learned Hand. However, in 1899 he dropped Billings and Peck was never conferred by Lydia and Samuel Hand on their only son.

Youth for Learned Hand was bliss. Only his father's death, when Learned was fourteen, interrupted that serenity. Albany, New York in "the Hand's solid brick house" at 224 State Street, two years at a "small primary school" nearby, the "Albany Academy" in State Street for ten years, August vacations in...


30. Biographical details are in GUNTHER, supra note 3, at 15-16.
31. Biographical details are in id.; Shanks, supra note 1, at 3-4.
32. Biographical details are in GUNTHER, supra note 3, at 21-32, 281, 284, 645-47; MORRIS, supra note 3, at 142-43; SCHICK, supra note 2, at 360-61 (references); THE REMARKABLE HANDS: AN AFFECTIONATE PORTRAIT (Marcia Nelson ed., 1983). Augustus was a Second Circuit district court judge (1914-1927) and Court of Appeals judge (1927-1954).
33. Lydia Coit Learned Hand (died 1921). Biographical details of Learned Hand's mother — Lydia — are in GUNTHER, supra note 3, at 10-11. In addition to the paternal side "Hand" family lawyer tradition (see supra notes 28-32), there was also a maternal side "Learned" family lawyer tradition. See GUNTHER, supra note 3, at 10-12; Shanks, supra note 1, at 4. However, "for young [Learned] Hand" the former, not the latter, "left a far deeper imprint." GUNTHER, supra note 3, at 12.
34. Learned Hand had one sister — Lydia — "eight years older" than himself. GUNTHER, supra note 3, at 4. The explanation for the names is "the Learned's family's idiosyncratic . . . habit of preserving maiden surnames as given names." Shanks, supra note 1, at 5-6. Thus, Learned Hand's name should have been "Billings Peck Learned Hand." Id. See also GUNTHER, supra note 3, at 4-5 (explaining this "formidable" terminology).
35. See generally GUNTHER, supra note 3, at 17-26.
Elizabethtown with its forests and trails around Lake Champlain, winter sojourns in the Adirondacks and a European holiday — Great Britain, France, Switzerland, and the Hapsburg Empire — in the summer of 1888 all contributed. Voracious reading, including the classics but not "dime novels" or "trash" also added to Learned's serenity. Presumably, Samuel Hand's three-thousand volume library was a source of this intellectual nourishment. In the quest to elucidate precursors to judicial greatness some obvious similarities, even at this early stage — Hand was now sixteen years old — with Oliver Wendell Holmes, Jr., protrude.

Others, of course, followed. Hand's Harvard education — college life (1889-1893), with William James, George Santayana, Josiah Royce, Charles Eliot Norton, and Frank Taussig as teachers, culminating in summa cum laude bachelors and masters degrees, and Law School (1893-1896) with Professors Christopher Columbus Langdell, Jeremiah Smith, Joseph Beale, Samuel Williston, James Barr Ames, John Chipman Gray, and James Bradley Thayer, from which, with an eighty percent average, he graduated sixth in his class — made Hand, like Holmes, a Harvard man.

Fluent chronological narratives of Hand's public and private life must, however, be enriched by explanations, analysis, and speculations. Learned Hand provides that supplement. For

36. GUNTER, supra note 3, at 1-26. See also Shanks, supra note 1, at 6.
37. GUNTER, supra note 3, at 6-8 (library), 19 (Hand's reading). See also Shanks, supra note 1, at 5 (discussing Hand's early reading). More information has been requested on Hand's subsequent reading habits. See supra note 15. In particular, did Hand read "the classics, like Holmes . . . or . . . more ephemeral stuff, about current issues"? Posner, supra note 1, at 528. See Friendly, supra note 1, at 10; GUNTER, supra note 3, at 60 (Hand "devoured books of history, economics, biography, and philosophy"), 123 (Hand's "readings in economic theory"). "Hand was a bookworm . . . . " Posner, supra note 1, at 525.
38. For Hand, see GUNTER, supra note 3, at 17-26 (discussing Hand's pre-Harvard College years). For Oliver Wendell Holmes, Jr., see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 7-48 (1993) (discussing the pre-Civil War years); Thomson, supra note 7, at 131-36 (same). For later contrasts, see Posner, supra note 1, at 528 (suggesting negative answers to: Was Holmes "an adulterer"? Was Hand "a cuckold"?), and see also infra notes 41, 113, 262 (providing other Hand-Holmes comparisons).
39. GUNTER, supra note 3, at 26-40.
40. Id. at 43-53.
41. On Holmes at Harvard College and Law School, see Thomson, supra note 7, at 131, 140; WHITE, supra note 38, at 25-48, 87-94.
42. On the techniques of judicial biography see Thomson, supra note 7, at 130
example, an initial question arises: Why did Learned Hand enter the law? Again, comparisons with Holmes emerge. Professor Gunther concludes that "Hand 'drifted' into Harvard Law School in the fall of 1893." However, other possibilities exist. Family pressure and tradition are obvious reasons. More subtly, the distinction between philosophers — scholars of contemplation and observation — and lawyers — persons engaged in practical matters of action and experience — might have been significant. Which answer is correct? Of course, only if the differences are crucial is this problem of relevance to analyses and hypotheses involving Hand's contribution to American law. Assume the "drift" theory is correct. Law, not philosophy, may have been the beneficiary. Here, fortuitous decisions or events have large and important consequences. What if the philosopher — lawyer divide was the primary motivation? Hand's subsequent evocative literature and jurisprudential record clearly evidence his quick and frequent return to the former side of that chasm. Perhaps, more pertinently, it illustrates the possibility and benefits of a law-philosophy fusion.

Practising law provided Hand with only a brief interlude between Harvard Law School and the federal judiciary. Initially, he joined his uncle Mathew Hale's law firm. That lasted merely a

n.31 (references).

43. Did Holmes go into law because of his father's influence, family tradition or his own deliberate choice? See Thomson, supra note 7, at 141-42 (examining alternatives); WHITE, supra note 38, at 87-88.

44. GUNther, supra note 3, at 43. See also Shanks, supra note 1, at 7 ("Learned Hand just drifted into law — nothing more than that."). But see infra notes 45, 46 (different explanations).

45. GUNther, supra note 3, at 40 ("family's expectation"), 41 ("recurrent family pressures"), 42 ("the family had all been lawyers" Hand subsequently explained). See also text accompanying supra notes 29-32; supra note 33.

46. GUNther, supra note 3, at 40-42 (stating that Hand's "great love" at Harvard College was "philosophy").

47. Josiah Royce (a Harvard philosopher — GUNther, supra note 3, at 36-37) probably considered that Hand would not have been a pre-eminent, or even a good, philosopher. Id. at 42.

48. See, e.g., supra note 10.

49. See, e.g., supra notes 1, 11, 12.

50. For example, even by 1897 "Learned sensed some prospect that he might not have to make the choice between the practical and reflective life . . . ." GUNther, supra note 3, at 54 (referring to Hand's 1897 Harvard Law Review article cited in supra note 11).
“few months” during 1896-1897. For the next “five and a half years” he practised with a firm which in 1900 was called “Hun, Johnston & Hand.” Partnership, with “the satisfactory income of $1,500 a year,” came in 1899 and a share of up to “15 per cent” of the partnership’s income began in 1900. Echoes of Hand’s subsequent judicial work do not, however, reverberate through these years of his legal practice. “[D]etailed, often dull research,” the writing of briefs, and debt collecting were “menial legal tasks” Hand endured. It was not the trial or appellate advocacy into which he yearned to plunge. Consequently, on October 2, 1901, Hand accepted an offer as “managing clerk” with a “$1,500 a year” salary with “the small Wall Street firm of Zabriskie, Burrill & Murray.” Unfortunately, much the same “routine [legal] business” ensued. Therefore, in January 1904, after an offer of “a partnership, with a guaranteed $3,000 a year,” Hand joined the Gould & Wilkie law office. He stayed for five years. Although, compared to the past, Hand’s work “was no more challenging,” his income increased to $6,000 in 1906 and 1907. But on April 30, 1909 Hand’s legal practice terminated when, at 37 years of age, he became a United States district judge for the Southern District of New York.

Interspersed in these years (1896-1909) of legal practice were other events: Hand’s private life, including a romance with and marriage to Frances Fincke; three daughters, and part-

51. GUNThER, supra note 3, at 54-55.
52. Letter from Learned Hand to Richard Hand in 1899 (cited in GUNThER, supra note 3, at 55).
53. On these aspects see GUNThER, supra note 3, at 55-58, 68.
54. On this period see id. at 70-71, 101-02.
55. On the Gould and Wilkie years (Jan. 1904 - April 1909) see id. at 103-07.
56. Id. at xv.
57. Id. at 133. Therefore, Hand was a federal court judge from April 30, 1909 to August 18, 1961. See supra note 4.
58. Frances Fincke (1876-1963). She was 25 in 1901, when Hand met her, and died 2 years after Hand’s 1961 death. GUNThER, supra note 3, at 77, 679. They were married in December 1902. Id. at 72. For extensive (perhaps, too extensive) details about Frances Hand and her friends (especially Mildred Minturn and Louis Dow) see id. at 72-100, 171-89, 500, 570-71. Three intriguing questions arise: Did the 1906-1944 “friendship” between Frances Hand and Louis Dow include a physical relationship? Was Learned Hand “a cuckold”? What, if any, effect did this “friendship” have on Hand’s judicial work? Discussions of the first two questions include id. at 183-89, 500, 570-71; POSNER, supra note 1, at 528; Coffin, supra note 6, at 391. See also supra note 38 (Hand not “a cuckold”).
59. Mary Deshon (born 1905), Frances (born 1907), and Constance (born 1909).
time (1901-1902) teaching at Albany Law School. Learned Hand also adumbrates two other important issues: money and politics. Was Hand a wealthy man? Professor Gunther suggests that "in reality [Hand's] economic situation was quite comfortable" in 1906. Two sources of income contributed. First, money from his legal practice, which "remained low" in Professor Gunther's assessment. Secondly, "a legacy under [Hand's] uncle Clifford's will" of $9,000 annually. However, Frederick Fincke, Hand's father-in-law, considered that Hand was "not independently wealthy" in 1907. From Hand's perspective, although he considered an annual income of $1,500 to be "satisfactory" in 1899, "money worries persisted" even when his income increased to $6,000 in 1906. "That Hand, like Holmes, Brandeis, and Cardozo, was a wealthy man" is, with the assistance of "evaluating the purchasing power of the dollar at a remove of almost a century," Chief Judge Posner's conclusion. More information is required to evaluate these juxtaposing views. Reasons are obvious. For example, presume that Posner is correct. Hand could afford to accept a federal judicial

There are at least two adult grandchildren - Jonathan Hand Churchill and Constance Jordan. Gunther, supra note 3, at xix, 172. See also id, at xi, 641, 642 ("grandchildren"). On the paucity of information about Hand's descendants (compared to ancestors - see supra notes 28-31, 33) see Posner, supra note 1, at 534.

60. Gunther, supra note 3, at 61. Unfortunately, no elaboration is provided. For example: What "course" did Hand teach? What pedagogical approach — "the Langdellian case method" Hand encountered at Harvard Law School (id. at 46-50) or the formal lecture style — did Hand utilize? How did students appraise him? For a hint see Talk, supra note 1, at 45 ("Hand lived the Socratic method") (emphasis in original).

61. Gunther, supra note 3, at 99. See also id. at 110 ("quite well off").

62. Id. at 99.

63. Id. at 70, 99 ("source of security"), 124 ("about $9,000 a year"). See also supra note 30 (discussing Clifford Hand).

64. Gunther, supra note 3, at 129. See id. at 87-88, 102-07, 116, 124-27, 130-31 (discussing Frederick Fincke).

65. See supra text accompanying note 52.


67. Posner, supra note 1, 533. Posner suggests that Professor Gunther considers Hand was not wealthy. However, in reaching that conclusion Posner attributes to Gunther the views of Hand and Frederick Fincke. Id. at 533 n.3. More critical is Gunther's "low" assessment of Hand's income (supra note 62) which Posner refutes by taking into account "the change in the purchasing power of the dollar wrought by inflation" between 1906 and 1991. Posner, supra note 1, at 533.

68. Posner, supra note 1, at 533-34 (asking what was Hand's subsequent income and the value of his estate?).
appointment. If that had not occurred, he may have remained "a worthy underachiever" with the consequential loss to American law and jurisprudence. Another ramification of that presumption is the ability to advocate philosophical or ideological positions favoring democratic majoritarianism with the reassurance that being wealthy provides protection from actually having to participate in or be affected by decisions emanating from the people.

Politics invigorated Hand. Compared to "menial legal tasks," he became involved in issues such as American imperialism and colonialism, Afro-Americans' predicament, labor strikes, conditions in state mental hospitals, municipal politics, the conglomeration of economic power, and child labor. Scholarly articulation of this commitment to "reform politics" occurred in "Hand's attack on Lochner" in the Harvard Law Review. Nothing but praise for this "most significant work" emanates from Professor Gunther.

69. Note that a federal district court judge's salary in 1909 was $6,000. Id. at 533; GUNTHER, supra note 3, at 124. Posner implies that this is a substantial salary. Posner, supra note 1, at 533. That is, even persons who were not wealthy could afford to accept such an appointment.

70. Coffin, supra note 6, at 382.


73. Compare Louis Brandeis' aversion to concentration of wealth. See, e.g., PHILIPPA STRUM, BRANDeIS: BEYOND PROGRESSIVISM (1993); Samuel Krislov, Back to Brandeis, 22 REV. AM. HIST. 685, 687-90 (1994). See also infra note 76 (discussing the difference between Hand and Brandeis approaches).

74. See generally GUNTHER, supra note 3, at 61-67, 107-23.

75. Id. at 110. See also id. at 111 ("reform cause"). Hand's "chief political concern was how [the national] government could curb the abuses of concentrated wealth without lapsing into Jeffersonian nostalgia." Id. at 113. Hand "presciently advocated the view that the national government should address domestic problems . . . ." Id. at 64. Compare Brandeis' greater emphasis on states' involvement. See, e.g., supra note 74; E. Steiner, A Progressive Creed: The Experimental Federalism of Justice Brandeis, 2 YALE L. & POLY REV. 1 (1983).

76. See id. at 118. On Lochner see supra note 29.


78. GUNTHER, supra note 3, at 118. See id. at 118-23 (Hand and Lochner). See
Hand's strong criticism of the [Lochner] ruling and the kind of judicial behavior it represented was...trenchant. His analysis devastated the economic and jurisprudential underpinnings of the ruling and reign of judicial supremacy — in [Hand's] view, the abuse of judicial power — that Lochner initiated. 80

Other views, more enamoured with Lochner's reasoning and result, are extant. 81 From the perspectives of vulnerable non-union workers, especially Afro-Americans, women, and migrants, where labor unions joined with employers to obtain protective legislation 82 and those supporting free competition, not corporations obtaining advantages via regulatory legislative measures, 83 Lochner is to be praised and resuscitated. Consequently, a rich historiographic tapestry surrounds Lochner. Unfortunately, Learned Hand does not enter this debate. Therefore, concerning judicial utilization of substantive due process in relation to economic and property rights, 84 it is one dimension-

also supra note 29 (asking whether Hand's contempt for Lochner was tinged with personal feelings).


81. See generally supra note 29 (citing references). See also infra note 82.


84. Is there a dichotomy or continuous spectrum where property, economic, and personal rights and liberties are involved? Favoring the latter see, for example, STRUM, supra note 74, at 116-49; David Burke, The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 HARV. J.L. & PUB. POLY 73, 163-73 (1994); Kainen, supra note 83, at 95-96; Leonard Levy, Property as a Human Right, 5 CONST. COMM. 169 (1988). Also, Hand rejected "the sharp distinctions between liberty and property that had [in the 1940s] emerged in constitutional jurisprudence." Gunther, supra note 80, at 39-40. See also GUNTER, supra note 3, at 565 (same); MASON, supra note 9, at 511-12 (same). For the Supreme Court's repudiation of those distinctions see Gunther, supra note 80, at 40; Kainen, supra note 83, at 95-96.
Here, Hand's "central themes," which he reiterated for the next fifty-three years, were clear:

A fervent plea for judicial restraint, a strong endorsement of legislative power to engage in experimentation, a sharp attack on exercises of judicial authority in the Lochner mode . . . .

His deep convictions about the dangers of permitting judges to consider the wisdom or expediency of challenged laws . . . . The risk . . . was that the Lochner philosophy allowed unelected, politically unaccountable judges to decide whether a particular legislative purpose was or was not legitimate. Courts . . . were not super-legislatures: they exceeded their legitimate powers unless they deferred to elected legislatures on debatable issues.

More intriguing is a stark question: Why did Hand adumbrate these "themes"? Three possibilities emerge. First, a political motivation. Lochner's result did not coincide with his politics. Hand's reform agenda would be severely damaged or, at least, buffeted given Lochner's reasoning and the Supreme Court Justices' personal predilections. Secondly, there is Hand's "eager[ness] to elaborate a position on the proper role of the Supreme Court that he had first absorbed in James Bradley Thayer's classes at Harvard Law School, one that [Hand] believed in deeply for the rest of his life."

85. Some hint of other perspectives appears to emerge when Gunther notes that "Hand's second line of attack drew on his readings in economic theory. He argued that it was justifiable [for state legislatures] to restrict hours of labor, for this promoted the economic welfare of workers. Could it really be claimed that the protective laws made no contribution to that welfare, either under classic free-market theories or under more modern, paternalistic ones?" GUNTHER, supra note 3, at 123. But who were the "workers"? For example, contrast the perspective in the text accompanying supra note 82. For another one-dimensional approach see infra notes 295-304 (revisionist history).

86. GUNTHER, supra note 3, at 122. For a critique of these "themes" including the adverse inference to be drawn from "unelected" and the notion that judges are "politically unaccountable" see infra note 287.

87. Learned Hand does not expressly suggest or pursue this possibility. Was Hand merely playing politics? If so, was his basic premise that constitutional law is just (another form of) politics? Gunther does acknowledge that Hand's article was "a sharp economic and political commentary, unusually blunt for the ... Harvard Law Review." GUNTHER, supra note 3, at 118.

88. Id. at 118. See also id. at 50-53 (discussing Thayer and his influence on Hand), 700 n.71 (quoted in infra note 329). For Thayer's biographical details (1831-1902), legal scholarship, jurisprudential theories, and influence see Sanford Gabin, Judicial Review, James Bradley Thayer, and the "Reasonable Doubt" Test, 3 HAST. CONST. L. Q. 961 (1976); Wallace Mendelson, The Influence of James B. Thayer upon
For Professor Gunther, this objective — to determine and explain the Supreme Court’s “proper role” — is the predominant reason for Hand’s article. Indeed, at least in Hand’s subsequent non-judicial ventures into the realm of constitutional law that may be correct. However, on this occasion in 1908, a third possibility exists: ambition to be a federal court judge. Professor Gunther provides the clue:


Hand’s essay elicited considerable attention and helped to make him attractive to those eager to place more articulate and independent individuals on the bench.

Even so, Professor Gunther concludes that “ambition was not [Hand’s] prime motive.” But, why not? On numerous occasions Hand was deeply involved in the politics of judicial appointments

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89. GUNTHER, supra note 3, at 118 (“Rather, [Hand] was eager”).

90. GUNTHER, supra note 3, at 118, 123. “This article was well received and, at least in discriminating circles, helped establish Hand as a thoughtful, independent, and articulate person.” Coffin, supra note 6, at 382. (footnote omitted). Note the dates: *Lochner* (1905); Hand’s endeavor to become a federal judge (1907); Harvard L. Rev. article (May 1908).

91. GUNTHER, supra note 3, at 118.
to secure a position for himself or another. Of course, he often succeeded.

III. THE JUDGE

Ascent to the pinnacle — the United States Supreme Court — eluded Hand. Fifty-two years a federal court judge, never (except, perhaps, in heaven) a Supreme Court justice, is merely the obvious result. Behind that odyssey is a panorama of early twentieth century American political and judicial history. Learned Hand provides the narrative. Others must divine and dissect the reasons, effects, and consequences. Private machinations, perhaps vendettas, public posturing and political intrigue — like friendships, loyalties, and strongly held beliefs — are, especially through participants' private correspondence, revealed. Presidents, from Theodore Roosevelt to John Kenne-

92. See, e.g., id. at 106 (Hand's 1907 attempt "to obtain [for himself] a federal judgeship"), 123-28 (similar), 128-33 (Hand's 1909 "campaign for a judgeship"), 270-71 (Hand's "nine-month campaign" in 1917 to be promoted to the Second Circuit Court of Appeals), 271-77 (Hand "entered the race for promotion"), 281 (Hand "unusually active in pressing for strong candidates" for the Second Circuit), 282-86 (Hand's "letters to Washington"), 647-52 (Hand's activities in 1957, 1958, 1959 and 1961). But see Kahn, supra note 12, at 284 ("Hand never campaigned for a seat on the Supreme Court"). Compare Chief Justice Taft's interventions in the appointment process. See, e.g., Gunther, supra note 3, at 239 ("repeatedly . . . block[ed] consideration of Hand for promotion to the Supreme Court . . . [in] the 1920s"), 272-75 (similar), 424-25 (influence in 1930); Alexander M. Bickel & Benno Schmidt, Jr., The Judiciary and Responsible Government 1910-21, at 3-64 (Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Vol. 9, 1984) (revising Alexander M. Bickel, Mr. Taft Rehabilitates the Court, 79 YALE L. J. 1 (1969)); Daniel McHargue, President Taft's Appointments to the Supreme Court, 12 J. OF POL. 478 (1950); Walter Murphy, In His Own Image: Mr Chief Justice Taft and Supreme Court Appointments, 1961 SUP. CT. REV. 159.

93. Hand "did not believe in a Hereafter" (Gunther, supra note 3, at 679) but others would have appointed Hand to their "ideal" U.S. Supreme Court. I Holmes-Laski Letters 446 ("God"), 548 ("Hand"), 555 ("ideal") 557 (Mark DeWolfe Howe ed., 1953). See also Powell, supra note 8, at ix (Hand "the Tenth Justice"). Hand did not even receive a "recess" appointment to the Supreme Court. On such appointments see Louis Fisher, Constitutional Conflicts Between Congress and the President 40-41 (3d ed. rev. 1991); Michael A. Carrier, When is the Senate in Recess for Purposes of the Recess Appointments Clause?, 92 Mich. L. Rev. 2204 (1994); James A. Thomson, Prologue to Power: Selecting Supreme Court Justices, 12 U. Dayton L. Rev. 71, 72 n.2 (1986).

94. For example, William Howard Taft, despite an overt friendship, "never [forgave Hand] for his Bull Moose criticisms of the Supreme Court's abuses of due process." Gunther, supra note 3, at 274. See also supra note 92 (repeated blocking).

95. See, e.g., supra note 8 (Hand's correspondence).
Chief Justices, and a myriad of prominent and influential government, commerce, and media personalities swirled around Hand’s life and career. Within that flux how could a law-politics divide survive? Obliquely, Professor Gunther postulates a solution: reconciliation of political participation and exercises of judicial power. Investigative questions and the problematic presentation of a central issue camouflage this response. “What was the nature and extent of Hand’s involvement in political issues during these [progressive] years? What motivated him? How did [Hand] reconcile his own political engagements with principles of appropriate judicial behavior?”

Learned Hand provides abundant evidence on the first question to support Professor Gunther’s answer: “Hand frequently took an active and public part in political affairs.” For example, Hand was “a major progressive figure [and] a true believer, in the ‘New Nationalism’ and the progressive cause.” Also, Learned Hand demonstrates, from Hand’s “life-long commitment to restrained judging,” what he considered to be “principles of appropriate judicial behavior.” Left somewhat bereft, by Professor Gunther, is the central reconciliation issue: How did

96. See, e.g., GUNTHER note 3, at 114, 129, 198-232 (Roosevelt), 652 (Kennedy).
97. See, e.g., supra notes 92, 94 (Taft); GUNTHER, supra note 3, at 566 (Stone).
98. This is a pervasive aspect of GUNTHER, supra note 3. For a slightly different perspective see Kahn, supra note 12, at 284 (“Hand did not cultivate the friendship of politicians or people with political influence. Rather, his friends were intellectuals, judges, and academics.”)
99. Critiques and responses about whether a law-politics dichotomy exists or can be maintained against, for example, legal realist and critical legal studies attacks include MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989); Mark Tushnet, Critical Legal Studies: A Political History, 100 YALE L. J. 1515, 1526 (1991) (“programmatic statement that law is politics, all the way down”).
100. GUNTHER, supra note 3, at 190. Of course, this assumes knowledge of and some agreement on the existence and content of such “principles.” For Hand’s position see text accompanying supra note 103.
101. GUNTHER, supra note 3, at xvi. Hand also covertly engaged in politics. See, e.g., id. at xvi (“behind-the-scenes adviser and platform drifter”). But see infra note 128 (suggesting that by 1924 Hand had ceased “all partisan activity”).
102. GUNTHER, supra note 3.
103. Id. at xvi.
104. This issue — reconciliation of political and judicial activities — is different from another issue — how to articulate and implement an “appropriate judicial” role — which is much more pervasive in GUNTHER, supra note 3.
Hand endeavor to achieve and justify such a reconciliation? For example, is "restrained judging" a justificatory warrant for federal judges' involvement in political activities? Are activist judges, therefore, precluded from participation in "political affairs"? Affirmative responses may not only diminish judicial activity but also entice judges into a more vigorous political life. Eventually, politicians, not judges, may be the result. To elucidate how Hand "reconcile[d]" his immersion in politics while ensconced in judicial robes three aspects — Hand's involvement in the appointment process; Hand in court: law and cases; and Hand's contribution to defining the Supreme Court's role — ought to be evaluated.

A. District Court

Aged thirty-five in 1907, "Hand's quest for a federal judgeship" commenced. Several reasons exist. First, Hand's self assessment: past failure and no prospect of future success in legal practice. His "dissatisfaction" was palpable. Secondly, Frederick Fincke's "casual remark" concerning a federal court vacancy "sparked" Hand's enthusiasm "to try for the federal bench." Thirdly, there were "very powerful, affirmative at-

105. Compare the suggestion that members of Congress have longer (and, perhaps, at least as secure) tenure as federal judges. Mark Tushnet et al., Judicial Review and Congressional Tenure: An Observation, 66 Tex. L. Rev. 967 (1988).

106. On several occasions, Hand considered moving, for example, to the World Court or New Republic magazine and, therefore, resigning from the bench either on his own initiative or his friends' behest. See, e.g., Gunther, supra note 3, at 244, 254-56.


108. See infra part IV.

109. See infra part V.

110. Gunther, supra note 3, at 123.

111. Id. at 106, 124.

112. Id. at 124.

113. Id. Compare Holmes' father's "kicking". See supra note 43.
tractions" of being a judge. However, at best, Hand’s initial foray into the politics of judicial appointments — his first “campaign” — appears to have been tepid. Even so, Professor Gunther suggests that Hand may well, in this “competition,” have won. Perhaps, merely because no vacancy eventuated such a victory eluded him.

Almost immediately, Hand took “steps to improve his chances” of appointment to a future vacancy. Three are clearly evident. Hand “joined his neighborhood Republican Club in late May 1907” and in October 1908 was a Republican campaign speaker. To improve Hand’s “weak political connections” was the motivation. Publication in 1908 of his visceral attack on *Lochner* is a third example. Therefore, “Hand’s second campaign for a judgeship” was a good deal longer — two years (1907-1909) — than Professor Gunther suggests. However, even earlier politics played a crucial role. “Involvement in [New York] municipal politics,” on the anti-Tammany side in 1903, secured Hand’s friendship with Charles C. Burlingham. Eventually, in 1909, Burlingham “suggested Hand’s name to Attorney General Wickersham and to President Taft” for appointment to the United States District Court. Perhaps, more crucially Hand “knew Wickersham” who, because he boldly pressed President Taft to send Hand’s name to the Senate, was “the critical element” in securing Hand’s elevation. That process — from va-
cancy to judicial oath — was swift: March 2 to April 30, 1909. Yet, despite Professor Gunther’s emphasis that this was “a merit appointment,” politics and prior political contacts were integral to Hand becoming a federal judge. Given that in 1907 Hand was “mindful of his weak political connections,” this represents a quantum change and illustrates how successful the “steps [Hand had taken] to improve his chances” had been.

B. Court of Appeals

Capitulating to politics did not, however, cease. Hand’s overt and covert political activities continued. Indeed, there were “rumblings around the courthouse about [Hand’s] political activism.” Prominent examples included advice and recom-

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124. Id. at 129, 133. See also supra notes 4 (judicial oath), 117 (bill creating vacancy).
125. Id. at 129. See also id. at 129 (“quality appointments”), 132 (“merit appointments”). Professor Gunther suggests that “[t]his nonpartisan zeal is surprising in light of Taft’s later reputation.” Id. at 129. But see Kahn, supra note 12, at 253-54 n.17 (“deeper probe . . . into Taft’s [judicial] selection process” reveals “politics,” not nonpartisan zeal). See also supra note 92 (detailed analyses). Compare Gunther’s suggestion that politics, not merit, prevailed when Hand was not a Supreme Court nominee in 1942. See infra note 179.
126. Similarly, in opposition to Gunther is Kahn, supra note 12, at 253-54 n.17 (“traditional forces”). See also id. at 253 (“while he was in private practice, Hand would hardly have appeared an inevitable choice for a judgeship”).
127. GUNTHER, supra note 3, at 129 (quotes).
128. See generally GUNTHER, supra note 3, at 190-269 (“The Peak of Political Enthusiasm”). By 1924, Professor Gunther suggests, that “Hand consistently avoided political involvements and public identification with causes that could be seen as ‘agitation’ . . . . [H]e abstained from all public partisan activity, although he remained an engaged observer of the political scene throughout his life and shared his views in his private correspondence with his friends.” GUNTHER, supra note 3, at 237. See also id. at 344-45 (Hand’s change). However, there is room for doubt. See, e.g., supra notes 92, 101, 102; infra notes 141-46, 254. Gunther also concludes that after World War I “Hand strove valiantly never to overstep the . . . important line between permissible and impermissible statements to be made by a judge. He did not always succeed.” GUNTHER, supra note 3, at 345. See also Posner, supra note 1, at 529 (“boundaries of judicial propriety”). See also infra note 254 (recusal).
129. See, e.g., GUNTHER, supra note 3, at 231 (“behind the scenes [Hand] . . . [did] . . . a great deal for the [Progressive] party”).
130. Id. at 231. For the Manhattan locations and description of the courthouse see id. at 139. Perhaps, this was to offset the fact that in 1909 “[t]he life of a district judge . . . was lonesome, considerable in power but cut off from most human contact in the conducting of official business.” Id. at 143.
mendations to Theodore Roosevelt, drafting the Republican and Progressive parties' 1912 election platforms, joining the national Progressive Party and local Progressive Club to which Hand made generous donations, participation in Progressive Party "organizational efforts," and being a Progressive Party candidate in the 1913 election for Chief Judge of the New York Court of Appeals. Hand knew and acknowledged, even in 1912, "that a judge should keep himself free from any active partisanship." Inevitably, therefore, questions emerge. Did Hand's "maverick behavior" harm his chances, especially with Republican Presidents, for promotion to the U.S. Supreme Court? Undoubtedly, as Hand conceded in 1921, the answer is yes. Less clear, especially during 1909-1913, is a response to the more important conundrum: Were Hand's ex-

131. See, e.g., id. at 192-232. See also id. at 237 ("frequently" offered Roosevelt "private advice"), 239-40 (Hand's "final substantive letter to Roosevelt" of June 13, 1916).
133. GUNTHER, supra note 3, at 228, 231.
134. Id. at 231.
135. Id. at 233.
136. Id. at 231, 233-39. Hand lost with only just "over 195,000 [votes] — about 13 percent of the total [of] more than 1.5 million" throughout New York state. Id. at 236.
137. Letter from Hand to Walter E. Weyl (a Progressive party official) (Oct. 2, 1912) quoted in GUNTHER, supra note 3, at 231. Subsequent similar Hand admonitions are noted in id. at 237, 239.
138. Id. at 237.
139. GUNTHER, supra note 3, at 274-75.
140. See, e.g., id. at 239, 274-75, 261 ("[Hand] paid the penalty: as future Second Circuit vacancies developed, he was passed over repeatedly"). See also supra note 92.
141. Professor Gunther considers that the "acceptable [view of] judicial conduct [during this time] . . . was less restrictive than [the] official view" in the American Bar Association's 1990 Model Code of Judicial Conduct. GUNTHER, supra note 3, at 237. See also infra note 128 (historical analyses).
tra-judicial activities "consistent with standards of propriety appropriate for a federal judge?" 143 Ambivalently, Professor Gunther seems to respond affirmatively. 144 The premise, however, is Hand's abstention — a "self-imposed restraint" 145 from politics. 146 Precisely at this juncture, Learned Hand casts aspersions.

"[F]requently," since May 1909, Hand had sat, "as a temporary appellate judge," on the Court of Appeals for the Second Circuit. 147 Enticed by appellate work, Hand spent "more than eight months" in 1917-1918 pursuing "a judicial promotion." Indeed, he "went to unusual lengths to land the appointment." At "Justice Brandeis's home" Hand met Attorney-General Gregory and "campaign[ed] to block [Judge Martin] Manton's promotion" from the District Court. 148 Unfortunately for Hand and the Second Circuit, Manton was appointed. 149

Assessing the political situation when the next Second Circuit vacancy occurred in 1921, Hand concluded "he had no chance for promotion" under President Harding and Attorney-General Daugherty. Instead, he "back[ed] his junior colleague Julius M. Mayer" and "pitched in to help defeat the only significant opposition to Mayer's promotion, from a Vermont competitor." 150 But, how did Hand pitch in? Regrettably Learned Hand does not elaborate. 151

Again, "Hand entered the race for promotion in July 1924" when Judge Mayer resigned. From Professor Gunther's perspective, Hand's nomination by President Coolidge on December 2, 1924, Senate confirmation on December 20, and swearing in as a

143. GUNTHER, supra note 3, at 237.
144. Id. at 238 (less certain limits on acceptable judicial behavior in 1913), 239 (Hand's justification for being a candidate in 1913 election "not wholly persuasive").
145. Id. at 238.
146. See, e.g., supra note 128.
147. GUNTHER, supra note 3, at 143-44.
148. Id. at 257-61; 270-71 (during a "nine-month campaign" Hand "pursued promotion with unaccustomed determination"). In light of Hand's previous campaigns, is "unaccustomed" a misleading adjective?
149. Id. at 260 (Manton's appointment), 502-13 (Manton's resignation, conviction, and imprisonment). Further details are in BORKIN, supra note 19.
150. GUNTHER, supra note 3, at 271.
151. Only one fragment is revealed. Hand "gathered statistics for Mayer to show that 94 percent of cases came to the Second Circuit from federal courts in New York rather than those in Connecticut or Vermont." Id. at 271 (footnote omitted).
Circuit Judge on December 29, was principally motivated by merit.\textsuperscript{152} However, others, including Attorney-General Harlan Fiske Stone,\textsuperscript{153} but not Chief Justice Taft,\textsuperscript{154} might not have agreed. As usual, politics loomed large. For example, Judge Mayer used his “experience\[ ] in politics” and “wide range of contacts” including senators and “local political people,” to ensure Hand’s promotion.\textsuperscript{155} Even Hand recognized the overriding importance of politics when, in December 1924, he wrote to district judge John R. Hazel, a Republican, admitting that Hazel “could have gotten the appointment if he had wanted it.”\textsuperscript{156}

C. United States Supreme Court

Two questions pervade discussions concerning Hand and the U.S. Supreme Court. First, why was Hand not one of the “august Nine”?\textsuperscript{157} Secondly, were Hand and American law “lucky”\textsuperscript{158} that he never achieved that status? To each a myriad of diverse responses have been proffered. Absence of definitive answers\textsuperscript{159} is, however, to be welcomed and enjoyed, not regretted. The reason is illustrated by both Hand’s life and Professor Gunther’s biography. They promote careful consideration of more general themes and issues: the appointment process — “that odd lottery”\textsuperscript{160} — by which Supreme Court membership is obtained\textsuperscript{161} and the Supreme Court’s role, especially relative to lower federal courts, in American law.

\textsuperscript{152} Id. at 271-72, 275-77.
\textsuperscript{153} Id. at 275 (Stone’s different views in letters to Hand and Taft), 277 (“many in the [Coolidge] administration considered [Hand] a dangerous radical”).
\textsuperscript{154} Id. at 275 (Taft supported Hand because he was “the best man”).
\textsuperscript{155} Id. at 275.
\textsuperscript{156} Id. at 725 n.25.
\textsuperscript{157} “Who in hell cares what anybody says about [constitutional questions] but the Final Five of the august Nine . . . ?” Letter from Hand to Justice Stone (Feb. 6, 1934) (quoted in MASON, supra note 9, at 384).
\textsuperscript{158} Felix Frankfurter, in In Commemoration, supra note 9, at 20, 21, 22. See also SCHICK, supra note 2, at 17-19; GUNther, supra note 3, at 570; Gunther, supra note 7, at 37 (Frankfurter used “lucky” “several times in public and far more frequently in the privacy of [Frankfurter’s] letters” to Hand).
\textsuperscript{159} Compare Kahn, supra note 12, at 252 (“no definite answer”).
\textsuperscript{160} Here, in Holmes’ aphorism, the challenge is “to see the universal in the particular . . . .” Letter from Holmes to John Wu (June 16, 1923), THE MIND AND FAITH OF JUSTICE HOLMES 421, 422 (Max Lerner ed., 1943).
\textsuperscript{161} Frankfurter, supra note 158, at 22.
\textsuperscript{162} See generally supra note 107.
Like other scholarship,163 Learned Hand enters the “why Hand was never appointed to the Supreme Court” fray.164 At least nineteen opportunities, between 1914 and 1943 when Hand’s age ranged from 42 to 71, were available for Presidents Wilson, Harding, Coolidge, Hoover, and Franklin Roosevelt to nominate and, if the Senate consented, make such an appointment.165 Again, behind the formal criteria166 — personal ideology, political affiliations, geographic location, professional qualifications, intellectual capacity, and age167 — lay the web of politics. Professor Gunther produces the evidence.168 For example, Chief Justice Taft’s role, at least between 1921 and 1930, in preventing Hand’s name being sent to the Senate.169 Only once may merit have been a decisive factor. However, as Learned Hand demonstrates, on that occasion in 1942 merit not only worked against Hand but it was merely a factor being utilized for a larger political objective. Brushing aside other reasons — age and the persistent importuning of Felix Frankfurter170 — to explain why the 1942 vacancy created by Justice Byrnes’ resignation171 was not filled by Hand, Professor Gunther, building upon a Hand letter to Burlingham,172 suggests a more

163. See e.g., GRIFFITH, supra note 1, at 9-10; MORRIS, supra note 3, at 137-38; SCHICK, supra note 2, at 14-15; Shanks, supra note 1, at 11-12; Kahn, supra note 12.
164. See e.g., GUNTHER, supra note 3, at 239 (Taft’s influence), 272-75 (same), 417-28 (President Hoover), 553-70 (President Franklin Roosevelt).
165. The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court . . . .” U.S. Const. art II, §2 cl. 2. See generally Thomson, supra note 93 (analysis of each requirement). See also Kahn, supra note 12, at 260-82, 285 (discussing each of the 19 opportunities and chronological table of the 19 appointees). A 20th opportunity arose “during the Truman administration . . . when Hand was more than 73 years old.” Id. at 282.
166. Unlike congressional representatives and Presidents, no qualifications for a Supreme Court Justice are prescribed by the Constitution or federal legislation. See U.S. Const. art I, §2, cl. 2 & art II, §1, cl. 5 (listing qualifications for congressional representatives and Presidents). See generally Thomson, supra note 93, at 71 n.1.
167. For a discussion of these factors and their fluctuating importance see supra note 107 (references). For their significance in relation to Hand see Kahn, supra note 12, at 254-60.
168. See supra note 164.
169. See supra notes 92, 94. But see supra note 154 (discussing Taft’s support in 1924 for Hand’s promotion to the Court of Appeals).
170. GUNTHER, supra note 3, at 561-62. See also Kahn, supra note 12, at 282 (age, Frankfurter, geography).
171. GUNTHER, supra note 3, at 553-54, 564. On Byrnes see DAVID ROBERTSON, SLY AND ABLE: JAMES BYRNES (1994).
172. Letter from Hand to Charles C. Burlingham (Jan. 12, 1943) in GUNTHER,
plausible explanation: Hand's conception, especially in constitutional litigation, of the Supreme Court's role. A brilliant and consistent advocate and practitioner of judicial restraint was not required as the Supreme Court, after 1937, began turning its attention away from economic reforms towards individual rights and liberties. Precisely the opposite stance — "a predictable judicial philosophy of liberal activism" — represented merit and satisfied political imperatives. Therefore, Wiley Rutledge, not Hand, was appointed.

supra note 3, at 568 ("I think that there was a deeper difficulty than age"). On Burlingham's efforts see id. at 554-60 (1942 vacancy); supra notes 121-23 (Hand's 1909 District court appointment).


174. GUNTHER, supra note 3, at 562-68. See also Kahn, supra note 12, at 283, 284 (suggesting that Hand's "judicial ideology" prevented his appointment at any stage).

175. See infra notes 244-45, 247 (discussing the only occasions Hand invalidated congressional legislative provisions).

176. Earlier Supreme Court civil libertarian postures can, however, be discerned. See, e.g., Near v. Minnesota, 283 U.S. 697 (1931) (holding a state statute an unconstitutional prior restraint on speech); Stromberg v. California, 283 U.S. 359 (1931) (holding a state statute unconstitutionally vague); JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS (1988); FRED FRIENDLY, MINNESOTA RAG (1981); David Hilderbrand, Free Speech and Constitutional Transformation, 10 CONST. COMM. 133 (1993).


178. GUNTHER, supra note 3, at 568.

179. Despite elucidating this "judicial role" explanation, Professor Gunther seems to revert to a purely "politics" conclusion. "Abstractly, Hand was no doubt the best-qualified individual for the Supreme Court in 1942. But the choice of a Supreme Court nominee is rarely a merit-selection process." Id. at 568. This varies from Gunther's merit explanation for Hand's 1909 District Court and 1924 Court of Appeals appointments. See text accompanying supra notes 125-36, 152-56.

180. Professor Gunther leaves the impression that Justice Rutledge's short Supreme Court tenure (1943-1949) and Hand's additional 12 years on the Court of Appeals (1949-1961) indicates that President Roosevelt made a mistake in not nominating Hand. However, Rutledge's libertarian opinions may well vindicate Roosevelt's choice. For this perspective see James A. Thomson, Mirages of Certitude: Justices Black and Douglas and Constitutional Law, 19 OHIO N. U. L. REV. 67, 76-77 (1992).
Such speculations are, however, different from another proposition: Hand should have been appointed to the Supreme Court. Obviously, there is a retort: Why? Responses to consequential questions — Would Justice Hand have made a difference to American law? What would have been Hand’s performance and legacy if he had been on the Supreme Court? — provide some answers. Frequently, it is suggested that Justice Hand’s contributions to and impact and influence on American law, in scope and depth, would, compared to Judge Hand, have been diminished. Given the Supreme Court’s more limited jurisdiction and work-load, the federal, not Supreme, court was the place to be. Professor Gunther, at least in Learned Hand, seems to agree. Other factors, however, lead to an opposite conclusion. For example, the obvious visibility of the Supreme Court and its justices with the power that provides to influence American law even outside formal jurisdictional limits. Secondly, as a federal court judge, Hand followed Supreme Court precedents even where his judicial predilections would have established a different rationale or mandated a different decision.

181. For an assessment see infra part IV.
182. For example, Justice Frankfurter’s assertion:

It is extremely doubtful whether on the Supreme Court, with its confined area of litigation, [Hand] would have influenced the course of law in its widest reaches as much as he did from the Second Circuit . . . In this regard and others, [Hand] would have found himself much more circumscribed on the Supreme Court than where he was.

Frankfurter, supra note 2, at 4. See also Frankfurter, supra note 158, at 22 (on the Supreme Court Hand’s views “would have been diluted eight-ninths and [on the Court of Appeals] only two-thirds”); Kahn, supra note 12, at 251 (same).
183. See supra note 182.
184. But see Gunther, supra note 7, at 16-27 (discussing Hand’s deference to Supreme Court precedent). See infra note 191 (explanation).
185. GUNther, supra note 3, at 569 (referring to Frankfurter view supra note 182). However, without elaboration, Professor Gunther concludes that “neither [Hand] nor the nation was ‘lucky’ that he had missed becoming [a Supreme Court Justice].” GUNther, supra note 3, at 570. At least, if the appointment was pre-1937, Judge Posner would agree with this latter conclusion. Posner, supra note 1, at 520 (quoted infra note 200).
186. One example is Justice Brennan’s influence on the revival of state constitutional law. See Robert C. Post, Justice Brennan and Federalism, 7 CONST. COMM. 227, 228 (1990) (William Brennan, State Constitutions and the Protection of Individual Rights, 90 HARv. L. REV. 489 (1977) is “one of the most cited law review articles in recent history”).
187. See generally GUNther, supra note 3, at 299, 600 (“took seriously his obliga-
Masses — Dennis conflict — is a classic example. Unfortunately, Justice Frankfurter failed to recognize this aspect. Thirdly, at least by the Supreme Court vacancies from 1930 and especially by the 1942 vacancy, Hand had been a prominent and influential federal court judge. An all or nothing situation — either a federal judge or Supreme Court justice — ought not to prevail. To have been both would have enriched and deepened Hand’s influence on and contribution to American law. Indeed, Hand may have recognized this possi-

tion to follow Supreme Court precedents?); 619 (“an obedient lower court judge”), 620. But see id. at 618 (extending existing principles).

188. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917). For details see infra notes 254, 256-66.


190. See infra text accompanying notes 252-66.

191. Particularly on the basis of Hand’s June 8, 1951 letter to Frankfurter (as well as other Hand-Frankfurter letters), Professor Gunther concludes that:

Hand had not forgotten Masses at the time of Dennis; he continued to prefer his “objectiva,” strict incitement test; but he viewed himself bound as a lower court judge to follow the Supreme Court’s lead in a different — and in his view a less protective — direction.

... Hand’s silence about Masses in Dennis, because of deference to Supreme Court authority, was no facade, no smoke screen for cowardice. Hand was one of [America’s] most creative judges over a wide range of common law and statutory areas, but his letters to Frankfurter over the years repeatedly reflect his deep conviction that his creativity was legitimately circumscribed by his position. [H]e was [not] free to disregard pronouncements from the Supreme Court, misguided as he might think them to be.

GUNTER, supra note 7, at 19-20, 21 (emphasis in original). Extracts of Hand’s June 8, 1951 letter and the conclusion that precedent dictated Hand’s Dennis opinion are in GUNTER, supra note 3, at 559-70, 603-05. But see Wirenius, supra note 1, at 519-21 (identifying “two flaws” in Gunther’s precedent explanation). Therefore, three alternative positions emerge. First, Hand was “an early liberal who gradually became conservative . . . .” Second, he was “a liberal bound by precedent . . . .” Third, he was a dissenter from all Supreme Court approaches to free speech. Id. at 520. See also Posner, supra note 1, at 517-18 (criticizing Hand’s application of his Dennis test).

192. Given Hand’s letters (supra note 191), Frankfurter should have arrived at the opposite conclusion to his assertion that Hand “certainly would have, applied on the Supreme Court the outlook governing adjudication that [Hand] expressed in the Dennis case . . . .” Frankfurter, supra note 2, at 4. See also text accompanying infra notes 203-07 (Hand may have acted differently on the Supreme Court).


194. See infra notes 198, 208 (discussing suggestions about Justice Hand’s perfor-
ibility. Like most lawyers, Hand wanted to be a Justice. Perhaps, part of his reason was to give even more to the law than he was able to accomplish on the Court of Appeals.

Presume that there had been a Justice Hand. Would his performance and legacy have differed from that of Judge Hand? If judicial restraint had continued to be his approach, at least in constitutional cases, then, like Felix Frankfurter, he may have been left, especially during Chief Justice Warren’s tenure, producing dissenting opinions as the Supreme Court moved towards a more activist, interventionist approach to Bill of Rights issues. Of course, this does not deny dissenters an honorable and powerful place in American jurisprudence.

195. Some have declined Supreme Court nominations. See, e.g., Thomson, supra note 93, at 79 n.32 (William Howard Taft, John W. Davis, Abe Fortas); Helen Dewar & Ruth Marcus, Mitchell Turns Down Supreme Court Offer, WASHINGTON POST, April 13, 1994, at A1, A10 (George J. Mitchell, Mario M. Cuomo).

196. See, e.g., GUNther, supra note 3, at 429 (“I ought to be on the Supreme Court”), 569 (Hand’s “ambition to be on the Court”) (“I longed as the thing beyond all else that I craved to get a place on it”), 570 (Hand “would have liked to sit on the Supreme Court”). On one occasion Hand sat on a “court of last resort” in United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d. Cir. 1945). Powell, supra note 8, at x.

197. On Judge Hand’s legacy see infra part IV.

198. In non-constitution areas “Hand was one of [America’s] most creative judges . . . .” Gunther, supra note 7, at 21 (fully quoted supra note 191). See also Frank, supra note 5, at 681 ("no other single judge has invented so many new rules, modified so many old ones").


Rather, it concedes that in the short run Hand may not have been influential.\textsuperscript{202} But, would Hand have remained the same? For example, would he have joined the dissenters in \textit{Dennis}？\textsuperscript{203} Professor Gunther provides evidence for an affirmative response.\textsuperscript{204} Further, with rare exceptions,\textsuperscript{205} Hand was not as a judge concerned with constitutional adjudication. Of course, his exposure would have been quantitatively and qualitatively much different as a Justice.\textsuperscript{206} Thus, just “being there” may have changed Hand, his judicial philosophy, written opinions, and decisions.\textsuperscript{207}

\begin{footnotesize}
\begin{enumerate}
\itemnote[7]{at 135 n.64 (Holmes the “great dissenter”).}
\itemnote[203]{\textit{Dennis v United States}, 341 U.S. 494 (1951) (sustaining Smith Act 1940 convictions against First Amendment free speech challenge) (Black, Douglas, J.J., dissenting).}
\itemnote[204]{\textit{GUNTHER, supra note 3, at 603-05. See also supra note 191 (Hand bound by Supreme Court precedent). But see Frankfurter, \textit{supra note 2, at 4} (quoted in \textit{supra note 192}); Posner, \textit{supra note 1, at 517-18} (Hand could have applied his \textit{Dennis} test to reverse the convictions).}
\itemnote[205]{But is “exceptions” correct? Compare Posner, \textit{supra note 1, at 515 (“merest handful of . . . constitutional cases”), 520 (Hand’s “sporadic engagements with constitutional law as a lower court judge”) with GUNTHER, \textit{supra note 3, at 462 (“challenges to the constitutionality of reform measures”), 412 (“Occasional constitutional challenges to New Deal laws continued to come before Hand”). See also infra notes 242-45.}}
\itemnote[206]{It has been suggested that “Hand’s fortune in not having to decide very many civil liberties cases . . . served to immunize him against sustained criticism from the libertarian camp.” \textit{SCHICK, supra note 2, at 187. However, there was some criticism. See, e.g., Frank, \textit{supra note 5, at 690-98; John P. Frank, 32 TULANE L. REV. 790 (1958) (book review); Louis L. Jaffe, 66 HARV. L. REV. 939 (1953) (book review).}}}
\itemnote[207]{See generally GUNTHER, \textit{supra note 7, at 37-49 (hypothesizing on Hand’s collegial relations, philosophy and theory of judicial review). Judge Posner considers that “because [Hand’s] perspective and experiences on the [Supreme] Court would have been far different from those he obtained from engagements with constitutional law as a lower court judge, it is impossible to say how [Hand’s] constitutional views would have developed.” Posner, \textit{supra note 1, at 520.}}}
\end{enumerate}
\end{footnotesize}
IV. THE LAW

Unanimity prevails on one proposition: Hand's influence on American law was wide and deep. Given the number of opinions and their time-span, Learned Hand could not be expected to offer a complete synthesis or appraisal of such a vast judicial panorama. Indeed, especially in the non-constitutional law domain, much of that task remains to be done. Therefore, two questions arise: Does Professor Gunther

208. Typical is the remark that "[i]n every legal province — contracts, torts, equity, conflict of laws, criminal law, evidence, admiralty, patents, copyrights, trademarks, taxation, statutory interpretation — [Hand] has shaped or reshaped the important doctrines. Everywhere in the judicial domain you can trace his handiwork." Frank, supra note 5, at 681. Hand's "influence radiated to all courts ... and thereby improved the corpus and spirit of American law." Frankfurter, supra note 5, at 2. "Most of [Hand's] suggestions have become ... modern law . . . ." GUNTHER, supra note 3, at 149.

209. See supra note 12 (varying estimates of the number of Hand's judicial opinions).


211. In addition to judicial opinions, there are "twenty-five small folio volumes of [Hand's] handwritten extensive minute-books as District Judge . . . [and Court of Appeals] memoranda . . . ." Frankfurter, supra note 5, at 1.

212. In the constitutional law arena, most attention has been devoted to Hand's First Amendment free speech views (especially in Masses and Dennis) and his theory of Supreme Court adjudication (especially as adumbrated in HAND, supra note 10). See infra note 213.

adequately confront this vast corpus of law? If not, does it really matter? Are Hand's opinions now only of "interest [to] the most avid archaeologist[?]" 214

Condemnation, on the first issue, has greeted Learned Hand. 215 Here, the assumption is that "Hand's oeuvre of judicial opinions [is] the very pith and marrow of Hand's achievements" 216 and, therefore, some depth, if not breadth, of discussion should occur. That is, an investigation "of the rather technical fields of law in which many of Hand's finest opinions are found" 217 is required. Starkly, too many of Hand's "most influential opinions" 218 are missing. Examples include: Alcoa, 219 Carroll Towing, 220 The T.J. Hooper, 221 Helvering v. Gregory, 222 Gregoire v. Biddle, 223 and United States v. Peoni. 224 Combined with other omissions, 225 the consequence is that it is impossible to gauge from Professor Gunther's scholarship why Learned Hand "was a great judge." 226 Of course, that may not matter. If Hand's opinions are relics, obsolescent legal history, rather than "durable and important," 227 then biographical narrative may suffice. But, at least on statistical data — citation of Hand's opinions by federal courts of appeals 228

214. Frankfurter, supra note 2, at 326.
215. See, e.g., Posner, supra note 1, at 513-15; Wirenius, supra note 1, at 515-16. But see Coffin, supra note 6, at 386 ("Gunther gives . . . a selective tour d'horizon of Judge Hand's work").
216. Posner, supra note 1, at 514.
217. Id. at 514.
218. Id. at 513.
221. The T.J. Hooper v. Northern Barge Corp., 60 F.2d 737 (2d Cir. 1932) (discussing the role of custom in negligence cases).
223. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) (explaining public officers' immunity from tort actions).
224. United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) (providing aider and abettor definition).
225. Posner, supra note 1, at 514 ("Federal income tax and federal criminal law . . . and Hand's theory and practice of statutory interpretation"). See also id. at 513-14 (discussing cases in supra notes 219-24).
227. Id. at 533.
228. Id. at 534-40 ("Citation Study of Learned Hand").
and reference to them in scholarly literature\textsuperscript{229} — the latter quality of being "durable and important", not the former, emerges as the correct epithet.

Despite those deficiencies, what does Learned Hand contribute? Exposure of judicial decision-making processes usually concealed from public scrutiny\textsuperscript{230} is one example. Access to confidential internal memoranda (including pre-conference memos\textsuperscript{231}), draft opinions, and private correspondence has enabled Professor Gunther to fill the void between courtroom appearances and publication of judicial opinions. How Hand arrived at a decision — writing and re-writing endless paragraphs on yellow paper, conversations with his current law clerk\textsuperscript{232} memoranda to and from judicial colleagues, and conferences — is vividly portrayed. As many as "thirteen complete versions" of an opinion might be produced.\textsuperscript{233} Here is Hand at work.\textsuperscript{234}

Substantively, the outcome of that work is displayed by Learned Hand in numerous contexts. Even without a feast of Hand's "most influential opinions"\textsuperscript{235} or discussion of whether,


\textsuperscript{230} This may no longer be correct, at least in relation to the U.S. Supreme Court. See Thomson, supra note 180, at 74 (discussing public availability of conference notes, memoranda, and draft opinions).

\textsuperscript{231} See Coffin, supra note 6, at 388 ("thirty-nine ... archival boxes [and memos] run from two to ten pages"). See also GUNTHER, supra note 3, at 291-92, 298.

\textsuperscript{232} They included Paul Bender, Ralph Collett, Archibald Cox, Ronald Dworkin, Gerald Gunther, Richard Hallet, Louis Henkin, Vincent McKusick, Lewis Meade, Arthur Robinson and Charles Wyzanski, Jr. See generally GUNTHER, supra note 3, at 140-43, 704 n.156 (discussing Hand's relationship and use of law clerks).

\textsuperscript{233} GUNTHER, supra note 3, at 620 (describing the evolution of Hand's dissenting opinion in United States v. Remington, 208 F.2d 567, 571-75 (2d Cir. 1953)). See also, e.g., GUNTHER, supra note 3, at 298 (other colleagues).

\textsuperscript{234} See generally GUNTHER, supra note 3; Coffin, supra note 6, at 387-88. See, e.g., GUNTHER, supra note 3, at 612-25 (Remington appeals).

\textsuperscript{235} Posner, supra note 1, at 513. For the cases see supra notes 219-24.
for example, Hand founded the Law and Economics Movement, some sense can be gleaned, from Learned Hand, of why Hand contributed so greatly to American law. From the “interminable flow of routine cases” — the “multitude of little cases” — Hand’s reputation, influence and impact flowed: maritime and admiralty cases; patent and copyright cases; obscenity, immigration, and criminal law cases; tort cases; statutory interpretation; and administrative law cases. Others — bankruptcy; conflict of laws; corporate and commercial law; evidence; federal jurisdiction; trademarks; and unfair competition — might easily, as Professor Gunther recognizes, be added.

Constitutional law, of course, remains. Numerically this component of cases is small: free speech; defendants’ Fourth, Fifth, and Sixth Amendment rights; due process; and

236. Compare Wirenius, supra note 1, at 515-16 (suggesting that “Hand’s decision in United States v. Carroll Towing . . . mark[ed] the beginning of the Law and Economics theoretical movement” and that United States v. Dennis applied “economic principles to legal analysis of non financial interests”) (footnotes omitted); Posner, supra note 1, at 517 (“Hand’s economic intuitions are a striking feature of his opinions”). See also Blasi, supra note 213, at 5, 11-16 (suggesting Hand as the founder of the democratic self-government theory of the First amendment).

237. GUNther, supra note 3, at 144.

238. Id. at 145 (quoting Friendly, supra note 1, at 13).


240. GUNther, supra note 3, at 291 (“a very wide range of subjects”).

241. At least compared to non-constitutional cases. But was the number so small so as to make Hand an observer of, rather than a participant in, constitutional adjudication? See supra note 205 (contrasting views of Posner and Gunther).


243. See, e.g., United States v. Coplon, 185 F.2d 629 (2d Cir. 1950) (Fourth, Fifth and Sixth amendments); United States v. Casino, 286 F. 976 (S.D.N.Y. 1923) (Fourth amendment probable cause); United States v. Kirschenblatt, 16 F.2d 202 (2d Cir. 1926) (Fourth amendment searches); United States v. Rabinowitz, 176 F.2d 732 (2d Cir. 1949) (Fourth amendment search). See GUNther, supra note 3, at 592-98. See also Frank, supra note 5, at 690 (“Hand . . . has been a doughty defender of the procedural provisions of the Constitution, whether contained in the Bill of Rights or elsewhere”); Wirenius, supra note 1, at 525-26 (“odd mixture of compassion and callousness, of sensitivity and harshness”). But see GUNther, supra note 3, at 391 (Hand’s “harsh, law-and-order remarks” in United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)).

244. Frew v. Bowers, 12 F.2d 625 (2d Cir. 1926) (1921 Revenue Act provision
the commerce clause.\(^\text{245}\) From that perspective, Hand's constitutional law "contributions" have been labelled "derivative, undistinguished, and out of the mainstream."\(^\text{246}\) However, does that characterization, which denigrates Hand to spectator status, rather than judicial participant, in constitutional adjudication and, therefore, implies a lessening in ability or importance in constitutional law debates, misrepresent the factual record? On two occasions, Hand held congressional legislative provisions unconstitutional.\(^\text{247}\) Twice he cast doubt on the constitutionality of other aspects of congressional legislation.\(^\text{248}\) Also, state legislation was not immune from Hand's declaration of unconstitutionality.\(^\text{249}\) Additionally, the Bill of Rights was invoked by Hand to render other governmental actions unconstitutional.\(^\text{250}\) Obviously, one consequence of an affirmative response is to increase the tension between Hand's public protestations to abjure judicial review and his judicial actions.\(^\text{251}\)

Prominent among that litany is Hand's First amendment free speech position. Cases, literature, and letters provide the primary resource.\(^\text{252}\) Differing interpretations of Hand's meaning and

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\(^\text{246}\) Posner, *supra* note 1, at 515.

\(^\text{247}\) A.L.A. Schechter Poultry Corp., 76 F.2d at 617; Bowers, 12 F.2d at 625. For Hand's doubts about the constitutionality of other federal legislative provisions see McComb, 177 F.2d at 137; Electric Bond & Share Co., 92 F.2d at 580.

\(^\text{248}\) Electric Bond & Share Co., 92 F.2d at 580; GUNTER, *supra* note 3, at 463-66; McComb, 177 F.2d at 137.

\(^\text{249}\) Seelig, 7 F.2d at 776.

\(^\text{250}\) See *supra* note 243.

\(^\text{251}\) Compare *infra* text accompanying notes 307-17 (Hand's jurisprudential theory) with *supra* notes 242-45 (cases).

\(^\text{252}\) See, e.g., *supra* notes 10 (literature), 242 (cases); Gunther, *supra* note 9.
intentions and debates as to whether he moved from a liberal or libertarian position to a free speech conservative emerge in the secondary literature.\textsuperscript{253} \textit{Masses}\textsuperscript{254} and \textit{Dennis}\textsuperscript{255} are the pivotal cases. In the former, Hand enjoined the New York postmaster from prohibiting \textit{The Masses}, a radical, iconoclastic, and confrontationalist magazine, from mailing its August, 1917 issue. Imbued with constitutional overtones,\textsuperscript{256} Hand construed the Espionage Act of 1917\textsuperscript{257} as encompassing only direct incitement to illegal action. This test focused on the content, not effect, of speech or words.

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution, and it would be folly to disregard the casual relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-brought acquisition in the fight for freedom . . . \textsuperscript{258}

"[E]xtraordinarily speech-protective" is Professor Gunther's conclusion.\textsuperscript{259} Within \textit{Masses}' historical context,\textsuperscript{260} that may

\begin{itemize}
\item \textsuperscript{253} See \textit{supra} note 213 (making references to scholarship in the "constitutional law domain").
\item \textsuperscript{254} \textit{Masses} Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917). Should Hand have recused himself from \textit{Masses}? In 1916, at the magazine editor's request, Hand wrote a letter "to be presented to a state legislative committee . . . defending the right of \textit{The Masses} to be circulated." GUNTHER, \textit{supra} note 3, at 154. See also \textit{supra} note 128 (judicial impropriety).
\item \textsuperscript{255} United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951). See generally infra note 277 (references).
\item \textsuperscript{256} \textit{Masses} did not reach any constitutional question. Rather, Hand "interpreted legislative purpose in the context of constitutional values . . . ." GUNTHER, \textit{supra} note 3, at 158.
\item \textsuperscript{257} Ch. 30, 40 Stat. 217. See, e.g., Rabban, \textit{supra} note 213, at 217-27 (legislative history).
\item \textsuperscript{258} 244 F. 535, 540 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d. Cir. 1917). Hand, did not agree (with Holmes) "that every argument is an 'incitement' . . . ." Hand to Frankfurter, June 8, 1951 (quoted in GUNTHER, \textit{supra} note 3, at 504. Compare Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement"). For the revival of this test in modified form see Posner, \textit{supra} note 1, at 515-16 (discussing Brandenburg v. Ohio, 395 U.S. 444 (1969)).
\item \textsuperscript{259} GUNTHER, \textit{supra} note 3, at 158.
\end{itemize}
be correct. But, even without juxtaposing Hand's direct incitement test against Justice Holmes' clear and present danger test\textsuperscript{261} to evaluate which is the most speech-protective\textsuperscript{262} four obvious flaws protrude. First, Hand decided that Congress did not prohibit the speech or language in the August 1917 issue of The Masses.\textsuperscript{263} Of course, such statutory interpretation took cognizance of constitutional values. However, Masses did not indicate or hold that Congress could not constitutionally have imposed such a prohibition. Second, Masses contains clear intimations pressing in the opposite direction. Hand's test adumbration carries the qualification "normal times" and, at least, in wartime and during insurrections Masses specifically left open the possibility that Congress may well possess constitutional power to repress or censor speech.\textsuperscript{264} Third, Hand's formulation is overinclusive: Congress could prohibit a harmless incitement, "a speaker explicitly urging violation of the law but with little realistic hope of success."\textsuperscript{265} Finally, the test is underinclusive: Masses may not have permitted laws to control an "indirect but purposeful incitement" to illegal conduct.\textsuperscript{266}

Given that perspective, how can the Dennis "puzzle"\textsuperscript{267} be resolved? Hand's "speech-restrictive" Dennis opinion not only upheld eleven Communist Party leaders' convictions and sustained congressional legislation\textsuperscript{268} against First Amendment free

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260. See supra note 213 ("constitutional law domain" references).
261. "[W]hether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). See, e.g., WHITE, supra note 38, at 412-54. See also, supra note 213 (references).
262. See generally GUNTER, supra note 3, at 707 n.232 (references analysing and comparing these tests). In addition to Hand, others consider Hand's test more speech protective. See, e.g., GUNTER, supra note 3, at 172; GREENWALT, supra note 213, at 194. Others consider Holmes' test more speech protective. See, e.g., Wirenius, supra note 1, at 517-21; John F. Wirenius, The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment, 43 DRAKE L. REV. 1, 18-24 (1994). See also supra note 38 (other Hand-Holmes comparisons).
263. In fact, Masses refers to "freedom of the press" and "censorship of the press" not free speech. 244 F. 535, 538, 543. See infra note 305 (question).
264. 244 F. 535, 538, 540, 543 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917).
265. GUNTER, supra note 3, at 160.
266. Id. at 160.
267. Id. at 603.
268. Smith Act of 1940, ch. 439, 54 Stat. 670 (crime "to knowingly or willfully advocate . . . the duty, necessity, desirability, or propriety of overthrowing any Gov-
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speech challenges. It "restated and diluted" the Holmes' clear and present danger test. Here, Hand's Dennis formula — a "utilitarian calculus" — is: "[Courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Consistency — that "hobgoblin of little minds" demands that Masses and Dennis be reconciled. But, can it be done? An easy explanation relies on precedent. Professor Gunther, echoing Hand, postulates a change between Masses and Dennis: movement from a protective to restrictive free speech philosophy required by federal judges' obedience to Supreme Court precedent. Changes occur in the law but not judges' personal predilections. Hand, from 1909 to 1951 remained a liberal or libertarian. However, Hand was a creative judge and, as Learned Hand concedes, Dennis reshaped previous precedents. Hand's metamorphosis from a liberal to a conservative can, therefore, be postulated. However, assume constitutional creativity of the Dennis variety falls within the parameters of Professor Gunther's notion of precedent. Convincing doubts have been raised impugning the correctness of Hand's application of his Dennis formula. Given the real circumstances, hindsight's

269. GUNTHER, supra note 3, at 599, 603. On Dennis see supra note 213 (references); Wirenius, supra note 262, at 36-42.
270. Wirenius, supra note 262, at 37.
271. Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950) (quoted in GUNTHER, supra note 3, at 600) (adopted in Dennis v. United States, 341 U.S. 494, 510 (1951)). See also Posner, supra note 1, at 516-17 (explaining test). This economic analysis or approach — "balancing" or "trade-offs" — to ascertain the scope of constitutional rights is examined in Posner, supra note 1, at 516-17; Wirenius, supra note 262, at 37-8.
272. Ralph W. Emerson, Self-Reliance, THE SELECTED WRITINGS OF RALPH WALDO EMERSON 145, 152 (Brooks Atkinson ed., 1940) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines").
273. See generally GUNTHER, supra note 3. See also id. at xvi ("Liberalism for Hand primarily meant scepticism and openmindedness").
274. See supra note 198.
275. See supra note 269.
is not necessary,\(^{278}\) to recognise that this test could easily have been utilized to justifiably sustain an opposite result in *Dennis*. Especially when combined with the *Masses'* flaws, Hand emerges as a conservative who became more conservative. Indeed, Hand conveyed a similar self-appraisal: "I am a conservative among liberals and a liberal among conservatives."\(^{279}\)

V. PHILOSOPHY

Complexity is also camouflaged beneath Hand’s seemingly unambiguous philosophic demeanor. Basic postulates are clearly identified by *Learned Hand*: unabashed skepticism, fervent opposition to absolutes, democratic faith, judicial deference and restraint. Letters, speeches, and articles constitute the corpus from which Professor Gunther demonstrates and enunciates those ideological commitments.\(^{280}\) More, however, is involved. Again, consistency\(^{281}\) does not prevail. An initial example is Hand’s passionate devotion to a relativistic position,\(^{282}\) an “intolerance of absolutes” combined with a belief that “no logically unchallengeable truths” existed.\(^{283}\) But, does not one absolute premise


279. Letter from Hand to Frank W. Hallowell (Jan. 12, 1920) in GUNTER, supra note 3, at 352. Given the possibility of Hand’s wealth (see supra notes 61-69) Hand’s lifelong conservatism may not be surprising. But see GUNTER, supra note 3, at 664 (suggesting Hand was still a liberal in 1958).

280. See supra notes 9-10. See also text accompanying supra notes 77-92; GUNTER, supra note 3, at 52 (“a mix of conservatism and innovativeness . . . legal traditions . . . must be used ‘flexibly’ . . . confined but not uncreative . . . ‘orderly change’”). Here, there is neither routine nor revolution.

281. See supra note 272 (“hobgoblin”).


283. GUNTER, supra note 3, at xvi, 36, 325 (“usual aversion to simplistic absolutes”). See also Gunther, supra note 7, at 45 (“Hand’s ultimate faith — that ‘THERE ARE NO ABSOLUTES’”). See also Posner, supra note 1, at 532 (arguing that Hand was a “philosophical” skeptic who considered “that no moral conviction can be objectively true” and not a “common sense” skeptic who believed such objective truths existed but that they could not be discovered).
— Hand's dismissal of all absolutes — remain? One response is to soften Hand by converting him into a pragmatic skeptic.284 Hand seems to have taken, or at least to have been aware of, a different route by, for example, confirming his complete commitment to scepticism: "[A]s a consistent sceptic, I must be sceptical as to the supreme value of scepticism, and that too I shall try to be."285 Occasionally, even Hand wondered: did he push his extreme skepticism "too far"?286

Combined with judicial independence, the appointive, rather than elective, nature of federal judicial office,287 and faith in democracy,288 Hand's skepticism led to his restrictive conception of the courts' role, especially in constitutional cases.289 Restraint and deference to legislatures, especially congressional legislation was required and, perhaps, constitutionally mandated.290 Here, via Thayer,291 is the topic most commonly as-

284. For example, Judge Posner:
   A consistent philosophical skeptic would have to be skeptical of his own skepticism . . . . But when used in a more informal sense, as the denial of certain dogmas, skepticism - better called 'pragmatism' because it denies metaphysical truth rather than the local, practical, always revisable truths of science and of everyday life - does describe significant elements of Hand's judicial practice.
   Posner, supra note 1, at 530. See generally id. at 528-32.

285. Letter from Hand to Bernard Berenson (Jan. 8, 1950) quoted in GUNTHER, supra note 3, at 582. See also Powell, supra note 8, at xii ("Skepticism is my only gospel, but I don't want to make a dogma out of it") (statement attributed to Hand).

286. GUNTHER, supra note 3, at 52 (utilizing letter of March 26, 1958 from Hand to Berenson). See also infra note 313.

287. See supra note 165. However, democratic elements (including political accountability) are injected into federal judicial office and courts, for example, by Senate participation in the appointment process; impeachment and removal by Congress; congressional control and regulation of the number of judges, jurisdiction of courts, judicial budgets; and presidential enforcement of judgments. For references see Thomson, supra note 93, at 73 nn.5 & 8, 78 n.27, 83-88. See also Eugenia F. Toma, Congressional Influence and the Supreme Court: The Budget as a Signaling Device, 20 J. LEGAL STUD. 131 (1991) (providing an empirical examination of effect of congressional control of Supreme Court's budget).

288. See, e.g., GUNTHER, supra note 3, at 385 (discussing Hand's "belief in the democratic process and the "principle of counting heads"), 432-34 (Hand's March, 1932 speech "Democracy: Its Presumptions and Realities" reprinted in Dillard, supra note 9, at 90-102). But see Posner, supra note 1, at 519 ("Hand's ultimate devotion was to liberty, not to democracy"). On the basis of Hand's letters and speeches, in GUNTHER, supra note 3, that assertion may be incorrect. See also Blasi, supra note 213, at 5, 11-16 (Hand is the founder of the democratic self-government theory of the First Amendment).

289. For Hand's non-constitutional creativity see supra note 198.

290. GUNTHER, supra note 3, at 655 (finding no constitutional basis, only practical
associated with Hand. Many, of course, did not and do not agree with him. 293 In 1908, Hand argued that courts must refrain from invalidating legislation dealing with economic and property matters. In this realm, these were problems “for exclusive consideration, and for exclusive determination, by the legislature,” not the Supreme Court. 294 Then came Meyer 295 and Pierce. 296 Other liberals, 297 at least where legislation threatened civil liberties rather than laissez-faire economics, 298 embraced judicial enforcement of substantive due process. However, Hand did not abandon restraint and antipathy to courts declaring legislation unconstitutional under the Fourteenth amendment. 299 Consequently, Hand has been berated for “oppos[ing]


291. See supra note 88.
292. See also supra part IV (discussing Hand’s influence in non-constitutional arenas).
293. See, e.g., GUNther, supra note 3, at 662 (“reception of Hand’s message proved almost universally negative”); Posner, supra note 1, at 518-20. See also supra note 206 (criticism). However, conservatives and liberals often reverse their positions regarding judicial restraint. See, e.g., GUNther, supra note 3, at 375-86 (liberals supporting due process judicial activism in 1923 and 1925 after previously advocating restraint); James A. Thomson, Making Choices: Tribe’s Constitutional Law, 33 WAYNE L. REV. 229, 240 n.48 (1986) (identifying at least three changes).
294. GUNther, supra note 3, at 121 (quoting Hand, supra note 78, at 507).
295. Meyer v. Nebraska, 262 U.S. 390 (1923) (holding a state law forbidding primary schools to teach a foreign language to be an unconstitutional violation of Fourteenth amendment due process clause).
296. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding a state law banning private schools to be an unconstitutional violation of Fourteenth amendment due process clause).
297. But see supra text accompanying notes 253-55, 272-79 (examining alternative characterizations of Hand).
298. See supra note 84 (dichotomy or spectrum of property, economic, and personal rights and liberties).
299. See GUNther, supra note 3, at 375-86. Also, Professor Thomas Reed Powell and Morris Cohen remained “consistent” in resisting judicial due process clause activism whether to protect liberal civil liberties values (Meyer and Pierce, supra notes 295-96) or economic laissez-faire (Lochner, supra note 29). Letter from Walter Lippmann to Hand (June 1925) in GUNther, supra note 3, at 382. Lippmann was one of the changing liberals. He was “getting steadily antidemocratic [and] . . . want[ing] to confine the actions of majorities.” Letter from Walter Lippmann to Hand, GUNther, supra note 3, at 382. See also RONALD STEEL, WALTER LIPPMANN
'liberal' substantive due process decisions such as *Pierce v. Society of Sisters* and *Meyer v. Nebraska*" and for failing to see "the First amendment values implicit in these free association decisions" in 1923 and 1925.\(^{300}\) Indeed, Professor Gunther suggests that Hand even "went beyond Holmes in narrowing the function of courts" under the due process clause.\(^{301}\) Justice Holmes had dissented in *Meyer* but not in *Pierce*. Is this criticism of Hand warranted or justified? Other than obvious retorts concerning democracy\(^{302}\) and the debate over whether courts have helped or hindered civil rights,\(^{303}\) revisionist history applauds Hand's stance. *Meyer* and *Pierce* are perceived as similar to *Lochner*: all three decisions adumbrated a constitutional freedom from governmental power and control. It was that freedom, laissez-faire in social policies, not intellectual or religious liberty, that *Meyer* and *Pierce* enhanced.\(^{304}\)

Initially, as *Learned Hand* indicates, Hand conceded some scope for courts to enforce the Bill of Rights and Fourteenth amendment's due process clause. Freedom of speech and press clauses of the First amendment were the obvious Bill of Rights' examples.\(^{305}\) Under the due process clause courts could act, but "only in the extremist cases."\(^{306}\) From that position, Professor Gunther considers, Hand moved. During "the cool, moonlit evenings of February 4, 5, and 6, 1958," while delivering the Oliver Wendell Holmes Lectures at Harvard Law School, Hand

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\(^{300}\) Wirenius, *supra* note 1, at 521 (footnotes omitted).

\(^{301}\) GUNTHER, *supra* note 3, at 121 (referring to Hand, *supra* note 78).

\(^{302}\) See *supra* note 288 and infra notes 327-28.


\(^{305}\) See *supra* notes 236 (democratic First amendment theory), 242 (First amendment cases). Was *Masses* a press freedom, rather than a free speech, case? See *Masses* v. Patten, 244 F. 535, 538 ("freedom of the press"), 543 ("censorship of the press") (S.D.N.Y. 1917).

\(^{306}\) Letter from Hand to Walter Lippmann (June 10, 1925), GUNTHER, *supra* note 3, at 383. An example may have been in *McComb v. Frank Scerbo & Sons*, 177 F.2d 137, 140-41 (2d Cir. 1949) ("a result so shocking to my notions of fair play").
"preached an extreme version of judicial self-restraint." It was "a more extreme position than he had taken earlier." For example, as a general rule Bill of Rights' provisions were "admonitory or hortatory, not definite enough to be guides" for courts exercising the power of judicial review in specific cases. Only three instances warranted courts enforcing the Constitution: federal separation of powers disputes, federalism controversies, and Bill of Rights and due process cases involving moral turpitude. Precisely at this juncture is the crucial conundrum: to what extent, under Hand's Holmes Lectures, is the Bill of Rights non-justiciable? Others have advanced exactly the reverse proposal: non-justiciability for separation of powers and federalism and a judicially enforceable Bill of Rights. Two responses to the Hand proposal conundrum are available. Narrowest is the confinement of courts to First amendment free speech disputes involving congressional or presidential dishonesty. Justiciability involving the Fourteenth

307. GUNTHER, supra note 3, at 654, 665. See also id. at 52 (Hand's "most extreme restatement"), 657 ("extreme judicial restraint"), 665 (resemblance, but exceed, prior statements with "extreme, stark position"), 672 ("bleakness, pessismism, and extremism of Hand's final major statement"). For a general discussion of these Holmes lectures (published as THE BILL OF RIGHTS, supra note 10) and their preparation see GUNTHER, supra note 3, at 52-53, 652-72. See also supra note 206 (book reviews). For continuity in Hand's approach see Robert G. Pugh, Jr., A Lifetime Preoccupation: Learned Hand and Judicial Review (unpub. paper, Stanford Law School, 1979) (referred to in GUNTHER, supra note 3, at 782 n.110); GUNTHER, supra note 3, at 661 (1908, 1913, 1937, and 1957). Indeed, Hand did not alter his position even in response to informed criticism such as Frank, supra note 5, at 697-98; Paul A. Freund, Competing Freedoms in American Constitutional Law, in Conference on Freedom and the Law, 13 U. CHI. CONFERENCE SERIES 26 (1953). But see infra text accompanying notes 316-18, 322-25 (suggesting HAND, supra note 10 might be an important "process" exception to Hand's general non-justiciability thesis).

308. HAND, supra note 10, at 34. But see Wirenius, supra note 1, at 521-23 (contrasting Hand's expertise in interpreting abstruse statutes).

309. See supra note 290 (practical, not constitutional, warrant).

310. HAND, supra note 10, at 3, 14-15, 29.

311. Id. at 13, 32-33, 47.

312. Id. at 61.

313. See text accompanying supra note 286. See also GUNTHER, supra note 3, at 52 (Hand’s post-Holmes Lectures doubts about “whether he had carried Thayer’s teachings too far”).

amendment's due process clause is completely abandoned. A wider scope for judicial review is intimated by Learned Hand when Professor Gunther articulates "Hand's startling thesis" as rendering the Bill of Rights' and Fourteenth amendment's "vague" provisions "essentially unenforceable by the courts." "[E]ssentially" provides the clue. Hand's lectures reveal the rest. Under those provisions, judges could intervene where the legislative process had not "impartially" or "honest[ly]" chosen between competing interests. Importantly, Hand does not advocate that judges balance incommensurable values. Legislatures had performed that task. Rather, the challenge was to perform a more appropriate judicial function: has the legislative balancing been performed in good faith? If not, courts might declare the statute or statutory provision unconstitutional.

Given that suggestion two questions emerge: Was Hand's judicial review thesis extreme? Clearly, Professor Gunther responds affirmatively. However, others, since Hand, but without attribution to him, have gone further. From their perspective rights fail to assist liberals' agenda and, therefore, even the concept of rights must be trenchantly dismissed. Further:

315. "[I]n the entire Bill of Rights, only the Free Speech Clause of the First amendment should be justiciable at all, and then only if Congress or the Executive had not acted in good faith in balancing the competing values of liberty and or-der ... [Hand] denied justiciability to the Due Process Clause of the Fourteenth amendment ... ." Posner, supra note 1, at 518. But see infra note 317 (other provisions but only in relation to statutes).

316. GUNTHER, supra note 3, at 656.

317. Two passages are important:

The controversy may arise over a statute covering the occasion, and the question [under the First amendment's free speech clause] will then be the same as on occasions when the 'Due Process Clause' is involved. The standard set should prevail unless the court is satisfied that it was not the product of an effort impartially to balance the conflicting values.

Secondly:

[A]t times [the other provisions of the first eight amendments] may present issues not unlike those that arise under the First amendment and the 'Due Process Clause,' and in such cases [Hand could not] see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

HAND, supra note 10, at 61, 65-66.

318. See supra note 307.

319. In addition to supra note 307, see GUNTHER, supra note 3, at 656 ("Hand's startling thesis, clearly outside the mainstream of modern legal thought").

320. An overview of this Critical Legal Studies position is in William Fisher, The
ther, there has been an on-going debate, motivated by normative and empirical concerns, as to whether and, if so, to what extent there should be judicial enforcement of constitutional rights. Secondly, was Hand's theory of judicial review the founder of or, at least, a participant in the process-perfecting school of constitutional jurisprudence? Close attention to the exceptions enunciated in Hand's Holmes Lectures seems to warrant serious consideration of a positive response. If so, "Hand's contribution to constitutional thought" cannot be easily dismissed as "slight."

Assume that the foregoing hypothesis — Hand's lectures contain an expansive and, perhaps, active role for courts in constitutional law — is incorrect. Why, therefore, did Hand advocate judicial deference and non-justiciability? Learned Hand discloses the usual litany: the counter-majoritarian nature of judicial review; judges' lack of expertise in the substantive matters being dealt with; Thayer's influence; and an individual's ability to participate in a society's decisionmaking process. But, despite contrary assertions, Hand's principal justification was democracy. "[C]ounting heads," despite its "flaws," was the "demo-

Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights, A CULTURE OF RIGHTS 266, 292-95 (Michael J. Lacey & Knud Haakonsen eds., 1991). For criticisms by minority scholars, including critical race theorists, see Thomson, supra note 180, at 82 n.100 (references).

321. See Thomson, supra note 180, at 82 n.96 (references). See also supra note 303 (empirical debate).


323. See supra note 317 (quoting exceptions).

324. The fleeting reference to those lectures by Professor Ely points in the opposite direction. ELY, supra note 322, at 232 n.18.

325. Posner, supra note 1, at 520. See also id. at 519 ("The Bill of Rights . . . not a work of original political or legal theory"). Compare supra note 307 (contrasting traditional view of continuity in Hand's deferential judicial review approach with the possibility that HAND, supra note 10, contains an important "process" exception).

326. Posner, supra note 1, at 519 ("Hand's ultimate devotion was to liberty, not to democracy"). But see supra note 288.

cratic process" which "negated" judicial protection of "liberal values" via substantive due process decisions. Even his concessions to judicial review, in this context, reinforced this emphasis. In the end, Hand was a democrat.

VI. CONCLUSION

Enticing the "real" Hand out of the myths and shadows is an alluring enterprise. Because of Learned Hand: The Man and the Judge, that task is easy and pleasurable. Availability of copious materials and Professor Gunther's analyses are the necessary ingredients. Consequently, the long biographical adventure is not merely intrinsically interesting. It also assists in ascertaining Hand's contributions to the law and legal theory and in postulating explanations for his judicial behavior. Combining those elements contributes to even more important on-going debates: enunciation of criteria to determine judicial greatness; the significance of Hand's contribution to American law and jurisprudence; and assessment of the roles and functions of courts, especially federal courts and the U.S. Supreme Court.

A larger panorama, therefore, emerges. Again, Learned Hand is revealing. Vividly illustrated is law's influence and impact on people, organizations, and society. Even in that perspective, one person — Learned Hand — makes a difference. From Professor Gunther, Learned Hand, and Judge Hand the message is clear: "Go ye and do likewise."

328. Gunther, supra note 3, at 382-83, 400, 433-34.
329. See supra notes 288, 317. For judicial review in other contexts see supra notes 310-11. See also Gunther, supra note 3, at 700 n.71 (Hand's Harvard Law School "class notes in Thayer's course . . . reveal how much emphasis Thayer gave to the proper role of courts in a democratic society — and how carefully [Hand] recorded [Thayer's] lectures.")
I. INTRODUCTION

The United States Constitution, through the Fourth Amendment, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The question of what constitutes an unreasonable search or seizure has been reviewed time and again by the United States Supreme Court, and recently in Minnesota v. Dickerson. While warrantless searches have been deemed presumptively unreasonable, the Court has recognized certain well-defined exceptions to the requirement that a judicial warrant be obtained prior to a search. The Court in Dickerson upheld the validity of the warrantless "stop and frisk" protective search of Terry v. Ohio and proceeded to expand Terry by adopting the controversial "plain feel" or "plain touch" doctrine.

According to Terry, the protection and safety of law enforcement officers is paramount to the intrusion on individual rights.

1. U.S. CONST. amend. IV.
6. For criticism of the plain feel doctrine, see Kevin A. Lantz, Search and Seizure: "The Princess and the 'Rock": Minnesota declines to extend "Plain View" to "Plain Feel", 18 U. DAYTON L. REV. 539 (Winter, 1993); David L. Haselkorn, Comment, The Case Against a Plain Feel Exception to the Warrant Requirement, 54 U. CHI. L. REV. 683 (Spring, 1987).
incurred by a stop and frisk search. This decision is premised on a long-accepted balancing test set forth by Justice Harlan in *Katz v. United States.* Under *Katz,* determining the constitutionality of a search or seizure requires a balancing of the governmental interest in law enforcement against the intrusion into a person's privacy interests. The Court in *Dickerson* approached the Fourth Amendment in a similar manner.

*Dickerson* involved a *Terry* stop and frisk wherein the officer performing the search discovered illegal drugs while feeling the outside of respondent Dickerson's jacket pocket. The officer seized crack cocaine which later became the subject of a suppression hearing. The issue of whether contraband discovered through the sense of touch can be constitutionally seized during a *Terry* frisk was debated up through the Minnesota Supreme Court. That court held that it is unconstitutional for police officers to rely upon the plain feel doctrine as an extension of the "plain view" doctrine in order to seize contraband discovered during a legitimate *Terry* frisk.

The United States Supreme Court reversed the Minnesota Supreme Court's rejection of the plain feel doctrine while determining that the doctrine itself has a legal basis arising not only from the plain view doctrine but also from *Terry.* The plain feel doctrine, as accepted by the Court, allows a police officer to seize "immediately apparent" contraband during a *Terry* stop so long as the scope of *Terry* is not violated. As will be shown, this holding has validated a rather controversial doctrine which expands the defined boundaries of

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8. See infra note 23 and accompanying text.
10. See id. at 354, 361.
11. See id. at 355, 361.
13. Id.
14. Id.
15. Id. at 2134.
16. Id.
18. *Dickerson,* 113 S. Ct. at 2137.
19. Id.
20. Id.
Terry and substantially boosts law enforcement efforts in discovering narcotics violations.

Section II of this casenote discusses the background of the Fourth Amendment doctrines which were instrumental in bringing the Court to its decision in Dickerson. Section II traces Dickerson back to its roots in Katz and Terry. Section II also reviews the plain view doctrine in depth and summarizes the plain feel doctrine as an extension of plain view.

Section III of the casenote reviews the facts, holdings, and lower court opinions of Dickerson. Section IV analyzes the Dickerson majority opinion, in view of the prior holdings which influence it, and the opinion's effect on subsequent lower court decisions. Section V examines the concurring opinion, and Section VI discusses the brief dissent. Section VII concludes with the opinion that law enforcement should welcome the Dickerson opinion because the decision makes seizure of narcotics significantly easier. The opinion will probably not be heralded, however, by civil libertarians who doubtless will view Dickerson as further eroding the constitutional protections provided by the Fourth Amendment.

II. BACKGROUND

A. Katz, Terry and Their Offspring

The Fourth Amendment to the United States Constitution was interpreted by the United States Supreme Court in Katz as making per se unreasonable a warrantless search or seizure.\(^\text{21}\) Katz determined that "the Fourth Amendment protects people, not places."\(^\text{22}\) In his concurring opinion, Justice Harlan promulgated a two-prong test for what constitutes a "search" within the meaning of the Fourth Amendment: a person must have an actual expectation of privacy, and that expectation must be one that society recognizes as "reasonable."\(^\text{23}\) In Katz, electronic surveillance of a person making a telephone call inside a telephone booth was deemed to be a search and seizure because the person had a reasonable expectation of privacy inside the booth.\(^\text{24}\) Katz

\(^{22}\) Id. at 351.
\(^{23}\) Id. at 361 (Harlan, J., concurring).
is particularly important to an analysis of Dickerson because Katz emphasizes the need for an objective standard. The Fourth Amendment bars only unreasonable searches and seizures. Katz determined that unreasonable searches are those which intrude upon a reasonable expectation of privacy; hence, Katz supports an objective analysis.

The Katz Court made another significant determination when it recognized that the warrant requirement for a search was subject to certain exceptions which would be deemed reasonable.\(^{25}\) It is preferable to obtain a warrant prior to searching;\(^{26}\) however, Katz recognized that in certain circumstances, obtaining a warrant is not always practical.\(^{27}\) To be justified, then, the failure to obtain a judicial warrant must be reasonable.\(^{28}\)

The exception upon which Dickerson is based is the stop and frisk, which was held constitutional in Terry.\(^{29}\) Terry used Justice Harlan’s balancing test in Katz as a basis for deciding that a stop and frisk for weapons is a reasonable exception to the warrant requirement of the Fourth Amendment.\(^{30}\)

The Terry Court balanced the governmental interest in protecting its law enforcement personnel against the intrusion on an individual’s expectation of privacy in what he conceals.\(^{31}\) In holding that a stop and frisk is a reasonable intrusion into an individual’s privacy,\(^{32}\) Terry recognized an additional exception to the warrant requirement.\(^{33}\) This exception states that if a police officer observes conduct which reasonably leads him to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, the officer may conduct a carefully limited search of the outer clothing of the persons in an attempt to discover weapons which might be used to assaults him.\(^{34}\) Under Terry there is a dual inquiry: “whether the

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25. Id. at 357.
26. See id.
27. Id. at 358 n.21.
28. Id. at 358.
30. Id. at 9.
31. Id. at 21-23.
32. Id. at 24.
33. Id. at 20-23.
34. Id. at 30.
officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.\textsuperscript{35}

Regarding the first prong of the test, in order to stop and frisk a person, \textit{Terry} requires officers to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."\textsuperscript{36} As for the second criterion, \textit{Terry} confines the scope of the search to a patdown reasonably designed to discover weapons.\textsuperscript{37} The Court then applied this inquiry to the facts in \textit{Terry}. The police officer in \textit{Terry}, after continuously observing actions on the part of the defendants which the officer believed to be "casing a store," stopped them and asked for their identification.\textsuperscript{38} The officer then patted down the suspects' outer clothing for weapons.\textsuperscript{39} Finding a revolver in Terry's overcoat,\textsuperscript{40} the officer seized it.\textsuperscript{41} The Court held this to be a permissible search\textsuperscript{42} because the officer "had observed enough to make it quite reasonable to fear that they were armed"\textsuperscript{43} and the officer "did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons."\textsuperscript{44}

The Court's decision in \textit{Terry} added a significant exception to the Fourth Amendment's warrant requirement because, under \textit{Terry}, only reasonable suspicion is required for a police officer to stop a suspect and perform a frisk. Previously, exceptions required either hot pursuit, exigent circumstances, or an automobile stop based on probable cause.\textsuperscript{45} It is important to note that \textit{Terry}, which used a reasonableness inquiry, is inconsistent with \textit{Katz}, which said only reasonable exceptions are constitutional.\textsuperscript{46} It should be noted also that \textit{Terry} expressly limited the

\textsuperscript{35} Id. at 20.
\textsuperscript{36} Id. at 21.
\textsuperscript{37} Id. at 29.
\textsuperscript{38} Id. at 6-7.
\textsuperscript{39} Id. at 7.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 30.
\textsuperscript{43} Id. at 28.
\textsuperscript{44} Id. at 29-30.
\textsuperscript{45} See supra note 4.
\textsuperscript{46} Katz v. United States, 389 U.S. 347, 357 (1967).
scope of the patdown search to one based on a fear that a suspect is concealing a weapon in order to retrieve such weapon.47

In a decision announced on the same day as Terry, the Court in Sibron v. New York48 expanded on the protective search exception. In Sibron, heroin found while reaching into a suspect's pocket during a Terry frisk was held inadmissible49 because there was no reasonable suspicion for the initial stop.50 The Court stated arguendo that even if there were adequate grounds to search for weapons, the heroin would still be inadmissible51 because if a protective search goes beyond what is necessary to determine if the suspect is armed, the search is no longer valid under Terry.52 Sibron explored the limits of Terry and determined that an officer may not extend a Terry frisk beyond what was initially justified, the basis for reasonable suspicion. This language becomes important in analyzing Dickerson because there the Court reiterated and applied the Sibron holding so that if contraband is discovered during a Terry frisk, it can be seized only if the bounds of Terry are not breached.53

A later case, Ybarra v. Illinois,54 further examined the scope of the Terry protective search. In Ybarra, the police had a legitimate warrant authorizing the search of a tavern and its bartender for narcotics.55 The subsequent frisk of a bar patron was held unconstitutional because the "narrow" scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.56 Thus, Terry also does not permit the frisk of a person simply because of where the person happens to be; instead, a frisk is valid under Terry only if the person's actions arouse reasonable suspicion. This decision

47. Terry, 392 U.S. at 29.
50. Sibron, 392 U.S. at 63-64.
51. Id. at 65.
52. Id. at 65-66.
55. Id. at 88.
56. Id. at 94.
was not an expansion of Terry principles as much as a demarcation of the boundaries of whom may be frisked constitutionally. It is significant to note, however, that Ybarra is another case which supports using a reasonableness standard.\textsuperscript{57}

Finally, in Michigan v. Long,\textsuperscript{58} the Court expanded Terry to allow police officers to “frisk” an automobile coincident with a lawful Terry stop.\textsuperscript{59} In Long, the police frisked the defendant and, after finding no weapons, looked inside the defendant’s car and saw something protruding from under the front seat armrest.\textsuperscript{60} Lifting the armrest, the police officer discovered marijuana.\textsuperscript{61} The Court, in holding the marijuana lawfully seized, determined that “the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible” if the police officer possesses sufficient reasonable suspicion to justify a Terry intrusion.\textsuperscript{62} In addition, the Court stated that “if, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.”\textsuperscript{63} Thus, in Long, the Court not only expanded the Terry search to the automobile but also recognized that contraband found while police conduct a lawful weapons search may be lawfully seized. This language was significant to the Court’s decision in Dickerson.

\textsuperscript{57} See id. at 92-93. The Ybarra Court stated, in support of the reasonableness standard of Katz and Terry, that “[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous.” Id.


\textsuperscript{59} Id. at 1049.

\textsuperscript{60} Id. at 1036.

\textsuperscript{61} Id.

\textsuperscript{62} Id. at 1049.

\textsuperscript{63} Id. at 1050. The Court relied also on its holding in New York v. Belton, 453 U.S. 454 (1981) (finding that the area within the arrestee passenger’s immediate control — from which he could gain control of a weapon — includes an automobile’s passenger compartment).
B. The Plain View Doctrine as an Exception to the Warrant Requirement

Acceptance of the plain feel doctrine has, in most cases, been couched as a logical extension of the plain view doctrine. Thus, a review of the plain view doctrine is helpful here. In *Coolidge v. New Hampshire*, Justice Stewart, writing for a plurality of the Court, said that "it is well established that under certain circumstances the police may seize evidence in plain view without a warrant." Justice Stewart then set forth three criteria for determining if an object is in plain view and thus may be seized: (1) the police must lawfully make an initial intrusion; (2) the discovery of the item in plain view must be inadvertent; and (3) the item's incriminating character must be "immediately apparent."

Subsequently, a plurality in *Texas v. Brown* decided that the *Coolidge* plurality did not constitute binding precedent. The Court in *Brown* also criticized the "immediately apparent" wording of *Coolidge*, saying it was "an unhappy choice of words." In the *Brown* Court's view, the police need not "know" an item is contraband in order to seize it; instead, the facts available to the officer only must give rise to probable cause that the item is incriminating.

The *Brown* plurality view, stating that probable cause is required to seize an object in plain view, was expressly upheld by a majority of the Court in *Arizona v. Hicks*. Justice Scalia noted that probable cause is not required for all seizures "if, for exam-

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67. *Id.* at 470.
68. *Id.* at 466.
70. *Id.* at 737.
71. *Id.* at 741.
72. *Id.*
73. *Id.* at 742.
ple, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime.\textsuperscript{75}

The Court revisited \textit{Coolidge} and \textit{Brown} in \textit{Horton v. California}\textsuperscript{76} where Justice Stevens and a majority of the Court, contrary to \textit{Brown}, determined that \textit{Coolidge} is indeed binding precedent.\textsuperscript{77} In \textit{Horton}, the Court also decided that the second criteria of \textit{Coolidge}, inadvertency, is not essential for an officer to seize an item in plain view.\textsuperscript{78} Thus, presently the plain view doctrine requires only that the initial intrusion be lawful and that the police have probable cause to believe an item is incriminating before it may be seized without a warrant.

The plain view doctrine was also addressed in \textit{Illinois v. Andreas}.\textsuperscript{79} In that case, a customs officer opened a metal container that Drug Enforcement Administration agents determined contained smuggled marijuana.\textsuperscript{80} After a "controlled" delivery, the agents arrested the defendant-addressee and seized the contraband in the container.\textsuperscript{82} The Court in \textit{Andreas} upheld the seizure under the plain view doctrine, stating that "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost."\textsuperscript{83} Thus, since customs had lawfully opened the container, the agents were lawfully in a position to view the contents, and the plain view doctrine applied.\textsuperscript{84} Analogizing contraband to objects physically within the police's plain view was particularly important to the Court in \textit{Dickerson} in accepting the plain feel extension of the plain view doctrine.

\textsuperscript{75} Id. at 327-28.
\textsuperscript{76} Horton v. California, 496 U.S. 128 (1990).
\textsuperscript{77} Id. at 136.
\textsuperscript{78} Id. at 137.
\textsuperscript{80} Id. at 767.
\textsuperscript{81} Once contraband is discovered, usually by a common carrier, drug enforcement officials are notified. These officials then authorize delivery of the container to the addressee. When the owner appears to take delivery, he is arrested and the container with contraband is seized. Id. at 770 (quoting United States v. Bulgier, 618 F.2d 472, 476 (7th Cir.), cert. denied, 449 U.S. 843 (1980)).
\textsuperscript{82} Id. at 767.
\textsuperscript{83} Id. at 771-72.
\textsuperscript{84} Id. at 769-72.
C. The Plain Feel Doctrine as an Extension of Plain View

The United States Supreme Court in *Dickerson* asserted that "most state and federal courts have recognized a so-called 'plain feel' or 'plain touch' corollary to the plain-view doctrine." 85 However, pre-*Dickerson*, only five federal circuits and three state courts had expressly or impliedly adopted the doctrine, while seven state courts rejected it. 86 The courts that have adopted plain feel generally accept it as a logical extension of the plain view doctrine. There is general agreement that the officer must be in a lawful position to first feel the object, 87 but courts disagree over how certain the officer must be that the object he or she feels is contraband or evidence of a crime. 88

Early cases accepted plain feel for specific circumstances, 89 but the decision in *United States v. Williams* 90 is generally regarded as the cornerstone for the plain feel exception. During a *Terry* stop, the defendant Williams "shove[d] a brown object underneath his leg." 91 The police officer felt the bag with both hands and said he could feel "rolled-up objects" that "felt like plastic baggies." 92 Upon opening the paper bag, the officer found baggies containing heroin. 93 In upholding the seizure of

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86. Id. The federal circuits recognizing a plain feel exception to the warrant requirement are the second, fourth, fifth, eighth, and District of Columbia. California, Delaware, and Wisconsin state courts have accepted plain feel, while Arizona, Illinois, Minnesota, New York, Oklahoma, Pennsylvania, and Washington have declined. 87. See *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), cert. denied, 112 S. Ct. 1975 (1992); *United States v. Norman*, 701 F.2d 295, 297 (4th Cir. 1983); *United States v. Coleman*, 969 F.2d 126, 131 (5th Cir. 1992); *United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987).
88. See, e.g., *Williams*, 822 F.2d at 1185 ("The information in 'plain view' must be good enough to eliminate all need for additional search activity."). But see *State v. Guy*, 492 N.W.2d 311, 317 (Wis. 1992) (stating that evidence sensed through touch which gives an officer probable cause to believe the object is contraband is sufficient for seizure under plain touch doctrine), cert. denied, 113 S. Ct. 3020 (1993).
89. See *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981) (finding that the contents of a closed container were readily discernible by feeling the container and thus were in plain view); *People v. Chavers*, 658 P.2d 96, 102 (Cal. 1983) (holding that feeling a gun in a shaving kit gave an officer as much meaningful knowledge as if the container had been transparent).
90. *Williams*, 822 F.2d at 1174.
91. Id. at 1176.
92. Id. at 1177.
93. Id.
the heroin, the D.C. Circuit considered the principles of Terry\textsuperscript{94} and Long\textsuperscript{95} and created a plain touch exception based on the plain view doctrine.\textsuperscript{96}

Williams set forth a three-part inquiry for the plain touch doctrine which is similar to the plain view doctrine requirements. First, the officer must be legally authorized to touch the container;\textsuperscript{97} second, the touching is limited to the initial contact with the container, that is the container cannot be manipulated;\textsuperscript{98} and third, the lawful touching must convince the officer to a reasonable certainty that the container holds contraband or evidence of a crime.\textsuperscript{99} The first two inquiries are similar to the requirements of the plain view doctrine; however, the third prong of Williams requires a higher degree of certainty than probable cause.\textsuperscript{100} Later decisions of other jurisdictions have accepted the Williams test\textsuperscript{101} while some courts have required that the officer have only probable cause to believe the item is incriminating before it can be seized.\textsuperscript{102} The Supreme Court, in granting certiorari in Dickerson, resolved this disagreement between the different state and federal courts by agreeing with Williams that a higher standard than probable cause is required for seizure by plain touch.

III. FACTS AND LOWER COURT HOLDINGS

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a

\begin{itemize}
  \item \textsuperscript{94} Terry v. Ohio, 392 U.S. 1 (1968).
  \item \textsuperscript{95} Michigan v. Long, 463 U.S. 1032 (1983).
  \item \textsuperscript{96} Williams, 822 F.2d at 1184.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id. at 1185.
  \item \textsuperscript{101} See, e.g., United States v. Coleman, 969 F.2d 126, 131 (5th Cir. 1992) (applying the Williams test, the appeals court allowed the seizure of a gun felt during a Terry frisk of an automobile under the plain feel doctrine).
  \item \textsuperscript{102} See, e.g., Texas v. Brown, 460 U.S. 730, 741-42 (1983) (finding that "immediately apparent" implied an unduly high degree of certainty as to an object's incriminating character); United States v. Salazar, 945 F.2d 47, 51 (2d Cir. 1991) (holding that if an officer's experience gives him probable cause to believe he feels narcotics, seizure of the drugs is permissible), cert. denied, 112 S. Ct. 1975 (1992); State v. Guy, 492 N.W.2d 311, 317 (Wis. 1992) (holding that if the feel of an object amounts to probable cause that the object is contraband, the object can be seized), cert. denied, 113 S. Ct. 3020 (1993).
\end{itemize}
marked squad car. At about 8:15 p.m., one of the officers observed Dickerson leaving a twelve-unit apartment building, a place the officers considered, based on previous responses to complaints of drug sales and executed search warrants, to be a notorious “crack house.” Dickerson began walking toward police but, upon spotting the police car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. These actions aroused the officers’ suspicion and, based upon Dickerson’s seemingly evasive actions and the fact that Dickerson had just left a building known for its cocaine traffic, the officers decided to stop Dickerson and to investigate further.

A frisk of Dickerson revealed no weapons; however, the officer conducting the search felt a small lump in Dickerson’s front pocket. The officer examined the lump with his fingers, sliding it around until he determined the lump was crack cocaine in cellophane. The officer reached into Dickerson’s pocket and retrieved a plastic bag containing crack cocaine. He seized the cocaine and arrested Dickerson for possession of a controlled substance.

In the pre-trial suppression hearing, the trial court first concluded that the officers were justified under Terry in stopping Dickerson to investigate whether he might be engaged in criminal activity. Because the stop was deemed lawful, the officers were also justified in frisking Dickerson for weapons. Finally, analogizing the plain view doctrine, the trial court ruled that the officers’ seizure of the cocaine did not violate the Fourth Amendment. In its ruling, the Hennepin County District Court recognized that the sense of touch, when grounded in experience and training, is as reliable as perceptions drawn from

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104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id. at 2133-34.
110. Id. at 2134.
111. Id.
112. Id.
other senses.\textsuperscript{113} The court then said that plain feel, therefore, is no different than plain view and will equally support the seizure of the cocaine.\textsuperscript{114}

On appeal, the Minnesota Court of Appeals reversed the trial court's ruling.\textsuperscript{115} The court of appeals agreed that the initial stop and frisk for weapons was justified under \textit{Terry} since the officers reasonably believed, based on specific and articulable facts, that Dickerson was engaged in criminal activity.\textsuperscript{116} However, the appeals court concluded that the officers had overstepped the bounds allowed by \textit{Terry} when they seized the cocaine. In doing so, the appeals court "decline[d] to adopt the plain feel exception to the Fourth Amendment warrant requirement."\textsuperscript{117}

The Minnesota Supreme Court affirmed.\textsuperscript{118} Like the court of appeals, the state supreme court held that both the stop and the frisk of Dickerson were valid under \textit{Terry} but found the seizure of the cocaine to be unconstitutional.\textsuperscript{119} The state court expressly refused "to extend the plain view doctrine to the sense of touch" on the grounds that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and that "the sense of touch is far more intrusive into the personal privacy that is at the core of the Fourth Amendment."\textsuperscript{120} Through its decision, Minnesota became the seventh state to reject a plain feel exception to the Fourth Amendment's warrant requirement for search and seizure.

IV. HOLDING AND ANALYSIS OF THE MAJORITY OPINION

A. \textit{Standards of the Plain Feel Doctrine as Decided by Dickerson}

The United States Supreme Court granted certiorari in \textit{Dickerson} in order to resolve a conflict in the federal circuits over whether the seizure of contraband, detected through a police

\begin{enumerate}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} State v. Dickerson, 469 N.W.2d 462 (Minn. Ct. App. 1991).
\item \textsuperscript{116} Dickerson, 113 S. Ct. at 2134.
\item \textsuperscript{117} Id. (quoting Dickerson, 469 N.W.2d at 466).
\item \textsuperscript{118} State v. Dickerson, 481 N.W.2d 840 (Minn.), \textit{cert. granted}, 113 S. Ct. 53 (1992).
\item \textsuperscript{119} Dickerson, 113 S. Ct. at 2134.
\item \textsuperscript{120} Id. (quoting Dickerson, 481 N.W.2d at 845).
\end{enumerate}
officer's sense of touch during a protective search for weapons, is constitutional. 121 The Supreme Court held in Dickerson that a police officer may seize non-threatening contraband detected by touch during a Terry search so long as the officer's search stays within the bounds of Terry. 122 According to the Court, staying within the bounds of Terry means that an officer can patdown a suspect's outer clothing only. 123 The officer cannot manipulate or otherwise further explore an item he feels if it is to be seized constitutionally. 124

Dickerson did not challenge the findings of the Minnesota trial court, which were affirmed by the court of appeals and the Minnesota Supreme Court, that the police were justified under Terry in stopping and frisking him for weapons. 125 The question before the United States Supreme Court was whether the officer who frisked Dickerson stayed within the bounds of Terry during his search, particularly at the time the officer gained probable cause to believe the lump in Dickerson's pocket was crack cocaine. 126

The police officer in Dickerson, the Court determined, did not stay within the bounds of Terry when he frisked the defendant. 127 Instead, the officer's "continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police officer and others.'" 128 The Court went on to conclude that:

[al]though the officer was lawfully in a position to feel the lump in respondent's pocket, because Terry entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized

121. Id.
122. Id. at 2136.
123. Id. at 2137.
124. Id. at 2138.
125. Id.
126. Id.
127. Id.
128. Id. at 2138-39.
by _Terry_ or by any other exception to the warrant requirement. 129

By justifying its conclusion based on the legality of where the officer was located when he felt the contraband, the Court directly incorporated language of the plain view doctrine as described previously. 130 Thus, the Court accepted the plain feel doctrine as an extension of the plain view doctrine but with limitations. One of these limitations requires that the incriminating nature of what the officer feels must be "immediately apparent" at the instant the officer touches the item. 131 Any "manipulation" of the item to determine what it is will constitute a further search and is not allowed without a warrant or an independent exception to the warrant requirement. While this is a significant limitation on the police's ability to "seize at will," 132 the fact that the police may now use the sense of touch as well as sight, sound, 133 and smell 134 to seize evidence of crime is a substantial benefit to law enforcement.

In reaching its conclusion that the plain feel exception is constitutional, the Court based its decision primarily on the principles of the plain view doctrine as applied to a _Terry_ frisk. As detailed in section II.A, _Terry_ allows a police officer to stop and patdown a suspect based on a reasonable suspicion (less than probable cause) that the person is armed and dangerous. 135 _Sibron_ added the corollary that if a protective search goes beyond what is necessary to determine if the suspect is armed, the search is no longer valid under _Terry_. 136 The Court in

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129. Id. at 2139.
131. Dickerson, 113 S. Ct. at 2139.
132. Id. at 2138.
133. See, e.g., United States v. Gann, 732 F.2d 714, 722-23 (9th Cir.) (accepting plain hearing as within purview of plain view doctrine when officers overheard incriminating words between a defendant and his attorney while the officers executed a valid search warrant), _cert. denied_, 469 U.S. 1034 (1984).
134. "Plain smell" as an extension of the plain view doctrine was present but not discussed by the Supreme Court in United States v. Sharpe, 470 U.S. 675, 679, 700 (1985). Plain smell was accepted, however, by the Fourth Circuit in United States v. Norman, 701 F.2d 295, 297 (4th Cir.), _cert. denied_, 464 U.S. 820 (1983), and by the Eleventh Circuit in United States v. Lueck, 678 F.2d 895, 903 (11th Cir. 1982).
Dickerson recognized and reiterated that the holdings in Terry and Sibron are still valid.\textsuperscript{137} However, the Court determined additionally that, based on an extension of the plain view doctrine, contraband detected by the sense of touch does not necessarily "go beyond" the bounds of a Terry search. Under Dickerson, if an officer senses contraband immediately, based on merely touching an object, removing the object does not "go beyond" Terry.\textsuperscript{138} Removing the object under those circumstances would not constitute a further search under Terry or Sibron.\textsuperscript{139}

To justify this holding, the Court pointed out that Long\textsuperscript{140} sanctioned the seizure of contraband or weapons in plain view while police officers conduct a Terry frisk of an automobile.\textsuperscript{141} The Dickerson Court relied on Long as precedent and seemingly determined that while Long involved the frisk of an automobile, contraband found during the frisk of a person is equally justified under the plain view doctrine. According to Long and plain view, if an item's incriminating nature is "immediately apparent," there is no further search within the meaning of the Fourth Amendment, so the item may be seized.\textsuperscript{142}

Applying the Long rationale to Dickerson, the Court asserted that if an officer feels something which he or she immediately recognizes as contraband, it is as if the object were in plain view, so there is no further search or invasion of privacy beyond that which was already authorized by Terry.\textsuperscript{143} Therefore, an officer is within the bounds of an initial Terry frisk if he or she seizes contraband or evidence of crime whose incriminating nature is immediately apparent during the frisk.

There is other authority which the Court used for holding that plain feel is a constitutional extension of the plain view doctrine. Justice White noted that Andreas\textsuperscript{144} and Hicks,\textsuperscript{145} both plain view cases, support the above rationale of the plain feel doctrine. "If contraband is left in open view and is observed by a police

\begin{enumerate}
\item\textsuperscript{137} Minnesota v. Dickerson, 113 S. Ct. 2130, 2136 (1993).
\item\textsuperscript{138} Id. at 2137.
\item\textsuperscript{139} Id.
\item\textsuperscript{140} Michigan v. Long, 463 U.S. 1032 (1983).
\item\textsuperscript{141} Dickerson, 113 S. Ct. at 2136.
\item\textsuperscript{142} Id. at 2136-37.
\item\textsuperscript{143} Id. at 2137.
\item\textsuperscript{144} Illinois v. Andreas, 463 U.S. 765 (1983).
\item\textsuperscript{145} Arizona v. Hicks, 480 U.S. 321 (1987).
\end{enumerate}
officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy" and thus no Fourth Amendment search. In *Andreas*, where there was a controlled delivery of lawfully discovered contraband, the Court stated that "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost." Apparently the *Dickerson* Court analogized *Andreas* by equating the lawful frisk of a person with the lawful opening of a container.

The *Andreas* holding is applicable to plain feel, the Court said, because just as the police in *Andreas* were lawfully in a position to view the container of drugs, an officer performing a *Terry* search is equally lawfully situated when he or she feels contraband. *Andreas* also requires a certainty that what an officer sees inside a container is contraband. Likewise, *Dickerson* requires the illegality of an item an officer feels to be "immediately apparent."

The reasoning in *Hicks* supports the *Dickerson* holding that a search which uncovers contraband must stay within the bounds of the initial invasion of privacy. Recall that similar language can be found in *Sibron*. A *Terry* search, as noted in *Dickerson*, "must be strictly limited to that which is necessary for the discovery of weapons." Any further search is unconstitutional without a warrant or an independent exception to the warrant requirement. In *Hicks*, the police, while executing a valid search warrant, suspected that stereo components in plain view were stolen. However, they could not confirm this suspicion without moving the equipment to read the identification numbers. The *Hicks* Court held this constituted a further

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146. *Dickerson*, 113 S. Ct. at 2137.
147. *Andreas*, 463 U.S. at 769-70.
148. *Id.* at 771-72.
149. *See Dickerson*, 113 S. Ct. at 2137.
150. *Andreas*, 463 U.S. at 771.
151. *Dickerson*, 113 S. Ct. at 2137.
155. *Id.*
search beyond the scope of the initial justified intrusion (the search warrant).156

As applied in Dickerson, the Hicks rationale means that if a police officer cannot determine during the frisk (i.e., the initial justified intrusion) that an item is contraband and further manipulates the item to make that determination, that manipulation is akin to moving the stereo components and is an unconstitutional search. Dickerson, therefore, will not allow an item to be seized under plain feel unless the officer performing the frisk is certain it is contraband by first touching it.

This holding seems to resolve a controversy in the lower courts over the proper standard of certainty to apply to plain feel seizures. As noted earlier, the District of Columbia Circuit in Williams, the leading plain feel case, decided that plain feel requires a higher degree of certainty than merely probable cause in order to constitutionally seize contraband.157 Dickerson apparently agreed with Williams when it required that an object's identity be immediately apparent to the police officer when he or she first touched it.158 However, Dickerson also employed language possibly indicating a lower standard when it said, "Regardless of whether the officer detects the contraband by sight or by touch . . . the Fourth Amendment's requirement that the officer have probable cause that the item is contraband before seizing it ensures against excessively speculative seizures."159 While the Court there seems to have said that only probable cause is required for plain feel seizures, in the context of its holding that the incriminating character of the object must be immediately apparent, it is clear the Court would not allow an officer to seize an item he or she only suspects is contraband. This is clear because the Court repeatedly emphasized that any continued exploration or manipulation to determine whether an item is contraband will not be allowed.160 Thus, it seems Dickerson sided

156. Id. at 325.
159. Id.
160. See id. at 2136-39. The Court noted that if the incriminating character of an object in plain view is immediately apparent, it may be seized without a warrant. Id. at 2136-37. If during a lawful Terry patdown, an officer feels something whose contour makes its identity immediately apparent, it may be seized. Id. at 2137. Since the officer in Dickerson never thought the lump he felt was a weapon, and since its
with the Williams court and its progeny in embracing a higher degree of certainty for seizure under plain feel.

B. Downsides to the Dickerson Holding

There are several negative aspects of the Dickerson holding. First, previously under Terry, police officers had a fairly clear boundary for what constituted a valid Fourth Amendment search: if they could articulate specific facts to show reasonable suspicion, they could stop and frisk for weapons. Dickerson added a new dimension to Terry; now the police can seize objects they feel during a Terry frisk but only if they know immediately what the objects are. The test in Dickerson, whether the officer knows he or she feels contraband, is clearly subjective. Only the officer can testify to that kind of recognition and knowledge. In stark contrast, the principles of Katz and Terry were grounded in an objective test: whether the officer's suspicion was reasonable. Thus, Dickerson moved the inquiry from a more predictable objective standard to a subjective one. More significantly, Dickerson snubbed the express language of the Fourth Amendment which prohibits "unreasonable searches and seizures." Not only has reasonableness been the standard for many years, but also adopting a subjective standard introduces uncertainty into every Terry frisk. Due to its subjectivity, it also introduces the very real possibility of police misconduct.

The obvious risk that Dickerson's subjective analysis creates is that officers, when questioned about their actions during evidence suppression hearings, will simply "speak the magic words" and say they knew immediately what the object was that they felt during the frisk. Cynical though it may be, common sense dictates that if the test that will be applied to admit evidence requires subjective knowledge on the part of the police officer, the officer will likely say he knew immediately that he felt contraband.

162. Dickerson, 113 S. Ct. at 2137.
163. U.S. CONST. amend. IV.
This could subvert the Fourth Amendment in the following way. If an officer thinks or knows he feels contraband and then removes an item that is indeed contraband, the officer will arrest the person, and a suppression hearing will likely result. At the hearing, it is wholly conceivable that the officer will testify that he knew the item was contraband on first touching it even if he only suspected or had probable cause. Under Dickerson, this subjective statement would satisfy the Fourth Amendment. It is natural that if an officer thinks an object he feels is contraband and finds out the object is indeed contraband when he removes it, he will be even more certain that the identity of the object was immediately apparent when he first touched it.

This does not necessarily suggest questionable behavior on the part of the police. It does suggest, however, that it may now be easier to circumvent the Fourth Amendment while seizing evidence of crime. That equates to lessened protection against "unreasonable searches and seizures" because reasonableness is not an inquiry under Dickerson. It is enough that the officer testify to his subjective knowledge as to whether he knows an item is contraband. In other words, so long as the initial stop is deemed reasonable, if the officer suspects he feels drugs, and the item felt does turn out to be drugs, the officer is practically guaranteed to get the drugs admitted.

Assume, for instance, the item turns out not to be contraband. The suspect may not be arrested at all, and the question of whether the search was constitutional is never reached. In this writer's opinion, the Supreme Court has created a significant expansion of Terry so that police officers are free to use hindsight to justify the seizure of items that previously could not have been admitted into evidence.

The Court stated in its defense that plain feel "only suggests that officers will less often be able to justify seizures of unseen contraband." The Court, as it must, assumed that in seeking to justify seizures, a police officer will always be truthful about whether he or she knew an item was contraband at the moment it was touched. It seems unrealistic, however, to expect that the police officer, after finding out the suspicions were correct by

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164. Dickerson, 113 S. Ct. at 2137.
165. Id.
discovering what he or she feels is indeed contraband, will later cause crucial evidence to be suppressed by the officer’s own testimony. With the obvious purpose to law enforcement being to prevent crime and apprehend criminals, giving the criminal the gift of suppressed evidence seems unlikely.

The possibility that an officer will now speak the magic words is supported by some decisions relying on Dickerson. In State v. Crawford, the Ohio Court of Appeals reviewed a stop and frisk very similar to Dickerson. During a patdown of the defendant’s jacket, the officer “could feel from the outside of the jacket that there were small, individual pieces of something, and right away, I knew what it was.” The officer’s testimony that he “knew right away” that he felt crack cocaine convinced the court of appeals to reverse the trial court’s suppression of the cocaine, and the seizure was authorized under Dickerson. The court in Crawford made no inquiry as to whether a reasonable officer would know what the object was; under Dickerson, the officer’s testimony alone was sufficient. Thus, speaking the magic words was essential to the court’s holding. Arguably, other officers will look at that decision and conclude that using the proper language could be necessary to get evidence admitted.

A similar frisk occurred in Commonwealth v. Johnson, and the Pennsylvania Superior Court also relied upon Dickerson in upholding the seizure of rock cocaine. In Johnson, the police officer again stated that, during the frisk of Johnson, he felt “something granular” and knew right away that it was cocaine. The officer’s certainty convinced the court that under Dickerson the seizure was constitutional. Again, the Johnson court made no reasonableness inquiry; the only evidence necessary was the officer’s subjective testimony.

167. Id. at *3.
168. Id. at *17.
169. Id.
171. Id. at 1335.
172. See id. at 1337.
173. See id. at 1340.
In another recent Pennsylvania case involving a Terry stop and frisk, In re S.D., an officer "testified at the suppression hearing that he 'felt a bulge in [S.D.'s] right pants pocket' during the patdown search." The court determined that Dickerson applied; however, there was no testimony available from the officer indicating "what it was he perceived he had felt." The court decided that without such evidence, they could only conclude that the search and seizure were unconstitutional. Thus, the court implied that with the proper testimony, it would have found the evidence admissible. Apparently it was crucial that the officer did not say the right words. Arguably, the officer will not make that mistake again and will make sure the court knows that he specifically felt contraband.

C. Dickerson Answers Minnesota's Objections to Plain Feel

The Supreme Court in Dickerson faced other objections to the plain feel doctrine: First, "that 'the sense of touch is inherently less immediate and less reliable than the sense of sight,' and second, that 'the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." The Court dismissed both concerns. As to the sense of touch being less immediate than sight, the Court reminded the Minnesota Supreme Court that "Terry itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure." The Court was referring to the fact that if an officer knows he feels a weapon, the weapon can be seized. The Court concluded from this that Terry implicitly recognized plain feel because the sense of touch is what is used in a frisk. However, the Court ignored the fact that Terry employed an objective standard while Dickerson set out a subjective standard. The Court said it found a basis for plain feel in Terry but then, by
adopting a subjective standard, proceeded to ignore the teachings of *Terry* which advocate reasonableness.

It could have been possible to construct an objective standard for plain feel and still find the two senses equally as reliable. The Court could have adopted the approach of *Terry* and required officers to put forth “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.”182 This kind of review could be based on what a reasonable police officer, or even more narrowly, on what a reasonable police officer trained in narcotics would recognize as being contraband. There are cases decided after *Dickerson* for which such an analysis could be effective.183 Had the Court done so, it could have continued the traditional use of an objective standard.

The Court also claimed a basis for its belief that the sense of touch is as reliable as sight in the stop and frisk case of *Ybarra*.184 The prosecutor in *Ybarra* argued that the seizure of a cigarette pack containing heroin was constitutional because the patdown of *Ybarra* yielded probable cause to believe *Ybarra* was carrying contraband.185 The Court did not reach the issue of the seized heroin because it determined that the initial *Terry* stop was not supported by a reasonable belief that *Ybarra* was armed and dangerous.186 Because the frisk of *Ybarra* itself was unconstitutional, any evidence seized during the frisk was inadmissible.187

The *Dickerson* Court believed that the *Ybarra* Court’s analysis was inconsistent with a “categorical bar against seizures of con-

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183. *See, e.g.*, United States v. Ross, 827 F. Supp. 711 (S.D. Ala. 1993) (involving an officer with extensive experience in drug interdiction who frisked defendant and felt a matchbox in the groin area, an area in which officer knew drug traffickers often carried drugs), aff’d, 19 F.3d 1446 (11th Cir. 1994); State v. Sanders, 435 S.E.2d 842 (N.C. Ct. App. 1993) (where during initial frisk of suspect, officer felt an object “like hard flour dough” which, based on his experience, he strongly suspected was cocaine); Commonwealth v. Johnson, 631 A.2d 1335 (Pa. Super. Ct. 1993) (where officer who had felt contraband over 50 times felt a chunky, granular substance in suspect’s groin area and strongly suspected it was cocaine).
185. *Id.* at 92.
186. *Id.* at 92-93.
187. *Id.* at 96.
traband detected manually during a Terry patdown search. Thus, the Court must have believed that the Ybarra Court, had it reached the issue of the heroin seizure, would have impliedly accepted plain feel by holding that the patdown of Ybarra gave the officer probable cause to search further and constitutionally feel the heroin. Unfortunately, the Ybarra Court made no such determination. This sort of negative support was not convincing enough to prove that Ybarra was a valid basis for Dickerson.

The second concern put forth by the Minnesota Supreme Court was similarly rejected in Dickerson. The Court did not believe that touch was more intrusive than sight because knowledge gained during an already lawful search is no more intrusive than the search itself. The Court based this belief on cases which show that "[t]he seizure of an item whose identity is already known occasions no further invasion of privacy." Apparently the Court, while not explicitly stating so, was also incorporating the substance of the plain view doctrine that if an item's incriminating nature is immediately apparent during an initial lawful search, there is no further search or invasion of privacy. The Court did not cite Hicks in this part of the opinion; however, it seems that the plain view doctrine influenced the Court in holding this way.

V. ANALYSIS OF THE CONCURRENCE

Justice Scalia, with Justice Rehnquist concurring in part, concurred in Dickerson. Justice Scalia agreed that, assuming the frisk was lawful, any evidence incidentally discovered in the course of that frisk was admissible. He did not agree, however, that the Terry frisk itself was constitutional. Justice Scalia believed that "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratifica-

189. Id. at 2139.
190. See id. at 2137-38.
192. Dickerson, 113 S. Ct. at 2138.
194. Dickerson, 113 S. Ct. at 2139 (Scalia, J., concurring).
195. Id. at 2141.
196. Id. at 2139.
In his opinion, the Fourth Amendment's prohibition against unreasonable searches and seizures must be interpreted according to "what was deemed an unreasonable search and seizure when it was adopted." Scalia doubted that a frisk on "mere suspicion" alone was constitutional because the Framers of the Constitution "would [not] have allowed themselves to be subjected . . . to such indignity." Because he thinks there is no tradition nor precedent for a physical search based only on reasonable suspicion, Scalia would find that a *Terry* frisk itself is unconstitutional.

Scalia’s concurrence seems to imply that only if the Framers of the Constitution had recognized that police officers’ safety is important enough to justify an exception to the warrant requirement would the *Terry* decision be constitutional. In reviewing centuries-old legislation, Scalia determined that the "stop" part of *Terry* has traditional common law precedent in the "so-called nightwalker statutes." He did not think, however, that the "frisk" part of *Terry* had any traditional basis. Scalia concluded that this was based upon the ancient nightwalker statutes as well. Under those statutes, "if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest." Apparently Scalia does not feel the hazards of modern day law enforcement are more severe than those which existed seven to eight hundred years ago.

In support of his conclusion, Justice Scalia asserted that *Terry* "made no serious attempt to determine compliance with traditional standards, but rather, according to the style of th[e] Court at the time, simply adjudged that such a search was ‘reasonable’ by current estimations." This strongly critical language indicates that Scalia wholly disapproves of courts determining what is constitutional based on society’s changing policies. Because of

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197. *Id.*
198. *Id.*
199. *Id.* at 2140.
200. *Id.*
203. *Id.*
204. *Id.* at 2139.
this, it is possible Scalia would disagree even with the basic holding of Katz, which said that the Fourth Amendment warrant requirement for a search would be subject to "a few specifically established and well-delineated exceptions."^{205} Under Katz, society determines what is considered reasonable;^{206} therefore, that determination is subject to evolution over time. Scalia's belief that constitutional inquiries must be grounded in tradition^{207} means Katz would be unacceptable. Thus, any decision relying on Katz would suffer the same infirmities as would Katz when subjected to Scalia's analysis.

It seems that in Scalia's view, an exception to the warrant requirement would not be constitutional unless precedent existed for such an exception before the time of the Constitutional Convention. Therefore, a search incident to arrest^{208} would probably be constitutional in Scalia's view because there is precedent for it in the nightwalker statutes.^{209} However, the plain view doctrine^{210} would probably be considered, like Terry, as being simply a product of the "style of th[e] Court at the time"^{211} rather than justified as reasonable.

Justice Scalia's rigid view of the Fourth Amendment would make modern law enforcement extremely difficult. In an age where the criminals are often better armed than the police, Scalia would not allow a frisk for weapons to protect police unless the police have probable cause to arrest. Scalia did concede that even if a frisk were not permissible based on the Framers' intent, it may have become permissible when the Fourteenth Amendment was adopted in 1868.^{212} He also conceded that the present state of well-armed modern criminals may only have evolved since that time so that neither the Framers nor the

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206. Id. at 361 (Harlan, J., concurring).
207. See Dickerson, 113 S. Ct. at 2139 (Scalia, J., concurring).
208. See Chimel v. California, 395 U.S. 752, 762 (1969) (holding that a search incident to a valid arrest is a constitutional exception to the Fourth Amendment's warrant requirement).
209. See Dickerson, 113 S. Ct. at 2140 (Scalia, J., concurring) ("[A] watchman . . . might arrest him and then search him for weapons.").
211. See Dickerson, 113 S. Ct. at 2139 (Scalia, J., concurring).
212. Id. at 2140.
Fourteenth Amendment would have contemplated the need for
*Terry.* However, Scalia then defended his view of *Terry* by
stating that "technological changes were no more discussed in
*Terry* than was the original state of the law."214

This is not wholly true. *Terry* did address both sides of the
controversy surrounding police protection: (1) that law enforce-
ment has changed over the years and interpretation of the Con-
stitution should reflect that, versus (2) that traditional precedent
should be followed. On the one hand, *Terry* recognized that "in
dealing with the rapidly unfolding and often dangerous situa-
tions on city streets the police are in need of an escalating set of
flexible responses."215 On the other hand, *Terry* considered
"that the authority of the police must be strictly circumscribed by
the law of arrest and search as it has developed to date in the
traditional jurisprudence of the Fourth Amendment."216 The
*Terry* decision sided with the prosecution, partly because "every
year in this country many law enforcement officers are killed in
the line of duty, and thousands more are wounded."217 Accord-
ing to *Terry*, this is in large part due to the "easy availability of
firearms to potential criminals,"218 a situation which has only
worsened since 1968, the year *Terry* was decided.

Therefore, contrary to Justice Scalia, in reaching its conclu-
sion, the *Terry* Court did consider both the technological sophisti-
cation of modern criminals as well as the traditional view that
the Fourth Amendment should be construed literally. In being
joined only in part by Justice Rehnquist, it seems Justice Scalia
has little support in his belief that the *Terry* frisk itself is uncon-
stitutional.

VI. ANALYSIS OF THE DISSENTING OPINION

In his brief dissent, Justice Rehnquist, who was joined by
Justice Blackmun and Justice Thomas in part, argued that re-
mand to the Minnesota Supreme Court was proper since that
Court's Fourth Amendment analysis "differs significantly from

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213. Id.
214. Id. at 2140-41.
216. Id. at 11.
217. Id. at 23.
218. Id. at 24 n.21.
that now adopted by this Court." Rehnquist agreed with the majority that "the dispositive question . . . is whether the officer who conducted the search was acting within the lawful bounds marked by Terry at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." However, since the state trial court did not make precise findings on the issue of probable cause, Justice Rehnquist believed that resolution of that issue should occur in the lower court using the Dickerson majority's analysis.

Justice Rehnquist, by joining parts I and II of the majority opinion, accepted the plain feel doctrine as a constitutional extension of the plain view exception to the Fourth Amendment's warrant requirement. Justice Rehnquist also agreed with the standards promulgated by the Dickerson majority, namely that any discovery of contraband must occur within the bounds of Terry and that it must be immediately apparent that the object felt is contraband. Rehnquist's dissent from part III only concerned his determination that the Minnesota state courts were better suited to resolve the ultimate issues particular to Dickerson.

VII. CONCLUSION

In adopting the plain feel exception to the Fourth Amendment's warrant requirement, Dickerson created a significant extension of Terry. Under Terry, an officer's seizure of weapons is subject to review under an objective standard which investigates whether the circumstances would lead a reasonable officer to believe a suspect is armed and dangerous. Under Dickerson, the seizure of contraband during a Terry frisk will be governed by a subjective standard which only asks what the particular officer performing the frisk believed he felt. Once an officer can show the initial frisk of a suspect was based on reasonable suspicion and within the bounds of Terry, the officer then need only state that he or she knew immediately that an object felt during that lawful frisk was contraband. Allowing a subjective standard into analysis of an exception to the Fourth Amendment's warrant requirement has led to an erosion of the Fourth Amendment's protection against unreasonable searches and seizures.

220. Id.
Amendment is contrary to the express language of the Amendment as well as to a long history of cases, tracing back to *Katz v. United States*, which construe it.

*Dickerson* will be a windfall to law enforcement, particularly narcotics investigations. At the same time, it encroaches more than slightly on the guarantees of the Fourth Amendment against general searches. The decisions to come which rely on *Dickerson* will determine if the Court went too far. Only the future will show if you need more than magic words to get what you feel.
Internal Revenue Code section 67 declares the rule commonly referred to as the "two percent floor on miscellaneous itemized deductions." The enactment of this section represented Congress' concern over the nature of miscellaneous itemized deductions. Many of these deductions have a "personal" or "voluntary" aspect to them which indicates that, regardless of any contribution to income-producing activities, the individual would still have incurred the expenses. To avoid a complex scheme of bifurcating these expenses, the Congress elected to use statutory "line drawing" to approximate the portion of these expenses which is not related to the production of income. The result is that an individual can only deduct these expenses to the extent that they exceed two percent of the individual's "adjusted gross income."

In section 67(e) the Internal Revenue Code explicitly states that trusts, generally, are to apply the section in the same manner as an individual. Section 67(e)(1) goes on to provide an exception to the section 67(a) two-percent floor "for costs which are paid or incurred in connection with the administration of the...trust and which would not have been incurred if the property were not held in such trust..."
In *O'Neill v. Commissioner*, the United States Court of Appeals for the Sixth Circuit attempted to address the exception provided in Internal Revenue Code section 67(e)(1). A case of first impression on appeal from the United States Tax Court, *O'Neill* forced the court to address the characterization issue of investment advisory fees incurred by a trust.

**II. BACKGROUND**

The Internal Revenue Code explicitly deals with the taxation of trusts. The Internal Revenue Code states that, unless provided otherwise, a trust is to compute tax liability in the same manner as an individual. The Internal Revenue Code also permits individuals to deduct expenses incurred for the production of income. Thus, a trust can ordinarily deduct expenses incurred for the production of income.

In 1986, however, Congress added Internal Revenue Code section 67 which limited an individual's ability to deduct expenses incurred for the production of income. These deductions are now only permitted to the extent that they exceed two percent of an individual's adjusted gross income. Internal Revenue Code section 67(e), however, gives an exception to the application of section 67 to trusts. Specifically, Internal Revenue Code section 67(e) provides that expenses "which would not have been incurred if the property were not held in such trust" can be fully deducted.

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661.
9. Id.
10. Id.
12. Id. § 641(b).
13. Id. § 212. A common example of an expense incurred for the production of income (i.e., a "section 212 expense") is the purchase of investment advice.
14. None of the provisions in I.R.C. § 212 limits the ability of a trust to apply the section.
17. Id. § 67(e) (1988). This section was made applicable to trusts via I.R.C. § 641(b) (1988).
18. Id. § 67(e)(1).
This exception to the two-percent floor avoids penalizing a trust and its beneficiaries simply because assets are held within a trust entity.\textsuperscript{19} Trusts serve a laudable role in protecting assets and assuring the welfare of beneficiaries.\textsuperscript{20} To penalize the fulfillment of this role is contrary to the best interests of those involved and would not be good public policy.

Having established the exception, a question arises concerning the definition of expenses which "would not have been incurred if the property were not held [in trust]."\textsuperscript{21} The Internal Revenue Code does not address the issue any further,\textsuperscript{22} and, conspicuously, the Treasury Department has not issued regulations on the subject.\textsuperscript{23}

Thus, one must look elsewhere to identify and define expenses which are a result of the trust form. A trust is defined as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held [the trustee] to equitable duties to deal with the property for the benefit of another person [the beneficiary]."\textsuperscript{24} To say that an expense "would not have been incurred if the property were not held [in trust]"\textsuperscript{25} is the same as saying that the action generating the expense was required by the existence of the trust. An expense incurred by a trustee as a result of duties placed upon him is a required expense (i.e., a trustee's failure to execute such a duty results in personal liability).\textsuperscript{26} Therefore, the duties imposed upon a trustee provide guidance in identifying expenses incurred as a result of the trust form.

In general, a trustee must exercise prudent care and skill in carrying out his duties.\textsuperscript{27} These duties include preserving the

\textsuperscript{19} See id. § 67(e).
\textsuperscript{20} See Brief of the Family Trust Association as Amicus Curiae in Support of Appellant at 3-4, O'Neill v. Commissioner, 994 F.2d 302 (6th Cir. 1993) (No. 92-1564).
\textsuperscript{22} See id. § 67.
\textsuperscript{24} RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).
\textsuperscript{25} I.R.C. § 67(e) (1988).
\textsuperscript{26} See RESTATEMENT (THIRD) OF TRUSTS §§ 205, 208-211, Reporter's Notes, at 166-73 (1990) (highlighting a trustee's personal liability for losses and citing multiple cases for the proposition).
\textsuperscript{27} RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).
property of the trust while at the same time making the property productive. These goals run counter to each other. Preserving the assets of a trust requires investments with minimum risk, but making the assets of a trust productive requires the assumption of risk to create acceptable returns.

The Restatement (Second and Third) of Trusts, however, provides a trustee with guidance in complying with the standard of prudent investment. The trustee is under a duty to "invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." To accomplish this charge, the trustee must exercise "reasonable care, skill and caution . . . [which] is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives suitable to the trust." The balance indicated by these duties can only be achieved by diversifying the assets of the trust so the goals of the trust and the obligations to the beneficiaries can be fulfilled.

One would normally expect the trustee to discharge the duties of the position; however, delegation of duties is permitted, and even required, in some circumstances. Specifically, a trustee is permitted to "delegate duties which a person of ordinary prudence might in like circumstances in the management of his own affairs entrust others to perform." For example, if a trustee lacked experience in the financial markets, ordinary prudence would dictate the acquisition of professional investment advice.

28. Id. § 176.
29. Id. § 181.
32. Id. § 227(a).
33. Id. § 227(b); RESTATEMENT (SECOND) OF TRUSTS § 228 (1959).
34. RESTATEMENT (SECOND) OF TRUSTS §§ 171, 184 (1959).
36. Id. § 171 cmts. a, f, h; § 227 cmt. j.
37. Id.
Thus, the duties of a trustee are numerous. Although a person chosen to be the trustee of property is generally expected to perform the duties of that office himself, the law recognizes that every individual has limitations. When a trustee lacks the personal ability to perform certain duties, the law not only permits, but even requires the trustee to seek the assistance of others who have the requisite skill. When this situation arises, a trust may incur additional expenses as a result of the duties created by the trust entity.

III. FACTS

In the instant case, the William J. O'Neill, Jr., Irrevocable Trust was created in 1965 for the benefit of O'Neill's family. Kathleen France, Sheldon M. Sager and Timothy O'Neill were cotrustees of more than $4.5 million in property held by the trust. None of the cotrustees possessed the investment expertise needed to invest large sums of money. In fact, each accepted his or her position on the contingency that professional investment advice would be retained.

From 1979 until the time of this action, investment advice was provided by Wall, Patterson, Hamilton & Allen. On its 1987 Form 1041 Income Tax Return, the trust claimed a deduction for amounts paid to Wall, Patterson, Hamilton & Allen as expenses incurred for the production of income. On audit, the Commissioner determined that the payments were made for investment advice and were subject to Internal Revenue Code section 67(a) as "miscellaneous itemized deductions." The Commissioner limited the deduction to the amount in excess of two percent of the trust's adjusted gross income, thus increasing both the tax-

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38. See Restatement (Second) of Trusts §§ 174, 176, 181 (1959); Restatement (Third) of Trusts § 227 (1990).
39. Restatement (Third) of Trusts § 171 cmts. a, f, h (1990); § 227 cmt. j.
40. Id.
42. Id.
43. Id.
44. Id.
45. Id. Wall, Patterson, Hamilton & Allen is the successor firm to Allen & Leavy Investment Management, Inc.
46. Id.
47. Id. (citing I.R.C. § 67(a) (1988)).
able income and the tax liability of the trust. The trust challenged the Commissioner's redetermination by asserting that the expenses were within the meaning of Internal Revenue Code section 67(e)(1) and not subject to the two-percent limitation as they "would not have been incurred if the property were not held in such trust." The United States Tax Court agreed with the Commissioner, and the trust appealed that decision to the United States Court of Appeals for the Sixth Circuit.

IV. THE COURT'S REASONING

Speaking via Judge Siler, the court of appeals attacked this question of first impression in a very simplistic manner. Syllagnostically, the court reiterated how a trust is to be taxed. Trusts are to compute tax liability in the same manner as individuals, unless the code provides otherwise. Individuals are subject to a two-percent limitation on "miscellaneous itemized deductions." Therefore, a trust is subject to the two-percent limitation on "miscellaneous itemized deductions," unless the code provides otherwise. The court also noted that Internal Revenue Code section 67(e)(1) provides an exception for trusts if the expense "would not have been incurred if the property were not held in such trust."

The court next turned to the heart of the question presented and analogistically determined whether the investment advisor fees "would not have been incurred if the property were not held in such trust." The court noted examples of expenses which are subject to the section 67(e) exception, including trustee fees, costs of construction proceedings, and judicial accounting.
The court then discussed how the investment advisor fees incurred by this trust were similar to those enumerated expenses which fall under the section 67(e) exception in that they are incurred because the property was held in trust.\textsuperscript{61}

The court found that a trustee must "invest and manage trust assets as a 'prudent investor.'"\textsuperscript{62} As a result, "[w]here a trustee lacks experience in investment matters, professional assistance may be warranted."\textsuperscript{63} In the instant case the court felt that without the advice of Wall, Patterson, Hamilton & Allen, the cotrustees would have "put at risk the assets of the trust."\textsuperscript{64} Since the trustees occupied a position of trust for others, they were required to take appropriate care, and any expenses incurred in doing so would not have been incurred if the property had not been held in trust.\textsuperscript{65} As such, the court found the expenses were subject to the section 67(e) exception and were not limited by the two-percent floor.\textsuperscript{66}

V. ANALYSIS

The opinion of the court is deceivingly simple. Closer examination reveals confusion rather than clarity. First, the court gave no clear test for distinguishing expenses which "would not have been incurred if the property were not held in such trust" from other expenses.\textsuperscript{67} However, the court did say that without professional advice in this case, "the co-trustees would have put at risk the assets of the trust."\textsuperscript{68} If this was an attempt to provide practitioners with a talisman, it results in an absurdity. The equitable duties of a trustee require him to make the trust assets productive.\textsuperscript{69} To do this, the trustee must establish a certain risk level that creates an acceptable return.\textsuperscript{70}

The "at risk" test was immediately preceded in the opinion by a discussion of a trustee's duty, in some circumstances, to seek

\begin{itemize}
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} See id.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} See Restatement (Second) of Trusts § 181 (1959).
\item \textsuperscript{70} Id.
\end{itemize}
experienced investment advice. 71 Does the “at risk” test refer to that duty? If so, then the practitioner could glean from the opinion that failing to comply with the law of trusts puts the assets of the trust at unnecessary risk. Therefore, any expense incurred to comply with the laws governing the trust is an expense which “would not have been incurred if the property were not held in such trust.” 72 While it seems reasonable to interpret the court’s words in this fashion, it is far from clear that the words were intended to make such a statement. 73

Adding to the confusion, the court, agreeing with the Tax Court below, recognized that fees paid to a trustee are fully deductible under Internal Revenue Code section 67(e). 74 What, then, would have been the result if Wall, Patterson, Hamilton & Allen had been named as an additional trustee? Would the mere change in title have recharacterized the expense? Certainly the nature of the services provided to the trust would have been the same; the only difference is that in one case, Wall, Patterson, Hamilton & Allen would have been a named trustee, and, in the other, the investment firm would have been fulfilling the “equitable duties” of the named trustee.

Second, by failing to provide explicit guidelines in the application of Internal Revenue Code section 67(e) concerning investment advisory fees, the court did not address the type of advice which qualifies for the deduction. Conspicuously in its opinion, the court continued to use an acronym for the professional, licensed firm which provided the advice. 75 By failing to use a ge-

71. RESTATEMENT (THIRD) OF TRUSTS § 171 cmta. a, f, h (1990); § 227 cmt. j.
73. See O'Neill v. Commissioner, 994 F.2d 302, 304 (6th Cir. 1993). In one sentence the court dismissed an argument made by the Commissioner that the trustees would have fulfilled their duties if they had selected investments from an approved list adopted by the Ohio legislature since the O'Neill trust was governed by Ohio law. Id.; see OHIO REV. CODE ANN. § 2109.37 (Anderson 1990) for the approved list of investments. By rejecting this argument so quickly, the court seemed to concur. This is consistent with the law of Ohio which has adopted the Restatement of the Law of Trusts as the common law in Ohio. See Homer v. Wullenweber, 101 N.E.2d 229, 232-33 (Ohio Ct. App. 1951) (applying common law to trusts as set out in the Restatement of Trusts); Stevens v. National City Bank, 544 N.E.2d 612, 617-19 (Ohio 1989) (using Restatement (Second) of Trusts to determine trustee’s duties); Fricke v. Weber, 145 F.2d 737, 739 (6th Cir. 1944) (recognizing Ohio as following common law with respect to trusts).
74. O'Neill, 994 F.2d at 303.
75. Id. at 302-04.
neric term, such as "investment advisors," was the court indicating to practitioners and trustees that only similar professional, commercial advice qualifies for the section 67(e) exception?

If this was not the intent of the court, then one must consider just what "investment advice" should include. For example, in many family-oriented trusts, a trustee may know an individual who has been quite successful at investing. Though he may not be a professional (nor in the business of offering investment advice to the public), if such an individual maintains the adequate expertise to fulfill the trustee's legal obligation, then the expenses of engaging him would appear analogous to the situation in O'Neill.

Within the same line of reasoning, practitioners must also be concerned about related parties. Although not an issue in this case, related-party transactions are always a concern when dealing with the Internal Revenue Code. By failing to provide a more complete list of important factors, the court rendered the application of this opinion in a related-party situation difficult.

For example, the trustee of a family trust may know that a member of the family, who also may be a beneficiary, has extensive experience in the investing of large sums of money and is, in fact, a professional who offers his investment services to the public. Assuming that the trustee fulfilled all his legal duties in hiring this beneficiary and that the parties negotiated a fee at arms length, would the related-party status affect the qualification for Internal Revenue Code section 67(e)? The court, by resorting to analogy, did not issue an opinion as clean as a syllogistic one would have been. Analogy requires the use of comparisons which stress the similarities of two premises. The court here failed to delineate a list of items used in comparing investment advisory fees with the expenses of trustee fees, costs of construction proceedings, and judicial accounting.

The solution could be enhanced by using the goals and intent of Internal Revenue Code section 67. Congress was concerned about taxpayer expenses which contributed to the production of income, but which also had a sufficient "personal nature" to indicate that a taxpayer may well incur the expense regardless

77. O'Neill, 994 F.2d at 302.
78. See id. at 304.
of its income-producing effect. 79 Trusts operate as "pass-through" entities in addition to being tax-paying entities. 80 If an expense incurred by a trust is found to be subject to the two-percent floor, then any portion of that expense which passes through to a beneficiary will be subject to the two-percent floor as well. 81 It is difficult to argue that a beneficiary has incurred an expense for personal reasons when the expense has been passed through to him involuntarily! In fact, Congress recognized this problem and explicitly stated that Internal Revenue Code section 67(e) was meant to relieve such burdens. 82

Expenses incurred by trusts for the operation of the trust in compliance with applicable laws do not fall under the canopy of expenses that Congress was concerned about when enacting the limiting provisions of Internal Revenue Code section 67. 83 This being the case, it is modest to conclude that any expenses incurred for the operation of a trust in compliance with applicable law should not be subjected to the limitations of Internal Revenue Code section 67.

Finally, inferring from the fact that Congress created the exception found in Internal Revenue Code section 67(e), one can conclude that trusts have a public value which Congress did not want to handicap with contrary tax policy. Trusts protect assets and see to the welfare of beneficiaries; they are valuable tools for families to use when planning for the care of minors, incompetents, or even irresponsible adults. Tax policy has often been used to promote positive social policy. Congress spoke explicitly when it enacted Internal Revenue Code section 67, saying expenses "which would not have been incurred if the property were not held [in trust]" are deductible without limitation. 84 No need exists for the Internal Revenue Service to challenge the plain language of that law; even less reason exists for a court to muddy the waters by not explicitly reminding the Internal Revenue Service of that plain language.

81. Id.
82. Id.
VI. CONCLUSION

In O'Neill, the United States Court of Appeals for the Sixth Circuit had a clear opportunity to define the operation of Internal Revenue Code section 67(e). The facts of the case were narrow, and the intent of the law was evident in legislative materials. The two-percent floor on miscellaneous itemized deductions was intended to limit an individual's ability to deduct expenses which have a "personal" aspect dissociated from the production of income. In the case of a trust, a "personal" aspect is not present. The expenses of a trust are incurred on direction of the trustee whose actions are dictated by the law governing his position.

The court's decision to make the investment advisory fees incurred by the William J. O'Neill, Jr., Irrevocable Trust eligible for the exception provided in Internal Revenue Code section 67(e) comports with the law as enacted. However, the court did not seize the opportunity to clarify the law and reprimand the Internal Revenue Service for its overzealous application of Internal Revenue Code section 67.

The lack of a sound opinion will present the Internal Revenue Service with fertile ground for future litigation. Practitioners can only hope that a future court will not build its decision in a marsh but instead will find firm soil on which to apply the law as it was written. To that future court: CARPE DIEM!

LOPER V. NEW YORK CITY POLICE DEPARTMENT:
A FIRST AMENDMENT RIGHT TO BEG?

by Christie L. Sheppard

I. INTRODUCTION

"[A]s civilization as a whole has moved forward, people have learned time and again that suppressing speech and conduct deemed contrary to a society's sense of order merely masks the underlying disorder."1 Society's protection against rampant suppression of speech is the First Amendment to the United States Constitution. This amendment provides, in part, "Congress shall make no law . . . abridging the freedom of speech . . . ."2 This prohibition has been extended to proscribe similar conduct by the States through the Fourteenth Amendment to the United States Constitution.3

With society's historical propensity for attempting to silence those voices it finds annoying or distasteful, the courts have had ample and numerous opportunities to confront the issue of the First Amendment's freedom of speech provision.4 One of the

2. U.S. CONST. amend. I.
4. See generally United States v. O'Brien, 391 U.S. 367 (1968) (affirming a conviction for destruction of a draft card in an anti-war protest where speech and nonspeech elements coexisted in the same course of conduct); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (upholding a statute prohibiting the deposit of unstamped mailable matter in a letterbox as neither the statute's enactment nor its enforcement was motivated by the content of the message); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding a collective bargaining provision granting one union exclusive access to interschool mail system as the provision was not unreasonable and was not an attempt to suppress expression of disfavored views); United States v. Grace, 461 U.S. 171 (1983) (holding that sidewalks which comprise outer boundaries of the Supreme Court's grounds are no different from other sidewalks in Washington, D.C. and are thus a proper public forum); Riley v. National Fed. of the Blind of N.C., Inc., 487 U.S. 781 (1988) (holding that a state may not regulate the fees that a professional fund-raiser may charge a charity for his services); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (proclaiming a state may prohibit solicitation in
most recent opportunities to confront the issues involved in a First Amendment lawsuit occurred in the Court of Appeals for the Second Circuit in 1993.\textsuperscript{5}

The case was brought as a class action on behalf of all "needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City."\textsuperscript{6} A "needy person" was defined as "someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation."\textsuperscript{7} The case, which was brought by two homeless New York City beggars, sought to have a New York statute declared unconstitutional on First Amendment grounds.\textsuperscript{8} The statute criminalized loitering which occurred with the purpose of begging.\textsuperscript{9}

In resolving this case, the court was confronted with various questions: (1) Is begging conduct or speech deserving of full First Amendment protection?; (2) What type of forum is involved in the challenged statute?; (3) Is the statute content-based or content-neutral?; and (4) Do the state's asserted interests meet the burden it shoulders in justifying the regulation?

To understand how the Second Circuit reached its answers to these questions and its ultimate conclusions, it is important to understand the various choices which were available in answering each of the above mentioned questions.

II. BACKGROUND

Over the years, the courts have developed different categories or pigeonholes for various acts which do or do not implicate speech.\textsuperscript{10} One of the threshold questions to decide is whether the proscribed activity is conduct or speech.

\begin{itemize}
\item[5.] Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993).
\item[6.] Id. at 701 (quoting Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1033 (S.D.N.Y. 1992)).
\item[7.] Loper, 999 F.2d at 701.
\item[8.] Id.
\item[9.] "A person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging . . . ." N.Y. PENAL LAW § 240.35(1) (McKinney 1989).
\item[10.] See supra note 4.
\end{itemize}
This distinction is necessary because a regulation which affects conduct is evaluated by a different standard than those statutes which proscribe speech.\(^{11}\) One court has noted that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."\(^{12}\) The test the courts apply to regulations of conduct upholds a regulation if:

\begin{quote}
[I]t is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\(^{13}\)
\end{quote}

In dealing with the speech/conduct dichotomy, the Supreme Court has continually cautioned against accepting the view "that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea."\(^{14}\) "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."\(^{15}\) To determine if conduct involves enough communication to activate First Amendment protection, the Court inquires if "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it."\(^{16}\)

The Supreme Court has found such "expressive conduct" in a protestor burning a United States flag during a political march,\(^{17}\) in school children wearing black armbands to protest the Vietnam War,\(^{18}\) in union members peacefully picketing a

\begin{footnotes}
12. Young, 903 F.2d at 153 (quoting Texas v. Johnson, 491 U.S. 397, 405-06 (1989)).
14. Id. at 376; Young, 903 F.2d at 152.
15. Young, 903 F.2d at 154 (quoting City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).
\end{footnotes}
supermarket to protest unfair labor practices,\textsuperscript{19} and in blacks sitting-in at a library to protest its policy of segregation.\textsuperscript{20} In all of these cases, the United States Supreme Court found that the conduct was “inextricably joined” with the expression.\textsuperscript{21} That is, the conduct demonstrated a specific, clear social or political message which was undoubtedly understood by the people who witnessed it.\textsuperscript{22}

Once the Court decides the regulation affects speech, there is still the question of whether the speech is protected. The First Amendment has been held not to be the “guardian of unregulated talkativeness,”\textsuperscript{23} and thus the Supreme Court has established broad categories of speech that are unprotected.\textsuperscript{24}

However, these various types of unprotected speech, which have often been lumped together under the term “offensive speech,” should not be viewed as justifications for regulating speech which society merely finds distasteful or repugnant.\textsuperscript{25} The Supreme Court has continually emphasized that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”\textsuperscript{26} Beyond this area of unprotected speech lies another pitfall, commercial speech. Before delving into the test and the issues involved in the category of commercial speech, it is important to note that “a speaker’s rights are not

\textsuperscript{21} Young v. New York City Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990).
\textsuperscript{22} Id.
\textsuperscript{24} See, e.g., Cox Broadcasting v. Cohn, 420 U.S. 469, 487-91 (1975) (holding that speech which infringes upon rights of privacy may not be protected); Cohen v. California, 403 U.S. 15, 20 (1971) (explaining that speech which contains “fighting words” that might cause violence or which is aimed at hostile audiences is not protected speech); New York Times v. Sullivan, 376 U.S. 254, 265-67 (1964) (stating that speech which is defamatory is not protected); Roth v. United States, 354 U.S. 476, 481-85 (1957) (holding that speech which is obscene is not protected); Schenck v. United States, 249 U.S. 47, 51 (1919) (explaining that speech which encourages illegal conduct is not protected) (noted in Knapp, supra note 23, at 414 n.72).
\textsuperscript{25} Hershkoff & Cohen, supra note 11, at 909-10.
\textsuperscript{26} Id. (quoting Rowan v. Post Office Dep't, 397 U.S. 728, 738 (1970)).
lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.\textsuperscript{27}

Traditionally, commercial speech has received less First Amendment protection than noncommercial speech.\textsuperscript{28} However, the Court has recently restated the test applicable to commercial speech.\textsuperscript{29} Under the test articulated in Fox, courts must first determine if the speech at issue involves illegal activity or misleading statements.\textsuperscript{30} If the commercial speech is neither misleading nor concerned with illegal activity, the courts must determine if the challenged regulation "directly" advances a 'substantial' state interest and if it "constitutes a reasonably narrow fit to the interest served."\textsuperscript{31} The Supreme Court further explained this test in City of Cincinnati v. Discovery Network, Inc.\textsuperscript{32} The Court held:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.\textsuperscript{33}

Regulations which are found to affect pure noncommercial speech are then subject to the forum analysis of the courts.\textsuperscript{34} Forum analysis is used to determine when the "[g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."\textsuperscript{35} Such an analysis is necessary because the mere fact


\textsuperscript{28} Knapp, supra note 23, at 418 n.110 (citing Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords lesser protection to commercial speech than to other constitutionally guaranteed expression.").

\textsuperscript{29} See id at 419 (citing Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

\textsuperscript{30} See id. at 419 (citing Central Hudson, 447 U.S. at 566).

\textsuperscript{31} See id. ("Previously, the commercial speech standard of review required a least restrictive means test inquiring whether the regulation was more extensive than required to serve governmental interests."). See also Central Hudson, 447 U.S. at 566.


\textsuperscript{33} Id. at 1510 n.12 (quoting Fox, 492 U.S. at 480).

\textsuperscript{34} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

that the government owns property does not necessarily mean that it is accessible to the public. Nor can the "mere physical characteristics of the property" dictate where the property falls within the analysis.

The Court's forum analysis has developed three categories of fora. The first category is that of a traditional public fora. This category includes property which either by long tradition or "government fiat" has been "devoted to assembly and debate . . . ." Justice Butler, in his oft-quoted statement, provides an example of a traditional public forum:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The second category is comprised of property which the government has designated for expressive activity by the public. This type of forum may be limited or unlimited, however, such a forum must be intentionally created by the government. The third category consists of public property which is neither by tradition nor designation a forum for public expressive activity, the so-called nonpublic forum.

Once the property at issue has been classified as public or nonpublic, then the court can apply the appropriate level of scrup-
tiny. For both traditional and limited public fora, one of two tests is applicable.\(^{46}\) If a regulation affecting a public forum is content-based, the state must demonstrate that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."\(^{47}\)

A state may also employ time, place, and manner restrictions on speech.\(^{48}\) Such restrictions are justified because the First Amendment has never been construed to mean "that people who want to propagandize protests or views have a constitutional right to do so whenever, and however, and wherever they please."\(^{49}\) These time, place, and manner regulations must be content-neutral, narrowly drawn to serve a significant governmental interest, and must leave open ample alternate channels of communication.\(^{50}\)

In determining content neutrality, the court must ask whether the government is regulating speech because it disagrees with the message conveyed.\(^{51}\) A regulation is content-neutral as long as it has a sufficient purpose without reference to the speech's content.\(^{52}\) As long as the regulation serves interests unrelated to the speech's content, it is neutral despite any "incidental effect[s] on some speakers or messages but not others."\(^{53}\) To satisfy the narrowly tailored requirement of this test, the regulation must advance a "substantial government interest that would be achieved less effectively absent the regulation."\(^{54}\)

That property which is categorized as nonpublic is subject to an entirely different standard of review.\(^{55}\) Besides employing time, place, and manner regulations, the state may restrict "the

\(^{46}\) Id. at 45.  
\(^{47}\) Id. (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).  
\(^{48}\) Id.  
\(^{52}\) Id. (citing Clark, 468 U.S. at 293).  
\(^{53}\) Id. (citing Benton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).  
\(^{54}\) Id. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).  
forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speakers' view. States have much greater power to regulate nonpublic fora:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.

[...]

... The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.

The final question, whether a state has met its respective burden, is case specific. A court's resolution depends upon the applicable level of scrutiny and the specific interests that the state advances.

While the Supreme Court has not addressed the issue of begging, it has been confronted with cases involving solicitation on various occasions. The Court of Appeals for the Second Circuit has, however, previously dealt with a case involving begging.

56. Id. (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).
In that case, the court upheld a regulation that prohibited panhandling and begging in the subway system. The court found begging not to be “inseparably intertwined with a ‘particularized’ message” and thus found begging to be conduct. The opinion noted that even if begging were protected speech, the regulation was narrowly tailored to meet the state’s interests in safety and commerce.

III. THE FACTS

Jennifer Loper and William Kaye were homeless people who begged on the streets and in the parks of New York City. This action was filed along with a state action which was stayed pending the outcome of this case. The lawsuit was certified as a class action suit with the class comprised of all “needy persons who live in the State of New York, who beg on the public streets or in the public parks of New York City.” “A needy person” is “someone who, because of poverty is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation.” The plaintiffs sought a declaratory judgment that New York Penal Law section 240.35(1) and the New York City Police Department’s enforcement of it both violate, among other things, the First Amendment to the U.S. Constitution. The challenged statute provided that “[a] person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging . . . .

Plaintiffs had never been arrested or issued a summons for begging. However, they had at times been ordered by police to quit begging and to “move along.” Police records indicated that the statute was largely used as authority to order beggars

60. Id. at 147.
61. Id. at 153.
62. Id. at 158.
64. Id.
65. Id.
66. Id.
67. Id. at 1032-33.
68. N.Y. PENAL LAW § 240.35(1) (McKinney 1989).
69. Id. at 1033.
70. Id.
to move on with summonses issued and arrests made where the order proved ineffective in combating the problem. 71

The district court found the reasoning of the Young v. New York City Transit Authority 72 case unpersuasive and granted the plaintiffs summary judgment. 73 Judge Sweet found no distinction between the message a charitable solicitor conveys and the message a beggar conveys. 74 The court delineated the similarities between begging and sankirtan, the Krishna solicitation method, which was held to be protected speech. 75 The court noted further that sankirtan could be more intrusive and more aggressive than the plaintiffs' begging practices. 76

Judge Sweet concluded that it was meaningless to distinguish between speech and conduct in this case. 77 The court believed that "[t]he conduct and expression are completely intertwined, and the Statute aims at both." 78 The court's ultimate decision was also aided by the fact that the plaintiffs solicited in the "quintessential public fora" of the New York City sidewalks and parks. 79 The district court also declared the statute overbroad since the State prohibited some of the activities which were offered as justifications for the statute under previously existing statutes. 80

The defendants argued that the statute was permissible because it was generally not enforced against peaceful beggars. 81 The court refuted this argument and declared that if that were true, the statute was still unconstitutional since it delegated "overly broad discretion to the ultimate decision maker." 82 It

71. Id. at 1034.
73. Loper, 802 F. Supp. at 1048.
74. Id. at 1037 ("It is the message that is the same, and that message is entitled its First Amendment protection.").
75. Id. (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992)).
76. Id. at 1037.
77. Id. at 1038.
78. Id.
79. Id.
80. Id. at 1045.
81. Id. at 1046.
82. Id. (citing Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2400-01 (1992)).
was noted that a vague allegation of potential fraud by the beggars was not sufficient to justify a "blanket ban on speech." The court advised that the State would do better to enact a narrowly drafted statute aimed at that behavior which could constitutionally be prohibited.

On appeal to the Second Circuit, the police department asserted that the statute was necessary to battle aggressive beggars who "station themselves in front of banks, bus stops, automated teller machines . . . [and who] make false and fraudulent representations . . ." The police also argued that beggars and panhandlers, if not stopped, would become more aggressive and would eventually participate in more serious crimes.

IV. THE COURT'S REASONING

The court declared these arguments to be "ludicrous" and discussed a variety of criminal sanctions, such as harassment, disorderly conduct, fraudulent accosting, and menacing, which were already available under New York's Penal Statutes, to combat the "socially undesirable conduct incident to begging [as] described by the City Police." The decision noted that the distinction between these specific criminal statutes and the challenged statute was that the former proscribe certain types of conduct and the latter proscribes speech in addition to conduct.

Judge Miner noted that this challenged statute prohibited begging throughout New York City, leaving beggars with no alternative channels in which to communicate their needs. This decision was in stark contrast to the Second Circuit's earlier opinion in Young. In that opinion, the court upheld a prohibition on begging in New York City's subway system, in part, because the prohibition was limited to the subways and did not extend throughout the entire city.

83. Id. at 1047.
84. Id. at 1046.
85. Loper v. New York City Police Dep't, 999 F.2d 699, 701 (2d Cir. 1993).
86. Id.
87. Id. at 701-02.
88. Id.
89. Id. at 702.
90. Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990).
91. Loper, 999 F.2d at 702.
In rejecting Young's view that begging is conduct, Judge Miner declared, "It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment." The court then discussed the forum-based analysis for First Amendment issues and detailed the elements of the applicable levels of scrutiny. It then declared that New York City's sidewalks are traditional public fora.

This opinion then quoted from a Supreme Court decision involving charitable solicitation:

"Charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment . . . Solicitation is characteristically intertwined with informative and perhaps persuasive speech support for particular causes or for particular views on . . . social issues, and . . . without solicitation the flow of such information and advocacy would likely cease."

The court recognized that begging does not always involve the dissemination of specific political or social views but declared that it "usually involves some communication of that nature." In comparing and contrasting charitable solicitation with begging, the court declared: "We see little difference between those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes."

Having determined that begging implicates speech interests and that the New York City sidewalks are public fora, the court then applied both the content-based and the content-neutral requirements.

92. Young, 903 F.2d at 153.
93. Loper, 999 F.2d at 703.
94. Id. at 703-04.
95. Id. at 704 (citing United States v. Grace, 461 U.S. 171, 179-80 (1983)).
96. Id. (quoting Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)).
97. Id. (citing Young v. New York City Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990)).
98. Id. (citing Blair v. Shanahan, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991)).
tests. Under the content-based analysis, the court found that no compelling state interest was served by prohibiting begging by peaceful beggars. The court then noted that even if a compelling state interest could be found to exist, the statute, with its total ban on begging in all public places, could not be viewed as narrowly tailored to achieve the state's interests. Applying the time, place, and manner test, the court found that this challenged statute was not content-neutral since it prescribed all begging-related speech. The challenged statute was also neither narrowly tailored to serve a significant government interest nor did it leave open alternate channels of communication for the beggars to espouse their views and messages.

Judge Miner also applied the United States v. O'Brien analysis for the sake of argument and found the statute to be unconstitutional still. The court found that the challenged statute could not be categorized as a mere "incidental limitation on First Amendment freedoms" since it silenced "both speech and expressive conduct on the basis of the message." The New York statute also failed the O'Brien analysis because it did not serve an important government interest. The court concluded that if the statute truly served a substantial governmental interest, charitable solicitations would not be allowed on New York City streets.

The Second Circuit also found the statute to be overbroad because it prohibited speech and expressive conduct which the State has "no interest in stifling." The district court's deci-

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99. Id. at 705.
100. Id.
101. Id.
102. Id.
103. Id.
105. Loper, 999 F.2d at 705.
107. Loper, 999 F.2d at 705 (citing Hershkoff & Cohen, supra note 11, at 909).
108. Id.
109. Id.
110. Id. at 706.
sion was affirmed, and the statute was found to be unconstitutional on First Amendment grounds.\footnote{111}

V. ANALYSIS OF THE SECOND CIRCUIT'S OPINION

"Selflessness has never been a prerequisite of protected speech; if we silence the beggar, we may effectively prevent the poorest citizens from speaking about society."\footnote{112} Society should be greatly concerned with the possibility of silencing such a growing number of people. The population of homeless people has been steadily increasing,\footnote{113} and these people are turning to begging when social services prove inadequate.

\textit{Loper}\footnote{114} raises a valid argument when it discusses the similarities between charitable solicitation and begging. There does not appear to be any valid reason for distinguishing between the two. Both charitable solicitation and begging seek to obtain other people's money for the benefit of less fortunate people. The only concrete difference is that charitable solicitors seek the money to benefit third parties while beggars seek the money to benefit themselves.

It seems anomalous to declare that "one homeless person could not solicit for himself but two homeless people could solicit donations for each other."\footnote{115} A more logical conclusion would hold that "wherever a person may stand with a container to collect money for charitable purposes, a destitute person may stand with a cup to collect money for himself."\footnote{116}

The argument for not distinguishing begging from charitable solicitation is even more powerful in a case like \textit{Loper}.

Where a public forum is involved, such a distinction would rest

\begin{footnotes}
\item[111] Id.
\item[113] Knapp, \textit{supra} note 23, at 405 (citing C. CATON, \textit{HOMELESS IN AMERICA} 17 (1990) ("The National Coalition for the Homeless estimated there were 2.5 million homeless as of 1983 in the United States.").
\item[114] \textit{Loper}, 999 F.2d at 699.
\item[116] Moses, \textit{Appeals Court Reinstates the Begging Ban}, \textit{NEWSDAY}, Feb. 8, 1990, at 41.
\item[117] \textit{Loper}, 999 F.2d 699.
\end{footnotes}
on the speaker's identity or the subject matter of the speech. This type of distinction would not be permissible unless the regulation could survive strict scrutiny.\textsuperscript{118} Strict scrutiny would require that the state advance a compelling state interest which is served by a narrowly tailored regulation.\textsuperscript{119}

In discussing what constitutes a substantial state interest, the courts have held that "[Undifferentiated] fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."\textsuperscript{120} In a variety of cases, the courts have held that preventing annoyance,\textsuperscript{121} keeping clean streets,\textsuperscript{122} protecting against general fears of violence,\textsuperscript{123} or preventing offensive language\textsuperscript{124} are not sufficient state interests.

The interests which the police department in \textit{Loper}\textsuperscript{125} advanced seem highly dubious in light of the fact that charitable solicitation is allowed on the same city streets which are proscribed for the use of begging. Even if mere annoyance were a justifiable state interest, it is difficult to categorize charitable solicitors as any less annoying, intrusive, aggressive, coercive or intimidating than beggars.

Anyone who has been subjected to the various charities which solicit at various times and locations knows exactly how annoying and aggressive these solicitors can be. These organizations employ bells, loud music, and literature, all in an effort to gain the public's attention and money. Some charities even station themselves in the middle of streets with buckets to solicit money as people drive past.

While some beggars do employ aggressive techniques, a walk down any city street will reveal that a large number of beggars merely sit or stand with a sign and a cup or perhaps request spare change from passersby. These begging practices are far

\textsuperscript{118} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
\textsuperscript{119} Id.
\textsuperscript{121} Knapp, supra note 23, at 421 (citing Coates v. Cincinnati, 402 U.S. 611, 614 (1971)).
\textsuperscript{122} Id. (citing Schneider v. State, 308 U.S. 147, 162 (1939)).
\textsuperscript{123} Id. (citing Edwards v. South Carolina, 372 U.S. 229, 236 (1963)).
\textsuperscript{124} Id. at 422 (citing Cohen v. California, 403 U.S. 15, 19 (1971)).
\textsuperscript{125} Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993).
less intrusive than the traditional methods employed by many charitable organizations.

It is a valid argument that face-to-face solicitation is inherently more coercive and intrusive than mail or phone solicitation. However, it is not a valid argument that charities employing face-to-face solicitation are less coercive or intrusive than beggars. In both situations, a person walking down the street has the option to walk past the solicitor, avert his gaze, or engage in dialogue himself. Solicitors who are more aggressive and who pursue the public should be dealt with by more specific statutes prohibiting particular types of conduct rather than across-the-board prohibitions on begging or soliciting. Further, these types of statutes should apply to both beggars and charitable solicitors.

While it is true that the First Amendment does not allow a person to engage in expression wherever or whenever he desires, it does ensure that protected speech is afforded an outlet at some time, at some place, and in some manner. A complete ban on begging, such as the one in *Loper*, 126 cannot withstand First Amendment analysis because of its overbreadth. A statute is deemed "overbroad" if its prohibitions affect constitutionally protected activities. 127 Overbreadth has also been found where a statute prohibits protected First Amendment activities and is not narrowly tailored to a compelling government interest. 128

The principal defect with the challenged statute in *Loper* 129 was that it was not narrowly tailored to serve a compelling government interest. If the state was genuinely seeking only to protect the public from those beggars who employ threatening or harassing techniques, then it should have enacted a law which only prohibited begging which was accompanied by harassment or assault instead of using a blanket ban on all begging.

To come within the purview of the time, place, and manner level of scrutiny, the state might enact such a statute which applies to all solicitation, whether by beggars or charitable orga-

126. *Id.*
nizations. However, as the Loper opinion pointed out, New York already has specific statutes which cover intrusive and intimidating conduct. With these statutes already in existence, it may be redundant to enact a separate statute to prohibit begging which is accompanied by harassment. But for those communities which lack such specific statutes, it is important to heed the Supreme Court's pronouncement that the "problems associated with solicitation must be addressed through 'measures less intrusive than a direct prohibition on solicitation.'"  

Unfortunately, the Loper decision does not devote more than a sentence or two to the overbreadth argument. This is unfortunate given its strength in relation to the challenged statute. While no one can in good faith assert that a state may not regulate begging to some extent, a more detailed analysis of the overbreadth issue and possible resolutions may have proved very helpful had they been included in the court's opinion.

The Loper opinion also failed to address the argument that begging is commercial speech. Some commentators have taken the position that begging/panhandling is a form of commercial speech. These commentators believe that as commercial speech, any regulations affecting begging should be given greater judicial deference than traditionally protected speech.

It seems doubtful that a court would label begging as commercial speech. Begging does not involve any kind of commercial transaction or sale of goods or services. A beggar merely seeks money without offering anything in return, except perhaps a thank you, a smile, or some other expression of gratitude. There appears to be nothing commercial in this kind of exchange. Even though this argument appears to lack validity, it would have been more helpful had the Loper court addressed it.

130. Id.
132. Loper, 999 F.2d at 699.
133. Id.
135. Id. at n.66.
136. See id. at 418.
137. Loper, 999 F.2d at 699.
VI. CONCLUSION

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive and disagreeable."138 New York City seemed to have forgotten this principle when it enacted its statute prohibiting begging on all city streets. The Court of Appeals for the Second Circuit held this statute unconstitutional because it found begging to be protected speech; the court also declared that the statute did not pass either of the applicable tests for regulation of a public forum.

To withstand constitutional scrutiny, states should abolish any distinction they recognize between charitable solicitation and begging. They should also enact statutes regulating begging which specifically address activities which can be constitutionally proscribed such as assault or harassment.

In light of the Supreme Court's treatment of charitable solicitation cases,139 it seems likely that a statute such as the one challenged in Loper140 would be struck down if it reached that Court. The Supreme Court has clearly held that solicitation is speech which is protected by the First Amendment.141 The Court has also fully embraced the principle that sidewalks are public fora.142

Given the Court's views on these two issues, it seems unlikely that they would find a reason to distinguish solicitation from

139. See Riley v. National Fed. of the Blind of N.C., Inc., 487 U.S. 781 (1988) (striking down a statute which mandates the fees a professional fund-raiser could charge a charity); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) (striking down a statute which prohibits a charity from paying a professional fund-raiser's expenses if they exceed 25% of the amount collected); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (striking down an ordinance which prohibits solicitation by charities which did not use at least 75% of their receipts for charitable purposes).
140. Loper, 999 F.2d at 699.
142. United States v. Grace, 461 U.S. 171, 177 (1983) (holding that the sidewalks comprising the Court's grounds should not be treated any differently from any other sidewalks in Washington, D.C.).
begging. As such, only those regulations prohibiting begging which meet either the applicable content-based standard or the time, place, and manner standard would be upheld. This should give many states and cities within this country food for thought.
THE ROAD TO NOWHERE:
TXO PRODUCTION CORP. V. ALLIANCE RESOURCES

by Allison M. Steiner

No two words cause more panic in a civil defendant's mind than "punitive damages." Their stated purpose runs contrary to the notions of remedies in civil law. The goal of civil law has always been to restore the plaintiff to the position he was in before the conduct of the defendant caused him injury. However, the conduct of the defendant occasionally rises to the level of wantonness, willfulness, or egregiousness. In the United States, this conduct gives rise to damages intended to punish the defendant. "Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different, public policy consideration — that of punishing the defendant or of setting an example for similar wrongdoers . . . ."¹

The number of punitive damage awards has risen significantly in the last twenty years.² The amounts in some cases have pushed the outer limits of what may be considered reasonable punishment.³ With the implementation of products liability laws and the veritable onslaught of mass tort litigation, the availability of punitive damages has become a weapon juries frequently wield against defendants. This increase in the use of punitive damages has prompted tort reformers and trial lawyers to call for a review of the standards used in determining whether the damages are warranted and in what amounts.⁴ The recent increase in punitive damage awards has prompted tort reform in this area. The majority of disputes over punitive damages has

1. BLACK'S LAW DICTIONARY 352 (5th ed. 1979).
2. Debra Cassens Moss, The Punitive Thunderbolt, 79 A.B.A. J. 88-92 (May 1993). Whether there is actually a punitive damages crisis is a matter of debate. Studies show that there has been an increase in the award of punitive damages, and an increase in amounts. However, it has not been agreed that these increases are as egregious as they have been described. Id.
4. Moss, supra note 2. Two advocated changes are the bifurcation of trials and the implementation of a standard of proof by which the jury is to judge the conduct of the defendant before awarding punitive damages. Id.
occurred quietly in the state courts and legislatures. 5 Several states have placed caps on these awards 6 while others allocated a portion of the awards to the state. 7 At the federal level, the Products Liability Fairness Act was introduced in the United States Senate in an effort to create uniform standards to govern the litigation of products liability actions. 8 The bill, which was never enacted, included a section setting standards for the award of punitive damages. 9

5. Id. Almost all of the states have taken some action in the last five to 10 years to change the procedures involving the award of punitive damages. Id.

6. See ALA. CODE § 6-11-21 (1987) (punitive damages not to exceed $250,000); CONN. GEN. STAT. ANN. § 52-240b (West 1979) (punitive damages in product liability action not to exceed twice the amount of compensatory damages); Fla. Stat. ANN. § 768.73 (West 1992) (punitive damages not to exceed three times the amount of compensatory damages); KAN. STAT. ANN. § 60-3701 (1988) (punitive damages not to exceed the lesser of the annual gross income earned by the defendant, determined by the highest of income earned for any of the five years preceding the act giving rise to the cause of action or $5 million); OKLA. STAT. tit. 23, § 23-9 (West 1986) (punitive damages not to exceed amount awarded in compensatory damages); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West 1989) (exemplary damages limited to four times the amount of actual damages or $200,000, whichever is greater); VA. CODE ANN. § 8.01-38.1 (Michie 1987) (punitive damages not to exceed $350,000).

7. COLO. REV. STAT. § 13-21-102 (1986) (one-third of all punitive damage awards be paid into the general state fund, declared unconstitutional in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991)); FLA. STAT. ANN. § 768.72 (West 1994) (35% of the award is payable to the state); GA. CODE ANN. § 51-12-5.1 (1987) (75% of the award is payable to the state); declared constitutional in Mack Trucks v. Conkle, 436 S.E.2d 635 (Ga. 1993); ILL. REV. STAT. ch. 735, para. 5/2-1207 (1992) (trial court has discretion to award a part of the award to the state); MO. REV. STAT. § 537.675 (1987) (50% of award is payable to the state); N.Y. CIV. PRAC. L. & R. 8701 (Consol. 1992) (20% of the award is payable to the state); OR. REV. STAT. § 18.540 (1991) (portion of the award is payable to the state); UTAH CODE ANN. § 78-18-1 (1989) (portion of the award is payable to the state). For a complete discussion of the constitutional aspects of these statutes, see Paul F. Kirgis, The Constitutionality of State Allocation of Punitive Damage Awards, 50 WASH. & LEE L. REV. 843 (1993).


9. Id. The bill, which was introduced in the 103rd Congress but not enacted, was an attempt to provide a uniform product liability law. The section regarding punitive damages was § 203, Uniform Standards for Award of Punitive Damages. Subsection (a) read:

In General. — Punitive damages may, if otherwise permitted by applicable law, be awarded in any civil action subject to this Act to any claimant who establishes by clear and convincing evidence that the harm suffered by the claimant was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by the product. A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions, or warnings is not of itself such conduct. Punitive damages may not be awarded in the ab-
The United States Supreme Court recently reviewed constitutional objections to large awards of punitive damages. These challenges have been argued under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. In Pacific Mutual Life Insurance Company v. Haslip, the Court held that the common law method for determining punitive damages was not unconstitutional per se.

This note will review the Court's decision in TXO Production Corporation v. Alliance Resources in light of the history and function of punitive damages and compare the Court's reasoning in TXO to that in Haslip. The constitutional issues in both cases are similar though the opinion in TXO was a plurality giving

sence of any award of compensatory damages.

Subsections (b) and (c) provided exceptions to certain drugs and medical devices, aircraft and components. Subsection (d) provided for a separate proceeding to be requested by manufacturer on the award of punitive damages.

Subsection (e) read:

Determining Amount of Punitive Damages. — In determining the amount of punitive damages, the trier of fact shall consider all relevant evidence, including — (1) the financial condition of the manufacturer or product seller; (2) the severity of the harm caused by the conduct of the manufacturer or product seller; (3) the duration of the conduct or any concealment of it by the manufacturer or product seller; (4) the profitability of the conduct of the manufacturer or product seller; (5) the number of products sold by the manufacturer or product seller of the kind causing the harm complained of by the claimant; (6) awards of punitive or exemplary damages to persons similarly situated to the claimant; (7) prospective awards of compensatory damages to persons similarly situated to the claimant; (8) any criminal penalties imposed on the manufacturer or product seller as a result of the conduct complained of by the claimant; and (9) the amount of any civil fines assessed against the defendant as a result of the conduct complained of by the claimant.


11. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

12. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . ").

13. Haslip, 499 U.S. at 15-18. The Court took note of the fact that every state and federal court had decided that "[T]he common law method for assessing punitive damages does not in itself violate due process." Instead, the Court examined the individual damage award as to whether or not it violated due process. Haslip was the Court's last punitive damages decision before TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711 (1993).

14. TXO, 113 S. Ct. at 2711.
rise to doubts about the lasting power of Haslip. This note will conclude that given the uncertainty of the Supreme Court's guidance on the issue, civil defendants should turn to state legislatures to place substantive guidelines or limits on punitive damages awards.15

I. HISTORICAL PERSPECTIVE OF PUNITIVE DAMAGES

Punitive damages have long served the civil justice system as a device to punish the egregious conduct of a civil defendant.16 The amount of damages awarded is not measured by the actual loss to the plaintiff, but by the conduct of the defendant.17 The origins of punitive damages can be traced back to medieval England.18 These damages were first recognized in this country in the early nineteenth century.19 Despite the fierce controversy surrounding punitive damages, they are widely accepted throughout the United States.20

The Supreme Court of the United States first reviewed the appropriateness of punitive damages in the early nineteenth century.21 Justice Story, writing for a unanimous court, opined, "[I]t might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper punishment which

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15. Since the writing of this note, the Court heard yet another case involving the constitutional implications of punitive damages, Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994). That decision dealt with an issue different than the issue involved in TXO. A brief discussion of Honda Motor will appear in the conclusion of this note.
16. Historically, punitive damages were awarded in cases involving only intentional torts. See W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 10-11 (5th ed. 1984).
17. Id. at 9-10. Conduct that gives rise to punitive damages has been described as "with malice," "fraudulent," "evil," and "wilful" or "wanton." Mere negligence or the commission of a tort alone was not enough to warrant an award of punitive damages. Id.
21. The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818) (involving a schooner that had been pirated of its papers and was thus detained and fined upon entering port).
belongs to such lawless misconduct." However, the issue of whether punitive damages were constitutional did not present itself until fifty years later. In *Day v. Woodworth*, the Court found the award to be within constitutional boundaries for two reasons: common law practice and acceptance; and the need for the remedy. "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." The *Day* decision seemed to settle the issue until the enactment of the Fourteenth Amendment in 1868. The Court fought the first attack by deciding:

> It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; yet the damages which should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury.

No further challenges to the constitutionality of punitive damages came about until the latter part of the twentieth century. The first came from a completely different perspective, that of the First Amendment. In *Gertz v. Robert Welch, Inc.*, a case involving libel, the argument was made that if punitive damages could be awarded for "negligent speech," then speech would be "chilled," violating the First Amendment. The Court found

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22. *Id.* at 558. The defendants were not held liable for punitive damages. Justice Story's admonishment was directed at the original wrongdoers who had robbed the ship in the high seas.


24. *Id.* at 371.

25. *Id.* Ironically, this same reasoning is used in *Haslip* to justify the constitutionality of common law assessment of punitive damages in the twentieth century.

26. Missouri Pacific Railway Co. v. Hume, 115 U.S. 512, 521 (1885) (where defendants argued that a statute allowing for double damages was unconstitutional in an action brought to recover double the value of a mule that was killed on the railway).

27. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Court, citing to *Day*, argued that if the state felt it necessary to have such a law, then it was the state's prerogative to impose the fines. *Id.*

28. *Id.* at 348-50 ("[S]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a strong showing of knowledge of falsity or reckless disregard for the truth.").
that absent reprehensible conduct on the part of the defendant, punitive damages would not be warranted in actions involving libel, slander or defamation.29 The Gertz decision is the first where the Court limited the application of punitive damages in a particular area.

Following Gertz came four decisions between 1986 and 1991 which framed the current punitive damages issue of whether a large award may violate the Due Process Clause of the Fourteenth Amendment. The door was opened for specific constitutional challenges by Aetna Life Insurance Company v. Lavoie,30 which involved the issue of whether a state supreme court judge should have recused himself for bias. Chief Justice Burger, responding to the appellant’s objections to the imposition of punitive damages, speculated that:

[A] $3.5 million punitive damages award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and the lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. . . . These arguments raise important issues which, in an appropriate setting, must be resolved . . . .31

By virtue of this invitation, Bankers Life and Casualty Company v. Crenshaw32 was hailed as the case that would determine the constitutionality of punitive damage awards. But the Court unanimously refused to review the constitutional challenges, on the grounds that they were not properly raised in the courts below.33 The Court felt that given the import of the is-

29. Id. (holding that plaintiffs would be limited to actual damages as determined by the trial court).
31. Id. at 828-29. The facts of this case were rather unique. This case was based on a bad faith claim that Aetna had failed to pay a valid medical claim. At the same time the case was before the Alabama Supreme Court, one of the Justices was involved in bringing several lawsuits alleging bad faith against several insurance companies. At that time, the law in Alabama surrounding bad faith was unclear. Recusal was sought on the grounds that the Justice could possibly influence his own cases by shaping the law in Lavoie. Id.
32. Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). In Bankers Life, the Court also reviewed the constitutionality of a statute that provided for a penalty on unsuccessful appeals.
33. Id. at 76. The Court’s hands were essentially tied in that the issues were not raised in the court below nor was the petition sufficient.
issue, its review should have waited until the state courts or state legislature took ample opportunity to address the issue. By this time, the debate over the constitutionality of punitive damages was in full swing. The following term, the Court granted review to yet another case, *Browning-Ferris Industries v. Kelco Disposal*. The Court finally disposed of one of the constitutional questions of whether a large award of punitive damages violates the Excessive Fines Clause of the Eighth Amendment. The Court held that the Eighth Amendment was not invoked, in that, "[I]t does not constrain an award of money damages in a civil suit where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." Again, the Court did not pass on the due process issue as it was not properly raised in the courts below.

In 1991, the Court certified the question of whether large punitive damage awards violated the Due Process Clause of the Fourteenth Amendment. In *Haslip*, a seven to one majority held that common law methods for awarding punitive damages are not unconstitutional per se. The Court stated that punitive damages have been a traditional remedy under common law, and the enactment of the Fourteenth Amendment did not change that fact. The Court found that due process was satisfied because: the jury was given "reasonable constraints" on the exercise of their discretion; the trial court's subsequent review of the verdict assured "meaningful and adequate review of the punitive

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34. *Id.* at 79-80.
37. *Id.* at 264.
38. *Id.* at n.4. The Court, citing to history, acknowledged that the Eighth Amendment was enacted to place limits on the prosecutorial power of the government. *Id.*
39. *Id.* at 276-77. The petitioners asked the Court to address the size of the award but the Court declined on the grounds that it was a question of first impression and must wait until another day. *Id.*
41. Justice Souter took no part in the consideration or decision of the case.
42. *Haslip*, 499 U.S. at 17.
43. *Id.*
awards;” and subsequent appellate review assured the award would be reasonable.\textsuperscript{44} For large corporations and the defense bar, this result was an obvious disappointment because the Court had established relatively loose standards which had unclear implications. Possibly because of those mysteries, the Court decided to revisit the due process issue in \textit{TXO}.\textsuperscript{45}

II. THE CASE

In 1984, TXO Production Corporation negotiated for the oil and gas rights to a tract of land held by Alliance and known as the “Blevins Tract.”\textsuperscript{46} Alliance accepted TXO’s offer in April 1985, assigning its interest in the land to TXO.\textsuperscript{47} Alliance also agreed to return consideration paid if it was determined that the title to the land was defective.\textsuperscript{48} In examining the title, TXO’s attorneys discovered a 1958 deed that conveyed mineral rights from Tug Fork Land Company to Leo J. Signaigo, who in turn conveyed the rights to Virginia Crews Coal Company.\textsuperscript{49} It was clear from this deed that the grantor, Tug Fork Land Company, had reserved all rights to the oil and gas under the Blevins Tract.\textsuperscript{50}

TXO advised Alliance in July 1985 of the possibility that the title was flawed.\textsuperscript{51} At this time, TXO took two actions which led to this litigation. First, TXO attempted, without success, to convince Virginia Crews that it did own an interest in the oil and gas rights.\textsuperscript{52} TXO paid Virginia Crews $6,000 for a quitclaim deed conveying whatever interest Virginia Crews did have to TXO.\textsuperscript{53} Without advising Alliance, TXO recorded the deed.\textsuperscript{54}

\textsuperscript{44} \textit{Id.} at 19-21.
\textsuperscript{46} \textit{Id.} at 2715. Alliance was the assignee of a leasehold interest that Georgia Fuels had obtained from Tug Fork Land Company. Georgia Fuels reserved an overriding royalty interest. \textit{Id.} at n.1.
\textsuperscript{47} \textit{Id.} at 2715.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} Tug Fork Land Company was predecessor in interest of Alliance.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} The Supreme Court of West Virginia characterized this action as an attempt to steal the land from Alliance. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992).
By obtaining this deed, TXO was hoping to acquire the oil and gas rights in order to reduce its royalty payments to Alliance.\(^{55}\) Second, TXO tried, without success, to persuade Mr. Signaigo to execute a false affidavit stating that the 1958 deed may have included the oil and gas rights.\(^{56}\)

On July 12, 1985, TXO wrote Alliance stating that there was in fact a defect in the title and that TXO may have acquired the oil and gas rights from Virginia Crews.\(^{57}\) TXO tried then to renegotiate the royalty arrangement with Alliance.\(^{58}\) On August 23, 1985, TXO brought suit to quiet title.\(^{59}\) Alliance counterclaimed for common law slander of title.\(^{60}\) The court declared the quitclaim deed a nullity and denied TXO's claim.\(^{61}\) The slander of title claim was tried before a jury which found for Alliance, awarding $19,000 in compensatory damages and $10,000,000 in punitive damages.\(^{62}\)

III. THE DECISIONS

The West Virginia Supreme Court of Appeals affirmed both verdicts.\(^{63}\) Judge Neely, in reviewing the punitive damage ver-

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55. TXO, 113 S. Ct. at 2716.
56. Id. Mr. Signaigo was aware of TXO's actions and refused to cooperate.
57. Id.
58. Id.
59. Id.
60. Id. The Restatement provides the elements for slander of title in two parts: One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

RESTATEMENT (SECOND) OF TORTS § 623A (1977). Additionally:

[T]he rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of third persons in respect to the other's interests in the property.

RESTATEMENT (SECOND) OF TORTS § 624 (1977). The cause of action has been recognized by the Fourth Circuit Court of Appeals in Lomar Elect. Targetry v. ATA Training Aids Aust. Pty., 828 F.2d 1021 (4th Cir. 1987).

61. TXO, 113 S. Ct. at 2716.
62. Id.
63. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 886 (W. Va.
dict, found that the guidelines given to the jury met the standards adopted in *Haslip*. The jury was given several factors on which to base its award: whether punitive damages should have a reasonable relationship to the harm likely to occur as well as the harm that has actually occurred; the reprehensibility of the defendant's conduct; whether the defendant profited from the wrongful conduct; the reasonable relationship to compensatory damages; and the financial position of the defendant. Judge Neely also gave the trial court several factors to use when reviewing the jury award. These factors include the costs of litigation; any criminal sanctions imposed on the defendant; any other civil actions against the defendant for the same conduct; and the appropriateness of punitive damages. The court stated: "We set out these guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*.

In his somewhat colorful opinion, Judge Neely divided civil defendants into three categories: "(1) really stupid defendants; (2) really mean defendants; and (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." According to Neely, by using these three categories, one could determine the reasonable relationship between the defendant's conduct and the amount of punitive damages that should be awarded. For really mean defendants, "the reasonableness of the jury's verdict under *Haslip* and *Garnes* is the amount of punitive damages required to cause


64. See *Garnes* v. *Fleming Landfill*, Inc., 413 S.E.2d 897 (W. Va. 1991). "Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia." *Id.* at 908. Judge Neely, writing the opinion in *Garnes*, took very seriously the objectives of *Haslip* and painstakingly reviewed them in light of previous West Virginia decisions. *Id.*

65. *TXO*, 419 S.E.2d at 887.

66. *Id.*

67. *Id.* At the discretion of the court, any of the factors may be presented to the jury. *Id.*

68. *Id.*

69. *Id.* at 887-88. Judge Neely further expounded on these categories in an editorial he wrote after the Supreme Court's decision. See Richard Neely, *Needed: Legal Standards on Punitive Damages*, WALL ST. J., July 14, 1993, at A13.

70. *TXO*, 419 S.E.2d at 888-89. Judge Neely found that each category had an outer limit for the size of the award. *Id.*
the defendant to mend its evil ways to discourage others similarly situated from engaging in like reprehensible conduct."71 While these categories may well describe some corporate defendants, they do not necessarily give guidance needed by practitioners to ascertain when punitive damages will be awarded.72 Chief Judge McHugh, in a concurring opinion, addressed this problem and listed several terms that would more legally define the defendant's conduct as warranting punitive damages.73

TXO petitioned the United States Supreme Court, requesting a decision on whether the punitive damage verdict violated the Due Process Clause of the Fourteenth Amendment, either because it was excessive or a product of unfair procedure.74 The Court affirmed the verdict, deciding that it did not violate the Due Process Clause as interpreted by Haslip.75 Justice Stevens, writing the plurality opinion,76 turned to Haslip for guidance:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.77

TXO asserted that the punitive damage verdict was grossly excessive because the mathematical ratio between the punitive

71. Id. at 889.
72. Id. at 895 (McHugh, C.J., concurring).
73. Id. at 896. Chief Judge McHugh was obviously disappointed in Judge Neely's opinion. "In its cavalier attempt to be clever and amusing, the majority opinion has carelessly ignored the fundamental factors which have traditionally been used by courts to characterize the conduct of the defendants in assessing punitive damages." Id. at 895.
75. Id. at 2724.
76. Justice Stevens was joined by Chief Justice Rehnquist and Justice Blackmun. Justice Kennedy filed an opinion concurring in part and concurring in judgment. Justice Scalia filed an opinion concurring in judgment in which Justice Thomas joined. Justice O'Connor filed a dissenting opinion in which Justice White joined and in which Justice Souter joined in part. The fact that this case could not garner a majority does not bode well for its future applicability.
77. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). This quite nebulous answer is the main source of criticism of the Haslip decision. The term "reasonable" is not defined in the opinion, but can be inferred from the opinion as a subjective standard, not an objective one.
and compensatory damages was so great, namely 526 to one.\textsuperscript{78} The Court rejected this argument on the grounds that, "[B]oth State Supreme Courts [sic] and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."\textsuperscript{79} The Court instead looked to several factors that justified the award including, the amount of money at stake,\textsuperscript{80} TXO's egregious conduct, and TXO's net worth.\textsuperscript{81}

TXO's second argument was that the punitive damage award violated due process.\textsuperscript{82} TXO first attacked the trial court's jury instructions.\textsuperscript{83} The Court rejected this issue because it was not presented in the court below.\textsuperscript{84} Second, TXO criticized the failure of the trial judge to fully explain his reasons for upholding the award, and Judge Neely's colorful characterization of defendants.\textsuperscript{85} The Court defended Justice Neely's opinion as well-reasoned and well-founded in the law.\textsuperscript{86} Additionally, the Court found his post-verdict review to be adequate as required by Haslip.\textsuperscript{87}

Two concurring opinions were filed, espousing valid points not considered in the majority opinion. Justice Kennedy argued that the jury verdict must be compared to the record in the case.\textsuperscript{88} If the record did not substantiate the jury's award, then other reasons should have been found to support the verdict.\textsuperscript{89} Justice

\begin{flushright}
\textsuperscript{78} \textit{TXO}, 113 S. Ct. at 2721.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} The Court noted that even if the actual value of the potential harm to the respondents was $1 million, the disparity between the punitive award and potential harm did not jar constitutional sensibilities. \textit{Id.} at 2722.
\textsuperscript{81} \textit{Id.} The fact that TXO's net worth was disclosed was a point of contention at each level of the litigation. The defense bar consistently argued for that factor to be disregarded by the jury on the grounds that it caused the jury to be motivated by contempt for large corporations. \textit{Id.} at n.28.
\textsuperscript{82} \textit{Id.} at 2723.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 2723-24. TXO argued that it had not received advance notice that the jury could consider potential harm in calculating its award. However, the jury instructions explicitly provided for this consideration. \textit{Id.}
\textsuperscript{85} \textit{Id.} at 2724. The Court found the trial judge complied with his duties by allowing hearings on post verdict motions. \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 2725 (Kennedy, J., concurring).
\textsuperscript{89} \textit{Id.}
\end{flushright}
Kennedy felt that the fact that TXO acted with malice alone could have justified the jury's findings. 90

Justice Scalia, joined by Justice Thomas, argued that the majority opinion had given a substantive due process right to the defendants of a reasonable punitive damage award. 91 "As I said in Haslip, the Constitution gives federal courts no business in this area, except to assure that due process (i.e., traditional procedure) has been observed." 92 In Justice Scalia's opinion, no questions were left unanswered by TXO and Haslip, which left the standards of reasonableness and fair procedure standing. 93

The strongest voice on the Court came from Justice O'Connor, whose vigorous dissent contradicted her dissenting opinion in Haslip. Joined by Justices Souter and White, Justice O'Connor rested her decision on three points: the disparity between the compensatory damages and punitive damages; the lack of a real test to guide future verdicts; and the reliance of the jury on bias and passion. 94 First, Justice O'Connor found that punitive damages should bear a "reasonable relationship" to the award of compensatory damages. 95 She argued that the gross difference between the two awards should have raised the Court's conscience, prompting more than a cursory review. 96 Second, Justice O'Connor found that the Court shirked its duty to the states by failing to provide future guideposts. 97 Justice O'Connor

90. Id. at 2726. Evidence at trial showed that TXO had acted in a pattern of fraud, deceit and trickery and engaged in deceptive business dealings with Alliance. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 880, 890 (W. Va. 1992). 91. TXO, 113 S. Ct. at 2726 (Scalia, J., concurring). Procedural due process relates to the requirement that the procedures followed are fundamentally fair. Substantive due process relates to the requirement that the award is proportional to the defendant's conduct. For a complete discussion of these two concepts, see James R. May, Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Ins. Co. v. Haslip, 22 ENVTL. L. 573 (1992). 92. TXO, 113 S. Ct. at 2726 (Scalia, J., concurring). 93. Id. 94. Id. at 2728-42 (O'Connor, J., dissenting). 95. Id. at 2731. Justice O'Connor outlined a series of federal and state cases which argue for proportionality between the verdicts. Id. 96. Id. at 2733. Justice O'Connor conceded that it was not the place of the Supreme Court to establish a test, lest it violate the principles of federalism. Id. 97. Id. at 2732. Judge Neely, who wrote the majority opinion for the West Virginia Court of Appeals, expressed disappointment in the Supreme Court's decision. "I wrote the state appellate court opinion in TXO and when the Supreme Court af-
wrote: "Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis." Finally, Justice O'Connor found that the lack of support in the record for the verdict could only have meant that the jury was guided by bias and passion. "[J]urors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice." She argued that bias, passion, and even malice can "replace reasoned judgment and law as the basis for jury decision making." For this reason, Justice O'Connor stated that safeguards including the rules of evidence, trial judges, and courts of appeals, have been incorporated into modern judicial systems to protect jury decision making.

IV. ANALYSIS

The arguments supporting and condemning punitive damages are cyclical in that each returns to the point at which it started. Those who favor punitive damages assert that they serve as a means of punishing defendants who demonstrate a reckless disregard of their responsibilities to other citizens. Those who disfavor punitive damages (most certainly large corporations) feel that they impede development and research by fostering a conservative attitude which may retard economic growth.

Essentially the issue may be resolved by choosing a public policy that protects the plaintiff by providing him with a remedy for the egregious conduct of the defendant, or one that allows the defendant to predict when and in what amounts he will have to pay for his conduct. In this situation, there are no winners or losers. It cannot be denied that punitive damages serve a valu-

firmed, I felt the same mixed emotions I would have felt if my mother-in-law had driven over a cliff in my new Cadillac." Richard Neely, Needed: Legal Standards in Punitive Damages, WALL ST. J., July 14, 1993, at A13.

98. TXO, 113 S. Ct. at 2732 (O'Connor, J., dissenting).

99. Id. at 2736-37. To Justice O'Connor, the consideration of TXO's wealth and potential harm was inappropriate in determining the amount of punitive damages. Id.

100. Id. at 2728.

101. Id.

102. Id. at 2728-29.
able function in today's society, but those who award them must be guided in their grants.

The above-discussed cases have created uncertainty as to the real limits on the award of punitive damages. Since the decision in TXO, courts confronted with the choice of granting punitive damages have applied the Haslip standards, using TXO to affirm those standards. Uncertainty may lie in the fact that the Court has been asked to set standards which would apply concurrently in negligence and intentional tort cases, even though it would (or should) follow that the defendant who acts with intent or malice should be subjected to more punishment than the defendant who acts negligently.

There are two possible explanations for the Supreme Court's recent decisions. One is that the principles of federalism prevented the Supreme Court from creating a substantive test in cases where state legislatures were better equipped to do so. The other is that the Supreme Court found it the responsibility of each state to protect its economy and the large corporations doing business within the state.

Federalism is defined by a central government, separate from individual state governments. The concept creates a sort of separation of powers between the two. In the twentieth century, it functions to prevent the federal government creating a nationwide law governing a particular field. Tort law, the field where the majority of punitive damages are awarded, has consistently been a matter of state law. For the Supreme Court to create a

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105. Many states have remedied this problem in the products liability area by setting out an evidentiary standard the jury must apply before it can award punitive damages. For example, Ohio requires that:

[P]unitive or exemplary damages shall not be awarded against a manufacturer or supplier in question in connection with a product liability claim unless the claimant establishes by clear and convincing evidence, that harm for which he is entitled to recover compensatory damages . . . was the result of misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. OHIO REV. CODE ANN. § 2307.80 (Anderson 1991).
substantive test would run afoul of federalism which protects our system of democracy. "Although it might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to 'experiment with different methods' of ferreting out impermissible awards 'and to adjust those methods over time.'"\textsuperscript{106}

"State legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime and have frequently exercised that authority . . . ."\textsuperscript{107} In \textit{TXO}, Justice Scalia embraced this idea, stating that if any real reform is going to come in the area of punitive damages, it should come from the states, not the Supreme Court.\textsuperscript{108} Whereas courts are limited to deciding only the issues presented to them, state legislatures have the time, resources, and ability to explore issues fully and develop standards and procedures. The Supreme Court's responsibility is simply to ensure that promulgated standards and procedures do not violate the United States Constitution. Though both state and federal courts and legislatures have undertaken tort reform in the area of punitive damages, not enough time has passed to determine whether any of these methods has been or will be effective.\textsuperscript{109}

\textbf{V. CONCLUSION}

The Court's decision in \textit{TXO} did little to clarify the uncertainty of whether the Constitution allows for substantive limits on the award of punitive damages because the Court simply reiterated its \textit{Haslip} decision, but with less support from the bench as a whole. Since \textit{TXO}, the Court has attempted to refine its standards for punitive damage cases in \textit{Honda Motor Company v. Oberg}.\textsuperscript{110}

Unfortunately, because of the narrow issue involved in \textit{Honda Motor}, the Court focused on procedural matters and did not answer the question of substantive limits.\textsuperscript{111} "In the case before

\begin{itemize}
\item \textsuperscript{106} \textit{TXO}, 113 S. Ct. at 2733 (O'Connor, J., dissenting).
\item \textsuperscript{107} \textit{Id.} at 2727 (Scalia, J., concurring).
\item \textsuperscript{109} \textit{See supra} notes 6-9 and accompanying text.
\item \textsuperscript{110} \textit{Honda Motor Co. v. Oberg}, 114 S. Ct. 2331 (1994).
\item \textsuperscript{111} The \textit{Honda Motor} question presented was slightly different than \textit{Haslip} or
\end{itemize}
us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner."

The Court continues to be confined by the principles of federalism and narrow questions it may choose to answer in a given case. These restraints have contributed to the Court's failure to provide concrete guidance in the awarding of punitive damages. One can hope that recent changes in the Court's make-up will result in a bench willing to improve on its vague guidelines. But until that day, the Court will continue down the road to nowhere.

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*TXO.* In *Honda,* the Court considered whether Oregon's denial of judicial review of punitive damages unless the Court could affirmatively say there was no evidence to support the verdict was a violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 2334.

112. *Id.* at 2333.

113. Since *TXO,* the Court has lost two Justices, one from each side of the punitive damages issue. Justice Byron R. White retired at the end of the 1992-1993 term. He joined with Justice O'Connor in her dissent in *TXO.* He was replaced by Justice Ruth Bader Ginsburg. Justice Harry Blackmun retired at the end of the 1993-1994 term. He was replaced by Justice Stephen Breyer.
Average life expectancies have been on the rise for several decades in the United States. Unfortunately, Americans have seen a corresponding increase in the size of the incompetent elderly population. Furthermore, disability is not limited to the elderly population; it is more likely to occur than death is in people under the age of sixty.\(^1\) In this context, durable powers of attorney (DPAs) have gained increased recognition as an effective, flexible device for planning for incapacity for people of all ages.

This article will explore the use of DPAs in the estate planning context — particularly, efforts by agents to make gifts of the principal’s property. Since many DPA instruments are silent as to the authority of the agent to make gifts, attention will be given to two schools of interpretation: those who read the document on its face only and those who look to the principal’s intent.

Although the mode of interpretation is a state law question, many states have not thoroughly addressed the issue of how to interpret silent instruments.\(^2\) One of the reasons this interpretation is important to both the principal and the agent is that it has a ripple effect for federal estate and gift tax purposes. As such, a determination of state law may be reached in a variety of different forums depending on how the issue arises. These fo-

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\(^*\) The author wishes to acknowledge the assistance of Paul L. Caron, professor of law at the University of Cincinnati, in preparing this article. Ms. Finn-DeLuca is a recent graduate of the University of Cincinnati College of Law.

rums will be discussed in turn. They include the Tax Court, a lower state court, the state supreme court, and the state legislature, each of which can resolve the issue with varying degrees of certainty.

Because of the tax consequences, the IRS is a vocal participant in the debate about whether the gift giving power should be inferred under state law. For this reason, the IRS' position will be examined as part of the discussion of state law determinations. Finally, drafting suggestions will be offered in order to avoid the risk of litigation over a vague instrument and to maximize the benefit of the DPA.

I. THE DURABLE POWER OF ATTORNEY

The DPA has emerged as one of the most popular devices for planning for incapacity, gaining increased recognition as an important planning device since the adoption of the Uniform Durable Power of Attorney Act in 1979. Through a DPA, the principal can designate another person to act as his or her agent, and this designation is made in such a way that the power survives the subsequent incapacity of the principal.

A. Role in Estate Planning

There are two types of DPAs — the health care DPA and the financial DPA. The health care DPA authorizes an agent to make medical decisions for the principal in the event of incapacity. Fourteen states recognize this type of decision making authority under a DPA. The financial DPA for property manage-

4. Unif. Prob. Code § 5-501, 8 U.L.A. 513 (1989) defines a DPA as follows: A durable power of attorney is a power of attorney by which the principal designates another his attorney in fact in writing and the writing contains the words 'This power of attorney shall not be affected by the subsequent disability or incapacity of the principal' or 'This power of attorney shall become effective upon the disability incapacity of the principal' or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

See also, Stiegel et al., supra note 2, at 691. The DPA can be structured as either a "springing" power or a "current" power. A "springing" power makes the DPA effective only when a specific event occurs, namely the incapacity of the principal, and is authorized in some 42 states, including Ohio, Kentucky, Illinois and California. A "current" power takes effect upon execution of the document.

5. Stiegel et al., supra note 2, at 691.
DURABLE POWERS OF ATTORNEY

ment, which is the subject of this paper, is recognized in all fifty states and the District of Columbia. It represents a hybrid of the general power of attorney in agency law and the court-imposed guardianship or conservatorship at common law, combining the best attributes of each into a more effective tool for planning for disability. The DPA avoids the public nature of guardianship proceedings and the cumbersome delays inherent in the court system. It eliminates the need to account to the court or obtain the court's approval for transfers or other uses of the principal's assets. The principal also retains more control over the lawful acts of an agent than over a guardian. Furthermore, one can use a DPA to nominate a guardian or conservator. By nominating the agent to serve as the guardian, the estate planner can avoid potential conflicts which may arise if a court were to appoint someone else, to whom the agent would then be answerable.

One major shortfall of the common law agency relationship is that the relationship is automatically terminates at the death or incapacity of the principal. On the other hand, the DPA avoids this limitation by continuing the relationship when the principal needs the agent most — when the principal is unable to act for himself or herself.

B. Authorizing the Agent to Make Gifts

*Inter vivos* gifts present significant tax-saving opportunities. Such transfers remove property, including post-transfer appreciation, from the gross estate of the principal for estate tax purpos-

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8. Schmitt, supra note 6, at 204.
10. Waters, supra note 7, at 523.
13. An *inter vivos* gift is a "[g]ift made when donor is living and provides that gift take effect while donor is living as contrasted with testamentary gift which is to take effect on death of donor (testator)." BLACK'S LAW DICTIONARY 821 (6th ed. 1990).
es, and qualify for the annual gift tax exclusion of $10,000.\textsuperscript{14} By capitalizing on these opportunities, the estate planner can significantly reduce his or her estate tax burden and increase the amount of property which can be passed to family members or other beneficiaries.\textsuperscript{15}

Using a financial DPA to make \textit{inter vivos} gifts is a valuable estate planning tool because the agent can initiate or continue tax savings strategies on behalf of the principal. Otherwise, undesirable occurrences could frustrate the true intentions of the incapacitated individual. Assets not used for the principal's support could continue to appreciate, driving the potential estate taxes higher and higher. Meanwhile, the annual exclusions of numerous potential beneficiaries might go unused and the financial needs of other family members might go unaddressed.

Unfortunately, many financial DPAs neither expressly confer nor expressly withhold the power to make gifts. They often contain authorization for other specific types of transfers — sales and mortgages, for example — and a sweeping statement that the agent is authorized to do anything else which the principal would be able to do in lieu of his or her incapacity. Such DPAs leave open the question whether the power to make gifts of property has been conferred. The omission could be interpreted as a conscious choice by the drafter, who perhaps fears that the depletion of the estate would deprive him or her of needed income. On the other hand, the omission might represent an inadvertent oversight on the part of the drafter. The latter is a more likely scenario since one who consciously decides to prohibit gift-giving would probably say so explicitly. However, the question of how to interpret the instrument ultimately falls into the purview of the state courts.

\section{II. THE STATE LAW}

\subsection*{A. Restatement of Agency}

Most state courts and legislatures have not addressed the interpretation of a durable power of attorney which neither confers nor withholds the power to make gifts.\textsuperscript{16} For those who

\begin{itemize}
  \item \textsuperscript{14} I.R.C. § 2503 (West 1994).
  \item \textsuperscript{16} Schmitt \& Hatfield, \textit{supra} note 6, at 210.
\end{itemize}
DURABLE POWERS OF ATTORNEY

have addressed it, the starting point of the analysis is the common law of agency and the Restatement of Agency. Generally, any powers which are not expressly conferred will not be implied under the law of agency. The Restatement (Second) of Agency explains:

Formal instruments which delineate the extent of authority, such as powers of attorney . . . giving evidence of having been carefully drawn by skilled persons, can be assumed to spell out the intent of the principal accurately with a high degree of particularity. Such instruments are interpreted in light of general customs and the relations of the parties, but since such instruments are ordinarily very carefully drawn and scrutinized, the terms used are given a technical rather than a popular meaning, and it is assumed that the document represents the entire understanding of the parties.

However, the common law of agency is premised on the assumption that the principal has sufficient capacity to direct the acts of the agent. Often, this presumption does not apply in the case of a DPA because the principal is incapacitated. The common law simply has not envisioned some of the important modern uses of the DPA such as in estate planning.

B. Approaches

Most DPA instruments confer some specifically enumerated powers, then include a general clause which demonstrates an intent that the agent stand in the principal’s shoes or that the agent be given all other powers necessary for the agent to carry out the goals of the principal. One of the state law issues presented by such an instrument is whether to interpret the document narrowly according to the powers conferred on its face, or to consider extrinsic evidence of the donor’s intent.

18. Id. § 34 cmt. h.
19. Id. § 7 cmt. a.
20. Id. § 34.5.
1. The Strict “Four Corners” Approach

The states which follow the strict agency rule of construction, which is a “four corners” rule similar to that used in interpreting wills, conclude that any power not specifically conferred is deemed not granted.22 Following this narrow reading, some state supreme courts have specifically rejected attempts to read gift-giving powers of an agent into instruments which do not expressly authorize such transfers.23 For example, the Supreme Court of South Carolina has barred gifts by an agent to himself or a third party in an effort to prevent fraud and abuse unless a clear intent to the contrary is expressed in the instrument.24 Oral authorization by the principal was held ineffective.25 The Nebraska Supreme Court followed South Carolina and held that “powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.”26 The highest courts of Texas, Alaska, and Oklahoma have refused to infer powers as well.27

Under this strict construction, any general “catch-all” clause is interpreted only to “confer those incidental interstitial powers necessary to accomplish objects as to which authority has been expressly conferred”28 and not to confer any additional substantive powers. The Oregon Supreme Court summarized this approach as follows:

[Where an agency was conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself and cannot be enlarged by parol evidence of... an intention to confer additional powers, because that would be to contradict or vary the terms of the written instrument.29

23. Id. at 7.
25. Id. at 431.
2. The Extrinsic Evidence of the Donor's Intent Approach

Courts in other states have held that determining the principal's intent through the use of extrinsic evidence is most important. Such extrinsic authority could be used to establish implied authority in law or in fact, or apparent authority, in addition to the express authority granted in the instrument. Thus, these states employ a very subjective, fact-oriented approach. As such, courts in these states will explore lifetime gift-giving histories, the financial position of the principal before and after the transfer, and other information to measure the likelihood that the principal intended to confer the power to make gifts.

Ohio is one state which considers extrinsic evidence although the question has not been addressed by the Supreme Court of Ohio. In Testa v. Roberts, an Ohio court of appeals invalidated gratuitous transfers but the court did not adopt a general rule that such powers could never be inferred. Rather, its decision was tied closely to the facts of the case, where the agent attempted to justify gifts he made to himself and other family members under a general power of attorney which was silent as to the power to make gifts. The court of appeals upheld the district court's decision to invalidate the gifts for several reasons. First of all, the district court found that the decedent, Florence Whipple, was not competent at the time the power of attorney was executed. As a result, the gifts made pursuant to that power were invalid, and the principal could not have ratified those gifts by her actions after the fact. The court also

33. Testa v. Roberts, 542 N.E.2d 654 (Ohio Ct. App. 1988). An appeal was taken to the Supreme Court of Ohio, but the case was later dismissed for want of prosecution.
34. Id. at 660.
35. Id. at 656-58.
36. Id. at 657.
37. Id.
38. Id. at 660.
had reason to be suspicious of the agent's motives because the gifts contravened the decedent's wishes as expressed in her will, which devised modest, specific bequests to the agent and others, with the remainder of her estate bequested to charity.\textsuperscript{39} The gifts made during her incompetency seemed to defeat Whipple's intentions as expressed in the will and were not consistent with any lifetime estate planning strategy.\textsuperscript{40} Furthermore, conflict of interest concerns arose because the transfers did not seem to be in Whipple's best interests. Although her estate was small, $90,000 of her original $210,000 in assets were transferred to the agent and others, raising serious questions about whether the remaining assets were sufficient for her support.\textsuperscript{41} For these reasons, the court rejected the validity of the gifts and ordered that the monies be returned to the estate.\textsuperscript{42} However, the court did not preclude the possibility that it would uphold an inferred gift-giving power based on extrinsic evidence in a more appropriate factual situation.\textsuperscript{43}

The Ohio appellate court's determination as to the agent's authority to make gifts has important implications. Potentially, the ruling may affect the distribution of assets which has a bearing on the overall size of the estate. If a court invalidates transfers made by a DPA, requiring those assets be returned to the estate to be distributed in accordance with the will or intestacy laws of the state, the value of the estate, for federal estate tax purposes, might increase significantly.

III. FEDERAL TAX LAW

Much of the litigation over the power of an agent to make gifts arises in federal taxation disputes. The problem relates to gift and estate taxes in particular. As discussed above, \textit{inter vivos} gifts present unique estate planning opportunities because of the availability of the annual exclusion and the reduced tax burden of removing highly appreciated property from an estate. However, several gift tax provisions pose potential problems when a transfer is made by an agent.

\textsuperscript{39} Id. at 657.
\textsuperscript{40} Id. at 660.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 662.
\textsuperscript{43} Id.
A. The Tax Problem

Internal Revenue Code section 2511 indicates that a gift is complete only when “[T]he donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another . . . .”44 When a gift is made through an agent pursuant to a financial DPA, whether the owner has forfeited control and the power to change its disposition is a factual determination tied to the issue of whether the gift is authorized under the power of attorney. If the agent does possess the power to make gifts, then such gifts are complete because the owner is bound by the acts of the agent. However, if the agent is not authorized to make gifts, then the transfers are considered to be revocable by the principal, even if the principal does not actually have the mental capacity to effect such a revocation.

Furthermore, section 2038(a)(1) of the Internal Revenue Code mandates:

The value of the gross estate shall include the value of all property . . . of which the decedent has at any time made a transfer . . . where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . to alter, amend, revoke or terminate . . . .45

In other words, if a gratuitous transfer were revocable by a decedent due to an agent’s lack of authority, any gifted property would be includible in the decedent’s estate for estate tax purposes. Thus, all tax advantages of the agent’s attempted gifts would be destroyed and the Internal Revenue Service (IRS) would assess a higher estate tax. If a DPA instrument is silent on the issue, state law governing an agent’s authority to make gifts becomes crucial to the taxpayer, the estate beneficiaries and the IRS.

B. Construing State Law

Numerous states have not addressed the issue of the agent’s gift-giving power under a silent DPA. Others have had some court or legislative consideration of the problem which guides,

but may not control, the IRS assessment of taxes. As such, the
taxpayer enters a complex legal labyrinth when the extent of the
gift-giving authority is not specified in a DPA instrument.

1. Determinations Made Without Statutory or Case Precedent

When there has been no state court or legislative determina-
tion regarding the gift-giving authority of an agent under a si-
ilent instrument, the IRS and, more importantly, the Tax Court,
attempt to discern what the state's highest court would do. The
IRS has consistently taken the position that durable powers of
attorney which do not explicitly authorize the agent to make
gifts create revocable transfers which are incomplete for gift tax
purposes and subject to taxation as part of the estate. It
reaches this conclusion based on strict interpretation under
agency principles and, undoubtedly, its own revenue interests
as well.

However, the Tax Court has been more inclined to infer gift-
giving authority under state law in some situations, especially
when the agent can show that he or she is carrying out a long-
established gift giving pattern of the principal. For example, in
Estate of Bronston v. Commissioner, the Tax Court interpreted
New Jersey law such that the provision "[t]o grant, bargain, sell,
convey, or lease, or contract for the sale, conveyance, or lease of
any property now or in the future owned by [the principal] . . . " included the power to make gifts where the principal
had a three-year history of making gifts to her children and
their spouses that qualified for the annual exclusion. "Her
usual affairs at the time she executed the power of attorney in-
cluded giving gifts to her children and their spouses."

The Tax Court reached a similar result interpreting Pennsyl-
vania law in Estate of Gagliardi v. Commissioner. The court
again relied on surrounding circumstances to determine whether

49. Id. at 551 (alteration in original) (citations omitted).
50. Id. at 553.
51. Id.
a power of attorney authorized gratuitous transfers.53 There, the court held that the agent was entitled to make gifts under a broad power of attorney because the principal had intended for that power to be included.54 In Estate of Council v. Commissioner,55 a North Carolina case, the trustees of a marital deduction trust with a testamentary general power of appointment in the beneficiary were permitted to distribute principle to the beneficiary so that she could make gifts to her children.56

Clearly, these Tax Court decisions have been of some assistance to agents and taxpayers in protecting gifted property from inclusion in estates for estate tax purposes. However, the court has been criticized in these cases for straining to find that gifts were part of the principal's ordinary course of business and for drawing unfounded distinctions between these fact patterns and similar cases where such an interpretation of state law was rejected by federal circuit courts.57 Indeed, such decisions are very unreliable. They are prone to attack on appeal by the IRS and are at substantial risk because of the direct conflict between these rulings and traditional agency rules of interpretation.

Estate of Casey v. Commissioner58 epitomizes the unpredictability of the Tax Court and circuit courts in deciding the extent of gift-giving authority. Olive Casey, a Virginia resident, died in September 1983.59 Her husband, Carlton, predeceased her, but she was survived by three sons.60 During the Caseys' marriage, approximately ninety percent of their assets were held in Carlton's name, but much of the property was real estate in which Olive had a dower interest under Virginia law.61 On several occasions, Carlton conveyed real estate to their sons, and Olive joined in these conveyances, releasing her dower interest.62

53. Id. at 1211.
54. Id.
56. Id. at 611.
59. Id. at 177.
60. Id.
61. Id.
62. Id.
In 1973, Olive executed a durable power of attorney which authorized her son, Robert, "(1) To lease, sell, grant, convey, assign, transfer, mortgage and set over to any person, firm, or corporation . . . as he may deem advantageous, any and all of my property . . . (3) To accept and receive any and all consideration payable to me on account of any such [transaction] . . . ."63

It also contained the following general power:

(11) To do, execute and perform all and every other act or acts, thing or things as fully and to all intents and purposes as I myself could or would do if acting personally, it being my intention by this instrument to give my attorney hereby appointed, full and complete power to handle any of my business or to deal with any and all of my property . . . in full and absolute discretion.64

The instrument did not expressly confer any power to make gifts, to convey with or without consideration or the like.65

Over a period of years prior to his death, Carlton had conveyed a series of parcels of land to the Caseys' children and grandchildren as part of an estate plan to minimize his estate tax burden through the use of the annual gift tax exclusion.66 For several years, Olive joined in these conveyances of her own accord, releasing her dower interest and consenting to being treated as making half of each gift.67 At some time after 1977, Olive had been rendered incompetent to manage her own affairs.68 From that time until the time of Carlton's death in 1982, Robert acted under Olive's power of attorney and joined in similar conveyances of real estate on Olive's behalf.69

After Carlton's death, Robert began to make monetary transfers from Olive's bank account to the estate plan beneficiaries, including himself, in addition to ongoing transfers of real estate.70 Olive had sufficient funds for her support at all times.71 Following Olive's death in 1983, the gifts made solely by Robert under the power of attorney were not included in her gross es-

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63. Id. (alteration in original) (citations omitted).
64. Id.
65. Id. See also Estate of Casey, 948 F.2d at 901.
66. Estate of Casey, 58 T.C.M. (CCH) at 177.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
The IRS contended that the gifts were voidable, revocable transfers and, therefore, includible in her estate under section 2038(a)(1) of the Internal Revenue Code.

The Tax Court was asked to determine whether the gifts made by Robert were authorized by the power of attorney under Virginia law, as it would be applied by that state's highest court. There was no Virginia authority on this issue at the time. The Tax Court weighed the importance of strictly interpreting the language in a power of attorney against the importance of construing the document in a way which would reflect the intent of the grantor of the power. In doing so, it concluded:

[The Virginia Supreme Court] would closely scrutinize the circumstances under which Robert Casey was granted the power of attorney and would conclude that the power to make gifts to family members in order to minimize the tax on the transfer of decedent's wealth to younger generations of her family, and to carry out an established estate plan, was within the scope of the power granted.

The court relied upon the Bronston and Gagliardi decisions discussed above, but it did not identify a particular power expressed in the instrument within which the specific power to make gifts would fall.

The U.S. Court of Appeals for the Fourth Circuit reversed, determining that Virginia's highest court would have invalidated the gifts based on the most relevant Virginia decisions interpreting powers of attorney. It believed that the Virginia Supreme Court would have adopted a strict rule of interpretation under agency principles and that the power to make gifts would not have been found in any formally drawn power of attorney which did not expressly grant it in order to avoid fraud and abuse.

72. Id.
73. Id. at 178.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
80. Id. at 898.
81. Id. at 898-99.
When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney—of which outright transfers for less than value to the attorney-in-fact herself are the most obvious—the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.\(^{82}\)

The circuit court relied upon a series of Virginia cases interpreting powers of attorney in reaching the conclusion that the Supreme Court would favor such a strict rule of interpretation.\(^{83}\) The state court had construed powers of attorney narrowly in other cases and had shown significant concern for protecting principals against self-dealing by their agents.\(^{84}\) In fact, the Virginia court treated agents as fiduciaries in regard to any self-dealing and applied the presumption of fraud to self-dealing transactions.\(^{85}\)

Furthermore, the circuit court concluded that even if the Virginia court would not have gone so far as to adopt a strict rule of interpretation, it would have, nonetheless, declined to infer the power to make gifts in the circumstances presented in this case.\(^{86}\) For example, Olive's previous gifts were not gifts of her own property, but merely joinders in her husband's gifts.\(^{87}\) Therefore, the court found that those giving patterns could not automatically be ascribed to her.\(^{88}\) Also, she had never acquiesced in monetary gifts, such as those which Robert made after Carlton's death.\(^{89}\) Furthermore, the court distinguished Olive's situation at the time the latter gifts were made because Carlton, her primary source of support, was no longer alive.\(^{90}\) This change would certainly factor in to any decision to transfer as-

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82. Id. at 898.
83. Id. at 899 (citing Eitel v. Schmidlapp, 459 F.2d 609, 613 (4th Cir. 1972) (citing Virginia cases)).
84. Id. at 899.
85. Id.
86. Id. at 901-02.
87. Id. at 898, 901.
88. Id.
89. Id. at 897. See also Estate of Casey v. Commissioner, 58 T.C.M. (CCH) 176 (1989), rev'd, 948 F.2d 895 (4th Cir. 1991).
90. Estate of Casey, 948 F.2d at 901.
sets gratuitously, although it is undisputed that Olive did, in fact, have enough resources for her support at all times.\textsuperscript{91}

In sum, the Fourth Circuit Court of Appeals attached great significance to the "glaring omission" of the "potentially dangerous" gift-giving power and read the DPA instrument as contemplating only transfers for value.\textsuperscript{92} The court found no intrinsic ambiguity regarding the gift power and held that its omission from the power of attorney was dispositive of the principal's intent on the subject.\textsuperscript{93} Thus, the Tax Court's decision was reversed and the gifts were included in Olive's gross estate.\textsuperscript{94}

2. Lower State Court Rulings

As discussed above, taxpayers' attempts to obtain rulings favoring the power of an agent to make gifts in the Tax Court have been somewhat successful, but are subject to attack on appeal. Unfortunately, obtaining a favorable lower state court ruling puts the agent in an equally precarious position.

The IRS has not hesitated to challenge lower state court determinations that the agent has authority to make gifts not specifically authorized in the DPA instrument. In part, this practice has been justified by the United States Supreme Court's ruling in \textit{Commissioner v. Estate of Bosch}.\textsuperscript{95} The \textit{Bosch} court ruled that the IRS is bound only by decisions of the state's highest court where state courts are determining a property law issue with federal tax implications.\textsuperscript{96} The Court indicated that "proper regard" should be given to lower state court decisions, but that these decisions are not binding upon the IRS.\textsuperscript{97} Typically, the IRS applies the "proper regard" test by noting the existence of a lower state court decision, then proceeding with an independent review of state law as if the decision were nonexistent.\textsuperscript{98}

For example, in one Texas case an agent sought and obtained a district court order declaring that gifts made under a general

\begin{thebibliography}{99}
\bibitem{91} \textit{Estate of Casey}, 58 T.C.M. (CCH) at 177.
\bibitem{92} \textit{Estate of Casey}, 948 F.2d at 901.
\bibitem{93} \textit{Id.}
\bibitem{94} \textit{Id.} at 902.
\bibitem{95} \textit{Commissioner v. Estate of Bosch}, 387 U.S. 456 (1967).
\bibitem{96} \textit{Id.} at 465.
\bibitem{97} \textit{Id.}
\bibitem{98} Verbit, \textit{supra} note 32, at 445.
\end{thebibliography}
power of attorney were valid conveyances. In a subsequent will dispute involving these gifts, the parties settled before any judicial determination was entered. However, the IRS ruled in technical advice that the agent did not have the power to make such conveyances. "Under Texas law, the instrument must be strictly construed and we do not believe that the Texas Supreme Court would construe this instrument as giving A the power to transfer D's property without full and adequate consideration."

Federal courts of appeals have virtually disregarded the "proper regard" dictate as well. Lower state court interpretations of state law often receive no regard at all. Federal district courts frequently ignore lower state court decisions, and federal courts of appeals have overruled lower state court determinations of state law in sixty-one percent of the cases since Bosch.

By applying Bosch in this way, federal courts overlook the fact that the states have a strong interest in seeing that their laws are properly applied. Furthermore, the states' motivation for preventing fraud and overreaching is even greater than that of the IRS. As the dissenters in Bosch recognized, the states are "[U]nquestionably better positioned to measure the requirements of their own laws; even the lowest state court possesses the tangible advantage of a close familiarity with the meaning and purposes of its local rules of law."

Although the federal estate and gift tax laws do not provide an express role for state court determinations of property issues, there is no evidence of an intent on the part of Congress to exclude such local decisions. By disregarding lower state court decisions in estate proceedings, the federal courts put an executor in an extremely difficult position: he or she may distribute

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100. Id.
102. Id.
103. Id. at 825.
106. Moore, supra note 104, at 687, 695.
the proceeds of the estate in accordance with the local probate court's decision, only to have the IRS subsequently disallow some of the gifts or challenge the court's determination in other ways which affect the tax liability.

An agent or executor must recognize the risks inherent in this approach before transferring property out of an estate through gifts or following probate of a will. Despite the policy arguments favoring deference to lower state court decisions, agents and taxpayers must recognize the limited value of these decisions. Where federal tax issues are at stake, the IRS and the federal courts will often have the final word when the state's highest court has not spoken.

3. State Supreme Court Rulings

A state supreme court ruling as to an agent's power to make gifts under a general power of attorney, or any other issue with federal tax implications, is far more useful to the taxpayer than a lower state court or Tax Court determination. As discussed above, the Supreme Court held in Bosch that the decision of a highest state court regarding the appropriate characterization of a property law issue is binding upon the IRS and federal courts for tax purposes.107 So, a state supreme court resolution whether to follow strict agency principles of interpretation or allow extrinsic evidence of the intent of the principal to make gifts is binding for federal tax purposes. Such a ruling provides much more security for the agent or taxpayer than the decisions discussed above.

The Supreme Court of Georgia recently issued such a ruling in LeCraw v. LeCraw.108 In that case, the decedent, Julia Adams LeCraw, had appointed her three sons to act as her attorneys-in-fact under a general power of attorney, which became effective upon execution.109 The instrument authorized the sons to, among other things:

Make deposits and to make withdrawals from any accounts [she] might now or hereafter have with banks . . . including but not limited to checking accounts [and] savings accounts . . . [and to]

107. Id. at 691, 697.
109. Id. at 698.
do any other thing or perform any other act, not limited to the foregoing, which [she] might do in person, it being intended that this shall be a general power of attorney.¹¹⁰

The instrument did not specifically authorize gifts, nor did it make any reference to estate planning.¹¹¹

Mrs. LeCraw had a history of making gifts to her children, their spouses, her grandchildren and close friends.¹¹² From 1978 through 1985, she made 252 such monetary transfers through checks totally approximately $30,000.¹¹³ Two hundred and thirty-five of these checks were for $100 or less.¹¹⁴

The financial DPA was executed in 1980, but the sons did not act under it until late 1985, approximately four months before Mrs. LeCraw's death.¹¹⁵ At that point, the sons made gifts to approximately forty persons within the annual gift tax exclusion amount totalling $650,000 to her usual beneficiaries, including her sons, the agents.¹¹⁶ LeCraw was competent at the time the gifts were made, and knew of the gifts, voicing no objections.¹¹⁷ She also accepted thanks from several gift recipients.¹¹⁸ The assets transferred were not necessary for LeCraw's support as she had over one million dollars in her estate after these transfers were made.¹¹⁹

Following LeCraw's death, the executors of her estate sought a declaratory judgment that the power of attorney authorized the agents to make gifts.¹²⁰ The trial court declined to apply strict rules of construction and allowed extrinsic evidence regarding LeCraw's intent and previous giving patterns.¹²¹ The court then held that the agents acted within their authority, that the gifts made pursuant to the DPA were in keeping with LeCraw's

¹¹⁰. Id.
¹¹¹. Id. at 700 (Fletcher, J., dissenting).
¹¹². Id.
¹¹³. Id.
¹¹⁴. Id.
¹¹⁵. Id. at 699.
¹¹⁶. Id. at 700.
¹¹⁸. Id.
¹¹⁹. Id.
¹²⁰. Id.
¹²¹. Id. (citing LeCraw v. LeCraw, No. 90-3237, slip op. at 3-4 (Super. Ct. of DeKalb County June 19, 1990)).
lifetime history of gift-giving, and that the gifts were sound steps designed to reduce her estate tax liability.\textsuperscript{122}

The determinative issues in the lower court's findings were that Mrs. LeCraw was competent at the time the gifts were made, that she acquiesced in the gift-giving by her actions, and that she understood the overall estate plan.\textsuperscript{123}

The court relied in part upon the ruling of the Tax Court in \textit{Casey}, as discussed above, which had not yet been overruled by the Fourth Circuit.\textsuperscript{124}

The Supreme Court of Georgia affirmed the lower court, rejecting the appellant's contention that Georgia law prohibited agents from making gifts of the principal's property under any circumstances.\textsuperscript{125} Instead, the court clarified that the existence of such authority is a fact-based determination which must be made on a case-by-case basis.\textsuperscript{126} The supreme court acknowledged the traditional agency principles of strict construction, which had been recognized in some of its earlier decisions, but found nonetheless that:

Ascertainment of the intent of the parties plays an important role in the construction of a power of attorney, as it does in construing any contract . . . . Where, as here, the grantor of the power of attorney expresses in that document the desires that her business be transacted by her [agents] and that the power of attorney be a general power, and the evidence is undisputed that the actions taken by the [agents], unobjected to by the grantor, continue the grantor's practice of giving monetary gifts to the natural objects of her bounty and affection; that the exercise of the power . . . does not deplete grantor of the assets necessary for her to live in her accustomed life-style; and that the exercise of the power . . . minimizes the estate transfer tax, a goal the grantor desired, we construe the general power of attorney executed by the grantor to include within it the power to make gratuitous transfers of property to the natural objects of the grantor's bounty.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} (stating that the intent of the parties also played an important role in the probate court's construction of the power of attorney).
\item \textsuperscript{124} \textit{Id.} (citing LeCraw v. LeCraw, No. 90-3237, slip op. at 5-6 (Super. Ct. of DeKalb County June 19, 1990)).
\item \textsuperscript{125} \textit{Id.} at 699.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 698-99.
\end{itemize}
Three justices dissented from this decision, preferring to apply strict agency rules of construction.\textsuperscript{128} They cited the fact that the instrument contained six paragraphs of detailed powers, none of which implied the power to make gifts or referred to estate planning.\textsuperscript{129} The dissenters reasoned that due to the fiduciary nature of the relationship, the agents should not have been allowed to place themselves in a position in which their duty to the principal and their own interest conflicted, and that the agents should not have profited from the principal's property without express consent.\textsuperscript{130} They viewed the agents' receipt of gifts made under the DPA in \textit{LeCraw} as a breach of their fiduciary obligation.\textsuperscript{131}

While a state supreme court ruling provides great certainty regarding the federal tax consequences of gifts under a financial DPA, this approach is problematic in that most appellate courts, not to mention supreme courts, are very reluctant to review factual determinations of a lower court absent some abuse of discretion. When the lower court reviews extrinsic evidence in reaching a decision, it makes a factual determination. Appellate courts generally do not conduct a \textit{de novo} review of the issues presented in such a situation except in very narrow, specific circumstances. Apparently, the \textit{LeCraw} court avoided this hurdle because of the dearth of Georgia decisions on this issue by adopting the extrinsic evidence approach.\textsuperscript{132} Where the issue presented can be characterized as one of law, not of fact, the petitioner will probably have broader access to the appellate courts. For that reason, appellate review could be justified more easily in \textit{LeCraw} than it could be in subsequent cases. Once the standard for interpretation has been established, future decisions will be characterized more clearly as factual determinations. Thus, obtaining a high court ruling on a case-by-case basis will be very difficult to the extent that any issue with federal tax implications can be characterized as a factual issue.

\textsuperscript{128} \textit{Id.} at 699-700 (Fletcher, J., dissenting).
\textsuperscript{129} \textit{Id.} at 699.
\textsuperscript{130} \textit{Id.} at 700.
\textsuperscript{131} \textit{Id.} at 701.
\textsuperscript{132} \textit{Id.} at 698 (citing \textit{LeCraw v. LeCraw}, No. 90-3237, slip op. at 3-4 (Super. Ct. of DeKalb County June 19, 1990)).
The Massachusetts Supreme Judicial Court has adopted a unique approach which assists the taxpayer in obtaining review by the highest court on issues with federal tax implications. Where public interest is involved, the Massachusetts procedure allows easier access to the state supreme court. First, the trial court must certify an issue for consideration by the appellate court. This can happen even if no party to the dispute requests it or challenges the lower court's interpretation. Then, if two or more justices on the state supreme court think that the public interest requires a final determination of the issue by that body, the case can bypass the appellate court and go directly to the high court. Connecticut and New Hampshire have similar procedures whereby the trial court can certify issues to the state supreme court. However, Massachusetts is the only state in which the state supreme court has heard a substantial number of probate matters primarily to create a precedent binding in federal tax proceedings.

It is not likely that many other states will follow the lead of Massachusetts. Currently, only thirty-six states provide for certification at all, and many of those only allow it from federal appellate courts. Furthermore, despite the advantages of getting the high court's ruling, such a procedure significantly increases the cost of getting a decision which previously might have been available from a lower court.

4. State Legislative Determinations

In states where the extent of authority conferred under a general power of attorney is unclear, the legislatures may intervene if state courts have not addressed the issue or if the courts have issued a ruling unfavorable to the taxpayers. This latter scenario took place in Virginia following the *Casey* decision.
In Estate of Ridenour v. Commissioner,\(^{142}\) Joseph Ridenour appointed his son, James, as his attorney-in-fact under a general DPA in 1971.\(^{143}\) The DPA authorized James to “sell, exchange, mortgage, lease, option, or otherwise dispose of any part or all of my property or estate...”\(^{144}\) The decedent had a lifetime gift-giving plan which primarily consisted of gifts to his wife and children of life insurance, shares in a closely held family corporation, cash and real estate.\(^{145}\)

Joseph Ridenour became extremely ill from congestive heart failure and renal failure in December 1986, and, soon afterward, he was unable to communicate effectively with others.\(^{146}\) In March 1987, James made gifts as his father’s agent for estate planning purposes of approximately $85,000 from Joseph’s checking accounts.\(^{147}\) These gifts were made to his children, grandchildren and great-grandchildren.\(^{148}\) Joseph Ridenour then died in April 1987.\(^{149}\)

Upon filing of the estate tax return, the IRS determined that the March 1987 gifts were revocable transfers includible in the estate under IRC section 2038, and an estate tax deficiency was assessed.\(^{150}\) However, following that assessment and before the case reached the Tax Court, the Virginia legislature passed a law which clarified the state law issue.\(^{151}\)

On March 30, 1992, the Virginia General Assembly enacted a statute in response to the Fourth Circuit’s Casey decision.\(^{152}\) The statute provides as follows:

Gifts under power of attorney — If any power of attorney or other writing (i) authorizes any attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do or (ii) evidences the principal’s intent to give the attorney-in-fact or agent full power to handle the principal’s affairs or deal with the principal’s property, the attorney-in-fact or agent shall have the

\(^{142}\) Estate of Ridenour v. Commissioner, 65 T.C.M. (CCH) 1850 (1993), aff’d, 36 F.3d 332 (4th Cir. 1994).
\(^{143}\) Id. at 1851.
\(^{144}\) Id. at 1851-52.
\(^{145}\) Id. at 1852-53.
\(^{146}\) Id. at 1853.
\(^{147}\) Id.
\(^{148}\) Id.
\(^{149}\) Id.
\(^{150}\) Id.
\(^{151}\) Id.
\(^{152}\) Id.
power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations . . . in accordance with the principal's personal history of making or joining in the making of lifetime gifts.\textsuperscript{153}

The Virginia General Assembly also provided that this section was "declaratory of existing law."\textsuperscript{154}

In light of this new statute, the Tax Court's primary decision became whether the statute should be applied retroactively or only prospectively.\textsuperscript{155} Once again, the outcome turned on what the Virginia Supreme Court would conclude.\textsuperscript{156} The Tax Court held that the statute should be applied retroactively for several reasons.\textsuperscript{157} Most importantly, the court relied upon the legislature's statement that the provision was "declaratory of existing law" to glean its intent that the act was meant to apply retroactively.\textsuperscript{158} Such language, the Tax Court held, could not be construed as intending prospective application only.\textsuperscript{159} Also, the court found that the words "any power of attorney" are comprehensive and suggest that they include powers created before as well as after the statute's enactment.\textsuperscript{160} Since retroactive application neither impaired contractual obligations nor destroyed vested rights in this case, retroactivity was permitted.\textsuperscript{161}

Thus, the taxpayer and the agent in \textit{Ridenour} prevailed due to legislation enacted after the issue arose. Individuals who are similarly situated in other states where the law has not been settled might seek a similar solution if the principal is no longer competent to reform the DPA instrument.

\section*{IV. DRAFTING CONSIDERATIONS}

As evidenced by the complicated litigation described above, the most important requirement for someone drafting a power of attorney is to state with specificity all powers which are intend-
ed to be conveyed. To convey the power to make gifts, a sample DPA provision might read:

I specifically authorize and encourage my attorney-in-fact to make gifts (outright, in trust or otherwise) to himself or herself, individually, or to my other children and their descendants, and to the spouses of all my descendants, to the extent such gifts will be eligible for the annual gift tax exclusion provided in Section 2503(b) of the Internal Revenue Code of 1986, as amended.

The extensive and costly litigation involved in resolving the cases discussed above could have been avoided if the instruments in question had stated explicitly that the principal intended for the agent to have the power to make gifts for estate planning purposes. Drafters should never rely on a pattern of past gifts by the principal to establish such authority.

For his or her own protection, the principal may want to limit the amount of property which the agent can transfer to each donee to the annual gift tax exclusion equivalent as in the sample provision above. The principal may also want to define the class of beneficiaries to some extent. In this way, he or she will have some control over the rate at which the assets are depleted, while capitalizing on the annual exclusion for estate planning purposes. However, such a limitation may prove disadvantageous as circumstances unfold if, for example, the principal becomes seriously ill sooner than expected and the agent is unable to transfer wealth out of the estate quickly. Another alternative available to principals who are hesitant to convey too much power to the agent is a standby trust. The principal could set up an unfunded standby trust in conjunction with a durable power of attorney which merely authorizes the agent to fund the trust upon the principal's disability.

163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Schmitt & Hatfield, supra note 6, at 214.
171. Id.
172. Schmitt & Hatfield, supra note 6, at 214.
DPAs should complement an individual’s overall estate plan, especially his or her will. However, estate planners should be aware that the competency requirements for drafting a power of attorney are more stringent than for a will.\textsuperscript{173} The principal must be competent under contract standards, not just the lower testamentary standards, in order to create a reliable instrument.\textsuperscript{174}

Drafters must pay particular attention to the nuances of state law, especially if the principal is likely to move from one state to another. In most states, a durable power of attorney must state specifically that the power of attorney is intended to survive the principal’s incapacity; otherwise, courts will terminate the authority at that point under traditional agency principles.\textsuperscript{175} Some states provide for automatic revocation of a DPA after a certain period of time. At least one state narrowly defines the class of people to whom a DPA can be given to the spouse and certain other family members.\textsuperscript{176} State law also varies significantly on the execution requirements for a DPA.\textsuperscript{177}

Through the use of a DPA, the principal is often able to avoid or delay the appointment of a guardian if he or she becomes unable to make decisions.\textsuperscript{178} The control which the principal can exert over this process through a DPA is one of its biggest advantages.\textsuperscript{179} However, the appointment of a guardian or conservator may still be necessary at some point.\textsuperscript{180} In that event, the guardian would step into the shoes of the principal and would assume all of his or her authority, including the power to revoke the DPA.\textsuperscript{181} For this reason, the estate planner may also want to exert some influence over who would be appointed guardian. The principal can nominate someone through the DPA, presumably the agent, to serve as guardian if necessary, to en-

\textsuperscript{173} Stiegel et al., supra note 2.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 691. Georgia is the only exception to this rule. Georgia courts presume that the principal intended to create a durable power of attorney unless he or she explicitly indicates a contrary intent.
\textsuperscript{176} Waters, supra note 7, at 521.
\textsuperscript{177} Schmitt & Hatfield, supra note 6, at 224-25.
\textsuperscript{178} Stiegel et al., supra note 2, at 695.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
sure that the goals of the estate plan are not compromised.\textsuperscript{182} Along the same lines, the principal might want to give the agent some authority to name alternate guardians or trustees to any trusts which are part of the estate plan to cover contingencies which may occur after the principal becomes incapacitated.\textsuperscript{183} Likewise, the principal should consider naming an alternate agent in case the first agent dies or becomes incapacitated before the principal's death.\textsuperscript{184}

The estate planner should take all possible steps to assure that the DPA will be honored by third parties.\textsuperscript{185} To this end, specificity is key.\textsuperscript{186} Itemization of the assets of the principal, all functions which the agent is authorized to pursue, and any specific limitations on the instrument will encourage third party reliance.\textsuperscript{187} Furthermore, the principal might want to include a clause releasing agents or third parties from liability for actions based upon the DPA and give the agent authority to initiate legal action against anyone who refuses to honor the DPA.\textsuperscript{188}

Anyone using a DPA for the purpose of avoiding court costs and delays should include in the instrument some standard by which loss of capacity is to be determined.\textsuperscript{189} A sample provision might require the concurrence of two physicians that the principal is no longer able to manage his or her affairs.\textsuperscript{190} Otherwise, the incapacity determination itself is likely to draw the parties into the court system.\textsuperscript{191}

Finally, no DPA should be drafted without giving careful consideration to the possible estate tax consequences to the agent.\textsuperscript{192} If the agent's powers are not drawn cautiously, the untimely death of the agent before the principal could cause the inclusion of the principal's property in the agent's estate for estate tax purposes. However, the agent's tax problems under a DPA are beyond the scope of this article.

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\textsuperscript{182} Schmitt & Hatfield, supra note 6, at 215-16.
\textsuperscript{183} Id.
\textsuperscript{184} Stiegel et al., supra note 2, at 693.
\textsuperscript{185} Schmitt & Hatfield, supra note 6, at 225-26.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 226-27.
\textsuperscript{189} Id. at 185, 226-27.
\textsuperscript{190} Id. at 227.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
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DPAs are invaluable estate planning tools. In addition to the significant tax advantages made possible by gift giving powers under a DPA, they help prevent the loss of individual autonomy and avoid premature or unnecessary guardianship. However, the extensive use of DPAs is relatively new, and courts still grapple with issues of interpretation and scope. In light of the unpredictability and unreliability of most case law, attorneys and estate planners must be educated as to the importance of specific grants of authority. The risks and advantages of gift giving powers deserve particular scrutiny. Courts are justified in their hesitance to infer a power with such inherent danger of abuse, so the taxpayer who wishes to incorporate a trusted agent into his or her estate planning scheme should leave no room for speculation as to the extent of the agent's authority.