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THE GREEN BAG

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In 1969 and 1970, students at the University of Michigan engaged in protests and demanded that the law school hire a black faculty member. It was because of these protests that I was recruited to teach at Michigan in 1970. In 1975, I was invited to join the faculty at Harvard Law School under similar circumstances.

Harry T. Edwards

quoted in Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. Legal Educ. 637, 641 (2016)

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AUTHOR NOTES. Gratitude to RAs is nice. Colleagues who make major contributions should share the byline. Recognize those who help in small ways with something printed by Hallmark, not the *Bag*.

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Our Mistakes

Shortly after our Autumn issue went to press, Ralph Moore, the author of *"Shuffling" Sam Thompson and Other Notes from the 1959 Term*, 19 Green Bag 2d 55 (2015), sent us this note:

> An error (mine) on page 64 of my piece on the 1959 Term of the Supreme Court has come to my attention. There is an assertion on that page that seven Justices now sitting attended the Harvard Law School. However, three of the sitting Justices attended and graduated from the Yale Law School, which leaves only six to attend Harvard. Which, of course, is the correct number, counting Justice Ginsburg, who started at Harvard and finished at Columbia. That concentration of educational experience contrasts to the situation during the 1959 Term, during which two of the Justices came from Harvard and the other seven all came from seven different law schools scattered around the country. That was reflected in the rather wider distribution of schools from which the law clerks came in those days. It would not be a bad policy for Justices to follow the examples of Justices Black and Douglas, who always took a clerk (in Douglas's case his only clerk) from the Circuit to which they were assigned, or the Chief, who always took one clerk from the West and the others from around the rest of the country. My apologies for miscounting.

Then, shortly after the issue went into the mail, we received a tactful note from attentive reader Adam Liptak:

> I suspect that I am not the first to point out that Ralph J. Moore Jr.'s charming essay on serving as a law clerk to Chief Justice Warren contained a small error. He writes that "seven of the Justices

> sitting today attended the Harvard Law School." The right number is six. Justices Thomas, Alito and Sotomayor attended Yale.

It is heartening both to have the Moore article corrected and to know that we have such attentive and knowledgeable authors and readers. It is, however, also a little bit embarrassing to be editors who are neither as attentive nor as knowledgeable as the people we are supposed to be supporting and serving.

Exemplary Legal Writing 2015

Congratulations to the *Green Bag* "exemplary legal writing" honorees for 2015. Samples of their good work appear in the forthcoming 2016 edition of the *Green Bag Almanac & Reader*. They are:

Opinions for the Court

Charles R. Breyer, *In re Hewlett-Packard Company Shareholder Derivative Litigation*, No. 3:12-cv-06003-CR (N.D. Cal. July 28, 2015)

Elena Kagan, *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015)

Cornelia T.L. Pillard, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015)

Amul R. Thapar, *Wagner v. Sherwin-Williams Co.*, 2015 WL 5174130 (E.D. Ky. 2015)

Concurrences, Dissents, etc.

Carlos T. Bea, *John Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015)

Frank H. Easterbrook, *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015)

Ojetta R. Thompson, *Sanchez v. Roden*, 2015 WL 8057132 (1st Cir. 2015)

Don R. Willett, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

Law Review Articles Published 50 Years Ago

Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harvard Law Review 713 (1965)

Herbert Wechsler, *The Courts and the Constitution*, 65 Columbia Law Review 1001 (1965)

HOLIDAY GREETING CARD: YALE 2015

Mike Widener, the Rare Book Librarian in the Lillian Goldman Law Library at Yale Law School, is a reliable correspondent. Each year, sometime close to its end, he sends us a lovely and scholarly greeting card. The front of the card is reproduced in black-and-white on the page before this one. (The original is quite colorful – mostly greens and reds.) Here is the explanatory note from the back of the card:

> Images like these, known as book presentation scenes, are common in medieval manuscripts and early printed books. They typically show the book's author presenting his finished work to a patron or monarch. This image, one of the earliest examples from printed books, is from the opening page of Niccolò de' Tudeschi's *Lectura super V libris decretalium* (5 volumes; Basel: Michael Wenssler, Berthold Ruppel & Bernard Richel, 1477), a commentary on one of the central texts of medieval canon law, the Decretals of Pope Gregory IX.
>
> The author is better known as Panormitanus (1386-1445), the name he received after his appointment as the Archbishop of Palermo (Panormus in Latin). His teaching and writings earned him the title of "lucerna juris" (lamp of the law). Kenneth Pennington calls him "the most influential jurist of the 15th century."
>
> The image shows Panormitanus before he became an archbishop, presenting his book to a pope in his three-tiered papal tiara. His relationship to the papacy was complicated. Pope Eugene IV sent Panormitanus as his representative to the Council of Basel in 1433, where Panormitanus energetically but unsuccessfully argued for the pope's supremacy over the council. Once Panormitanus became Archbishop of Palermo, however, he switched sides and returned to the Council of Basel as an opponent of papal supremacy, in accordance with the wishes of his royal patron King Alfonso V of Sicily. The sides finally made peace in 1443, and Panormitanus died from the plague not long after returning to Palermo.

Mike Widener, *Happy Holidays!* (Dec. 2015).

Kevin Gerson at the UCLA Law Library, displaying the front of his library's 2015 holiday T-shirt.

Holiday Greeting Card: UCLA 2015

This season we also heard from another prominent law librarian who is known for his clever holiday greetings. Kevin Gerson, Director of the UCLA Law Library, sent us the latest edition of his annual all-cotton, short-sleeved holiday greeting: "UCLA Law Library. We stack up." It is, Gerson explained, "an extremely limited edition. The last edition is worn by two members of SCOTUS." It is a very sharp shirt, as you can see on this page,

Gerson in the same place, displaying the back of the same shirt.

and this one. We also are inclined to think that Gerson has good taste in law-related knick-knacks.

AN INDEX OF NOT MUCH

Attention junior scholars. Preparing an index for a book-length work is a difficult and time-consuming exercise that will not earn you any extra academical glory, or money. The benefits of indexing will be visited entirely on people other than yourself — people who merely want to learn from your work, or at least make good use of it. Indeed, a well-made index

is a true blessing for the reader-researcher-explorer, and a true curse for the author-indexer-guide. Nevertheless, you should not attempt the maneuver described below until you have safely crossed over to tenured status:

> Readers having recourse to this index should be alert to certain compromises that have been made between comprehensiveness in indexing and the publishing economies to be obtained through brevity. . . . [E]ven diligent use of an exhaustive index would not be a substitute for a careful reading of the book. For those readers unwilling to do so, ...

George Lee Haskins & Herbert A. Johnson, *About the Index*, in THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME II: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 679 (1981) (introducing an index that is not much longer, or more useful, than the introduction to the index).

To the Bag

The Authoritative Webster's Third

To the *Bag*:

Regarding the letter captioned "The Inferences of Webster's Third" (19 Green Bag 2d 5), I don't suppose *Green Bag* readers would be interested to note that, whatever the Supremes' opinions of *Webster's Third New International Dictionary*, for purposes of federal government writing, it is the definitive spelling reference? The public printer of the US, in the exercise of his/her authority under 44 U.S.C § 1105, has specified W3NID as the GPO's "guide for the spelling of words not appearing in the GPO style manual." GPO Style Manual ¶ 5.1.

> **5. Spelling**
> (See also Chapter 7 "Compounding Examples" and Chapter 9 "Abbreviations and Letter Symbols")
>
> **5.1.** GPO uses Webster's Third New International Dictionary as its guide for the spelling of words not appearing in the GPO Style Manual. Colloquial and dialect spellings are not used unless required by the subject matter or specially requested. The tendency of some producers of computer-assisted publications to rely on the limited capability of some spell-checking programs adds importance to this list.

The GPO, a legislative branch agency, is responsible for the printing of the bound volumes of *United States Reports*.[1]

Jeffrey Harper
Seattle, WA

[1] 28 U.S.C. §§ 411(c) and 412; www.supremecourt.gov/opinions/info_opinions.aspx.

Violin, Antonio Stradivari, Cremona, 1683.

EVEN A BEGINNER CAN MAKE MUSIC ON ONE

To the *Bag*:

I just received the wonderful *Philanthropical Cricket in Edinburgh* (and now really don't have much to look forward to receiving as the gift season approaches). Thank you! I read all the Sherlock Holmes stories during an intersession break in college, after my favorite professor, having made an obscure reference to a Sherlock Holmes story (not like a "dog that didn't bark" reference) expressed disappointment that everyone in his class didn't know the canon. I didn't want to disappoint again, and am glad he didn't make a reference to a line from the *Field Bazaar*, because I don't remember the *Field Bazaar*. Say, maybe he did make a reference after that, and it just went right by me.

In any event, the map (for lack of a better word) is terrific. The trees of Cremona line reminds me of the old story about the store signs on a street in Cremona: Amati's said "Best Violins in the World"; Stradivari's said, "Best Violins in Italy"; Guarnari's said, "Best Violins on this Street."

That story was told to me by a violinist, and when I asked whether the Stradivariuses were the best, he looked at me like I'd just fallen off the turnip truck and replied, Strads are beautiful and easy to play, even a beginner can make music on one; Guarnaris are hard and take time to learn, but when you learn to play one, she can sing like nothing else can.

Adam Sachs
Folger Levin LLP
San Francisco, CA

The house of Stradivari.
Horace Petherick, Antonio Stradivari 4 (1900).

WE'LL ALWAYS HAVE PARIS

To the *Bag*:

In your most recent volume, saloonkeeper Rick Blaine is cited for this wistful comment to Ilsa, spoken with affection as he sets her off on the journey to Lisbon with Victor Laszlo.[2] As a journal dedicated to great writing, the *Green Bag* should have also credited the writers of that evocative line.[3]

Turns out that there is a backstory of interest to lawyers.

The screenplay for *Casablanca* is credited to the Epstein brothers, Julius and Philip, and Howard Koch. The trio shared the Academy Award for Best Adapted Screenplay in 1943.[4]

I went back to see if the Paris line was in the source material. The movie script was based on an unproduced play called *Everybody Comes to Rick's*, written by Joan Alison and Murray Burnett.[5] Although much of the action in the movie also takes place in the play – yes, including the defiant singing of "La Marseillaise" by French patrons and the pivotal role of the song "As Time Goes By" – the play does *not* include the line "We'll always have Paris."

The closest line in the play is in Act III. In a scene not depicted in the movie, Rick and Lois Meredith[6] and Police Prefect Luis Rinaldo[7] are waiting in the closed bar for Victor to come to Rick's to be arrested picking up the letters of transit:

---

[2] 19 GREEN BAG 2D 82 (2015).

[3] The line has been designated as Number 43 on the American Film Institute's list of 100 greatest movie lines. www.afi.com/100years/quotes.aspx. Five other lines from the movie made that list: "Here's looking at you, kid." (#5); "Louie, I think this is the beginning of a beautiful friendship." (#20); "Play it, Sam. Play 'As Time Goes by'" (#28); "Round up the usual suspects." (#32); and "Of all the gin joints in all the towns in all the world, she walks into mine." (#67).

[4] Longtime Warner Brothers scriptwriter Kenneth Casey Robinson has also been cited as having contributed to some of the rewrites but his work was uncredited.

[5] Manuscript copy found at www.pages.drexel.edu/~ina22/splaylib/Screenplay-Everybody_Comes_to_Rick's.pdf.

[6] Ilsa Lund in the film. Have to account for Ingrid Bergman's accent after all.

[7] Capt. Louis Renault in the film. Claude Rains' accent was pretty strong too you know.

> Rick: (pouring out some champagne) A votre sante.
>
> Lois: Not champagne, darling. Brandy.
>
> Rinaldo: (also raising a glass) Shall we drink to love again?
>
> Lois: (quietly) No. Let's drink to France.
>
> Rinaldo: With all my heart.
>
> Lois: (turning to Rick) To France, and to Paris . . . as we knew it.
>
> (They drink).

(I do not count Rick's line in Act II, scene 1 – "I'm still just as nuts about you as I was in Paris" – as being in the same league as "We'll always have Paris.")

In reviewing the source play, I came upon two matters of interest to lawyers. First, Rick Blaine is a lawyer. There is no mention of this in the film, just that Rick was a champion of lost causes. But early in the play, Rick's "dossier" is reviewed by Prefect of Police Rinaldo:

> Ah, here you are. Richard Blaine. American. Age – here I shall be discreet. Formerly a prominent and successful attorney in Paris . . . .

Act II of the play presents this angle:

> Lois: So, Richard Blaine of Paris, criminal lawyer, champion of lost causes, becomes M. Rick, dispenser of entertainment for Casablanca.
>
> Rick: There isn't much difference. You meet quite a lot of nasty people in both professions.

No word about how Rick Blaine, American, came to hang his shingle in Paris in the 1930s.[8] But his negotiation skills and his care to stay on this side of the law in the movie may now be better explained (at least until he kills Major Strasser). Anyway, makes you feel better that that noble character on screen started out as a lawyer.

Second, while there were and are exit visas in real life, the letters of transit that animate the play and the movie were a creation of the playwrights. In Act I, Monsieur Ugarto (Peter Lorre's Ugarte in the film) de-

[8] Early adopter of multijurisdictional practice I guess.

scribes them as "letters of transit signed by Marshall Weygand. They cannot be rescinded or questioned."[9] Alas, letters of transit did not exist, although the idea of a no-questions-asked ability to move from country to country remains a topical one today![10]

While the creation of these lines may not amount to a hill of beans in this crazy world, I knew that the editors at the *Green Bag* would be among the usual suspects eager to learn more.

Paul J. Kiernan
Holland & Knight LLP
Washington, DC

TWISTS AND TURNS

To the *Bag*:

Thank you for Ted White's article, *The Lost Episode of Gong Lum v. Rice*, published in the Winter 2015 *Green Bag*. The story of the Chinese in Mississippi has many twists and turns which are ably described by Professor White's article and the sources he cites.

As it happens, subsequent events proved more favorable to the Chinese here than the 1927 decision in *Gong Lum*. My friend Harriet Causey DeCell Kuykendall, now in her ninth decade, grew up in Cleveland, Mississippi, the county seat of Bolivar County where Gong Lum lived. She recalls that after the Japanese invaded Manchuria in 1933 a Baptist missionary to China returned to Cleveland and brought his Chinese congregation with him. He became pastor at the First Baptist Church. The church built a school for the Chinese children. They were not allowed to attend the white public schools but, when they got older, were allowed to attend a nearby white junior college.

Harriet remembers her father, president of the Cleveland school board, talking about the inconvenience this caused the families. At some point in the late 1940s it was decided to allow the Chinese students to attend the white public high school. One became a star basketball player and another,

---

[9] Maxime Weygand (1867-1965) was a career military man who served in the Vichy government.

[10] For an intriguing discussion of the letters of transit and their real-life counterparts (visas, safe-passage documents and the like), enjoy the podcast from University of Washington Professor Joe James at faculty.washington.edu/jwj/doc/transit.mp3.

the class valedictorian. And that brought an end to the exclusion of Chinese from the white schools in Cleveland.

Unfortunately the next step, the elimination of segregated schools for African-Americans, took another twenty years, and is even today in litigation because the Justice Department deems the presence of a high school that is evenly divided between the races objectionable because another high school remains virtually all-black. The twists and turns continue.

Luther Munford
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One More Beard

To the *Bag*:

In his excellent contribution to this journal's Supreme Court Top Ten Micro-Symposium, Brian Stewart presents detailed information about past and present justices' mustaches, as well as introductory information concerning past justices' beards.[11]

In one respect, however, Mr. Stewart's analysis is incomplete: He does not discuss the fact that one of the Court's *current* justices sported a beard for a full term of the Court, albeit two decades ago. That justice was Antonin Scalia. According to a contemporaneous Associated Press report, when the Court came out from behind the velvet curtain and onto the bench on the first Monday in October 1996, spectators were surprised to see a beard on Scalia's face. "And a beaut [the beard] is," the report continued. "This was a beard, black-and-white speckled, that came down from the sideburns, across the chin and up the other side."[12] Scalia wore the beard throughout October Term 1996, but it was gone by the time the curtain rose on October Term 1997, and it has not returned.

The fact that someone, even a Supreme Court justice, varied his personal appearance for a year or less might ordinarily pass unnoticed. But in this instance, the most official of the Court's records decree that attention must be paid. For more than a century, the Supreme Court has maintained

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[11] Brian M. Stewart, *Supreme Soup Strainers: Top Ten Supreme Court Mustaches*, 18 Green Bag 2d 453, 453 nn.1-2 (2015).

[12] *See* "To Beard or Not To Beard: That's Question," *Deseret News*, Oct. 7, 1996, at 2.

III

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Page III, Journal of the Supreme Court of the United States, Oct. Term 1996.

a *Journal* as its official record of the business of each term, including a prefatory table of contents listing significant events of the term. For many years, preparing these *Journal* entries was the responsibility of the late Deputy Clerk Francis Lorson, who "included what he call[ed] 'discretionary' items that people will want to remember in the future."[13] And in the *Journal* for October Term 1996, it is memorialized for posterity: "Scalia, J. Wore beard during the Term."[14] A listing of bearded justices that omits this fact is, I fear, subject to a facial challenge.

Ira Brad Matetsky
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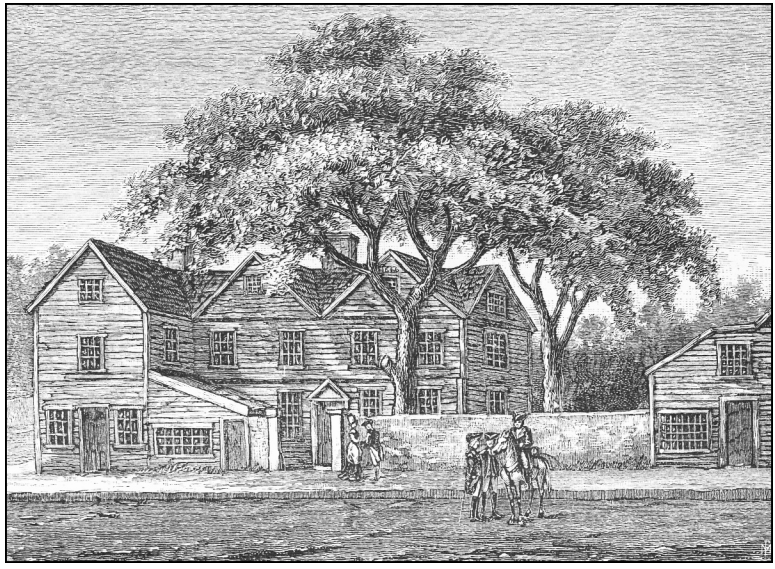
[13] Tony Mauro, *Longtime U.S. Supreme Court Deputy Clerk To Retire* (Aug. 12, 2002).

[14] *See* Journal of the Supreme Court of the United States, O.T. 1996, *available at* www.supremecourt.gov/orders/journal/jnl96.pdf, at iii.



Articles

At this period, the universal cry, among the friends of their country was "what shall we do to be saved?" It was by all agreed, as the Governor was entirely dependent on the Crown, and the Council in danger of becoming so, if the judges were made so too, the liberties of the country would be totally lost, and every man at the mercy of a few slaves of the Governor; but no man presumed to say what ought to be done, or what could be done. Intimations were frequently given, that this arrangement should not be submitted to. I understood very well what was meant, and I fully expected that if no expedient could be suggested, the judges would be obliged to go where Secretary Oliver had gone, to Liberty Tree, and compelled to take an oath to renounce the royal salaries. Some of these judges were men of resolution, and the Chief Justice, in particular, piqued himself so much upon it and had so often gloried in it on the bench, that I shuddered at the expectation that the mob might put on him a coat of tar and feathers, if not put him to death. I had a real respect for the judges; three of them Trowbridge, Cushing, and Brown, I could call my friends. Oliver and Ropes, abstracted from their politics, were amiable men, and all of them were very respectable and virtuous characters.

John Adams

Diary, with Passages from an Autobiography,
Mar. 2, 1774, reprinted in
2 The Works of John Adams 328
(Little & Brown 1850)

pictured: The Liberty Tree, in Boston, Massachusetts.

The Lost Library

Robert C. Berring

What is in a name? Is a library by any other name a lesser thing?[1] And what of the people who work within them? As these words are written, the members of the American Association of Law Libraries (AALL) are voting on whether to change the organization's name from the AALL to the Association for Legal Information (ALI). Voting is open from January 12 to February 10, 2016.[2]

The change was passed by the AALL Executive Board at its November 2015 meeting and is being presented to the membership as a bylaw amendment, with a vote of the membership to determine the decision. The AALL website contains links to a FAQ, videos of Executive Board members explaining the change, and a bulletin board for discussion. A lively exchange has developed on the bulletin board. As with any such change some have lodged procedural protests about the genesis of the vote. Concern with

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Robert Berring is the Walter Perry Johnson Professor of Law at the Berkeley Law School, Boalt Hall.

[1] The Oxford English Dictionary defines the word "library" thusly:

> A building, room, or set of rooms, containing a collection of books for the use of the public or of some particular portion of it, or of the members of some society or the like; a public institution or establishment, charged with the care of a collection of books, and the duty of rendering the books accessible to those who require to use them.

www.oed.com/view/Entry/107923?rskey=53Np4r&result=1#eid.

[2] Much information about the proposed name change can be found at www.aallnet.org/. One must be a member to gain access to most of the relevant information.

process is a hallmark of legal thinking. But there are also cries of anguish emanating from those who see the abandonment of the word "library" in association with the group as a mistake of substance; a surrender to the forces of digitization and the commodification of legal information. Is it a tempest in a teapot or an important milestone in the world of libraries and information? No matter how the vote comes out, the idea behind it is worth mulling.

The AALL was founded in 1906.[3] The original membership skewed towards subscription libraries and libraries attached to bar associations and courts. As time passed academic librarians took control of the Association. The AALL played an important role working with legal publishers. The Index to Legal Periodicals and the Index to Foreign Legal Periodicals were produced and guided by the AALL. As the role of academic librarians grew in the last third of the 20th century, the AALL worked with the American Bar Association and the Association of American Law Schools on a wide variety of issues.

In the final quarter of the 20th century the number of librarians working in law firms and in county and court libraries grew, and they began to assert their interests. The world of the law librarian who works at a global law firm is quite different from the experience of one who labors in the environs of the Yale Law Library. While both work with legal materials, they come to the table with different agendas, each with its own interests and emphases. At several points in the final decades of the 20th century there was talk of splitting the AALL into two pieces, with one serving the academic law librarians and another for the emerging sectors. Each time partition rose to the fore the whole was judged to be greater than its parts and the AALL stayed together. Even so, everyone knew who everyone else was.

The passage of time accentuated the divide. As law firms grasped at the opportunities to adopt sophisticated tools of digitized information more quickly than the more sclerotic law school libraries, the gulf grew perilously wide. While academic law librarians fought to protect budgets and status, law firm librarians were plunging headlong into a world of technology and

[3] See American Association of Law Libraries History in Brief: A Chronology (2015), compiled by Professor Frank Houdek. Professor Houdek is the leading source of historical perspective on the AALL. On the Internet the work can be found at www.aallnet.org/tm/about/aall-chronology.pdf.

the bottom line. Where once a grand collection of books arrayed on fine wood shelving was a symbol of importance for a law firm, suddenly books and other printed material could not pay for the space they occupied.

As librarianship in general struggled to survive the information revolution, the continuing health of the AALL depended on recruiting librarians in the private sector where much of the job growth was to be found. By emphasizing special interest groups within the larger tent of the law librarianship brand, and rallying around the concept of strength in numbers, the AALL held together. One motivation for cleaving to one another was the incessant assault on librarianship as a profession. As legal information, like all information, moved away from the paradigm of paper and print, librarians faced questions of identity.

The Name Change

There was always something odd about the name American Association of Law Libraries. Like the American Library Association, the AALL was named not for its members but instead for the institutions in which its members labored. (The Association of American Law Schools is in the same boat.) A visitor from Mars would assume that the AALL was made up of buildings, not individuals. Worse, the library as a fixture in the intellectual life of the nation has been fading. Where once libraries were concerned with attaining, housing, and making available tangible materials, the advent of the Internet and the rise of social media and streaming have changed the recipe. The book and the library, once central elements in our intellectual and cultural life, are being replaced at the center of discourse and study. For example when I wanted to find the dictionary definition of the word "library," I once would have traveled to the reading room of the law library to find it. Today I need only tap a few keys on my computer to consult the online version. In the world of Wikipedia and Google Plus, is there a place for the ancient temples of learning? This is a large question that implicates issues about culture and our shared intellectual heritage, but here and now the inquiry is limited to law libraries.

Legal information led the way in moving from paper to digital information. The role of Westlaw and Lexis in the life of the American lawyer expanded until it became the reality for new generations of law students and lawyers. When first introduced, these systems pioneered the use of full

text databases and Boolean searching. Watching the arc from lawyers who viewed the online systems as a gimmick and law students who did not know how to type to the smartphone-empowered social media savants of 2016 has been one of the most fascinating aspects of a long career in the field. The revolution is over. Where once a lawyer, judge, or law student physically came to the materials in the library, today Lexis and Westlaw (and other systems) bring the materials to their computer, tablet, or smartphone. Academic law libraries still serve as comfortable study halls for students, but most students sitting in the library space are not using materials held by the library. They are working with a personal portal to needed information. The law student is seated in the law library reading room but could well be sitting up in her bed working on her tablet. In a law firm, the librarian may still direct information flow and work with users, but no longer is the library a communal space for lounging, reading, and conversation.

If the library qua building is being redefined, perhaps it is wise to jettison the word from the name of AALL. A name change might help the profession escape from the stereotypical image of who a librarian actually is, and allow for a redefinition of said professional as an information worker. Perhaps it is time to leave behind any association with a grey stone (or metal and glass) edifice, and perhaps it is also time to leave behind the image of Marian the Librarian working within its bowels. The title "librarian" is tied to those buildings and that image of the woman who cares for books.

Problems with the Change

There are three problems with the name change. Two are practical, the other emotional.

At a practical level, rechristening the group as the Association for Legal Information effects a change in which the AALL would switch from naming itself after the building in which its members work (libraries) to the raw material that its members handle (legal information). Now the Martian visitor would assume that the ALI was a data set and its supporters. Neither name, neither the AALL nor the ALI, mentions the humans who compose the association. It is as if a step was missed in the renaming process.

There is a second practical problem. The abbreviation of the new name, ALI, already exists in the law. The American Law Institute is the Valhalla

of legal scholars and academics. Most law professors, judges, and lawyers know those three letters and know what they mean. The American Law Institute name is freighted with the trappings of power and prestige. To roughly paraphrase Rick from the movie *Casablanca*, of all the combinations of all the letters in the world, AALL had to walk into this one. If the AALL seeks a new moniker that will represent it more effectively, it has made an odd choice. Only many years of marketing will change the initial reaction of most legal professionals to the term ALI. At best, the law librarians' Association will be the B deck version of the name ALI, it will be the *other* ALI, the very type of stigma that the AALL wishes to avoid. If the goal is to provide a unique new identity for the association, rechristening it as the second best ALI in the field of law may not be the best choice.

The emotional issues attached to the name change are intangible but run deep. The idea of the library has deep roots. From the library at Alexandria[4] to clan libraries in ancient China,[5] the library represented the preservation and protection of information encoded on a three-dimensional medium. Libraries held the intellectual heritage of mankind. Such a mission was not always appreciated. Alexandria was destroyed. Clan libraries were victims in the Cultural Revolution. Forces opposed to the preservation of possibly heterodox information have been a constant through history. T.C. Boyle's story "We are Norsemen," recounts a Viking raid on a monastery through the eyes of a Viking skald.[6] The Vikings glory in sacking and pillaging but the skald most loves depicting the destruction of the library. Resentment of accumulated learning is not unknown in 2016 either.

For those who love the traditions and honor the travails of libraries and librarians, there is lustre in the word "library" and those who call themselves librarians. Consigning the terms to the hard drive of history carries a bit of pain. Possessing a dollop of self-awareness, I recognize my geezerhood. Graduating from law school in 1974, my research habits and preferences were locked in place long before word processing was a glimmer in An Wang's eye. People can learn new methods of research, but most of us find the most comfort in the systems with which we matured. Ergo I may be

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[4] See Battle, Library: An Unquiet History (2003) for a broad ranging history of libraries and those who work within them.

[5] See Van der Sprenkel, Legal Institutions in Manchu China 84 (1962).

[6] Boyle, The Descent of Man (1979).

the very worst person to make a rational assessment here. If the younger members, the future of the profession, wish to change the name of the professional organization, so be it. But one should take care about abandoning a few millennia of tradition. It is not simply the personal comfort level of those of us on the wrong side of the digital divide that is at stake, it is deeply rooted cultural institutions. Once libraries, and the librarians who work within them, abandon the task of exalting knowledge and working to verify its validity, there will be no going back. Just as the profession of law led the way in digitizing information, it may lead the way in deconstructing the concept of the library.

Perhaps there is something in a name.

JUSTICE BRANDEIS AND SUBSTANTIVE DUE PROCESS

Barry Cushman

WHEN ONE THINKS OF JUSTICE BRANDEIS and substantive due process, one thinks of his famous dissents. Throughout his nearly twenty-three year tenure on the Supreme Court, Brandeis published a series of landmark, fact-saturated, and prophetic dissents against decisions invalidating state or federal regulation on the ground that they worked a deprivation of liberty or property without due process of law. The list of such dissents is a familiar one. Among the more celebrated are those in *Adams v. Tanner*,[1] which struck down a Washington State statute prohibiting employment agencies from taking fees from those seeking employment; in *Truax v. Corrigan*, where the majority vindicated a challenge to a statute restricting the power of state courts to issue injunctions in labor disputes;[2] in *Jay Burns Baking Co. v. Bryan*,[3] which invalidated a Nebraska statute prescribing weight ranges for loaves of bread offered for sale; and in *New State Ice v. Liebmann*, where, dissenting from an opinion declaring unconstitutional an Oklahoma statute requiring those wishing to enter the business of manufacturing and selling ice to secure a certification of necessity from the State, Brandeis remarked: "There must be power in the States and the nation to remould,

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[1] 244 U.S. 590, 597 (1917) (Brandeis, J., dissenting).

[2] 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting).

[3] 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting).

through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[4] In each of these dissents, Brandeis presented a rich description of the evils that the statutes in question sought to remedy, and an impressive defense of the challenged measures as reasonable and appropriate tonics for the evils documented. And though he was not yet on the Court when Holmes published his seminal dissents from major decisions invalidating labor regulations,[5] Brandeis likewise often noted his dissents from opinions striking down statutes on the ground that they infringed the liberty of contract.[6] Indeed, Brandeis reportedly would have preferred that the Fourteenth Amendment's Due Process Clause never had been ratified, and maintained that the Clause should be repealed, or at the very least restricted in its application to procedural matters.[7]

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[4] 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

[5] Coppage v. Kansas, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting); Adair v. United States, 208 U.S. 161, 190 (1908) (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

[6] *See, e.g.,* Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 631, 636 (1936) (Brandeis joins Hughes and Stone dissents); Fairmont Creamery v. Minnesota, 274 U.S. 1, 11 (1927) (Brandeis, J., dissenting); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 377 (1918) (Brandeis, J., dissenting). Brandeis did not participate in Adkins v. Children's Hospital, 261 U.S. 525 (1923), which invalidated as an infringement of liberty of contract a minimum wage law for women, and so did not join Holmes's dissent there. However, he did expressly dissent from two subsequent per curiam opinions invalidating similar minimum wage laws on the authority of *Adkins*. *See* Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927) (Arkansas statute); Murphy v. Sardell, 269 U.S. 530 (1925) (Arizona statute).

[7] MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 619 (2009); WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 188 (1994); Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 318, 325; ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 26 (1978).

There is a substantial literature emphasizing the aforementioned aspects of Brandeis's views on due process. *See, e.g.*, UROFSKY, *supra*, at 483-85, 596-98, 603-05, 678-83; STEPHEN W. BASKERVILLE, OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS 259-61, 272, 302-05, 306-07 (1994); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 303-05, 347-48 (1984); SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 99-102, 129-36, 150-51, 153-56, 177-80 (1956).

Yet confining our field of vision to these familiar declarations would leave us with a misleading impression. First, as is well known, there were instances in which Brandeis joined opinions invalidating non-economic regulations on the ground that they violated the Due Process Clause. In 1923, for example, Brandeis joined two McReynolds opinions invalidating state laws prohibiting the teaching of modern foreign languages to primary school students.[8] Similarly, in *Pierce v. Society of Sisters*,[9] Brandeis signed on to McReynolds's opinion declaring that a state law prohibiting private education ran afoul of the Due Process Clause. Indeed, in these cases, Brandeis was more solicitous of substantive due process claims than was Holmes. Holmes dissented in the language cases, and Justice Butler's conference notes suggest that Holmes went along in *Pierce* largely if not solely because he regarded the question as governed by those decisions.[10]

More to the point, a narrow focus on Brandeis's celebrated dissents would overlook the numerous instances in which Brandeis joined or wrote opinions in which the Court held that an economic regulation deprived the regulated party of its liberty or property without due process of law. As Professor Michael Phillips has shown, Holmes was far from a dogmatic opponent of economic substantive due process. Though he persistently derided "the dogma, Liberty of Contract,"[11] in fact he joined opinions invoking that doctrine to invalidate regulatory legislation on more than one occasion,[12] and he wrote or joined numerous opinions striking down a variety of economic regulations on substantive due process grounds.[13] The

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[8] Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923).

[9] 268 U.S. 510 (1925).

[10] Butler OT 1924 Docket Book, Office of the Curator, Supreme Court of the United States (hereafter "OCSCOTUS") (Holmes: "As an original prop[osition] might be troublesome without Meyer").

[11] *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

[12] Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas, 267 U.S. 552 (1925) (hereafter "*Wolff Packing II*"); Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522 (1923); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918). *See also* Dorchy v. Kansas, 264 U.S. 286 (1924); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922).

[13] *See* MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 60, 61, 89 n.243, 95 (2001); Michael J. Phillips, *The Substantive Due Process Decisions of Mr. Justice Holmes*, 36 AM. BUS. L.J. 437 (1999);

same was true of Brandeis's posture toward economic substantive due process. Though he was a frequent critic of certain of its strands – liberty of contract, limiting price regulation to businesses "affected with a public interest,"[14] and a branch of the doctrine limiting the taxing jurisdiction of states and territories[15] – his opposition to this dimension of the Court's jurisprudence was far less pervasive than one might surmise.

Consider first a trio of cases from the mid-1920s in which the Court unanimously struck down orders of the Kansas Industrial Court on the ground that they deprived a company of its liberty of contract and/or property without due process of law. The Industrial Court was established by the Kansas legislature in 1920 as part of a system of compulsory arbitration of labor disputes. The statute's purpose was to preserve industrial peace and secure continuity of operation in various vital industries, and to these ends the Industrial Court was authorized to prescribe wages and other terms of employment for companies engaged in such enterprises. In the 1923 decision of *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas* ("*Wolff Packing I*"), the Supreme Court unanimously held that the meatpacking business was not sufficiently public in character to be subject to state regulation designed to secure its continuity of operation, and that the Industrial Court's order fixing the wages paid by a meatpacking concern therefore deprived the company of liberty of contract and property without due process.[16] The following year, Brandeis himself wrote the unanimous opinion extending the reasoning of *Wolff Packing* to the coal

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Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1083-86 (1997).

[14] *See, e.g.*, Ribnik v. McBride, 277 U.S. 350 (1928); Tyson & Bro. v. Banton, 273 U.S. 418 (1927). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[15] *See, e.g.,* Senior v. Braden, 295 U.S. 422, 441 (1935) (Brandeis joins Stone dissent); First National Bank of Boston v. Maine, 284 U.S. 312, 334 (1932) (Brandeis joins Stone dissent); Baldwin v. Missouri, 281 U.S. 586, 596, 599 (1930) (Brandeis joins Holmes and Stone dissents); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 218 (1930) (Brandeis joins Holmes dissent); Cudahy Packing Co. v. Hinkle, 278 U.S. 460, 467 (1929) (Brandeis, J., dissenting); Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 101 (1927) (Brandeis joins Holmes dissent); Southern Ry. Co. v. Kentucky, 274 U.S. 76, 86 (1927) (Brandeis, J., dissenting); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 220 (1925) (Brandeis, J., dissenting); Union Tank Line Co. v. Wright, 249 U.S. 275, 287 (1919) (Brandeis joins Pitney dissent).

[16] 262 U.S. 522 (1923).

industry.[17] And again in 1925, Brandeis joined the unanimous opinion invalidating the Industrial Court's maximum hours order to the Wolff Packing Company on the ground that it infringed liberty of contract and deprived the company of property without due process ("*Wolff Packing II*"). Brandeis returned Chief Justice Taft's draft opinion in *Wolff Packing I* with laudatory remarks,[18] and Justice Butler's docket books show that Brandeis voted with the majority at conference in each of these cases.[19] Brandeis's performance in the Kansas Industrial Court cases accurately reflected his substantive due process commitments.

Though Brandeis disparaged "[t]he notion of a distinct category of business 'affected with a public interest,'" as resting "upon historical error,"[20] he occasionally agreed with the results reached by colleagues reasoning within that analytic category. For instance, he agreed with Justice Holmes's 1921 opinion upholding a temporary rent control measure in the District of Columbia enacted in response to "emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business." Holmes opined that such circumstances had "clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law."[21] Three years later, however, when a landlord challenged the regulation on the ground that the emergency that had justified the regulation no longer obtained and that it was now therefore unconstitutional, Brandeis joined the unanimous conference vote to remand the case to the lower court to make the relevant factual determination, as well as the unanimous opinion suggesting that changed conditions had deprived the measure of its constitutional foundation.[22]

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[17] Dorchy v. Kansas, 264 U.S. 286 (1924).

[18] *See* Justice Brandeis, Return of *Wolff Packing I*, William Howard Taft Papers, Manuscript Division, Library of Congress (hereafter "MDLC"), Reel 639 ("Yes. This will clarify thought and bury the ashes of a sometime presidential boom").

[19] Butler OT 1922-1924 Docket Books, OCSCOTUS.

[20] New State Ice v. Liebmann, 285 U.S. at 302 (Brandeis, J., dissenting).

[21] Block v. Hirsch, 256 U.S. 135, 154, 155 (1921).

[22] Chastleton Corp. v. Sinclair, 264 U.S. 543, 548-49 (1924); Butler OT 1923 Docket Book, OCSCOTUS.

Similarly, when the Court invalidated price regulation of retail gasoline sales in Tennessee on the ground that the business was not "affected with a public interest," Brandeis concurred in the result,[23] presumably, as one commentator surmised, because there was no showing "that the business was peculiarly subject to abuse in the matter of price."[24] In *Michigan Pub. Util. Comm'n v. Duke*, Brandeis respected the public/private distinction by joining the Court's unanimous condemnation of the state's attempt "to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier" as a deprivation of property without due process.[25] Brandeis and his colleagues followed *Duke* in *Smith v. Cahoon*, which invalidated a statute regulating private carriers for hire in the same manner as common carriers.[26]

Brandeis's embrace of substantive due process was most prominently on display in the many cases in which he either joined in or concurred with opinions holding that a rate regulation deprived a common carrier or public utility of its property without due process by not affording the company a reasonable rate of return on its investment. Though Brandeis differed from many of his colleagues concerning how a reasonable return on investment should be computed[27] – and as a consequence he occasionally dissented from opinions finding that a rate regulation violated due process[28] – he joined or concurred in the vast majority of the decisions in

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[23] Williams v. Standard Oil Co., 278 U.S. 235, 245 (1928). Brandeis also voted to invalidate the statute in conference. Stone OT 1928 Docket Book, OCSCOTUS.

[24] Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 786 (1930).

[25] 266 U.S. 570, 571 (1925). Brandeis also voted with the majority at the conference. Butler OT 1924 Docket Book, OCSCOTUS.

[26] 283 U.S. 553 (1931). Brandeis again voted with the majority at conference. Stone OT 1930 Docket Book, OCSCOTUS. *Compare* Frost & Frost Trucking Co. v. R.R. Comm'r of Cal., 271 U.S. 583, 600 (1926) (Holmes & Brandeis, J.J., dissenting).

[27] *See, e.g.*, Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 289 (1923) (Brandeis concurring in judgment holding telephone rates confiscatory, but dissenting as to rationale).

[28] West v. Chesapeake & Potomac Tel. Co. of Baltimore, 295 U.S. 662, 693 (1935) (Brandeis joins Stone dissent); United Rys. & Elec. Co. of Balt. v. West, 280 U.S. 234, 255 (1930) (Brandeis, J., dissenting); McCardle v. Indianapolis Water Co., 272 U.S. 400, 421 (1926) (Brandeis, J., dissenting); Pac. Gas & Elec. Co. v. City of San Francisco, 265 U.S. 403, 416 (1924) (Brandeis, J., dissenting); Vandalia R.R. v. Schnull, 255 U.S.

which he participated where the Court invalidated such a regulation on due process grounds.[29] In fact, he authored two such opinions.[30] As he stated in his 1936 concurrence in *St. Joseph Stock Yards Co. v. United States*, a rate regulation order of the Secretary of Agriculture issued under the Packers and Stockyards Act of 1921 "may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory."[31]

113, 123 (1921) (Brandeis, J., dissenting); Detroit United Ry. v. City of Detroit, 248 U.S. 429, 446 (1919) (Brandeis joins Clarke dissent); City of Denver v. Denver Union Water Co., 246 U.S. 178, 198 (1918) (Brandeis joins Holmes dissent).

[29] West Ohio Gas Co. v. Pub. Utils. Comm'n, 294 U.S. 79 (1935); West Ohio Gas Co. v. Pub. Utils. Comm'n, 294 U.S. 63 (1935); Columbus Gas & Fuel Co. v. Pub. Utils. Comm'n of Ohio, 292 U.S. 398 (1934); Cent. Ky. Natural Gas Co. v. R.R. Comm'n, 290 U.S. 264 (1933); R.R. Comm'n v. Maxcy, 282 U.S. 249 (1931); Denney v. Pac. Tel. & Tel. Co., 276 U.S. 97 (1928); Chi., Milwaukee & St. Paul Ry. v. Public Utils. Comm'n, 274 U.S. 344 (1927); Ottinger v. Brooklyn Union Gas Co., 272 U.S. 579, 581 (1926) (Brandeis, J., concurring in the result); Patterson v. Mobile Gas Co., 271 U.S. 131 (1926); Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co., 271 U.S. 23 (1926); Smith v. Ill. Bell Tel. Co., 270 U.S. 587 (1926); Banton v. Belt Line Ry., 268 U.S. 413 (1925); Ohio Util. Co. v. Pub. Util. Comm'n of Ohio, 267 U.S. 359 (1925); Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 690 (1923) (Brandeis, J., concurring in the judgment); Prendergast v. N.Y. Tel. Co., 262 U.S. 43 (1923); City of Paducah v. Paducah Ry., 261 U.S. 267 (1923); Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 289 (1923) (Brandeis, J., concurring in the judgment); Newton v. Consol. Gas Co., 258 U.S. 165 (1922); City of San Antonio v. San Antonio Pub. Serv. Co., 255 U.S. 547 (1921); S. Iowa Elec. Co. v. City of Chariton, 255 U.S. 539 (1921); Rowland v. Boyle, 244 U.S. 106 (1917). *See also* Miss. R.R. Comm'n v. Mobile & Ohio R.R. Co., 244 U.S. 388 (1917). Brandeis passed at the conference vote in the two *West Ohio Gas* cases, expressed jurisdictional reservations at the *Central Kentucky* conference, dissented at the *Ohio Utilities* conference, and is recorded ambiguously at the *Bluefield* conference. For the last seven cases cited, there are no docket book records of the conference votes. Brandeis voted with the conference majority in each of the remaining ten cases. Butler OT 1922, 1924, & 1933 Docket Books; Stone 1924-1927, 1930, & 1934 Docket Books, OCSCOTUS.

[30] N. Pac. Ry. v. Department of Pub. Works, 268 U.S. 39 (1925); Groesbeck v. Duluth, S. Shore & Atl. Ry. Co., 250 U.S. 607 (1919).

[31] 298 U.S. 38, 74-75 (1936) (Brandeis, J., concurring). The fact that Brandeis invoked the Due Process Clause, rather than the Takings Clause of the Fifth Amendment, in considering the constitutionality of a federal rate regulation, counsels against viewing the state cases invalidating "confiscatory" rate or other regulations as resting upon the incorporation of the Takings Clause into the Fourteenth Amendment. In fact, the Court consistently

Brandeis also joined several opinions invalidating various land use restrictions as inconsistent with the Due Process Clause. To be sure, he joined Justice Sutherland's majority opinion upholding comprehensive residential real estate zoning in *Village of Euclid v. Ambler Realty Co.*[32] At the same time, however, he joined Justice Day's unanimous opinion in *Buchanan v. Warley* holding that a racially restrictive zoning ordinance deprived homeowners of property without due process;[33] he joined the decision in *Nectow v. City of Cambridge*, which unanimously held that a zoning ordinance, as applied, deprived a landowner of property without due process;[34] and he joined the unanimous decision in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, which invalidated as repugnant to the Due Process Clause a zoning ordinance conditioning permission to construct a home for the aged poor on the written consent of the owners of two-thirds of the property within 400 feet of the proposed building.[35]

As many of the foregoing cases suggest, Brandeis, like many of his colleagues who were even more fully invested in substantive due process, was especially skeptical of regulations that did not appear to confer a benefit on the public generally, but instead upon a favored group or class. Several decisions bring this feature of Brandeis's jurisprudence into sharper relief. In *Brooks-Scanlon Co. v. R.R. Comm'n of La.*, Brandeis joined Holmes's unanimous opinion invalidating on due process grounds an order requiring a lumber company owning a narrow gauge railroad to operate its railroad at a loss. The opinion insisted that

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maintained that such regulations, where they effectively "took" from A and gave to B, for a private purpose and without just compensation, violated the respective Amendments' prohibitions on deprivations of property without due process. For a list of such instances in the federal context, *see* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 911-12 n.141 (2005).

[32] 272 U.S. 365 (1926).

[33] 245 U.S. 60 (1917).

[34] 277 U.S. 183 (1928). Here, however, Brandeis had dissented from the conference majority, but acquiesced in the final vote on the merits. Stone OT 1927 Docket Book, OCSCOTUS.

[35] 278 U.S. 116, 122-23 (1928). Brandeis also voted with the majority at the conference. Stone OT 1928 Docket Book, OCSCOTUS.

> [a] carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. . . . The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.[36]

Similarly, in *Great Northern Ry. Co. v. Cahill*, Brandeis joined the unanimous opinion holding that the order of a state railroad commission requiring a railroad company to install and maintain weighing scales at its stations as a convenience to traders in livestock was "arbitrary and unreasonable," and therefore a deprivation of its property without due process of law.[37] *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg* involved an order of the Nebraska state railway commission requiring the company to install, partly at its expense, an underground cattle-pass across its right of way. The commission ordered the construction of the underground pass not as a safety measure, but instead merely to spare the farmer owning land on either side of the railway the inconvenience of driving his cattle across an otherwise adequate existing grade crossing. Here again, Brandeis joined the unanimous opinion holding that the order "deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment."[38] Brandeis similarly joined opinions invalidating on due process grounds special tax assessments that disproportionately advantaged some members of the taxing district at the expense of others.[39]

Late in his career, Brandeis resoundingly affirmed this principle. The case of *Thompson v. Consolidated Gas Utilities Corp.* involved two Texas gas companies seeking to enjoin enforcement of a proration order of the Texas

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[36] 251 U.S. 396, 399 (1920).

[37] 253 U.S. 71, 72 (1920).

[38] 282 U.S. 162, 167 (1930). Brandeis voted with the majority at conference, Stone OT 1930 Docket Book, OCSCOTUS, and wrote "Yes" or "Yes sir" on each of Stone's four circulated draft opinions. Harlan Fiske Stone Papers, MDLC, Box 57.

[39] Road Improvement Dist. No. 1 v. Missouri Pacific R.R. Co., 274 U.S. 188 (1927); Standard Pipe Line Co. v. Miller County Highway & Bridge Dist., 277 U.S. 160 (1928). Brandeis voted with the conference majority in each of these cases. Stone OT 1925 & 1927 Docket Books, OCSCOTUS.

Railroad Commission. The companies had invested significantly in the creation of markets for their gas in distant states through the acquisition and development of gas reserves, the drilling of wells, and the construction of compressor plants and pipelines. These investments had enabled the companies to perform their contractual obligations without the need to purchase gas from other wells. The challenged order limited production of sweet gas from the companies' wells to a quantity beneath their marketing requirements under existing contracts, below their capacity and current production levels, and below the capacity of their transportation and marketing facilities. The order thus prevented the companies from fulfilling their contractual obligations unless they purchased gas from other producers. The companies alleged that both the purpose and the effect of such limitations on their production was not to prevent waste, nor to prevent invasion of the legal rights of co-owners in a common reservoir, but instead simply to compel them and others similarly situated to purchase gas that they did not need from other well owners who had not made the investments in marketing facilities, such as pipelines, that would have provided them with a market for their gas and the capacity to deliver it. Under existing law, such well owners without pipelines would have been required to cease production unless they secured some marketing outlet.[40]

Brandeis's opinion for a unanimous Court discerned that "the sole purpose of the limitation which the order imposes upon the plaintiffs' production is to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product." Accordingly, "[t]he use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of gas which there is no wish to buy." This was not "for the public benefit." The companies' pipelines were private property, built on private lands. They were not common carriers. The Court had "many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose." The requirement that the companies

[40] 300 U.S. 55, 58, 60-61, 67-68 (1937).

purchase the gas necessary to fulfill existing contracts from other producers, Brandeis concluded, "results in depriving the plaintiffs of property." "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."[41]

Three years later, after Brandeis had retired, the Court effectively overruled *Thompson* when it upheld a Texas oil production proration order against a due process challenge. Dissenting for himself, Chief Justice Hughes, and Justice McReynolds, Justice Roberts invoked the authority of Brandeis in protest:

> The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established. A recent exposition of the applicable principles is found in the opinion of Mr. Justice Brandeis, written for a unanimous court, in Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue. I think that adherence to the principles there stated requires the affirmance of the [lower court's] decree [enjoining the Commission from enforcing its order].[42]

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[41] Id. at 77-80.

[42] R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co., 310 U.S. 573, 585 (1940) (Roberts, J., dissenting). For other instances in which Brandeis voted to strike down state or local laws as deprivations of liberty and/or property without due process, *see, e.g.*, Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U.S. 83 (1929); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); Missouri, Kansas, & Texas Ry. Co. v. Oklahoma, 271 U.S. 303 (1926); Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69 (1926); Lee v. Osceola & Little River Road Improvement Dist. No. 1 of Mississippi County, 268 U.S. 643 (1925); Frick v. Pennsylvania, 268 U.S. 473 (1925); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922); Wallace v. Hines, 253 U.S. 66 (1920); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918); Looney v. Crane, 245 U.S. 178 (1917). Brandeis was in the conference majority in the first five of these cases. For the last three cases, there are no docket book records. In *Frick*, Brandeis dissented at conference. Butler OT 1923-1924 Docket Books, Stone OT 1924, 1925, 1927, & 1929 Docket Books, OCSCOTUS.

It is doubtful that in due process cases Brandeis was simply adhering to the dictates of *stare decisis* rather than voting his principles, for two reasons. First, a number of these decisions presented questions for which there was no clearly governing authority. Second, Brandeis famously argued in *Burnet v. Coronado Oil & Gas Co.* that the Court "should refuse to follow an earlier constitutional decision which it deems erroneous." 285 U.S. 393,

Brandeis's former law clerk, Paul Freund, reported that Brandeis always considered himself a conservative,[43] and compared with many of the justices who would succeed him, he was. Justice Hugo Black, for example, maintained that it was never appropriate for the Court to review the substance of economic regulations under the Due Process Clauses. As a result, he refused to follow Brandeis, Hughes, and Roberts in joining the portion of Stone's majority opinion in *United States v. Carolene Products Co.* announcing a very deferential standard of review, on the ground that it did not go far enough in extricating the Court from that enterprise.[44] But the explicit premise of Brandeis's classic critique of the investment banking industry, entitled *Other People's Money*,[45] was that there is such a thing. And Brandeis believed, along with contemporary colleagues with whom he otherwise frequently differed, that the Court had an important role to play, under the Due Process Clauses, in preventing its deprivation by the government.

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406-10 (1932) (Brandeis, J., dissenting). As his persistent dissents from a variety of established doctrinal propositions indicate, *see, e.g.*, the cases collected in notes 6, 14, 15, 28, and 29, *supra,* he acted on this conviction throughout his judicial career. Equally implausible is the possible conjecture that Brandeis did not actually embrace economic substantive due process, but instead opportunistically invoked it (or agreed to such invocations by his colleagues) when it served to invalidate a policy of which he disapproved. Such a cynical assessment would be difficult to square with the depth of conviction one senses in his *Thompson* opinion, and neither would it easily square with well-known instances in which Brandeis voted to uphold economic regulations that he regarded as unwise or even morally abhorrent. For example, Brandeis disapproved of the Agricultural Adjustment Act of 1933 as a policy matter, *see* UROFSKY at 706; LEWIS PAPER, BRANDEIS 345-47 (1983), yet he dissented when the Court invalidated the statute in United States v. Butler, 297 U.S. 1 (1936). *See id.* at 88 (Brandeis joins Stone dissent). Brandeis also deplored the Roosevelt Administration's gold policy, *see* UROFSKY at 697, 698, PAPER at 346, yet he joined the majority to sustain the policy in the *Gold Clause Cases*: Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1935); and Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935).

[43] Paul Freund, *Mr. Justice Brandeis*, in ALLISON DUNHAM & PHILIP KURLAND, eds., MR. JUSTICE 185 (1964).

[44] *See* Cushman, 85 B.U. L. REV. at 992-95.

[45] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

CELEBRITY JUSTICE

SUPREME COURT EDITION

Richard L. Hasen

IT IS NOT YOUR IMAGINATION. Supreme Court Justices are in the news more than ever, whether they are selling books, testifying before Congress, addressing a Federalist Society or American Constitution Society event, or just talking to a Muppet on Sesame Street.[1] The number of books about the Court and particular Justices continues to grow. A website (www.scotusmap.com) is now devoted to tracking the Justices' movements as they crisscross the country (and the world) speaking to various audiences. Justice Ruth Bader Ginsburg is even promoted on T-shirts as the "Notorious R.B.G.,"[2] a riff on the name of famous rap artist Notorious B.I.G. She will soon be the topic of a biopic starring Natalie Portman.[3]

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[1] *Supreme Court Justice Sonia Sotomayor Visits 'Sesame Street' to Talk About Careers*, HUFFINGTON POST, Nov. 11, 2012, www.huffingtonpost.com/2012/11/11/supreme-court-justice-sonia-sotomayor-sesame-street_n_2113625.html.

[2] Dahlia Lithwick, *Justice LOLZ Grumpycat Notorious R.B.G.*, SLATE, Mar. 26, 2015, www.slate.com/articles/double_x/doublex/2015/03/notorious_r_b_g_history_the_origins_and_meaning_of_ruth_bader_ginsburg_s.html; *see also* notoriousrbg.tumblr.com.

[3] Lanie Goodman, *Natalie Portman on Directing Her First Film and Playing Ruth Bader Ginsburg*, WALL ST. J., Speakeasy Blog, May 19, 2015, blogs.wsj.com/speakeasy/2015/05/19/natalie-portman-on-directing-her-first-film-and-playing-ruth-bader-ginsburg/.

That Supreme Court Justices have become celebrities is not news.[4] Indeed, Justices' public statements about same-sex marriage (Justice Ginsburg thinks the public can handle it[5]) or *Bush v. Gore* (Justice Antonin Scalia urges Democrats to "get over it"[6]) often get extensive coverage, and extrajudicial comments on issues in pending cases sometimes lead to (usually unsuccessful) calls for judicial recusal.[7] However, until now no one has quantified the number of publicly reported events and interviews or which Justices engage in the most reported extrajudicial speech.

Using an original dataset of reported instances of Supreme Court Justices' extrajudicial appearances and interviews from 1960 to 2014,[8] I find that the amount of reported extrajudicial speech has increased dramatically, especially in the past decade. Research identified 192 publicly reported appearances or interviews between 1960 and 1969. This number fell by more than half (to 91) in the 1970s. But in the last decade (2005-2014), it rose to 744, an eight-fold increase since the 1970s. The number nearly doubled in each successive decade between the 1970s and the 2000s. While some of the increase may be due to research limitations as to older news sources, most of the discrepancy appears due to the great increase in

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[4] *See* Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299 (2013); Tal Koppan, *The Not-So-Reclusive Justices*, POLITICO, Jun. 28, 2013, www.politico.com/story/2013/06/supreme-court-justices-public-appearances-93583.html; Richard Wolf, *Justices Rock the Road, If You Can Find Them*, USA TODAY, Dec. 26, 2014, www.usatoday.com/story/news/politics/2014/12/26/supreme-court-scalia-kagan-travel-speeches/20267589/.

[5] Greg Stohr & Matthew Winkler, *Ruth Bader Ginsburg Thinks Americans are Ready for Gay Marriage*, BLOOMBERG, Feb. 5, 2015, www.bloomberg.com/news/articles/2015-02-12/ginsburg-says-u-s-ready-to-accept-ruling-approving-gay-marriage-i61z6gq2.

[6] Scott Lemieux, *Sorry, Still Not Over Bush v. Gore*, THE AM. PROSPECT, Jul. 19, 2012, prospect.org/article/sorry-still-not-over-bush-v-gore (quoting Justice Scalia's "get over it" comment on Piers Morgan's CNN show).

[7] *See, e.g.*, Emma Margolin, *Calls Increase for Justice Ginsburg to Recuse Herself in Same-Sex Marriage Case*, MSNBC, Feb. 16, 2015, www.msnbc.com/msnbc/calls-increase-ginsburg-recuse-herself-same-sex-marriage-case; Amanda Marcotte, *Justice Scalia Should Recuse Himself from the Abortion Clinic Buffer Zone Case*, SLATE, Apr. 23, 2014, www.slate.com/blogs/xx_factor/2014/04/23/abortion_clinic_buffer_zone_case_justice_scalia_should_recuse_himself.html.

[8] The dataset is available as an Appendix at: electionlawblog.org/wp-content/uploads/Hasen-Celebrity-SCOTUS-Research-data-final.xlsx.

the number of reported public appearances by Justices, driven in part by the swelled number of media outlets looking to interview and report on the Justices.

Further, not all Justices are created equal when it comes to Celebrity-hood. John Marshall Harlan had only four reported appearances or interviews between 1960 and 1971, while four current Justices have each had over 150 reported appearances or interviews: Stephen Breyer (214), Ruth Bader Ginsburg (194), Antonin Scalia (178), and Clarence Thomas (174). Dividing the number of appearances by the number of years a Justice was on the Court from 1960 until 2014 yields a "Celebrity Index." In that Index, Justice Sonia Sotomayor scores the highest (at 13.0 annual reported appearances), followed by Justice Breyer (at 10.7). Nine of the top ten Justices in the Index are current Supreme Court Justices.

This Essay proceeds in three parts. Part I sets out the evidence of the rise of Celebrity Justices and the variations among Justices. Part II discusses methodological concerns. Part III briefly reflects on whether the rise of the Celebrity Justice is good or bad. I argue that the answer is mixed, but the trend of public appearances and interviews likely will continue to grow in coming years thanks to a drastically changed media landscape and a politicized Court.

I.
CELEBRITY JUSTICE: THE EVIDENCE

Justices regularly appear in public when they sit for Supreme Court arguments or announce Supreme Court decisions. But due to the ban on cameras in the courtroom and the delayed release of argument audio, Justices are not as well known to the public as other public officials, such as Senators and Members of the House of Representatives.

Justices are life-tenured government officials and have no need for public appearances for purposes of reelection or reappointment. Why do Justices engage in extrajudicial speech at all? Professor Christopher Schmidt offers the following taxonomy of reasons: "the personal" (as in autobiography), "the interpersonal" (observations about the Justices' colleagues, sometimes to dish on those colleagues), "the educational" (Justices as civics teachers), "the institutional" (defending the Supreme Court as an

institution), and "the jurisprudential" (engaging questions about interpretation and the role of the Court).[9]

Justices have long testified before Congress over issues of Court administration or other topics, and they have given speeches to bar associations and conferences of lower court judges. These days, however, Justices' extrajudicial speaking is much more likely to garner press coverage and Justices are more likely to speak directly to journalists. They do so for the reasons Professor Schmidt gives and also for a more prosaic reason: to sell books. Some books have become bestsellers and gained Justices significant royalties.[10] As Adam Liptak notes, Justices rarely give interviews to journalists when they are not selling books.[11] Or at least not until recently.

The phenomenon of Justices speaking to a broader public is not new. Justice William O. Douglas gave a 30-minute televised interview in 1958 to Mike Wallace about issues related to freedom of expression.[12] He also appeared that year on the game show *What's My Line?*, where celebrities guessed his profession and identity.[13] However, Justice Douglas's appearances then were quite unusual. He was perhaps the first real Celebrity Justice, especially active in the 1960s, helping to pull up the overall numbers for that decade. Professor Schmidt describes as quite rare Justice Hugo Black's decision to give a long television interview in 1968, and he reports that Justice Black insisted that an exchange about his former membership in the Ku Klux Klan be cut from the interview.[14] Today, television appear-

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[9] Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. REV. 487, 495-509 (2013).

[10] Tony Mauro, *Sotomayor Reports $1.9 Million in Income from Royalties*, BLOG OF LEGAL TIMES, June 7, 2013, legaltimes.typepad.com/blt/2013/06/sotomayor-reports-19-million-in-income-from-book-royalties.html; *Thomas Said to Ink Seven-Figure Book Deal*, CHI. TRIBUNE, Jan. 9, 2003, articles.chicagotribune.com/2003-01-09/news/0301090338_1_harpercollins-supreme-court-thomas.

[11] Adam Liptak, *Court is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html?hp&_r=0&pagewanted=all.

[12] ABC, The Mike Wallace Interview with William O. Douglas, May 11, 1958, www.c-span.org/video/?288556-1/mike-wallace-interview-william-o-douglas.

[13] The video of the *What's My Line?* segment is posted at www.youtube.com/watch?v=2B9wM4gATvM.

[14] Schmidt, *supra* note 9.

ances by sitting Justices are far from unusual: Justices Scalia, Sotomayor, and Thomas all have spoken with the CBS newsmagazine *60 Minutes*.[15]

To quantify the frequency of reported Supreme Court Justices' extrajudicial appearances, research assistants and I tracked down reported public appearances or interviews of sitting Supreme Court Justices between 1960 and 2014. I did not count appearances before 1960, even if a Justice was on the Court in the earlier period. Nor did I count appearances of Justices in this time period if they took place after a Justice left the Court. My aim was to count reported appearances or interviews, not the news stories about them. So multiple stories about a single appearance or interview counted as a single reported appearance. When a Justice did a single public event reported during a visit (say on a college campus), I generally counted it as a single event. If there were multiple events in the same visit that garnered separate press coverage, I counted each.

Crucially, if an event garnered no contemporaneous press coverage, it did not count, even if a public appearance could be verified through later information (such as financial-disclosure reports posted at the OpenSecrets.org website).

The main data source was the "Proquest: Historical Newspapers database," which contains full-text articles from significant newspapers,[16] supplemented by many other online sources including Google News, YouTube, C-SPAN, and the Supreme Court's own website listing of some post-2000 speeches by the Justices.[17] Researchers searched databases for each Justice's name and included keywords such as "speech," "public speech," "public appearance," and "interview."

The data show a big drop in reported public extrajudicial appearances from the 1960s to the 1970s, followed by sharp increases from the 1970s to 2014, as illustrated in Figure 1 and Table 1.

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[15] Justice Thomas appeared in 2007 (www.cbsnews.com/news/clarence-thomas-the-justice-nobody-knows/). Justice Scalia appeared in 2008 (www.cbsnews.com/videos/justice-scalia-on-life-part-1/). Justice Sotomayor appeared in 2013 (www.cbsnews.com/videos/justice-sotomayor-prefers-sonia-from-the-bronx/).

[16] *See* www.proquest.com/products-services/pq-hist-news.html.

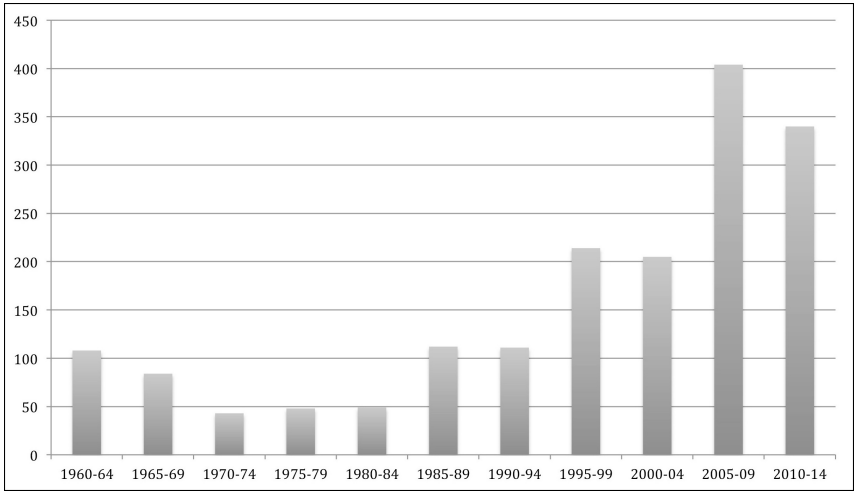
[17] *See* www.supremecourt.gov/publicinfo/speeches/speeches.aspx.

TABLE 1
NUMBER OF PUBLICLY REPORTED APPEARANCES/INTERVIEWS OF SUPREME COURT JUSTICES, 1960-2014

Period	Total Reported Appearances/ Interviews
1960-64	108
1965-69	84
1970-74	43
1975-79	48
1980-84	49
1985-89	112
1990-94	111
1995-99	214
2000-04	205
2005-09	404
2010-14	340
1960s	192
1970s	91
1980s	161
1990s	325
2000-09	609
[2005-14	744]

Publicly reported appearances dropped by half from the 1960s (192) to the 1970s (91). They then about doubled in the 1980s (161) and again in the 1990s (325) and again in the 2000s (609). The number of reported appearances in the 1970s (91) is less than one-eighth the number in 2005-2014 (744). There was a decrease between 2005-2009 (404) and 2010-2014 (340), raising the possibility that we have already reached peak Celebrity Justice, but I would not count on it, for reasons given in Part III.

FIGURE 1
NUMBER OF PUBLICLY REPORTED APPEARANCES/INTERVIEWS OF SUPREME COURT JUSTICES, 1960-2014



What explains the drop from the 1960s to 1970s, followed by the rise that began in the mid-1980s? The data cannot tell us. Perhaps some of it has to do with personality. In the 1960s, Justice Douglas, Justice Goldberg, and Chief Justice Warren engaged in a fair bit of extrajudicial speech, perhaps because they had experience as politicians and public figures before serving on the Court. The rise in the 1980s might have begun with Justice Scalia and other Justices' eventually feeling a need to respond to some of the controversial things he had to say. Some of the change could be due to the Chief Justice. Chief Justice Burger discouraged oral dissents, and perhaps extrajudicial speech as well.[18]

While the overall number of reported extrajudicial appearances has increased dramatically, the increase has not been distributed equally among the sitting Justices. Some Justices are much more likely to engage in public appearances than others, although all of the current Justices have more recorded public appearances than just about all of their predecessors.

[18] Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting in the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 108 (2010).

Table 2 lists each Justice's number of reported appearances between 1960 and 2014 while serving as a Justice, the number of years (rounded) the Justice served on the Court within that period, and a "Celebrity Index," which divides the number of appearances by the number of years.

TABLE 2
CELEBRITY INDEX: AVERAGE ANNUAL NUMBER OF PUBLICLY REPORTED APPEARANCES/INTERVIEWS BY EACH SUPREME COURT JUSTICE, 1960-2014
(ranked from highest to lowest)

Justice	Total Reported Appearances/ Interviews	Years on Court, 1960-2014	Celebrity Index
Sotomayor	65	5	13
Breyer	214	20	10.7
Goldberg	31	3	10.33
Ginsburg	194	21	9.24
Thomas	174	23	7.57
Scalia	178	28	6.36
Alito	52	9	5.78
Roberts	51	9	5.67
Kennedy	139	27	5.15
Kagan	20	4	5
Burger	74	17	4.35
Fortas	16	4	4
Rehnquist	130	34	3.82
Clark	25	7	3.57
Douglas	56	16	3.5
Warren	29	9	3.22
Stevens	61	35	1.74
O'Connor	37	24	1.54

Justice	Total Reported Appearances/ Interviews	Years on Court, 1960-2014	Celebrity Index
Souter	27	19	1.42
Marshall	31	24	1.29
Brennan	37	31	1.19
Blackmun	26	24	1.08
Frankfurter	3	3	1
Powell	12	15	0.8
Whittaker	2	3	0.67
White	16	31	0.52
Black	6	12	0.5
Stewart	8	22	0.36
Harlan	4	12	0.33

Consider a few notable features of these data. First, the Chief Justices are not at the top. Earl Warren (3.22), Warren Burger (4.35), and William Rehnquist (3.82) are in the middle of the pack, and John Roberts (5.67), while high by historical standards, is near the bottom among current Justices. I expected Chiefs would be more likely to get coverage for speaking about the Court and Court administration, but perhaps they feel a need to hold back from other types of public appearances which can garner more publicity.

Further, while Justice Sotomayor (13.0 reported appearances per year) has come out at the top of the Celebrity Index, she has been on the Court for a relatively short time. The period coincides with the release of her autobiography and a book tour, and it is uncertain if she will keep the same pace of public appearances in future years. She has, however, made it her personal mission to bring the story of the Court more to the general public, earning her the title of "the People's Justice" from Professor David Fontana.[19] She alone among the Justices has chosen to drop the ball in

[19] David Fontana, *The People's Justice?*, 123 YALE L.J. F. 447 (2014), yalelawjournal.org/forum/the-peoples-justice.

Times Square on New Year's Eve,[20] although both she and Justice Alito have thrown out the first pitch at major league baseball games.[21]

Justice Thomas places fifth, with about 7.5 annual reported appearances. Although he almost never speaks at oral argument, he is evidently not shy to speak in public settings.

The biggest surprise to me was Justice Breyer's second-place finish, with a total of 214 reported appearances and an annual rate of 10.7 appearances. I expected Justice Scalia or Ginsburg to beat him, because their appearances tend to be more controversial. Indeed, Professors Sandy Levinson and David O'Brien have speculated that Justice Scalia's willingness to get out and talk about issues before the Court and about his judicial philosophy led other Justices to do the same.[22] This shows a limitation of treating all publicly reported extrajudicial appearances as equally relevant. When it comes to flash, Justices Scalia and Ginsburg appear to act more as Celebrity Justices than Justice Breyer, despite the latter's greater frequency. It is hard to imagine anyone wearing a Justice Breyer T-shirt, whether tied to a rapper (think "Grandmaster Steve") or otherwise.

Nine of the top-ten Celebrity Justices are current Justices. This shows how the trend of press coverage has increased over time. The one former Justice in the top ten, Arthur Goldberg, averaging 10.33 annual reported appearances in his 3 years on the Court, comes in third. Many of the news stories describe speeches Justice Goldberg made to Jewish groups, especially about issues of anti-Semitism.[23]

The three most recently retired Justices were less-active speakers while

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[20] Emma G. Fitzsimmons, *Sotomayor to Lead Countdown to New Year in Times Square*, N.Y. TIMES, Dec. 29, 2013, www.nytimes.com/2013/12/30/nyregion/sotomayor-to-lead-countdown-to-new-year-in-times-square.html.

[21] Kevin Sherrington, *After Tossing First Pitch in Arlington, Supreme Court Justice Samuel Alito Reveals a Bit About His Love of the Game*, DALLAS MORNING NEWS, Jun. 19, 2013, www.dallasnews.com/sports/texas-rangers/headlines/20130619-sherrington-after-tossing-first-pitch-in-arlington-supreme-court-justice-samuel-alito-reveals-a-bit-about-his-love-of-the-game.ece; Jack Curry, *Justice Sotomayor Throws Out First Pitch*, N.Y. TIMES Bats Blog, Sept. 26, 2009, bats.blogs.nytimes.com/2009/09/26/justice-sotomayor-throws-out-first-pitch/.

[22] Koppan, *supra* note 4 (quoting Professors Levinson and O'Brien).

[23] *See, e.g.*, AP, *Goldberg Welcomes Israeli-German Ties*, WASH. POST TIMES HERALD, May 28, 1965, search.proquest.com/news/docview/142602779/1433D3C589045F6EFD/285?accountid=14509.

on the Court, with Justice David Souter at 1.42 reported appearances per year, Justice John Paul Stevens at 1.74, and Justice Sandra Day O'Connor at 1.54. Justices O'Connor and Stevens have been very active since leaving the Court, sometimes engendering controversy,[24] but these appearances are not included in the Index.

II.
METHODOLOGICAL CONCERNS

No doubt my methodology for creating the Celebrity Index is not perfect. Here I briefly consider three objections.

(1) *Missing Data, Especially from Earlier Periods*. Unquestionably, this research has not uncovered every appearance or interview by a sitting Supreme Court Justice covered in the U.S. press during 1960-2014. Data are biased toward the most recent period, where much news is digitized and easily searchable in databases such as Google, but, at least when it comes to newspapers, a major source of information in the pre-Internet era, the Proquest Historical Database is wide-ranging and easily searchable. The fact that I found more than double the number of reported instances in the 1960s compared to the 1970s is a good indication that the problem is not primarily with the availability of data in earlier periods. Thus, I am confident I have found most appearances of Justices which were publicly reported by major newspapers. Further, a number of older television appearances of Justices during earlier periods have now been captured and placed in searchable websites, such as C-SPAN's. Thus, while some data are undoubtedly missing from the earlier period, there is no reason to believe that such gaps could explain the enormous disparities between the earlier and later periods.

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[24] *See* AP, *Retired Justice O'Connor Draws Criticism Over Political, Judicial Activities*, Apr. 10, 2011, www.foxnews.com/politics/2011/04/10/critics-fault-retired-justice-oconnor-political-judicial-activities/. Justice Stevens created some controversy when he released a book, SIX AMENDMENTS (2014), calling for constitutional amendments, and testified to a Senate committee about a constitutional amendment to overturn *Citizens United*. Noah Bierman, *Justice Stevens Reaffirms Dissent on Campaign Finance*, May 1, 2014, www.bostonglobe.com/news/nation/2014/04/30/john-paul-stevens-taking-another-run-putting-his-imprint-constitution/RkBFe4veWWMk0AiT3Pon5I/story.html.

It is important to recognize, however, that I am measuring *reported* appearances and not *actual* appearances. Many Justices were actively giving speeches which garnered no press coverage. For example, I found over 30 speeches by Justice Brennan reprinted in law reviews. These speeches (listed in my online appendix) were excluded from Justice Brennan's count because I could not find contemporaneous press reports. Similarly, as noted above, recent financial-disclosure forms show that Justices still make appearances that produce no contemporaneous press coverage.

(2) *Quality Not Quantity of Appearances Matters for Celebrity*. When Justice Douglas appeared on *The Mike Wallace Interview* in 1958, the public might have viewed it as more of a cultural event than would be a recent *60 Minutes* interview. There were fewer television networks and news outlets overall, but each appearance could have packed more celebrity impact. Further, Justice Douglas spoke so much more than many of his colleagues that his celebrity status could have loomed even larger. Even so, this phenomenon is counterbalanced, at least in part, by the changing media landscape. Part of a Justice's celebrity comes from the number of news stories (not measured by my study), and the Justices' ubiquity today contrasts with the relative scarcity of earlier coverage about them. When Justice Sotomayor ran into Hillary Clinton signing books at a Costco in Virginia in 2014, it made national news.[25] Further, some Justices today, such as Justices Scalia and Ginsburg, appear more willing to say controversial (and newsworthy) things, which may make them more likely to attain celebrity status. Further, by counting a Muppet appearance the same as giving a lecture on purposivist statutory interpretation, I have not captured how different types of events might contribute to a Justice's celebrity stature.

(3) *The List Is Biased Toward Justices Who Write Books*. Many of the reported appearances were made in connection with books written by the Justices, including Justices Breyer, Sotomayor, Scalia, and Thomas. But that is not a glitch in the celebrity rankings; the very writing of books and going on book tours adds to the nature of the Celebrity Justice. The book tours are a relatively new thing. Chief Justice Rehnquist wrote some books,[26] but he

[25] David Taintor, *Sonia Sotomayor Greets Hillary Clinton at Book Signing*, MSNBC, Jun. 14, 2014, www.msnbc.com/msnbc/sonia-sotomayor-greets-hillary-clinton-book-signing.

[26] One of his most famous books is WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2007), a provocative topic given his own role in the dis-

seemed more comfortable speaking to historical societies than signing books at Costco.

In sum, I am confident that the counting of these reported public appearances and interviews tells us something about the changing role of Supreme Court Justices over time. Certainly the Justices are getting more press stories written about them than before, dramatically so compared to earlier decades. And some Justices have been engaging in more of these activities than others.

III.
THE COSTS AND BENEFITS OF CELEBRITY JUSTICE

A full discussion of the role of the Justice as a public figure is beyond the scope of this paper, but here I address whether the rise of the Celebrity Justice is desirable and likely to continue.

Celebrity Justice is a double-edged sword. The Justices' extrajudicial speech arguably serves educative and civic functions. Supreme Court decisions affect every American, on issues ranging from privacy to security to protection of our rights to the quality of our democracy. Yet its proceedings are opaque, in some ways deliberately so. Its decisions are necessarily written in legal language, making the Court's work all but inaccessible to most Americans. Getting the Justices out there explaining what the Court does and why their positions sometimes differ serves a great public purpose. Whether it is Justice Scalia explaining his philosophy of originalism,[27] Justice Thomas speaking to a group of high school students about his upbringing from poverty,[28] Justice Sotomayor inspiring young children to believe they can grow up to do anything,[29] or Justice Ginsburg speaking

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puted 2000 presidential election culminating with the controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000).

[27] C-SPAN classroom has helpfully posted a video of a Justice Scalia talk with questions for student discussion. www.c-spanclassroom.org/Video/382/Justice+Scalia+on+Constitutional+Interpretation.aspx.

[28] Gina Holland, *Thomas: Black Students Must Think for Selves*, AP, May 21, 2003, online athens.com/stories/052103/new_20030521042.shtml#.VVVieZNVhHw.

[29] HUFFINGTON POST, *supra* note 1.

out on gender equality,[30] Justices can inspire, infuriate, and spark debate.

On the other hand, the controversies that Justices spark can undermine public confidence in the Supreme Court. Liberals are incensed when Justice Scalia tells them to "Get over" *Bush v. Gore*. Conservatives believe Justice Ginsburg says too much about pending cases and should recuse herself. Justice Samuel Alito's appearances before conservative groups raising funds have caused liberals to criticize him.[31] Seeing the Justices mocked on *The Daily Show* for their extrajudicial speech might cause some to lose faith in the institution (although others may gain a newfound appreciation).

It is hard to know what to make of the public-confidence argument. Confidence in the Court has indeed declined in recent years,[32] but there is no easy way to tie this to the role of the Celebrity Justice or to other factors. Whether the net benefits of a more accessible set of Justices out educating the public outweigh any costs to public confidence is too hard to say. It may be that some public appearances add to the public's confidence in the Court and its decisions while others detract. Everyone may favor a Justice giving a sober speech on constitutional interpretation, but not snippy answers in a question-and-answer session.

There also seems a partisan element to the public's views of appearances. Liberals may find conservative Justices' appearances at a Federalist Society event as undermining the rule of law, and conservatives may find liberal Justices' appearances at an American Constitution Society event the same way. It probably does not help that only conservative Justices speak at the annual Federalist Society events and only liberal Justices at the

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[30] Ariane de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABC NEWS, Nov. 18, 2011, abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality/.

[31] Jonathan Turley, *Alito Criticized for Participation in Another Conservative Fundraiser*, JONATHAN TURLEY.COM, Nov. 16, 2010, jonathanturley.org/2010/11/16/alito-criticized-for-participation-in-another-conservative-fundraiser/.

[32] Around 60 percent of respondents approved of the job of the Supreme Court in the early 2000s, a number which fell to 46 percent by 2014. Disapproval rose from 29 percent in 2000 to 48 percent in 2014. Gallup, Job Approval of Supreme Court, www.gallup.com/poll/4732/supreme-court.aspx (last visited May 19, 2015). *See also* Karlyn H. Bowman & Andrew Rugg, Public Opinion on the Supreme Court, AEI Public Opinion Series (updated June 2012), www.aei.org/wp-content/uploads/2012/06/-possupreme-courtjune-20122_162919650849.pdf.

American Constitution Society.[33] This might signal to the public that we have a more politicized Court.

In thinking about the normative value of Celebrity Justice, it is worth considering why the Justices have become celebrities. Judge Richard Posner offers three possibilities: first, public intellectuals, including the Justices, have greater access to the media thanks to changes in the media landscape and the rise of social media; second, the Justices have more time on their hands to be celebrities because the Court's workload has decreased; third, with the resulting increase in leisure time, Justices can pursue extracurricular activities with financial incentives, such as "book deals with big advances" which necessitate public book tours.[34] Books are especially attractive, not only for their financial benefits but because they are one of the few potential outside activities for Justices which do not raise the potential for conflicts of interest.

Judge Posner is right that all of these factors push the Justices more into the celebrity role, but there is more to the growing nature of their celebrity.

Justices could decline to write books (or at least to go on book tours). They could turn down invitations to give lectures or participate in events where they answer questions. What Justices cannot do is limit the dissemination of information that is publicly available. The Justices are learning what professors, police officers, and others already learned long ago: once people have access to the Internet and a smartphone, anything spoken

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[33] Although Justice Elena Kagan proclaimed as dean of Harvard Law School "I love the Federalist Society!," Jim Lindgren, *Elena Kagan: "I LOVE the Federalist Society! I LOVE the Federalist Society!*," VOLOKH CONSPIRACY, May 10, 2010, volokh.com/2010/05/10/elena-kagan-i-love-the-federalist-society-i-love-the-federalist-society/, I could find no record of a sitting, liberal Supreme Court Justice addressing the Federalist Society annual meeting or a sitting conservative Supreme Court Justice addressing the American Constitution Society annual meeting. Justice Breyer has spoken at local Federalist Society lawyer events. See the 2007 annual report of the Federalist Society, at page 9, www.fed-soc.org/library/doclib/20080501_2007AnnualReport.pdf. Further, in December 2006 and May 2012, Justices Breyer and Scalia spoke at events on constitutional interpretation co-sponsored by the two organizations. Videos of the events are posted at: www.fed-soc.org/multimedia/detail/a-conversation-on-the-constitution-with-supreme-court-justices-stephen-breyer-and-antonin-scalia-event-audio and www.youtube.com/watch?v=_4n8gOUzZ8I, respectively.

[34] Posner, *supra* note 4, at 300-02.

publicly is capable of being recorded or memorialized, distributed on social media, and eventually picked up by a wide audience. Even if Justices are not trying to become "public intellectuals" (as Judge Posner puts it), their every public move is now scrutinized like never before.

There is an audience of people obsessed with the workings of the Supreme Court, who hang on each word (especially the out-of-Court words) of the Justices. Whether those words are tea leaves for how the Court will decide cases – think of the stir created over whether Justice Ginsburg emphasized the word "Constitution" during a same-sex marriage she performed before the Court decided a major same-sex-marriage case[35] – the Justices are powerful, compelling figures whose moves are tracked and whose sentences are parsed by thousands of SCOTUS groupies on their smartphones and tablets. In short, whenever they choose to leave the cloistered halls of 1 First Street in Washington, D.C. to speak to any group on the record for any purpose, they have become Celebrity Justices.

Further, the Justices seem to find it harder to remain in their cloistered halls. Perhaps there is a new equilibrium of Celebrity Justice. Once a few Justices are out there speaking and interacting with the public, other Justices feel the urge to do the same.

Justices also have political and ideological reasons to speak out. The increased politicization of the United States and the Court has led at least some Justices to defend their rulings and their judicial philosophy against charges of bias. Justice Ginsburg recently spoke with the *New York Times* to attack her colleagues for being part of an "activist Court."[36] Justices also preach to the faithful – as noted, some conservative Justices speak regularly to conservative groups and some liberal Justices speak regularly to liberal

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[35] *See* Maureen Dowd, *Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word 'Constitution'*, N.Y. TIMES, First Draft Blog, May 18, 2015, www.nytimes.com/politics/first-draft/2015/05/18/presiding-at-same-sex-wedding-ruth-bader-ginsburg-emphasizes-a-key-word/. A few years earlier, before the Court decided a constitutional challenge to the Affordable Care Act, commentators read much into a comment Justice Ginsburg made about "broccoli." Orin Kerr, *If You Really Want to Read the Tea Leaves from Justice Ginsburg's Speech at the ACS . . .*, VOLOKH CONSPIRACY, Jun. 19, 2012, volokh.com/2012/06/19/foolishly-reading-the-tea-leaves-of-justice-ginsburgs-speech-at-the-acs/; *see also* Rick Hasen, *With Justice Ginsburg, Is Today's "Constitution" Yesterday's "Broccoli?"*, ELECTION LAW BLOG, May 18, 2015, electionlawblog.org/?p=72557.

[36] Liptak, *supra* note 11.

groups. They have become public gladiators in a national fight over the Court and its jurisprudence.

The Court will not soon run out of controversial cases or issues. Nor apparently, will it soon run out of Justices willing to step into the public spotlight to educate, dish, defend, cajole, sell books, entertain, or just bask in the celebrity spotlight.

The Rule of Law

John V. Orth

The importance of the rule of law is universally acknowledged. It is regularly invoked by politicians and commentators, not just in America but around the world, even in countries not known for their devotion to civil rights. Hardly a day passes without mention of the rule of law in the news media. But rarely is the concept defined, and when an attempt is made to give it specific content, the definition is often contested as too limited or too broad. In the Anglo-American legal tradition, the rule of law developed over time, its roots usually traced to Magna Carta in 1215, when rebellious English barons, "sword in hand," forced the king to promise to proceed only "*per legem terrae*," according to the law of the land.[1] Over the ensuing centuries, this promise was occasionally lost sight of, but in repeated political and constitutional crises it was forcefully restated and elaborated. The modern struggle to establish the rule of law began in the sixteenth and seventeenth centuries in England and continued as thirteen of Britain's American colonies demanded their independence. The struggle is not over yet, and probably never will be.

The rule of law is not a purely legal concept but has broad cultural resonance. An early debate about its meaning, with eerie echoes in the highest political circles, can be heard in William Shakespeare's bitter comedy

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[1] *The Federalist* No. 84 (Alexander Hamilton), at 534 (ed. Benjamin Fletcher Wright, 1966); Magna Carta c. 39 (1215); William Blackstone, *Commentaries on the Laws of England* I:123 (1765-69) ("sword in hand").

Measure for Measure, which premiered in 1604 with King James I in the audience. Angelo, the deputy who ruled Vienna during the absence of its Duke, enforced the duchy's harsh law against fornication, sentencing the concupiscent Claudio to death. In response to an impassioned plea by Claudio's sister, Angelo denied personal responsibility: "It is the law, not I, condemns your brother."[2] When acting as a judge, Angelo explained, he was merely "the voice of the recorded law."[3] Twenty years later, Sir Edward Coke, once a royal judge, now an outspoken critic of royal absolutism, rallied the House of Commons in defense of the writ of habeas corpus: "It is a maxim, *The common law hath admeasured the King's prerogative*. . . . It is against law that men should be committed and no cause shown. . . . [I]t is not I, Edward Coke, that speaks it but the records that speak it."[4] Not the judge, but the law.

This was not the first time that Coke had defended the common law against the King, often invoking a reinvigorated version of Magna Carta. Only a few years after the premiere of *Measure for Measure*, he had dared to instruct his monarch that "[c]auses which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain cognizance of it. . . ."[5] Speaking for the law and not for oneself does not come naturally; it is a skill that must be learned. Furthermore, Coke declared – at the risk of being charged with treason – the King is not above the law but "*sub Deo et lege*," under God and the law.[6] No one is above the law.

Law's autonomy and universality are essential elements of the rule of law. Specific legal arrangements that implement and often accompany these elements vary with time and place, making a comprehensive statement of the requirements of the rule of law difficult, but these twin ideals are always

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[2] *Measure for Measure* 2.2.80.

[3] 2.4.61-62.

[4] Quoted in Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* 484 (1956) (referring to *Darnell's Case*, 3 How. St. Tr. 1 (K.B. 1627), popularly known as the Five Knights Case).

[5] *Prohibitions del Roy,* 12 Co. 63, 65, 77 Eng. Rep. 1342, 1343 (1607).

[6] Id. (paraphrasing 2 Bracton, *On the Laws and Customs of England* 33 (Samuel E. Thorne trans. 1968)).

at its core. Law is radically distinct from the personality of the judge, who decides cases by reference not to personal preference but to specific types of authority, using a distinctive style of legal reasoning. And law applies equally to all, high and low, the governors as well as the governed.

When in 1776 British colonists in North America lost confidence in the royal judges and became convinced that King George III was acting as if he were above the law, they determined to renounce their allegiance and make real Tom Paine's vision: "In America the law is king."[7] The obvious place to begin was with the independence of the judiciary. Prominent among the articles of indictment against King George in the Declaration of Independence was the charge: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[8] The new states promptly responded by writing into their constitutions guarantees of judicial independence. The North Carolina Constitution of 1776, for example, granted the judges tenure "during good behaviour" – making them removable, not at will, but only for cause – and promised them "adequate salaries," to prevent economic coercion.[9] A dozen years later, the United States Constitution cast the guarantee in classic form: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[10]

Quickly it came to be seen that an independent judiciary would be best anchored in a separate department of government. The Massachusetts Constitution, adopted in 1780, recognized the connection between judicial independence and the supremacy of the law when it declared that the powers of the executive, legislative, and judicial branches must be separate "to the end that it may be a government of laws and not of men."[11] Chief Justice John Marshall invoked the same phrase to justify judicial review of congressional legislation in the landmark case of *Marbury v. Madison* in 1803: "The government of the United States has been emphatically termed a

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[7] Thomas Paine, *Common Sense* 98 (ed. Isaac Kramnick, 1976).

[8] *The Declaration of Independence* para. 12.

[9] N.C. Const. of 1776, §§ 13 & 21.

[10] U.S. Const. art. III, § 1.

[11] Mass. Const., Decl. of Rts., art. XXX.

government of laws, and not of men."[12] The fundamental difficulty, of course, is that law is not a disembodied force that can rule a nation. As the practical statesmen who established the American government recognized, it would necessarily be a government "administered by men over men."[13] The law must find its voice in the mouths of the judges.

More than an independent judiciary is required if the law is truly to be king. Judgments must be enforced, even against the other branches of government. As the unillusioned James Madison explained: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[14] Arrangements to diffuse power are built into the constitutional structure, the famous checks and balances that allow one branch of government to restrain another. Congress has the power to impeach and remove officers in the other branches. The President has the power to veto congressional legislation. The Supreme Court has the power to declare government actions unconstitutional and void. While the executive and the legislative branches contend for power, the judiciary defends the law and the constitution.

Power is diffused, not only among separate branches of government, but also between the state and federal governments. Bills of Rights at both levels offer safeguards against government over-reaching – some garnered from the English legal tradition, such as the writ of habeas corpus, earlier defended by Sir Edward Coke; others inspired by colonial experience with official harassment, such as the guarantee of proper procedure; still others added later to redress specific abuses, such as the equal protection clause adopted after the American Civil War. Particular attention is paid to law enforcement which is subject to restraints at every stage, from search and seizure through arrest, detention, prosecution, trial, and final punishment. Ex post facto laws, making acts criminal after the fact, are prohibited. Trial by jury, which had proved itself so potent a defense against tyranny both in England and in the colonies, is guaranteed.

Abuses of criminal law were not the only objects of concern. Economic rights are also protected. States are prohibited from "impairing the obliga-

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[12] 5 U.S. (1 Cranch) 137, 163 (1803).

[13] *The Federalist* No. 51 (James Madison), at 356 (ed. Benjamin Fletcher Wright, 1966).

[14] Id.

tion of contracts."[15] The Fifth Amendment prohibits the taking of private property "for public use without just compensation."[16] And the guarantee of due process, the American expression of Magna Carta's "law of the land," developed in time extensive and unexpected applications as a defense of economic and privacy interests.

Supplementing the constitutional guarantees are judicial practices familiar from English common law, such as stare decisis, the doctrine of precedent, "a foundation stone of the rule of law."[17] Another English tradition was the detailed judicial opinion, explaining a court's decision. In Chief Justice John Marshall's last reported case, he described his lifelong goal in opinion-writing: to convince the parties "that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case."[18]

A hundred years after American Independence, and long after America had settled on due process as its guarantee against arbitrary rule, influential English legal scholar A.V. Dicey popularized the phrase "the rule of law."[19] Because England lacks a written constitution like the American one with textual restraints on the government, Dicey deployed the concept to mark the proper limits of government power. No one should be punished except for a violation of previously declared law. There should be a unified court system, with no special courts for public officers. And rights are not to be understood as conferred by the constitution but rather as the basis of it.

Although the phrase is forever associated with Dicey, the rule of law has escaped his specific formulation and become a generic term to refer to a legal system that prevents arbitrariness, guarantees equal treatment, and – in many usages – enforces contracts and protects property. The demand for the rule of law in this sense is now a global phenomenon, not limited to countries sharing the common law tradition and sounded even in non-Western societies. The President of China, for example, has called on judges to "lock power in a cage," and the Chinese Communist Party has

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[15] U.S. Const. art. I, § 10.

[16] U.S. Const. amend. V.

[17] *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014).

[18] *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 715 (1835).

[19] A.V. Dicey, *The Law of the Constitution* 179-99 (7th ed. 1908).

reaffirmed the constitution's guarantee of judicial independence: "The people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual."[20]

While due process has remained the familiar American expression of the rule of law, in the decades after Dicey his phrase occasionally appeared in United States Supreme Court opinions, including in important cases in which the court was forced to look beyond familiar constitutional texts. A generalized version of the rule of law was invoked in the Insular Cases, concerning the civil rights of residents in America's newly acquired island possessions such as Hawaii and the Philippines. Because the specific constitutional protections in the Bill of Rights did not extend to these unincorporated territories, the justices were forced to distinguish rights that are "fundamental in their nature," such as fair trial, from those that are incidental to the Anglo-American legal tradition, such as indictment by grand jury and trial by a jury of twelve.[21] In 1904 the Supreme Court recognized that there are "certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom."[22] These are guaranteed even to people from a different legal tradition.

The Insular Cases anticipated the later debate over the limitations that the Fourteenth Amendment imposes on the states. Did the Amendment's guarantee of due process include the protections detailed in the Bill of Rights that are applicable to actions by the federal government? In other words, did the Fourteenth Amendment incorporate the Bill of Rights and apply it to the states? At first, the Court tried, as in the Insular Cases, to distinguish rights that are "of the very essence of a scheme of ordered liberty" from those that are not fundamental.[23] In the words of Justice Felix Frankfurter, "As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a constitution we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the

[20] *Economist* (16 Aug. 2014) p. 35; P.R.C. Const. art. 126.

[21] *Hawaii v. Mankichi*, 190 U.S. 197, 217 (1903).

[22] *Kepner v. United States*, 195 U.S. 100, 122 (1904).

[23] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

sanction of the Eighteenth Century."[24] But in the end, the familiar forms asserted themselves and one-by-one were incorporated in the Fourteenth Amendment, until today most of the Bill of Rights is applicable to the states as essential components of due process.

Difficulty in giving content to the rule of law has led to widely varying assessments of its value. On the one hand, the English historian E.P. Thompson hailed it as "an unqualified human good," a defense against "power's all-intrusive claims."[25] On the other, Yale law professor Grant Gilmore remembered the phrase as used in America during the Cold War as one of several "cheerfully meaningless slogans."[26] Recently, promoting the rule of law has become a global industry with international aid agencies touting rule-of-law programs as "a way to reduce poverty, secure human rights, and prevent conflict."[27] But critics have complained that the programs ignore local conditions and overstate what can be achieved.

The rule of law begins with rule *by* law, itself a not inconsiderable benefit. A rule-based society is certainly preferable to a lawless one. Sir William Blackstone spoke for many when he described anarchy as "a worse state than tyranny itself, as any government is better than none at all."[28] Fidelity to properly adopted and widely known rules protects citizens from arbitrary decision-making; it is also economically efficient. At the very beginning of the Industrial Revolution, Lord Mansfield recognized that "[i]n all mercantile transactions, the great object should be certainty and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."[29] Without the security provided by an independent judiciary enforcing contracts and protecting property, investors are less likely to risk their capital, which explains why authoritarian rulers of developing countries often lay claim to this limited version of the rule of law.

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[24] *Adamson v. People of State of California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (internal quotation from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

[25] E.P. Thompson, *Whigs & Hunters: The Origin of the Black Act* 266 (1975).

[26] Grant Gilmore, *The Ages of American Law* 106 (1977).

[27] G. John Ikenberry, Recent Books, *Foreign Affairs* vol. 93: no. 6 (Nov./Dec. 2014), p. 185.

[28] Blackstone, *Commentaries on the Laws of England* I:123.

[29] *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng. Rep. 1012, 1017 (K.B. 1774).

But the rule of law is meant to be more than merely utilitarian – a safeguard for the rights of free people, not only for the operations of the free market. By codifying and reinforcing unequal power relationships, particular laws may themselves violate the ideal which the rule of law expresses. It is cautionary to reflect that the rule of law co-existed for centuries with the institution of slavery. In what today seems a perversion, Chief Justice Roger Taney even held in the *Dred Scott* case that due process protected a slave owner's property rights.[30] To advance beyond rule *by* law to the rule of law, as Professor Harold Berman pointed out, "justice-based-on-law" must give way to "law-based-on-justice, with mercy playing an important role in exceptional cases."[31] For this reason, many commentators insist that to realize the ideal of the rule of law it must be accompanied by robust respect for individual rights and fair political processes.

Where the rule of law allows for effective enforcement, as with the American guarantee of due process, it can protect the individual from oppression by the majority. The American Revolution may have deposed the king in favor of the law, but the law that should have restrained the king now restrains the sovereign people, who occasionally chafe at its restraints just as monarchs once did. More subtly, long-continued experience with the rule of law fosters a legal mentality in both the governors and the governed, causing grievances to be expressed in legal terms and channeling both action and reaction into legal forms.

But even nations long committed to the rule of law admit exceptions to the ideal. During times of war or national emergency the normal protections of law are often abandoned. Internment, detention without trial, denial of legal representation, wiretapping, rule by decree – all appear in times of duress in the best regulated states. Although the Constitution expressly guarantees "the Privilege of the Writ of Habeas Corpus," it also concedes that the writ can be suspended "when in Cases of Rebellion or Invasion the public Safety may require it."[32] *Inter arma silent leges* (When arms speak, the laws are silent) is a maxim as old as the Romans.[33]

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[30] *Scott v. Sanford*, 60 U.S. 393, 450 (1857).

[31] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 530 (1983).

[32] U.S. Const. art. I, § 9.

[33] Cf. Cicero, *pro Milone* 4.11-12.

Law's universality, the claim that law applies equally to all, high and low – regularly repeated ever since Magna Carta – is also never fully realized. States can close their courts to suits against themselves by asserting the extra-constitutional doctrine of sovereign immunity. In a famous dictum Justice Oliver Wendell Holmes implicitly recognized that the doctrine is at odds with the rule of law: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[34] Without a remedy there is no right.

The rule of law is often equated with formal legal equality. In his celebrated dissent in *Plessy v. Ferguson*, the case that upheld racial segregation, Justice John Marshall Harlan I argued that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[35] But equal laws applied to an unequal society inevitably produce unequal results. "The rich as well as the poor are forbidden to sleep under the bridges of Paris,"[36] but no one who could afford an alternative would choose to billet there. Not only can undeviating adherence to equality under the law prevent unequal laws that promote substantive equality, but the procedural demands of due process also offer decided advantages to the wealthy, the educated, and the well-counseled, who can be sure to secure all the protections afforded by law.

Today, specialized bodies of law have developed to protect various classes perceived to be at a disadvantage in the marketplace: tenants against landlords, consumers against producers, employees against employers. Groups victimized by past (and present) discrimination may benefit from affirmative action programs, giving them preferential treatment. Yet, unequal laws intended to rectify social inequality have been challenged as violations of the rule of law. Indeed, the conservative economist F.A. Hayek roundly declared that "formal equality before the law is in conflict, and in fact incompatible, with any activity of the government deliberately aiming at material or substantive equality of different people, and . . . any policy

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[34] *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907).

[35] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[36] Anatole France, *Le Lys Rouge* c. 7 (1894).

aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."[37]

Law's autonomy, ideally protecting individuals from arbitrary decisions, may also lead to unacceptable rigidity. All societies committed to the rule of law have struggled to provide some latitude for discretion. The historic court of equity offered substantial justice when the remedy at law was inadequate. But judges exercising equitable jurisdiction have long insisted that their discretion is not unbounded. As one of the English founders of modern equity put it, echoing Sir Edward Coke's praise of the law's artificial reason: "if conscience be not dispensed by the rules of science, it were better for the subject there were no Chancery at all than that men's estates should depend upon the pleasure of a Court which took upon itself to be purely arbitrary."[38] As long ago remarked, the measure of justice in the court of equity should not, like the length of the Chancellor's foot, vary from judge to judge.[39]

Discretion in limited circumstances has been admitted even in law enforcement. The prosecutor has discretion whether to file charges or not. The jury has the power to nullify a statute in individual cases by refusing to convict. And the executive may pardon a convicted criminal or commute a convict's sentence. Indeed, the dramatic dilemma in Shakespeare's *Measure for Measure* is finally resolved by the Duke's pardon of all the law-breakers, while leaving the law unaltered. Even civil disobedience finds support in the rule of law. Although the law necessarily speaks through the judges, not everything that comes out of their mouths is law. The law is king, supreme over all its subjects, and protesters appeal directly to the throne.

Although due process has been given substantial content by two centuries of judicial decisions, it is ultimately no more readily defined than the rule of law. As explained by Justice John Marshall Harlan II: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

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[37] F.A. Hayek, *The Road to Serfdom* 87-88 (1944).

[38] Sir Heneage Finch, Lord Nottingham, Ch. 1675-82, quoted in *Biographical Dictionary of the Common Law* 176 (ed. A.W.B. Simpson, 1984).

[39] John Selden, *Table Talk* (1689), quoted in *Sources of English Legal and Constitutional History* 223-224 (eds. M.B. Evans & R.I. Jack, 1984).

purposeless restraints. . . ."[40] Any final definition of due process, as of the rule of law, risks confining it in such a way as to prevent its use in future emergencies.

If it is to endure, the rule of law must strike deep roots in the society at large. The public must develop a legal consciousness, not with the detail of a professional jurist, but with at least a general understanding and acceptance of the role assigned to the judiciary. Of course, respect for the law does not guarantee perfect adherence to its norms. Like all ideologies, it can tolerate individual lapses, sometimes even serious and prolonged lapses. But repeated and widespread failure can lead to the cynicism that causes its ultimate collapse. The rule of law can exist only if supported by a deep social consensus that respects proper procedure, that values equal treatment and fundamental fairness, and that fears the corrupting influence of power unrestrained by law.

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[40] *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable

Part I

Richard A. Posner

I realize I've gotten a not entirely welcome – though not entirely undeserved – reputation as a maverick, naysayer, scoffer, gadfly, faultfinder – in short a committed candid critic of the American legal system,[1] and in particular of the federal judiciary, the branch of the system that I know best, having been a federal court of appeals judge for the past 34 years, and that I hammer most frequently. My just-published book *Divergent Paths: The Academy and the Judiciary* (2016) will cement that reputation.

What is odd is that most of the criticism I receive is of my writings or speeches about the judicial process, as exemplified by this article. Criticisms of my judicial opinions are rare, even though I have written more than 3100 published opinions in my 34 years as a federal appellate judge. And such criticisms as the opinions do receive differ in tone and content from the

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[1] See, e.g., Lincoln Caplan, "Rhetoric and Law: How the productive, contentious, prodigious Richard A. Posner became one of America's most influential judges," *Harvard Magazine*, Feb. 2016, p. 49, www.harvardmagazine.com.

criticisms of my extrajudicial comments on the judicial process. Criticisms of my opinions tend to focus on my citing Internet websites in them.

In the present article, however, and its sequel (Part II, to be published in the next issue of this journal), I try to retreat some distance from controversy by confining my discussion to those features of the federal judicial process that are at once demonstrably unsound *and* readily corrigible without need for federal legislation or radical changes in legal doctrines or practices. That is not to say that anything I criticize *will* be changed, however convincing my critique. For law is wedded to the past as no other profession is. You don't hear doctors bragging about thirteenth-century medicine, but you hear lawyers bragging about the thirteenth-century Magna Carta (without even understanding it – they think it guaranteed the ancient liberties of the English, whereas in fact it guaranteed just the rights of barons, and in any event was soon annulled, later restored, and eventually demoted to the purely symbolic).

Another way to characterize the legal profession in all three of its major branches – the academy, the judiciary, and the bar – is that it is complacent, self-satisfied. Chief Justice Roberts in his annual reports likes to describe the American legal system as the envy of the world. Nonsense. The system has proved itself ineffectual in dealing with a host of problems, ranging from providing useful (as distinct from abstract theoretical) legal training at bearable cost to curbing crime and meting out rational punishment, providing representation for and protection of the vast number of Americans who are impecunious or commercially unsophisticated (so prey to sharpies), incorporating the insights of the social and natural sciences (with the notable exception of economics, however), curbing incompetent regulatory agencies such as the immigration and social security disability agencies, and limiting the role of partisan politics in the appointment of judges. The system is also immensely costly (more than $400 billion a year), with its million lawyers, many overpaid, many deficient in training and experience, some of questionable ethics.

I focus on the three principal phases of the federal judicial process: trials, intermediate appeals, and decisions by the Supreme Court. But much that I'll be saying is applicable to state judiciaries as well, all of which (so far as I know) have a tripartite structure (trial court, intermediate appellate court, supreme court) similar to that of their federal counterpart.

TRIALS

The most obvious and most readily corrigible defect of the federal trial process is the use of "pattern jury instructions," which are drafted by committees consisting of both judges and lawyers. Judges are not required to use them in instructing a jury, but they like to do so, both to spare themselves the agonies of composition and to minimize the likelihood of a reversal because of an instruction error. The problem is that, being drafted in legal language, many pattern instructions are largely unintelligible to jurors. The drafters appear to have a deficient sense of the capabilities of the intended audience. I conduct trials as a volunteer in the district courts of my circuit (the Seventh Circuit), and when I have a jury trial I draft the instructions myself, writing on a level that a person with no legal training can understand.

I employ other simple methods of making trials more intelligible to jurors, such as allowing them to ask questions, limiting the number and length of the exhibits (documents and sometimes photos or videos) admitted into evidence, ruling on the admissibility of exhibits before trial in order to expedite the trial, requiring lawyers to limit their objections to one word (so as not to distract the jury with legal mumbo-jumbo), conducting the voir dire (the questioning of prospective jurors to determine their suitability to participate as jurors in the case) myself and limiting the number of voir dire questions. I also make sure to give the jurors *reasons* for what I tell them not to do, such as not to do their own Internet research. Some judges just tell them: you must not do your own research. But to be told this without a reason must puzzle jurors, and may induce some of them to disobey the order. There *is* a good reason to forbid jurors to conduct their own research, and it's easily (though rarely) explained: they may discover things online that the lawyers and witnesses at the trial don't mention and don't even realize are pertinent to the case, with the result that the jurors who do such research may acquire information that the lawyers or witnesses could explain was false or misleading or even irrelevant yet that they would never have a chance to explain because the jurors would not have disclosed the information to them. Trials would become downright chaotic if to solve the problem just indicated jurors were told that if they come across some juicy bit of information from their Google searches they should ask the lawyers about it during the trial.

A big problem with jury trials is that often they involve technological or commercial issues that few jurors understand (not that many judges understand them either) and that the lawyers and witnesses are unable or unwilling to dumb down to a level that the jurors would understand. There is a solution to this problem, however, though one that few judges employ: appointment by the judge of an expert witness (thus a "neutral" expert, by virtue of not having been selected by the lawyer for one party to the litigation). The authority to make such an appointment is explicitly conferred on federal judges by Rule 706 of the Federal Rules of Evidence, but is alien to the Anglo-American judicial culture, in which the witnesses in a case are designated by the lawyers rather than by the judge.

The fault is the culture. Our legal culture, in contrast to that of most countries in the world (notably Japan and the nations of Continental Europe), is "adversary," in the sense that the judge is the arbiter of a contest – a drama, really – put on by the lawyers for the contending parties. (In the inquisitorial system, as the system in force in most other countries is called, the lawyers can nominate witnesses but the judge decides whether to call them and he questions them, at least initially.) The lawyers in a case in our system often differ *greatly* in quality, and this distorts the adversary process. Often one of the parties, moreover – invariably the plaintiff if it's a civil case and the defendant if it's a criminal one – has no lawyer, which shifts the odds enormously in favor of the represented party regardless of the merits of his case.

Differences in the quality of lawyers wouldn't matter a great deal if, for example, they were compensated as judges are: with a uniform government salary unrelated to outcomes or the relative wealth of the respective parties in a case. (The analogy is to a "single payer" system of medical care.) There would then be no contingent fees and no $1100 an hour billing rates. My pay isn't docked if I'm reversed by the Supreme Court, and neither do I get a bonus if the Court affirms a decision of mine, or for that matter denies certiorari in every single case in which the loser in a case in which I wrote the majority opinion asks the Court to take the case and reverse me. That's not how lawyers in our system are compensated. "The rule of law is a huge public good, but no commercial lawyers are working to achieve 'justice': they work to win a case in a zero-sum tournament. The last hour of legal effort purchased by a party to a legal dispute yields its return not

by generating more justice, but by increasing the chances of winning the tournament. There are simply too many people spending their time on these zero-marginal-social-product activities. Worse, many of them are highly talented."[2]

Another serious problem with trials in our system is the overemphasis on live testimony and thus on the efficacy of cross-examination as a method of determining the truth. Jurors are told to assess the truthfulness of a witness's testimony by considering not only the plausibility of what the witness says but also the witness's "demeanor" – the manner in which he expresses himself, his apparent confidence or nervousness, and other visual and auditory clues (tone of voice, rapidity of speech, etc.). Actually these are misleading clues – there are nervous liars and confident liars, nervous truth-tellers and confident truth-tellers, articulate and inarticulate liars and truth-tellers, and so on. Yet no legal catchphrase is more often repeated than that determinations by a trial judge (or jury) whether to believe or disbelieve a witness can be overturned on appeal only in extraordinary circumstances. The reason is said to be the inestimable value, in assessing credibility, of seeing and hearing the witness rather than reading a transcript of his testimony (which the appellate judges ordinarily are limited to doing), since the transcript eliminates clues to veracity that are supplied by tone of voice, hesitation, body language, and other nonverbal expression. But this is one of those commonsense propositions that appears to be false. A considerable academic literature finds that nonverbal clues to veracity are unreliable and distract a trier of fact from the cognitive content of the witness's testimony.[3] In short, "demeanor cues do not lead to accurate lie detection."[4]

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[2] Paul Collier, "Wrong for the Poor: A Clearer Alternative to Thomas Piketty: and the Problem When Capitalists Make Nothing But Money," *Times Literary Supplement*, Sept. 25, 2015, p. 3. I would not limit his criticisms to commercial lawyers.

[3] See, e.g., Amina Memon et al., *Psychology and Law: Truthfulness, Accuracy and Credibility* (2d ed. 2003); Scott Rempell, "Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason," 25 *Georgetown Immigration Law Journal* 377 (2011); Guri C. Bollingmo *et al.*,"The Effect of Biased and Non-Biased Information on Judgments of Witness Credibility," 15 *Psychology, Crime & Law* 61 (2009); Jeremy A. Blumenthal, "A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility," 72 *Nebraska Law Review* 1157 (1993).

[4] Max Minzer, "Detecting Lies Using Demeanor, Bias, and Context," 29 *Cardozo Law Review* 2557, 2566 (2007).

The implication is that a witness's truthfulness can be determined more reliably by reading a transcript of his or her testimony than by listening to it. The law, however, "has its own set of psychological principles and concepts that permeate all its activities. By keeping these independent of 'basic legal psychology' its statements are protected from any criticism from scientific psychology. Therefore, the law can regard its basic psychological statements as valid even if scientific verification qualifies them as invalid."[5] It's time that law caught up with science.

I have mentioned the potentially important inroad that Rule 706 makes into the adversary system, and another and more traditional one, though little noted as constituting such an inroad, consists of the many exceptions to the hearsay rule.[6] Most hearsay statements, including much of the hearsay admissible at trial under one or more of the exceptions (notably hearsay relied on by expert witnesses), are statements made by persons who are not available to be cross-examined and so are not subjected to the imagined rigors of the adversary process.

We're not about to change from a system of mainly oral testimony to one in which all testimony is written, but at least we should give jurors transcripts of the testimony they hear. Nowadays oral testimony at a trial or other hearing is not only recorded by the court reporter but also simultaneously transcribed electronically so that it can be read by the judge on a video screen on the bench as the witness testifies. Each juror should be similarly equipped so that he or she can be reading a transcript of each witness's testimony simultaneously with hearing and seeing the witness testify.

Sentencing criminals is another major task of trial judges, and one they could do better than they do by thinking more clearly about the goals and consequences of sentencing and the extensive academic literature that deals with this and related issues of criminal law.[7] A particular shambles is

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[5] Viktoras Justickis, "Does the Law Use Even a Small Proportion of What Legal Psychology Has to Offer?" in *Psychology and Law: Bridging the Gap* 223 (Canter and Žukauskiene eds. 2008).

[6] See, e.g., Fed. R. Evid. 801-807, and my article "On Hearsay," forthcoming in *Fordham Law Review* (2016).

[7] See, e.g., my book *Divergent Paths* 197-221, 347-350 (2016); John Bronsteen et al., "Happiness and Punishment," 76 *U. Chi. L. Rev.* 1037, 1060 n. 115 (2009); Yair Listokin, "Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing," 44 *Am. Crim. L. Rev.* 115, 124 (2007); Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 117 *Harv. L. Rev.* 2463, 2504-2506 (2004); Paul H. Robinson &

"supervised release," which has almost entirely displaced parole in the federal system. Parole was sensibly based on observations of the convicted criminal's behavior in prison; if he behaved himself he could expect a shortened sentence plus a degree of supervision during the parole period. Under the regime of supervised release, the judge at sentencing decides what restrictions to impose when the inmate is released, yet without having a clear idea of what he'll be like when released, which may not be for many years. There is a huge menu of restrictions, many vague, for the judge to select from, and if he likes he can make up his own. We've had cases in which conditions of supervised release were imposed on defendants sentenced to life in prison. I call these Lazarus cases because the conditions will go into effect only if, after dying in prison, the defendant is resurrected.

Finally I'd like to see the trial judge play a more active role in the trial. He needn't be just an umpire. I said that jurors shouldn't be permitted to do Internet research, but the judge should be. With at least 4 billion websites accessible via Google, the Internet is an enormous repository of information pertinent to an enormous variety of legal and factual (notably technological and financial) issues that arise in or relate to trials. It's important however, as I suggested earlier, that the lawyers be given a chance to rebut any contestable Internet-sourced evidence (as distinct from evidence that the judge can take judicial notice of because it's incontestable, or evidence that merely supplies background or context that helps make the decision comprehensible) that the judge injects into the case. But to avoid complicating trials and confusing jurors, or for that matter lawyers and their clients and witnesses, judge-sponsored Internet-sourced evidence should remain, for the time being, exceptional rather than routine.

Appeals to the Courts of Appeals

There are changes at once desirable and feasible to be made at the federal court of appeals level too, some of form and some of substance. At the level of form, the first thing to do is burn all copies of the *Bluebook*,

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John M. Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best," 91 *Geo. L.J.* 949, 954-955 (2003); Linda S. Beres & Thomas D. Griffith, "Habitual Offender Statutes and Criminal Deterrence," 34 *Conn. L. Rev.* 55, 62-65 (2001); A. Mitchell Polinsky & Steven Shavell, "On the Disutility and Discounting of Imprisonment and the Theory of Deterrence," 28 *J. Legal Studies* 1, 4-6 (1999).

in its latest edition 560 pages of rubbish,[8] a terrible time waster for law clerks employed by judges who insist as many do that the citations in their opinions conform to the *Bluebook*; also for students at the Yale Law School who aspire to be selected for the staff of the *Yale Law Journal* – they must pass a five-hour exam on the *Bluebook*. Yet no serious reader pays attention to citation format; all the reader cares about is that the citation enable him or her to find the cited material. Just by reading judicial opinions law students learn how to cite cases, statutes, books, and articles; they don't need a citation treatise. In the office manual that I give my law clerks only two pages are devoted to citation format.

There is a zombie quality to the *Bluebook*. If you look up "*Bluebook*" in *Wikipedia*, you find under "reception" a summary of my criticisms; but you find no defenses.[9] That however is typical of legal academia. The academy rarely bothers to defend any of its antiquated and pointless practices, numerous as they are; and the cone of silence embraces the judges and the practicing lawyers as well. Critics of established practices typically are ignored.

One might think that even if the *Bluebook* has to remain untouchable – that is to the legal profession what the Rules of Golf are to golfers[10] – judges and their clerks would endeavor to eliminate from their judicial opinions superfluous verbiage, which is experiencing a weed-like growth and tenacity. Many an opinion ends for example with the statement that "for the foregoing reasons the decision of the district court is" affirmed or reversed. Were "for the foregoing reasons" deleted, would the reader think that the judge was concealing the reasons for the decision? That there *were* no reasons? That the reasons would be announced at some indefinite time in the future? Sometimes this silly flourish is found at the beginning of the opinion, as when we read that "for the reasons set forth below, we affirm [or reverse] the judgment of the district court." Is the

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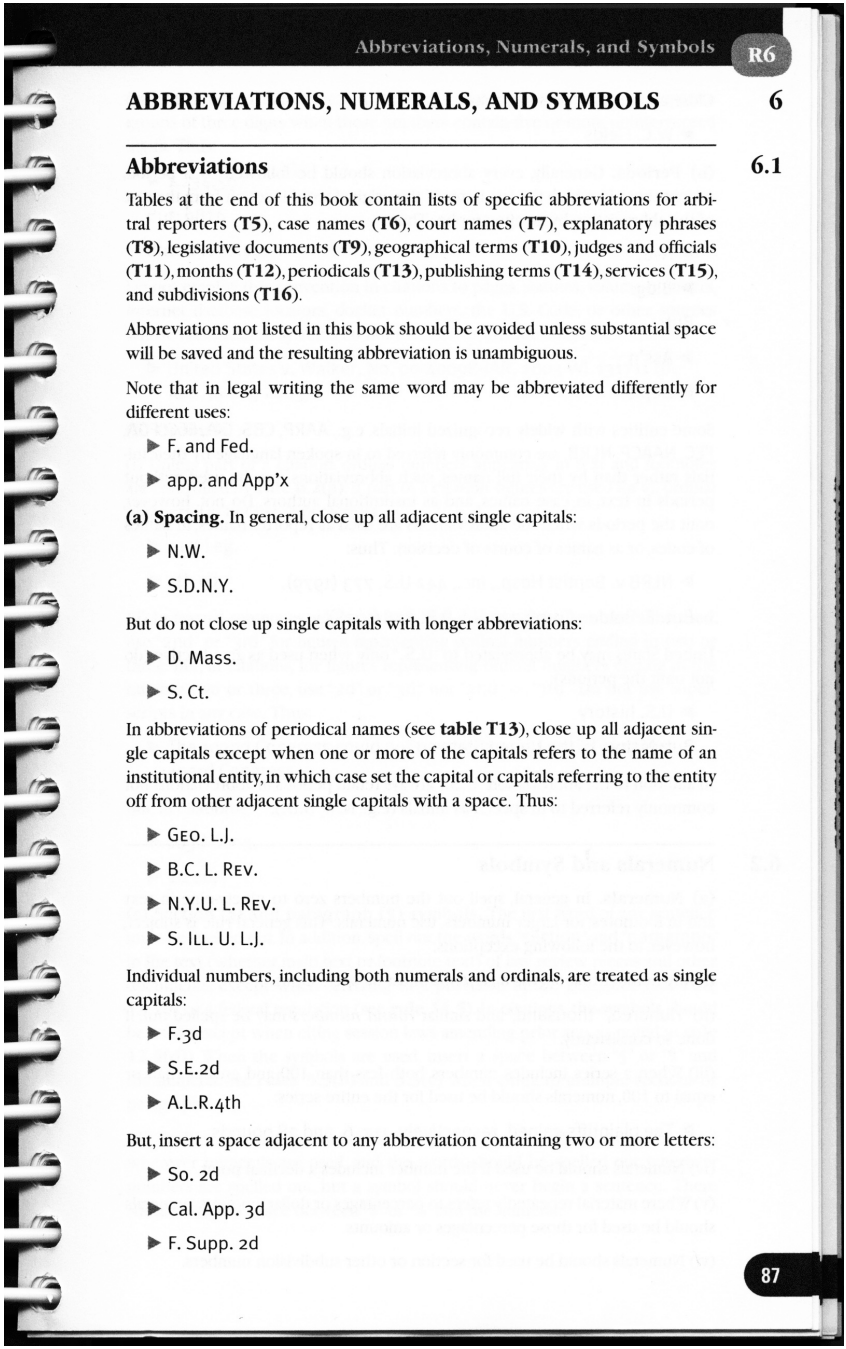
[8] To illustrate, I have included scans of Section R6.1 from the 20th edition of *The Bluebook*. See pages 195 & 196 below. R6.1 is one-and-a-half pages of mandates dealing with abbreviations, including directions to another 29 pages of "lists of specific abbreviations" in a dozen categories.

[9] "Bluebook," *Wikipedia*, https://en.wikipedia.org/wiki/Bluebook#Reception.

[10] R&A Rules Limited and The United States Golf Association, *Rules of Golf* (33rd ed., Jan. 2016); www.usga.org/rules-hub.html.



ABBREVIATIONS, NUMERALS, AND SYMBOLS 6

Abbreviations 6.1

Tables at the end of this book contain lists of specific abbreviations for arbitral reporters (**T5**), case names (**T6**), court names (**T7**), explanatory phrases (**T8**), legislative documents (**T9**), geographical terms (**T10**), judges and officials (**T11**), months (**T12**), periodicals (**T13**), publishing terms (**T14**), services (**T15**), and subdivisions (**T16**).

Abbreviations not listed in this book should be avoided unless substantial space will be saved and the resulting abbreviation is unambiguous.

Note that in legal writing the same word may be abbreviated differently for different uses:

- F. and Fed.
- app. and App'x

(a) Spacing. In general, close up all adjacent single capitals:

- N.W.
- S.D.N.Y.

But do not close up single capitals with longer abbreviations:

- D. Mass.
- S. Ct.

In abbreviations of periodical names (see **table T13**), close up all adjacent single capitals except when one or more of the capitals refers to the name of an institutional entity, in which case set the capital or capitals referring to the entity off from other adjacent single capitals with a space. Thus:

- Geo. L.J.
- B.C. L. Rev.
- N.Y.U. L. Rev.
- S. Ill. U. L.J.

Individual numbers, including both numerals and ordinals, are treated as single capitals:

- F.3d
- S.E.2d
- A.L.R.4th

But, insert a space adjacent to any abbreviation containing two or more letters:

- So. 2d
- Cal. App. 3d
- F. Supp. 2d

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Close up initials in personal names:

▶ W.C. Fields

(b) Periods. Generally, every abbreviation should be followed by a period, except those in which the last letter of the original word is set off from the rest of the abbreviation by an apostrophe. Thus:

▶ Ave.

▶ Bldg.

But:

▶ Ass'n

▶ Dep't

Some entities with widely recognized initials, e.g., AARP, CBS, CIA, FCC, FDA, FEC, NAACP, NLRB, are commonly referred to in spoken language by their initials rather than by their full names; such abbreviations may be used without periods in text, in case names, and as institutional authors. Do not, however, omit the periods when the abbreviations are used as reporter names, in names of codes, or as names of courts of decision. Thus:

▶ NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979).

But: E. Belden Corp., 239 N.L.R.B. 776 (1978).

United States may be abbreviated to "U.S." only when used as an adjective (do not omit the periods):

▶ U.S. history

But: history of the United States

In addition to the abbreviation "U.S.," always retain periods in abbreviations not commonly referred to in speech as initials (e.g., N.Y., S.D.).

6.2 Numerals and Symbols

(a) Numerals. In general, spell out the numbers zero to ninety-nine in text and in footnotes; for larger numbers, use numerals. This general rule is subject, however, to the following exceptions:

(i) Any number that *begins a sentence* must be spelled out.

(ii) "Hundred," "thousand," and similar *round numbers* may be spelled out, if done so consistently.

(iii) When a series includes numbers both less than 100 and greater than or equal to 100, numerals should be used for the entire series:

▶ The plaintiffs gained, respectively, 117, 6, and 28 pounds.

(iv) Numerals should be used if the number includes a decimal point.

(v) Where material repeatedly refers to percentages or dollar amounts, numerals should be used for those percentages or amounts.

(vi) Numerals should be used for section or other subdivision numbers.

judge worried that, without the flourish, the reader would think that the opinion would not give reasons for the decision? Another silly expression is "after careful consideration, we [affirm, reverse, or whatever]," implying (unintentionally) that usually the judges are careless but this time they've given the case "careful consideration."

Redundancy is a common form of superfluity in judicial opinions, as when the opinion states that "a question of fact [is] to be determined from the totality of all the circumstances." A totality is all. Even grammatical mistakes are not uncommon, such as "his presentence report . . . recommended that he was subject to an enhanced sentence." Terms appear commonly that have no meaning at all, such as "moral turpitude."

Apart from being crowded with superfluous flourishes, of which I've given just a few examples, appellate opinions tend to be overlong, crammed with irrelevant facts and repulsive legal jargon ("subjective prong" is one of my favorite examples of judicial illiteracy – for further examples see footnote 15 below) and also crammed with headings and subheadings like the chapter headings in books, yet in opinions they introduce paragraphs that need no headings, with headings such as "Introduction," "Facts," "Analysis," "Conclusion" (often a conclusion of one sentence or less). Often the opinion conceals the judges' actual thinking, which may be at the level of hunch, common sense, emotion, or ideology (four headings you'll never see), that motivated the decision. Would that judges would heed Polonius's aphorism in *Hamlet* that "brevity is the soul of wit and tediousness its outward limbs and flourishes."

My complaint is not that modern appellate opinions lack eloquence. They certainly do lack it. But eloquence is no longer a property of legal writing. No judge or Justice today writes eloquently, as Holmes and Hand and Brandeis and Cardozo and Jackson and a few others once did. The literary culture is moribund in today's United States. Clarity, not eloquence, is the only attainable, though not attained, literary goal of modern judicial writing, cultural changes having largely killed off the humanities. (Among the current Supreme Court Justices, only Justice Breyer appears to have genuine cultural breadth.) The attainable goal in contemporary judicial opinions comes down to plain talk. I am therefore minded to take my motto from a century-old poem of the great Irish poet William Butler Yeats:

> And I grew weary of the sun
> Until my thoughts cleared up again,
> Remembering that the best I have done
> *Was done to make it plain*.[11]

Judicial complexity afflicts the substance as well as form of appellate decision making. At the substantive level the obvious, and readily implementable, reform is to simplify – indeed largely to discard – the standards of appellate review. There are multiple standards for deciding how much weight to give the decision or findings of a district judge or an administrative agency – the main ones are substantial evidence, abuse of discretion, clearly erroneous, arbitrary and capricious, reasonableness, and de novo. But all but the last are as a practical matter synonyms. The last means that the appellate court gives no weight to a district court's or an agency's ruling on a pure issue of law, as otherwise there would be insufficient uniformity of law – rules of law would vary across district judges. The other standards of review mean little more than that in reviewing factual or procedural rulings the appellate court will affirm unless convinced that the ruling was incorrect; and so if the court has doubts about the soundness of the ruling but thinks it quite possible that the ruling is correct after all, it will affirm – ties go to the district court or agency. If my analysis is correct, there is no reason for an appellate opinion to mention a standard of review. All it need say, unless the challenged ruling is a pure legal ruling rather than a fact-finding or the application of a rule to facts, is that it is or is not persuaded by the district court's or agency's finding.

A number of common practices of federal appellate courts can easily be abandoned, and should be. One is announcing in advance (often months in advance) who the members of the panel will be that will hear a particular case. Such a pre-announcement is likely to cause the lawyers to focus on the particular leanings of the panel members, which may result in decisions that reflect the idiosyncrasies of particular judges rather than the law of the circuit and by doing so may provoke gratuitous rehearings en banc. Another unsound practice is for one judge on a panel to be assigned by the presiding judge to prepare a bench memo (which means, as a practical

[11] "Words," from William Butler Yeats, *The Green Helmet and Other Poems* (1910) (emphasis added).

matter, have a law clerk of the assigned judge prepare a bench memo) for circulation to the other members of the panel in advance of argument. The likely result is to give that judge disproportionate influence in the panel's deliberations. And finally, though federal judges' staffs, consisting mainly of law clerks, are very small from a managerial standpoint, judicial management is frequently inefficient, even eccentric, yet, given the smallness of the judges' staffs, readily improvable (one would think).[12]

The most serious problem with appellate litigation, both at the circuit level and in the Supreme Court (as I'll argue at greater length in Part II of my article), is the stodginess and stuffiness of the American legal culture, characteristics that I noted earlier with reference to the continued veneration of Magna Carta. Judges are forever looking backwards, and not only in constitutional cases, where the backward looks carry them back mainly to the late eighteenth century (the years of the original Constitution and the Bill of Rights) and to 1868 (the year the Fourteenth Amendment was ratified), but also in statutory and common law cases, where judicial precedents are venerated, as are many constitutional decisions. The judges march forward while looking back – that is the stodginess. Not for them T.S. Eliot's admonition: "Not fare well, but fare forward, voyagers."[13] Nor Nietzsche's great critique of historicism.[14] Rather "the many authors in the nineteenth century who thought they were recovering the historical Jesus" but in fact "were looking down the well of history and catching their own reflections. Jesus-scholars . . . are often writing autobiography and

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[12] See Mitu Gulati and Richard A. Posner, "Judicial Staff Management," __ *Vanderbilt Law Review* __ (2016) (forthcoming); Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 222-230, 372-373 (2016).

[13] "The Dry Salvages."

[14] Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in Nietzsche, *Untimely Meditations* 57 (R.J. Hollingdale trans. 1983). The essay was first published in 1874. I discussed the application of his critique to law at some length in my article "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," 67 *University of Chicago Law Review* 573 (2000). Since I am citing an article that is almost 150 years old, I have to qualify my aversion to the backward judicial glance. (And I cite an almost 100-year-old article by Max Weber in Part II of this article (footnote 9).) I am also mindful that two thousand years ago Aristotle formulated the modern concept of the rule of law: indifference of judges to the social status or individual attractiveness or repulsiveness of a litigant – in other words, seeing litigants as representative parties and thus judging, as the federal judicial oath states, "without respect to persons." 28 U.S.C. § 453.

calling it biography."[15] Modern judges and constitutional scholars project their policy preferences on the hapless framers of the Constitution and call this mirror-gazing history. The profession's stuffiness, as distinct from stodginess, is its stubborn adherence to stale legal terminology, sometimes still in Latin.[16]

The problem is that the past does not contain usable solutions to contemporary problems. The eighteenth-century United States, the nineteenth-century United States, and much of the twentieth-century United States might as well be foreign countries so far as providing guidance to solving today's legal problems is concerned. The judges and Justices know this, though they are unwilling to admit it (often even to themselves), because they feel or sense that their authority is bound up with ancientness, that if they admitted they are constantly remaking the law they would be thought legislators, competing with what judges self-servingly like to call "the political branches," namely Congress and its state legislative counterparts and the executive branch (both federal and state), with its countless agencies and officials. Though not elected, federal judges legislate whenever their

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[15] A.N. Wilson, "Two Horses" (review of John Dominic Crossan, *Jesus and the Violence of Scripture*), *Times Literary Supplement*, Dec. 11, 2015, pp. 26, 27.

[16] I offered the following litany of judicial offenses against the English language in my book *Reflections on Judging* 250 (2013): Latinisms (such as "ambit," "*de minimis*," "*eiusdem generis*," "*sub silentio*"); legal clichés (such as "plain meaning," "strict scrutiny," "instant case," "totality of circumstances," "abuse of discretion," "facial adequacy," "facial challenge," "chilling effect," "canons of construction," "gravamen," and "implicates" in such expressions as "the statute implicates First Amendment concerns"); legal terms that have an ambulatory rather than a fixed meaning (such as "rational basis" and "proximate cause"); incurably vague "feel good" terms such as "justice" and "fairness"; pomposities such as "it is axiomatic that"; insincere verbal curtsies ("with all due respect," or "I respectfully dissent"); and gruesome juxtapositions (such as "*Roe* and its progeny," meaning *Roe v. Wade* and the subsequent abortion-rights cases). To this add: timid obeisance to clumsy norms of politically correct speech; unintelligible abbreviations gleaned from the *Bluebook*; archaic grammatical rules (for example, don't begin a sentence with "But," "And," "However," or "Moreover" – these words are "postpositives," and never say "on the other hand" without having first said "on the one hand"); archaic rules of punctuation, especially placement of commas; and offenses against good English ("choate" for "not inchoate," "pled" for "pleaded" when referring to a complaint or other pleading, "proven" as a verb instead of "proved," "absent" and "due to" as adverbs, "habeas claim" for "habeas corpus claim," "he breached his contract" for "he broke his contract") or against good Latin: "*de minimus*" for "*de minimis*" and *ejusdem generis* for *eiusdem generis*).

decisions create rules, because those rules have the force of law. The rules sometimes are inspired by orthodox legislative activity, including constitutional provisions, but the principal use to which judges put such provisions is as grants of judicial authority. The free-speech clause of the First Amendment can't mean what it says because a society can't function without a degree of censorship, so instead is treated by judges as an invitation to regulate legislative and executive regulations of speech – permitting some curtailments, such as defamation law and copyright and trademark law and laws punishing unauthorized disclosures of sensitive information, and forbidding others. But to say as judges like to say that in deciding what speech to privilege (adult pornography for example) and what speech to allow to be suppressed they are implementing decisions by the drafters or ratifiers of the Constitution is a joke.

To be continued in the next issue of the *Green Bag*.

From the Bag

George, said his father, *do you know who killed that beautiful little cherry-tree yonder in the garden?* This was a *tough question*; and George staggered under it for a moment; but quickly recovered himself: and looking at his father, with the sweet face of youth brightened with the inexpressible charm of all-conquering truth, he bravely cried out, "*I can't tell a lie, Pa; you know I can't tell a lie. I did cut it with my hatchet.*" – *Run to my arms, you dearest boy*, cried his father in transports, *run to my arms; glad am I, George, that you killed my tree; for you have paid me for it a thousand fold.*

M.L. Weems

The Life of George Washington;
with Curious Anecdotes 14
(8th ed. 1809)

pictured: Augustine (left) and George Washington, in the imagination of Mason Weems.

The Purloined Letter (part two)

Edgar A. Poe

The first part of this story appeared in our Autumn 2015 issue. *See* Edgar A. Poe, *The Purloined Letter (part one)*, 19 Green Bag 2d 83 (2015). The rest of it is here.

– *The Editors*

"The Parisian police," he said, "are exceedingly able in their way. They are persevering, ingenious, cunning, and thoroughly versed in the knowledge which their duties seem chiefly to demand. Thus, when G— detailed to us his mode of searching the premises at the Hotel D—, I felt entire confidence in his having made a satisfactory investigation – so far as his labours extended."

"So far as his labours extended?" said I.

"Yes," said Dupin. "The measures adopted were not only the best of their kind, but carried out to absolute perfection. Had the letter been deposited within the range of their search, these fellows would, beyond a question, have found it."

I merely laughed – but he seemed quite serious in all that he said.

"The measures, then," he continued, "were good in their kind, and well executed; their defect lay in their being inapplicable to the case, and to the man. A certain set of highly ingenious resources are, with the Prefect, a

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Edgar Allan Poe (1809-1849) was a writer.

sort of Procrustean bed, to which he forcibly adapts his designs. But he perpetually errs by being too deep or too shallow, for the matter in hand; and many a schoolboy is a better reasoner than he. I knew one about eight years of age, whose success at guessing in the game of 'even and odd' attracted universal admiration. This game is simple, and is played with marbles. One player holds in his hand a number of these toys, and demands of another whether that number is even or odd. If the guess is right, the guesser wins one; if wrong, he loses one. The boy to whom I allude won all the marbles of the school. Of course he had some principle of guessing; and this lay in mere observation and admeasurement of the astuteness of his opponents. For example, an arrant simpleton is his opponent, and, holding up his closed hand, asks, 'are they even or odd?' Our schoolboy replies, 'odd,' and loses; but upon the second trial he wins, for he then says to himself, 'the simpleton had them even upon the first trial, and his amount of cunning is just sufficient to make him have them odd upon the second; I will therefore guess odd;' – he guesses odd, and wins. Now, with a simpleton a degree above the first, he would have reasoned thus: 'this fellow finds that in the first instance I guessed odd, and, in the second, he will propose to himself, upon the first impulse, a simple variation from even to odd, as did the first simpleton; but then a second thought will suggest that this is too simple a variation, and finally he will decide upon putting it even as before. I will therefore guess even;' – he guesses even, and wins. Now this mode of reasoning in the schoolboy, whom his fellows termed 'lucky,' – what, in its last analysis, is it?"

"It is merely," I said, "an identification of the reasoner's intellect with that of his opponent."

"It is," said Dupin; "and, upon inquiring of the boy by what means he effected the *thorough* identification in which his success consisted, I received answer as follows: 'When I wish to find out how wise, or how stupid, or how good, or how wicked is any one, or what are his thoughts at the moment, I fashion the expression of my face, as accurately as possible, in accordance with the expression of his, and then wait to see what thoughts or sentiments arise in my mind or heart, as if to match or correspond with the expression.' This response of the schoolboy lies at the bottom of all the spurious profundity which has been attributed to Rochefoucault, to La Bougive, to Machiavelli, and to Campanella."

"And the identification," I said, "of the reasoner's intellect with that of his opponent, depends, if I understand you aright, upon the accuracy with which the opponent's intellect is admeasured."

"For its practical value it depends upon this," replied Dupin; "and the Prefect and his cohort fail so frequently, first, by default of this identification, and, secondly, by ill-admeasurement, or rather through non-admeasurement, of the intellect with which they are engaged. They consider only their *own* ideas of ingenuity; and, in searching for any thing hidden, advert only to the modes in which *they* would have hidden it. They are right in this much – that their own ingenuity is a faithful representative of that of *the mass*; but when the cunning of the individual felon is diverse in character from their own, the felon foils them, of course. This always happens when it is above their own, and very usually when it is below. They have no variation of principle in their investigations; at best, when urged by some unusual emergency – by some extraordinary reward – they extend or exaggerate their old modes of *practice*, without touching their principles. What, for example, in this case of D—, has been done to vary the principle of action? What is all this boring, and probing, and sounding, and scrutinizing with the microscope, and dividing the surface of the building into registered square inches – what is it all but an exaggeration *of the application* of the one principle or set of principles of search, which are based upon the one set of notions regarding human ingenuity, to which the Prefect, in the long routine of his duty, has been accustomed? Do you not see he has taken it for granted that *all* men proceed to conceal a letter, – not exactly in a gimlet-hole bored in a chair-leg – but, at least, in *some* out-of-the-way hole or corner suggested by the same tenor of thought which would urge a man to secrete a letter in a gimlet-hole bored in a chair-leg? And do you not see also, that such *recherches* nooks for concealment are adapted only for ordinary occasions, and would be adopted only by ordinary intellects; for, in all cases of concealment, a disposal of the article concealed – a disposal of it in this *recherché* manner, – is, in the very first instance, presumed and presumable; and thus its discovery depends, not at all upon the acumen, but altogether upon the mere care, patience, and determination of the seekers; and where the case is of importance – or, what amounts to the same thing in the policial eyes, when the reward is of magnitude, the qualities in question have *never* been known to fail. You will now understand what I meant

in suggesting that, had the purloined letter been hidden any where within the limits of the Prefect's examination – in other words, had the principle of its concealment been comprehended within the principles of the Prefect – its discovery would have been a matter altogether beyond question. This functionary, however, has been thoroughly mystified; and the remote source of his defeat lies in the supposition that the Minister is a fool, because he has acquired renown as a poet. All fools are poets; this the Prefect *feels*; and he is merely guilty of a *non distributio medii* in thence inferring that all poets are fools."

"But is this really the poet?" I asked. "There are two brothers, I know; and both have attained reputation in letters. The Minister I believe has written learnedly on the Differential Calculus. He is a mathematician, and no poet."

"You are mistaken; I know him well; he is both. As poet *and* mathematician, he would reason well; as poet, profoundly; as mere mathematician, he could not have reasoned at all, and thus would have been at the mercy of the Prefect."

"You surprise me," I said, "by these opinions, which have been contradicted by the voice of the world. You do not mean to set at naught the well-digested idea of centuries. The mathematical reason has been long regarded as *the* reason *par excellence*."

"'Il y a à parièr,' replied Dupin, quoting from Chamfort, 'que toute idée publique, toute convention recue, est une sottise, car elle a convenue au plus grand nombre.' The mathematicians, I grant you, have done their best to promulgate the popular error to which you allude, and which is none the less an error for its promulgation as truth. With an art worthy a better cause, for example, they have insinuated the term 'analysis' into application to algebra. The French are the originators of this particular deception; but if a term is of any importance – if words derive any value from applicability – then 'analysis' conveys 'algebra' about as much as, in Latin, '*ambitus*' implies 'ambition,' '*religio*' 'religion,' or '*homines honesti*,' a set of *honourable* men."

"You have a quarrel on hand, I see," said I, "with some of the algebraists of Paris; but proceed."

"I dispute the availability, and thus the value, of that reason which is cultivated in any especial form other than the abstractly logical. I dispute,

in particular, the reason educed by mathematical study. The mathematics are the science of form and quantity; mathematical reasoning is merely logic applied to observation upon form and quantity. The great error lies in supposing that even the truths of what is called *pure* algebra, are abstract or general truths. And this error is so egregious that I am confounded at the universality with which it has been received. Mathematical axioms are *not* axioms of general truth. What is true of *relation* – of form and quantity – is often grossly false in regard to morals, for example. In this latter science it is very usually *un*true that the aggregated parts are equal to the whole. In chemistry also the axiom fails. In the consideration of motive it fails; for two motives, each of a given value, have not, necessarily, a value when united, equal to the sum of their values apart. There are numerous other mathematical truths which are only truths within the limits of *relation*. But the mathematician argues, from his *finite truths*, through habit, as if they were of an absolutely general applicability – as the world indeed imagines them to be. Bryant, in his very learned 'Mythology,' mentions an analogous source of error, when he says that 'although the Pagan fables are not believed, yet we forget ourselves continually, and make inferences from them as existing realities.' With the algebraist, however, who are Pagans themselves, the 'Pagan fables' *are* believed, and the inferences are made, not so much through lapse of memory, as through an unaccountable addling of the brains. In short, I never yet encountered the mere mathematician who could be trusted out of equal roots, or one who did not clandestinely hold it as a point of his faith that x^2+px was absolutely and unconditionally equal to q. Say to one of these gentlemen, by way of experiment, if you please, that you believe occasions may occur where x^2+px is *not* altogether equal to q, and, having made him understand what you mean, get out of his reach as speedily as convenient, for, beyond doubt, he will endeavour to knock you down.

"I mean to say," continued Dupin, while I merely laughed at his last observations, "that if the Minister had been no more than a mathematician, the Prefect would have been under no necessity of giving me this check. Had he been no more than a poet, I think it probable that he would have foiled us all. I knew him, however, as both mathematician and poet, and my measures were adapted to his capacity, with reference to the circumstances by which he was surrounded. I knew him as a courtier, too, and as a bold

intriguant. Such a man, I considered, could not fail to be aware of the ordinary policial modes of action. He could not have failed to anticipate – and events have proved that he did not fail to anticipate – the waylayings to which he was subjected. He must have foreseen, I reflected, the secret investigations of his premises. His frequent absences from home at night, which were hailed by the Prefect as certain aids to his success, I regarded only as *ruses*, to afford opportunity for thorough search to the police, and thus the sooner to impress them with the conviction to which G—, in fact, did finally arrive – the conviction that the letter was not upon the premises. I felt, also, that the whole train of thought, which I was at some pains in detailing to you just now, concerning the invariable principle of policial action in searches for articles concealed – I felt that this whole train of thought would necessarily pass through the mind of the Minister. It would imperatively lead him to despise all the ordinary *nooks* of concealment. *He* could not, I reflected, be so weak as not to see that the most intricate and remote recess of his hotel would be as open as his commonest closets to the eyes, to the probes, to the gimlets, and to the microscopes of the Prefect. I saw, in fine, that he would be driven, as a matter of course, to *simplicity*, if not deliberately induced to it as a matter of choice. You will remember, perhaps, how desperately the Prefect laughed when I suggested, upon our first interview, that it was just possible this mystery troubled him so much on account of its being so *very* self-evident."

"Yes," said I, "I remember his merriment well. I really thought he would have fallen into convulsions."

"The material world," continued Dupin, "abounds with very strict analogies to the immaterial; and thus some colour of truth has been given to the rhetorical dogma, that metaphor, or simile, may be made to strengthen an argument, as well as to embellish a description. The principle of the *vis inertia*, for example, with the amount of *momentum* proportionate with it and consequent upon it, seems to be identical in physics and metaphysics. It is not more true in the former, that a large body is with more difficulty set in motion than a smaller one, and that its subsequent *impetus* is commensurate with this difficulty, than it is, in the latter, that intellects of the vaster capacity, while more forcible, more constant, and more eventful in their movements than those of inferior grade, are yet the less readily moved, and more embarrassed and full of hesitation in the first few steps of

their progress. Again: have you ever noticed which of the street signs, over the shop-doors, are the most attractive of attention?"

"I have never given the matter a thought," I said.

"There is a game of puzzles," he resumed, "which is played upon a map. One party playing requires another to find a given word – the name of town, river, state, or empire – any word, in short, upon the motley and perplexed surface of the chart. A novice in the game generally seeks to embarrass his opponents by giving them the most minutely lettered names; but the adept selects such words as stretch, in large characters, from one end of the chart to the other. These, like the over-largely lettered signs and placards of the street, escape observation by dint of being excessively obvious; and here the physical oversight is precisely analogous with the moral inapprehension by which the intellect suffers to pass unnoticed those considerations which are too obtrusively and too palpably self-evident. But this is a point, it appears, somewhat above or beneath the understanding of the Prefect. He never once thought it probable, or possible, that the Minister had deposited the letter immediately beneath the nose of the whole world, by way of best preventing any portion of that world from perceiving it.

"But the more I reflected upon the daring, dashing, and discriminating ingenuity of D—; upon the fact that the document must always have been *at hand*, if he intended to use it to good purpose; and upon the decisive evidence, obtained by the Prefect, that it was not hidden within the limits of that dignitary's ordinary search – the more satisfied I became that, to conceal this letter, the Minister had resorted to the comprehensive and sagacious expedient of not attempting to conceal it at all.

"Full of these ideas, I prepared myself with a pair of green spectacles, and called one fine morning, quite by accident, at the ministerial hotel. I found D— at home, yawning, lounging, and dawdling as usual, and pretending to be in the last extremity of *ennui*. He is, perhaps, the most really energetic human being now alive – but that is only when nobody sees him.

"To be even with him, I complained of my weak eyes, and lamented the necessity of the spectacles, under cover of which I cautiously and thoroughly surveyed the whole apartment, while seemingly intent only upon the conversation of my host.

"I paid especial attention to a large writing-table near which he sat, and upon which lay confusedly, some miscellaneous letters and other papers,

with one or two musical instruments and a few books. Here, however, after a long and very deliberate scrutiny, I saw nothing to excite particular suspicion.

"At length my eyes, in going the circuit of the room, fell upon a trumpery fillagree card-rack of pasteboard, that hung dangling by a dirty blue riband, from a little brass knob just beneath the middle of the mantel-piece. In this rack, which had three or four compartments, were five or six visiting-cards, and a solitary letter. This last was much soiled and crumpled. It was torn nearly in two, across the middle – as if a design, in the first instance, to tear it entirely up as worthless, had been altered, or stayed, in the second. It had a large black seal, bearing the D— cipher *very* conspicuously, and was addressed, in a diminutive female hand, to D—, the minister, himself. It was thrust carelessly, and even, as it seemed, contemptuously, into one of the uppermost divisions of the rack.

"No sooner had I glanced at this letter, than I concluded it to be that of which I was in search. To be sure, it was, to all appearance, radically different from the one of which the Prefect had read us so minute a description. Here the seal was large and black, with the D— cipher; there, it was small and red, with the ducal arms of the S— family. Here, the address, to the minister, was diminutive and feminine; there, the superscription, to a certain royal personage, was markedly bold and decided; the size alone formed a point of correspondence. But, then, the *radicalness* of these differences, which was excessive; the dirt, the soiled and torn condition of the paper, so inconsistent with the *true* methodical habits of D—, and so suggestive of a design to delude the beholder into an idea of the worthlessness of the document; these things, together with the hyper-obtrusive situation of this document, full in the view of every visiter, and thus exactly in accordance with the conclusions to which I had previously arrived; these things, I say, were strongly corroborative of suspicion, in one who came with the intention to suspect.

"I protracted my visit as long as possible, and, while I maintained a most animated discussion with the minister, upon a topic which I knew well had never failed to interest and excite him, I kept my attention really riveted upon the letter. In this examination, I committed to memory its external appearance and arrangement in the rack; and also fell, at length, upon a discovery which set at rest whatever trivial doubt I might have entertained.

In scrutinizing the edges of the paper, I observed them to be more *chafed* than seemed necessary. They presented the *broken* appearance which is manifested when a stiff paper, having been once folded and pressed with a folder, is refolded in a reversed direction, in the same creases or edges which had formed the original fold. This discovery was sufficient. It was clear to me that the letter had been turned, as a glove, inside out, re-directed, and re-sealed. I bade the minister good morning, and took my departure at once, leaving a gold snuff-box upon the table.

"The next morning I called for the snuff-box, when we resumed, quite eagerly, the conversation of the preceding day. While thus engaged, however, a loud report, as if of a pistol, was heard immediately beneath the windows of the hotel, and was succeeded by a series of fearful screams, and the shoutings of a terrified mob. D— rushed to a casement, threw it open, and looked out. In the meantime, I stepped to the card-rack, took the letter, put it in my pocket, and replaced it by a *facsimile*, which I had carefully prepared at my lodgings imitating the D— cipher, very readily, by means of a seal formed of bread.

"The disturbance in the street had been occasioned by the frantic behaviour of a man with a musket. He had fired it among a crowd of women and children. It proved, however, to have been without ball, and the fellow was suffered to go his way as a lunatic or a drunkard. When he had gone, D— came from the window, whither I had followed him immediately upon securing the object in view. Soon afterwards I bade him farewell. The pretended lunatic was a man in my own pay."

"But what purpose had you," I asked, "in replacing the letter by a *facsimile?* Would it not have been better, at the first visit, to have seized it openly, and departed?"

"D—," replied Dupin, "is a desperate man, and a man of nerve. His hotel, too, is not without attendants devoted to his interests. Had I made the wild attempt you suggest, I should never have left the ministerial presence alive. The good people of Paris would have heard of me no more. But I had an object apart from these considerations. You know my political prepossessions. In this matter, I act as a partisan of the lady concerned. For eighteen months the minister has had her in his power. She has now him in hers – since, being unaware that the letter is not in his possession, he will proceed with his exactions as if it was. Thus will he inevitably commit

Dupin distracts and dispossesses D—.

himself, at once, to his political destruction. His downfall, too, will not be more precipitate than awkward. It is all very well to talk about the *facilis descensus Averni;* but in all kinds of climbing, as Catalini said of singing, it is far more easy to get up than to come down. In the present instance I have no sympathy – at least no pity – for him who descends. He is that *monstrum horrendum*, an unprincipled man of genius. I confess, however, that I should like very well to know the precise character of his thoughts, when, being defied by her whom the Prefect terms 'a certain personage,' he is reduced to opening the letter which I left for him in the card-rack."

"How? did you put any thing particular in it?"

"Why – it did not seem altogether right to leave the interior blank – that would have been insulting. To be sure, D—, at Vienna once, did me an evil turn, which I told him, quite good-humouredly, that I should remember. So, as I knew he would feel some curiosity in regard to the identity of the person who had outwitted him, I thought it a pity not to give him a clue. He is well acquainted with my MS., and I just copied into the middle of the blank sheet the words –

> "' – Un dessein si funeste,
> S'il n'est digne d'Atrée, est digne de Thyeste'

They are to be found in Crébillon's 'Atrée.'"

Ex Post

The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's natural manure. Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite to keep the hen-yard in order.

Thomas Jefferson

Letter (from Paris) to William Smith, Nov. 13, 1787

pictured: Monticello, in Charlottesville, Virginia.

Exam Questions from Famous Authors

Charles J. Ten Brink

F. Scott Fitzgerald on Admiralty

Daisy is piloting Nick's dinghy. When she abandons the helm to open a bottle of Veuve Cliquot '98, she is borne back ceaselessly not into the past, but into the *S.S. Shiraz*, an Australian oil tanker recently converted into a bulk wine carrier. West Egg is inundated with cheap wine and dead fish, ruining the summer season and leaving the local emporia with an enormous unpurchased stock of white shoes. The storeowners sue Daisy.

A. The storeowners will prevail under the ancient French riparian doctrine of *in vino veritas*.

B. Daisy will prevail because she will convince the jury that Gatsby was piloting the dinghy.

C. Who cares? Only poor people drink Shiraz.

Jane Austen on Family Law

Mr. Bennet, finding that his lady has amused him long enough, seeks legal relief in divorce. Mrs. Bennet, whose poor nerves have at last gotten the better of her, chooses not to contest the divorce, but countersues demanding that he take custody of Lydia and Kitty, their youngest daughters.

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Mr. Bennet files a petition to have Lydia committed as a chronic flirt. Lydia contests the petition and asks the court to declare her an emancipated minor. The cases are joined by a special literary license, and Lady Catherine de Burgh intervenes because she just cannot resist a good family scandal and the opportunity to scold them all into harmony and plenty.

A. Mr. Bennet will be forced to keep Lydia in the manner to which she has become accustomed until he can prevail upon one of the most worthless young men in England to marry her.

B. Lady Catherine and the judge will engage in such a lengthy battle of self-righteousness that the case will eventually be joined with *Jarndyce v. Jarndyce* and mooted upon the deaths of all the parties in interest.

C. The court will declare Lydia to be a very silly girl indeed, emancipate her, and sentence her to the title role in *Moll Flanders*.

H.P. Lovecraft on Environmental Law

Randolph Carter decides to reopen the family copper mine in Michigan's Upper Peninsula. Though warned by the shaman of the local tribe that the mine is now inhabited by an eldritch horror on sabbatical from the mountains of madness, he proceeds with further digging, unleashing the Goat-with-a-Thousand-Young, Hastur, and Cthulhu's irritating younger brother from the Jersey Shore, CthYOLO. The mine is now belching fuliginous slime whose emanations are causing the locals to develop the Innsmouth look and mutter darkly about acquiring a taste for "meat that you can't raise nor buy." The EPA issues an order to close the mine, and Carter appeals.

A. The judge will determine that the EPA lacks jurisdiction over point-source emissions from the spectral plane of the Elder Gods, and abstention is invoked.

B. The locals will successfully intervene to stop the closing of the mine because the offspring of the Goat-with-a-Thousand-Young have revitalized the area's dormant chevre industry.

C. You fool, Warren is dead! *Ph'nglui Mglw'nafh CthYOLO R'lyeh wgah'nagl fhtagn*!

The Ultimate Unifying Approach to Complying with All Laws and Regulations

Daniel J. Solove and Woodrow Hartzog

Be reasonable.

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Page 129: The house of Stradivari. From Horace Petherick, Antonio Stradivari 4 (1900).

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Page 203: "Father, I cannot tell a lie: I cut the tree" – painted by G.G. White; engraved by John C. McRae (1867). Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-pga-02152.

Page 214: The Purloined Letter (n.d.). From 5 The Tales and Poems of Edgar Allan Poe 109 (Barrie 1900).

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Page 220: Mr. and Mrs. Bennet – illustration by Hugh Thomson (n.d.). From Jane Austen, Pride and Prejudice 5 (George Allen 1894).