Bard High School Early College

Writing and Thinking Workshop 2010

Justice

All there is to thinking is seeing something noticeable,

Which makes you see something you weren't noticing,

Which makes you see something that isn't even visible.

- Norman Maclean, *A River Runs Through It*

Bard High School Early College is grateful for the support of The Historical Society of the Courts of the State of New York in developing the 2010 anthology and *Writing & Thinking Workshop: Justice.* We thank the Printing House Press for its generous donation of the printing of this anthology for use by BHSEC students.

About The Historical Society of the Courts of the State of New York:

As the new century dawned, then-New York State Chief Judge Judith S. Kaye had the vision to create an organization that would collect and preserve this State's legal history. It would showcase the New York connection to our founding fathers and their contributions to the U.S. and New York State constitutions and the nation's developing democracy. It would breathe life into the history of our State's prominent legal figures, its rich legacy of court cases, and its magnificent courthouses. The Society was thus born, nurtured by a terrific partnership with Albert M. Rosenblatt, then an Associate Judge of the New York State Court of Appeals.

Judge Kaye recently reminisced about how, for her, the birth of this idea was linked to the 150th anniversary of the New York State Court of Appeals. She recalled how in 1996, as this important anniversary neared, she gazed at the portraits looking down at her in the courtroom and wanted to know more about each of the judges. She requested a list of her predecessors on the bench, with their dates of service, and was amazed to discover that none existed.

Calling upon Frances Murray, the ever-resourceful Chief Legal Reference Attorney of the Court of Appeals, to look into this matter, Frances confirmed that the list was nonexistent. One day shortly thereafter, Judge Kaye arrived at her office to find a huge stack of photocopies that Frances had made of the inner front pages of each of the New York Official Reports since 1847. Each contained a record of the then-sitting Court of Appeals Judges for the period of that Report. From these photocopies a complete record of the Judges of the Court of Appeals from 1847 to 1997 was meticulously assembled. This newly minted list was included in a publication for the 150th anniversary celebration. From that incident came the realization that New York State's court history needed to be preserved, and the idea was planted for the formation of a Society to do just that.

Here's what's ahead for the Society in 2010:
The Society will be joined by Chief Judge Jonathan Lippman in partnering with the Robert H. Jackson Center, based in Jamestown, New York, and The U.S. Holocaust Memorial Museum in Washington D.C. to present a program to be held at the New York City Bar on May 11th that will explore the breakdown of the rule of law in Nazi Germany and lessons learned. An exciting series of programs is also in the works

Cover Image: Appellate Division Courthouse, 25th Street and Madison Ave., New York City, from the Digital Collection of the New York Public Library

with the Supreme Court of the United States Historical Society exploring New York's contributions to the United States Supreme Court Bench.

The New York State Museum of Legal History is under construction. The Society is working with the Court of Appeals on an exciting project to design a museum showcasing the legal history of our State. It will be housed in Centennial Hall near the Court of Appeals in Albany.

In its own short life, the Society has produced an impressive list of publications. In 2007, it published an important reference work on our legal history, *The Judges of the New York Court of Appeals: A Biographical History.* This is a comprehensive guide to 160 years of the legacy of the court and features original biographies of 106 Chief and Associate Judges, edited by Judge Rosenblatt. The Society has also published *Historic Courthouses of the State of New York: A Study in Postcards* by Julia and Albert Rosenblatt, featuring rare postcard images of county courthouses throughout the State along with narratives of notable trials, anecdotes, and the history of each county. Currently in production is a book of essays by prominent Dutch and American scholars on the Dutch influence on jurisprudence in this State and the nation, again edited by Julia and Albert Rosenblatt, to be published by SUNY Press, titled *Opening Statements: Law and Jurisprudence in Dutch New York.*

The Society also regularly publishes *Judicial Notice—a* scholarly journal with articles by noted authors as well as gifted amateurs with a love of the subject—on the rich diversity that is our State's legal history. Finally, we publish a calendar each year that is a fun way to spend a moment or two each month of the year glimpsing an aspect of legal history. This year, our theme is *Justice, Courthouses, and T*owns *Along the Erie Canal.*

Since history can be just as important when spoken as when written, we have embarked on an initiative to record the oral history of legal luminaries in this State. Each of these interviews has proved to be an intimate and informative exploration of our legal history by those who have lived it. To date, we have interviewed Judges Joseph W. Bellacosa, George Bundy Smith, Albert M. Rosenblatt, William Thompson, and Milton Mollen, as well as Hazard Gillespie and Norman Goodman.

The annual David A. Garfinkel Essay Contest invites SUNY and CUNY community college students from across the State to write an original essay on specified topics of legal history. In 2009, awards totaled $1,500. The 2010 topic is *The Evolution of Justice Along the Erie Canal.*

We are very pleased to offer our support to Bard High School Early College so that students may explore the exciting and thought-provoking issues involved in determining justice and applying the rule of law. We hope it will impart a better understanding of how our courts work and why they are so important to the democratic process.

Marilyn Marcus, Executive Director

This article originally appeared in Leaveworthy (Vol. 1 No. 2, Spring 2010), the newsletter of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction.

Writing and Thinking Anthology: *Justice*

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Plato, *Republic* (359d-360c)
The Ring of Gyges

They say that to do injustice is, by nature, good; to suffer injustice, evil; but that the evil is greater than the good. And so when men have both done and suffered injustice and have had experience of both, not being able to avoid the one and obtain the other, they think that they had better agree among themselves to have neither; hence there arise laws and mutual covenants; and that which is ordained by law is termed by them lawful and just. This they affirm to be the origin and nature of justice;--it is a mean or compromise, between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice, being at a middle point between the two, is tolerated not as a good, but as the lesser evil, and honoured by reason of the inability of men to do injustice. For no man who is worthy to be called a man would ever submit to such an agreement if he were able to resist; he would be mad if he did. Such is the received account, Socrates, of the nature and origin of justice.

Now that those who practise justice do so involuntarily and because they have not the power to be unjust will best appear if we imagine something of this kind: having given both to the just and the unjust power to do what they will, let us watch and see whither desire will lead them; then we shall discover in the very act the just and unjust man to be proceeding along the same road, following their interest, which all natures deem to be their good, and are only diverted into the path of justice by the force of law. The liberty which we are supposing may be most completely given to them in the form of such a power as is said to have been possessed by Gyges the ancestor of Croesus the Lydian. According to the tradition, Gyges was a shepherd in the service of the king of Lydia; there was a great storm, and an earthquake made an opening in the earth at the place where he was feeding his flock. Amazed at the sight, he descended into the opening, where, among other marvels, he beheld a hollow brazen horse, having doors, at which he stooping and looking in saw a dead body of stature, as appeared to him, more than human, and having nothing on but a gold ring; this he took from the finger of the dead and reascended. Now the shepherds met together, according to custom, that they might send their monthly report about the flocks to the king; into their assembly he came having the ring on his finger, and as he was sitting among them he chanced to turn the collet of the ring inside his hand, when instantly he became invisible to the rest of the company and they began to speak of him as if he were no longer present. He was astonished at this, and again touching the ring he turned the collet outwards and reappeared; he made several trials of the ring, and always with the same result-when he turned the collet inwards he became invisible, when outwards he reappeared. Whereupon he contrived to be chosen one of the messengers who were sent to the court; where as soon as he arrived he seduced the queen, and with her help conspired against the king and slew him, and took the kingdom. Suppose now that there were two such magic rings, and the just put on one of them and the unjust the other;,no man can be imagined to be of such an iron nature that he would stand fast in justice. No man would keep his hands off what was not his own when he could safely take what he liked out of the market, or go into houses and lie with any one at his pleasure, or kill or release from prison whom he would, and in all respects be like a God among men. Then the actions of the just would be as the actions of the unjust; they would both come at last to the same point. And this we may truly affirm to be a great proof that a man is just, not willingly or because he thinks that justice is any good to him individually, but of necessity, for wherever any one thinks that he can safely be unjust, there he is unjust. For all men believe in their hearts that injustice is far more profitable to the individual than justice, and he who argues as I have been supposing, will say that they are right. If you could imagine any one obtaining this power of becoming invisible, and never doing any wrong or touching what was another's, he would be thought by the lookers-on to be a most wretched idiot, although they would praise him to one another's faces, and keep up appearances with one another from a fear that they too might suffer injustice.

Plato, *Republic*, Book 4
Socrates Answers the Question: What is Justice?

If we are asked to determine which of these four qualities by its presence contributes most to the excellence of the State, whether the agreement of rulers and subjects, or the preservation in the soldiers of the opinion which the law ordains about the true nature of dangers, or wisdom and watchfulness in the rulers, or whether this other which I am mentioning, and which is found in children and women, slave and freeman, artisan, ruler, subject, --the quality, I mean, of every one doing his own work, and not being a busybody, would claim the palm --the question is not so easily answered.

Certainly, he replied, there would be a difficulty in saying which.
Then the power of each individual in the State to do his own work appears to compete with the other political virtues, wisdom, temperance, courage.

Yes, he said.
And the virtue which enters into this competition is justice?
Exactly.
Let us look at the question from another point of view: Are not the rulers in a State those to whom you would entrust the office of determining suits at law?

Certainly.
And are suits decided on any other ground but that a man may neither take what is another's, nor be deprived of what is his own?

Yes; that is their principle.
Which is a just principle?
Yes.
Then on this view also justice will be admitted to be the having and doing what is a man's own, and belongs to him?

Very true.
Think, now, and say whether you agree with me or not. Suppose a carpenter to be doing the business of a cobbler, or a cobbler of a carpenter; and suppose them to exchange their implements or their duties, or the same person to be doing the work of both, or whatever be the change; do you think that any great harm would result to the State?

Not much.
But when the cobbler or any other man whom nature designed to be a trader, having his heart lifted up by wealth or strength or the number of his followers, or any like advantage, attempts to force his way into the class of warriors, or a warrior into that of legislators and guardians, for which he is unfitted, and either to take the implements or the duties of the other; or when one man is trader, legislator, and warrior all in one, then I think you will agree with me in saying that this interchange

and this meddling of one with another is the ruin of the State.

Most true.
Seeing then, I said, that there are three distinct classes, any meddling of one with another, or the change of one into another, is the greatest harm to the State, and may be most justly termed evil-doing?

Precisely.
And the greatest degree of evil-doing to one's own city would be termed by you injustice?

Certainly.
This then is injustice; and on the other hand when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just.

I agree with you.
We will not, I said, be over-positive as yet; but if, on trial, this conception of justice be verified in the individual as well as in the State, there will be no longer any room for doubt; if it be not verified, we must have a fresh enquiry. First let us complete the old investigation, which we began, as you remember, under the impression that, if we could previously examine justice on the larger scale, there would be less difficulty in discerning her in the individual. That larger example appeared to be the State, and accordingly we constructed as good a one as we could, knowing well that in the good State justice would be found. Let the discovery which we made be now applied to the individual --if they agree, we shall be satisfied; or, if there be a difference in the individual, we will come back to the State and have another trial of the theory. The friction of the two when rubbed together may possibly strike a light in which justice will shine forth, and the vision which is then revealed we will fix in our souls.

Hesiod, from *Works and Days*

And now I will tell a fable for princes who themselves understand. Thus said the hawk to the nightingale with speckled neck, while he carried her high up among the clouds, gripped fast in his talons, [205] and she, pierced by his crooked talons, cried pitifully. To her he spoke disdainfully: "Miserable thing, why do you cry out? One far stronger than you now holds you fast, and you must go wherever I take you, songstress as you are. And if I please, I will make my meal of you, or let you go. [210] He is a fool who tries to withstand the stronger, for he does not get the mastery and suffers pain besides his shame." So said the swiftly flying hawk, the long-winged bird. But you, Perses, listen to right and do not foster violence; for violence is bad for a poor man. [215] Even the prosperous cannot easily bear its burden, but is weighed down under it when he has fallen into delusion. The better path is to go by on the other side towards Justice; for Justice beats Outrage when she comes at length to the end of the race. But only when he has suffered does the fool learn this. For Oath keeps pace with wrong judgments. [220] There is a noise when Justice is being dragged in the way where those who devour bribes and give sentence with crooked judgments, take her. And she, wrapped in mist, follows to the city and haunts of the people, weeping, and bringing mischief to men, even to such as have driven her forth in that they did not deal straightly with her. [225] But they who give straight judgments to strangers and to the men of the land, and go not aside from what is just, their city flourishes, and the people prosper in it: Peace, the nurse of children, is abroad in their land, and all-seeing Zeus never decrees cruel war against them. [230] Neither famine nor disaster ever haunt men who do true justice; but light-heartedly they tend the fields which are all their care. The earth bears them victual in plenty, and on the mountains the oak bears acorns upon the top and bees in the midst. Their woolly sheep are laden with fleeces; [235] their women bear children like their parents. They flourish continually with good things, and do not travel on ships, for the grain-giving earth bears them fruit.

But for those who practice violence and cruel deeds far-seeing Zeus, the son of Cronos, ordains a punishment. [240] Often even a whole city suffers for a bad man who sins and devises presumptuous deeds, and the son of Cronos lays great trouble upon the people, famine and plague together, so that the men perish away, and their women do not bear children, and their houses become few, [245] through the contriving of Olympian Zeus. And again, at another time, the son of Cronos either

destroys their wide army, or their walls, or else makes an end of their ships on the sea. You princes, mark well this punishment, you also, for the deathless gods are near among men; and [250] mark all those who oppress their fellows with crooked judgments; and heed not the anger of the gods. For upon the bounteous earth Zeus has thrice ten thousand spirits, watchers of mortal men, and these keep watch on judgments and deeds of wrong [255] as they roam, clothed in mist, all over the earth. And there is virgin Justice, the daughter of Zeus, who is honored and reverenced among the gods who dwell on Olympus, and whenever anyone hurts her with lying slander, she sits beside her father, Zeus the son of Cronos, [260] and tells him of men's wicked heart, until the people pay for the mad folly of their princes who, evilly minded, pervert judgment and give sentence crookedly. Keep watch against this, you princes, and make straight your judgments, you who devour bribes; put crooked judgments altogether from your thoughts. [265] He does mischief to himself who does mischief to another, and evil planned harms the plotter most. The eye of Zeus, seeing all and understanding all, beholds these things too, if so he will, and fails not to mark what sort of justice is this that the city keeps within it. [270] Now, therefore, may neither I myself be righteous among men, nor my son—for then it is a bad thing to be righteous—if indeed the unrighteous shall have the greater right. But I think that all-wise Zeus will not yet bring that to pass.

But you, Perses, lay up these things within your heart and [275] listen now to right, ceasing altogether to think of violence. For the son of Cronos has ordained this law for men, that fishes and beasts and winged fowls should devour one another, for right is not in them; but to mankind he gave right which proves [280] far the best. For whoever knows the right and is ready to speak it, far-seeing Zeus gives him prosperity; but whoever deliberately lies in his witness and foreswears himself, and so hurts Justice and sins beyond repair, that man's generation is left obscure thereafter. [285] But the generation of the man who swears truly is better thenceforward. To you, foolish Perses, I will speak good sense. Badness can be got easily and in shoals; the road to her is smooth, and she lives very near us. But between us and Goodness the gods have placed the sweat of our brows; [290] long and steep is the path that leads to her, and it is rough at the first; but when a man has reached the top, then is she easy to reach, though before that she was hard. [295]

Hesiod. The Homeric Hymns and Homerica with an English Translation by Hugh G. Evelyn-White. Works and Days. Cambridge, MA.,Harvard University Press; London, William Heinemann Ltd. 1914.

Genesis 1 (New International Version)

Genesis 1

The Beginning

1 In the beginning God created the heavens and the earth.
2 Now the earth was formless and empty, darkness was over the surface of the deep, and the Spirit of God was hovering over the waters.
3 And God said, "Let there be light," and there was light. 4 God saw that the light was good, and He separated the light from the darkness. 5 God called the light "day," and the darkness he called "night." And there was evening, and there was morning—the first day.
6 And God said, "Let there be an expanse between the waters to separate water from water." 7 So God made the expanse and separated the water under the expanse from the water above it. And it was so. 8 God called the expanse "sky." And there was evening, and there was morning—the second day.
9 And God said, "Let the water under the sky be gathered to one place, and let dry ground appear." And it was so. 10 God called the dry ground "land," and the gathered waters he called "seas." And God saw that it was good.
11 Then God said, "Let the land produce vegetation: seed-bearing plants and trees on the land that bear fruit with seed in it, according to their various kinds." And it was so. 12 The land produced vegetation: plants bearing seed according to their kinds and trees bearing fruit with seed in it according to their kinds. And God saw that it was good. 13 And there was evening, and there was morning—the third day.
14 And God said, "Let there be lights in the expanse of the sky to separate the day from the night, and let them serve as signs to mark seasons and days and years, 15 and let them be lights in the expanse of the sky to give light on the earth." And it was so. 16 God made two great lights—the greater light to govern the day and the lesser light to govern the night. He also made the stars. 17 God set them in the expanse of the sky to give light on the earth, 18 to govern the day and the night, and to separate light from darkness. And God saw that it was good. 19 And there was evening, and there was morning—the fourth day.
20 And God said, "Let the water teem with living creatures, and let birds fly above the earth across the expanse of the sky." 21 So God created the great creatures of the sea and every living and moving thing with which the water teems, according to their kinds, and every winged bird according to its kind. And God saw that it was good. 22 God blessed them and said, "Be fruitful and increase in number and fill the water in the seas, and let the birds increase on the earth." 23 And there was evening, and there was morning—the fifth day.
24 And God said, "Let the land produce living creatures according to their kinds: livestock, creatures that move along the ground, and wild animals, each according to its kind." And it was so. 25 God made the wild animals according to their kinds, the livestock according to their kinds, and all the creatures that move along the ground according to their kinds. And God saw that it was good.
26 Then God said, "Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground."
27 So God created man in his own image,
in the image of God he created him;
male and female he created them.
28 God blessed them and said to them, "Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground."
29 Then God said, "I give you every seed-bearing plant on the face of the whole earth and every tree that has fruit with seed in it. They will be yours for food. 30 And to all the beasts of the earth and all the birds of the air and all the creatures that move on the ground—everything that has the breath of life in it—I give every green plant for food." And it was so.
31 God saw all that he had made, and it was very good. And there was evening, and there was morning—the sixth day.

Genesis 2

1 Thus the heavens and the earth were completed in all their vast array.
2 By the seventh day God had finished the work he had been doing; so on the seventh day he rested from all his work. 3 And God blessed the seventh day and made it holy, because on it he rested from all the work of creating that he had done.

Adam and Eve

4 This is the account of the heavens and the earth when they were created.
When the LORD God made the earth and the heavens- 5 and no shrub of the field had yet appeared on the earth and no plant of the field had yet sprung up, for the LORD God had not sent rain on the earth and there was no man to work the ground, 6 but streams came up from the earth and watered the whole surface

of the ground- [7] the LORD God formed the man from the dust of the ground and breathed into his nostrils the breath of life, and the man became a living being.
[8] Now the LORD God had planted a garden in the east, in Eden; and there he put the man he had formed. [9] And the LORD God made all kinds of trees grow out of the ground—trees that were pleasing to the eye and good for food. In the middle of the garden were the tree of life and the tree of the knowledge of good and evil.
[10] A river watering the garden flowed from Eden; from there it was separated into four headwaters. [11] The name of the first is the Pishon; it winds through the entire land of Havilah, where there is gold. [12] (The gold of that land is good; aromatic resin and onyx are also there.) [13] The name of the second river is the Gihon; it winds through the entire land of Cush. [14] The name of the third river is the Tigris; it runs along the east side of Asshur. And the fourth river is the Euphrates.
[15] The LORD God took the man and put him in the Garden of Eden to work it and take care of it. [16] And the LORD God commanded the man, "You are free to eat from any tree in the garden; [17] but you must not eat from the tree of the knowledge of good and evil, for when you eat of it you will surely die."
[18] The LORD God said, "It is not good for the man to be alone. I will make a helper suitable for him."
[19] Now the LORD God had formed out of the ground all the beasts of the field and all the birds of the air. He brought them to the man to see what he would name them; and whatever the man called each living creature, that was its name. [20] So the man gave names to all the livestock, the birds of the air and all the beasts of the field.

But for Adam no suitable helper was found. [21] So the LORD God caused the man to fall into a deep sleep; and while he was sleeping, he took one of the man's ribs and closed up the place with flesh. [22] Then the LORD God made a woman from the rib he had taken out of the man, and he brought her to the man.
[23] The man said,

"This is now bone of my bones
and flesh of my flesh;
she shall be called 'woman, '
for she was taken out of man."

[24] For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh.
[25] The man and his wife were both naked, and they felt no shame.

Genesis 3

The Fall of Man

[1] Now the serpent was more crafty than any of the wild animals the LORD God had made. He said to the woman, "Did God really say, 'You must not eat from any tree in the garden'?"
[2] The woman said to the serpent, "We may eat fruit from the trees in the garden, [3] but God did say, 'You must not eat fruit from the tree that is in the middle of the garden, and you must not touch it, or you will die.' "
[4] "You will not surely die," the serpent said to the woman. [5] "For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil."
[6] When the woman saw that the fruit of the tree was good for food and pleasing to the eye, and also desirable for gaining wisdom, she took some and ate it. She also gave some to her husband, who was with her, and he ate it. [7] Then the eyes of both of them were opened, and they realized they were naked; so they sewed fig leaves together and made coverings for themselves.
[8] Then the man and his wife heard the sound of the LORD God as he was walking in the garden in the cool of the day, and they hid from the LORD God among the trees of the garden. [9] But the LORD God called to the man, "Where are you?"
[10] He answered, "I heard you in the garden, and I was afraid because I was naked; so I hid."
[11] And he said, "Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?"
[12] The man said, "The woman you put here with me—she gave me some fruit from the tree, and I ate it."
[13] Then the LORD God said to the woman, "What is this you have done?"

The woman said, "The serpent deceived me, and I ate."

[14] So the LORD God said to the serpent, "Because you have done this,

"Cursed are you above all the livestock
and all the wild animals!
You will crawl on your belly
and you will eat dust
all the days of your life.
[15] And I will put enmity
between you and the woman,
and between your offspring and hers;

he will crush your head,
and you will strike his heel."
16 To the woman he said,
"I will greatly increase your pains in childbearing;
with pain you will give birth to children.
Your desire will be for your husband,
and he will rule over you."
17 To Adam he said, "Because you listened to your wife and ate from the tree about which I commanded you, 'You must not eat of it,'
"Cursed is the ground because of you;
through painful toil you will eat of it
all the days of your life.
18 It will produce thorns and thistles for you,
and you will eat the plants of the field.
19 By the sweat of your brow
you will eat your food
until you return to the ground,
since from it you were taken;
for dust you are
and to dust you will return."
20 Adam named his wife Eve, because she would become the mother of all the living.
21 The LORD God made garments of skin for Adam and his wife and clothed them. 22 And the LORD God said, "The man has now become like one of us, knowing good and evil. He must not be allowed to reach out his hand and take also from the tree of life and eat, and live forever." 23 So the LORD God banished him from the Garden of Eden to work the ground from which he had been taken. 24 After he drove the man out, he placed on the east side of the Garden of Eden cherubim and a flaming sword flashing back and forth to guard the way to the tree of life.

Genesis 4

Cain and Abel

1 Adam lay with his wife Eve, and she became pregnant and gave birth to Cain. She said, "With the help of the LORD I have brought forth a man." 2 Later she gave birth to his brother Abel.

Now Abel kept flocks, and Cain worked the soil. 3 In the course of time Cain brought some of the fruits of the soil as an offering to the LORD. 4 But Abel brought fat portions from some of the firstborn of his flock. The LORD looked with favor on Abel and his offering, 5 but on Cain and his offering he did not look with favor. So Cain was very angry, and his face was downcast.
6 Then the LORD said to Cain, "Why are you angry? Why is your face downcast? 7 If you do what is right, will you not be accepted? But if you do not do what is right, sin is crouching at your door; it desires to have you, but you must master it."
8 Now Cain said to his brother Abel, "Let's go out to the field." And while they were in the field, Cain attacked his brother Abel and killed him.
9 Then the LORD said to Cain, "Where is your brother Abel?"
"I don't know," he replied. "Am I my brother's keeper?"
10 The LORD said, "What have you done? Listen! Your brother's blood cries out to me from the ground. 11 Now you are under a curse and driven from the ground, which opened its mouth to receive your brother's blood from your hand. 12 When you work the ground, it will no longer yield its crops for you. You will be a restless wanderer on the earth."
13 Cain said to the LORD, "My punishment is more than I can bear. 14 Today you are driving me from the land, and I will be hidden from your presence; I will be a restless wanderer on the earth, and whoever finds me will kill me."
15 But the LORD said to him, "Not so; if anyone kills Cain, he will suffer vengeance seven times over." Then the LORD put a mark on Cain so that no one who found him would kill him. 16 So Cain went out from the LORD's presence and lived in the land of Nod, east of Eden.
17 Cain lay with his wife, and she became pregnant and gave birth to Enoch. Cain was then building a city, and he named it after his son Enoch. 18 To Enoch was born Irad, and Irad was the father of Mehujael, and Mehujael was the father of Methushael, and Methushael was the father of Lamech.
19 Lamech married two women, one named Adah and the other Zillah. 20 Adah gave birth to Jabal; he was the father of those who live in tents and raise livestock. 21 His brother's name was Jubal; he was the father of all who play the harp and flute. 22 Zillah also had a son, Tubal-Cain, who forged all kinds of tools out of bronze and iron. Tubal-Cain's sister was Naamah.
23 Lamech said to his wives,
"Adah and Zillah, listen to me;

wives of Lamech, hear my words.
I have killed a man for wounding me,
a young man for injuring me.
[24] If Cain is avenged seven times,
then Lamech seventy-seven times."
[25] Adam lay with his wife again, and she gave birth to a son and named him Seth, saying, "God has granted me another child in place of Abel, since Cain killed him." [26] Seth also had a son, and he named him Enosh.
At that time men began to call on the name of the LORD.

Genesis 5

From Adam to Noah

[1] This is the written account of Adam's line.
When God created man, he made him in the likeness of God. [2] He created them male and female and blessed them. And when they were created, he called them "man. "
[3] When Adam had lived 130 years, he had a son in his own likeness, in his own image; and he named him Seth. [4] After Seth was born, Adam lived 800 years and had other sons and daughters. [5] Altogether, Adam lived 930 years, and then he died.
[6] When Seth had lived 105 years, he became the father of Enosh. [7] And after he became the father of Enosh, Seth lived 807 years and had other sons and daughters. [8] Altogether, Seth lived 912 years, and then he died.
[9] When Enosh had lived 90 years, he became the father of Kenan. [10] And after he became the father of Kenan, Enosh lived 815 years and had other sons and daughters. [11] Altogether, Enosh lived 905 years, and then he died.
[12] When Kenan had lived 70 years, he became the father of Mahalalel. [13] And after he became the father of Mahalalel, Kenan lived 840 years and had other sons and daughters. [14] Altogether, Kenan lived 910 years, and then he died.
[15] When Mahalalel had lived 65 years, he became the father of Jared. [16] And after he became the father of Jared, Mahalalel lived 830 years and had other sons and daughters. [17] Altogether, Mahalalel lived 895 years, and then he died.
[18] When Jared had lived 162 years, he became the father of Enoch. [19] And after he became the father of Enoch, Jared lived 800 years and had other sons and daughters. [20] Altogether, Jared lived 962 years, and then he died.
[21] When Enoch had lived 65 years, he became the father of Methuselah. [22] And after he became the father of Methuselah, Enoch walked with God 300 years and had other sons and daughters. [23] Altogether, Enoch lived 365 years. [24] Enoch walked with God; then he was no more, because God took him away.
[25] When Methuselah had lived 187 years, he became the father of Lamech. [26] And after he became the father of Lamech, Methuselah lived 782 years and had other sons and daughters. [27] Altogether, Methuselah lived 969 years, and then he died.
[28] When Lamech had lived 182 years, he had a son. [29] He named him Noah and said, "He will comfort us in the labor and painful toil of our hands caused by the ground the LORD has cursed." [30] After Noah was born, Lamech lived 595 years and had other sons and daughters. [31] Altogether, Lamech lived 777 years, and then he died.
[32] After Noah was 500 years old, he became the father of Shem, Ham and Japheth.

Genesis 6

The Flood

[1] When men began to increase in number on the earth and daughters were born to them, [2] the sons of God saw that the daughters of men were beautiful, and they married any of them they chose. [3] Then the LORD said, "My Spirit will not contend with man forever, for he is mortal; his days will be a hundred and twenty years."
[4] The Nephilim were on the earth in those days—and also afterward—when the sons of God went to the daughters of men and had children by them. They were the heroes of old, men of renown.
[5] The LORD saw how great man's wickedness on the earth had become, and that every inclination of the thoughts of his heart was only evil all the time. [6] The LORD was grieved that he had made man on the earth, and his heart was filled with pain. [7] So the LORD said, "I will wipe mankind, whom I have created, from the face of the earth—men and animals, and creatures that move along the ground, and birds of the air—for I am grieved that I have made them." [8] But Noah found favor in the eyes of the LORD.
[9] This is the account of Noah.
Noah was a righteous man, blameless among the people of his time, and he walked with God. [10] Noah had three sons: Shem, Ham and Japheth.

[11] Now the earth was corrupt in God's sight and was full of violence. [12] God saw how corrupt the earth had become, for all the people on earth had corrupted their ways. [13] So God said to Noah, "I am going to put an end to all people, for the earth is filled with violence because of them. I am surely going to destroy both them and the earth. [14] So make yourself an ark of cypress wood; make rooms in it and coat it with pitch inside and out. [15] This is how you are to build it: The ark is to be 450 feet long, 75 feet wide and 45 feet high. [16] Make a roof for it and finish the ark to within 18 inches of the top. Put a door in the side of the ark and make lower, middle and upper decks. [17] I am going to bring floodwaters on the earth to destroy all life under the heavens, every creature that has the breath of life in it. Everything on earth will perish. [18] But I will establish my covenant with you, and you will enter the ark—you and your sons and your wife and your sons' wives with you. [19] You are to bring into the ark two of all living creatures, male and female, to keep them alive with you. [20] Two of every kind of bird, of every kind of animal and of every kind of creature that moves along the ground will come to you to be kept alive. [21] You are to take every kind of food that is to be eaten and store it away as food for you and for them."
[22] Noah did everything just as God commanded him.

Genesis 7

[1] The LORD then said to Noah, "Go into the ark, you and your whole family, because I have found you righteous in this generation. [2] Take with you seven of every kind of clean animal, a male and its mate, and two of every kind of unclean animal, a male and its mate, [3] and also seven of every kind of bird, male and female, to keep their various kinds alive throughout the earth. [4] Seven days from now I will send rain on the earth for forty days and forty nights, and I will wipe from the face of the earth every living creature I have made."
[5] And Noah did all that the LORD commanded him.
[6] Noah was six hundred years old when the floodwaters came on the earth. [7] And Noah and his sons and his wife and his sons' wives entered the ark to escape the waters of the flood. [8] Pairs of clean and unclean animals, of birds and of all creatures that move along the ground, [9] male and female, came to Noah and entered the ark, as God had commanded Noah. [10] And after the seven days the floodwaters came on the earth.
[11] In the six hundredth year of Noah's life, on the seventeenth day of the second month—on that day all the springs of the great deep burst forth, and the floodgates of the heavens were opened. [12] And rain fell on the earth forty days and forty nights.
[13] On that very day Noah and his sons, Shem, Ham and Japheth, together with his wife and the wives of his three sons, entered the ark. [14] They had with them every wild animal according to its kind, all livestock according to their kinds, every creature that moves along the ground according to its kind and every bird according to its kind, everything with wings. [15] Pairs of all creatures that have the breath of life in them came to Noah and entered the ark. [16] The animals going in were male and female of every living thing, as God had commanded Noah. Then the LORD shut him in.
[17] For forty days the flood kept coming on the earth, and as the waters increased they lifted the ark high above the earth. [18] The waters rose and increased greatly on the earth, and the ark floated on the surface of the water. [19] They rose greatly on the earth, and all the high mountains under the entire heavens were covered. [20] The waters rose and covered the mountains to a depth of more than twenty feet. [21] Every living thing that moved on the earth perished—birds, livestock, wild animals, all the creatures that swarm over the earth, and all mankind. [22] Everything on dry land that had the breath of life in its nostrils died. [23] Every living thing on the face of the earth was wiped out; men and animals and the creatures that move along the ground and the birds of the air were wiped from the earth. Only Noah was left, and those with him in the ark.
[24] The waters flooded the earth for a hundred and fifty days.

Genesis 8

[1] But God remembered Noah and all the wild animals and the livestock that were with him in the ark, and he sent a wind over the earth, and the waters receded. [2] Now the springs of the deep and the floodgates of the heavens had been closed, and the rain had stopped falling from the sky. [3] The water receded steadily from the earth. At the end of the hundred and fifty days the water had gone down, [4] and on the seventeenth day of the seventh month the ark came to rest on the mountains of Ararat. [5] The waters continued to recede until the tenth month, and on the first day of the tenth month the tops of the mountains became visible.
[6] After forty days Noah opened the window he had made in the ark [7] and sent out a raven, and it kept flying back and forth until the water had dried up from the earth. [8] Then he sent out a dove to see if the water had receded from the surface of the ground. [9] But the dove could find no place to set its feet because there was water over all the surface of the earth; so it returned to Noah in the ark. He reached out his hand and took the dove and brought it back to himself in the ark. [10] He waited seven more days and again sent out the dove from the ark. [11] When the dove returned to him in the evening, there in its beak was a freshly plucked

olive leaf! Then Noah knew that the water had receded from the earth. [12] He waited seven more days and sent the dove out again, but this time it did not return to him.
[13] By the first day of the first month of Noah's six hundred and first year, the water had dried up from the earth. Noah then removed the covering from the ark and saw that the surface of the ground was dry. [14] By the twenty-seventh day of the second month the earth was completely dry.
[15] Then God said to Noah, [16] "Come out of the ark, you and your wife and your sons and their wives. [17] Bring out every kind of living creature that is with you—the birds, the animals, and all the creatures that move along the ground—so they can multiply on the earth and be fruitful and increase in number upon it."
[18] So Noah came out, together with his sons and his wife and his sons' wives. [19] All the animals and all the creatures that move along the ground and all the birds—everything that moves on the earth—came out of the ark, one kind after another.
[20] Then Noah built an altar to the LORD and, taking some of all the clean animals and clean birds, he sacrificed burnt offerings on it. [21] The LORD smelled the pleasing aroma and said in his heart: "Never again will I curse the ground because of man, even though every inclination of his heart is evil from childhood. And never again will I destroy all living creatures, as I have done.
[22] "As long as the earth endures,
seedtime and harvest,
cold and heat,
summer and winter,
day and night
will never cease."

Genesis 9

God's Covenant With Noah

[1] Then God blessed Noah and his sons, saying to them, "Be fruitful and increase in number and fill the earth. [2] The fear and dread of you will fall upon all the beasts of the earth and all the birds of the air, upon every creature that moves along the ground, and upon all the fish of the sea; they are given into your hands.
[3] Everything that lives and moves will be food for you. Just as I gave you the green plants, I now give you everything.
[4] "But you must not eat meat that has its lifeblood still in it. [5] And for your lifeblood I will surely demand an accounting. I will demand an accounting from every animal. And from each man, too, I will demand an accounting for the life of his fellow man.
[6] "Whoever sheds the blood of man,
by man shall his blood be shed;
for in the image of God
has God made man.
[7] As for you, be fruitful and increase in number; multiply on the earth and increase upon it."
[8] Then God said to Noah and to his sons with him: [9] "I now establish my covenant with you and with your descendants after you [10] and with every living creature that was with you—the birds, the livestock and all the wild animals, all those that came out of the ark with you—every living creature on earth. [11] I establish my covenant with you: Never again will all life be cut off by the waters of a flood; never again will there be a flood to destroy the earth."
[12] And God said, "This is the sign of the covenant I am making between me and you and every living creature with you, a covenant for all generations to come: [13] I have set my rainbow in the clouds, and it will be the sign of the covenant between me and the earth. [14] Whenever I bring clouds over the earth and the rainbow appears in the clouds, [15] I will remember my covenant between me and you and all living creatures of every kind. Never again will the waters become a flood to destroy all life. [16] Whenever the rainbow appears in the clouds, I will see it and remember the everlasting covenant between God and all living creatures of every kind on the earth."
[17] So God said to Noah, "This is the sign of the covenant I have established between me and all life on the earth."

The Sons of Noah

[18] The sons of Noah who came out of the ark were Shem, Ham and Japheth. (Ham was the father of Canaan.) [19] These were the three sons of Noah, and from them came the people who were scattered over the earth.
[20] Noah, a man of the soil, proceeded to plant a vineyard. [21] When he drank some of its wine, he became drunk and lay uncovered inside his tent. [22] Ham, the father of Canaan, saw his father's nakedness and told his two brothers outside. [23] But Shem and Japheth took a garment and laid it across their shoulders; then they walked in backward and covered their father's nakedness. Their faces were turned the other way so that they would not see their father's nakedness.
[24] When Noah awoke from his wine and found out what his youngest son had done to him, [25] he said,
"Cursed be Canaan!

The lowest of slaves
will he be to his brothers."
[26] He also said,
"Blessed be the LORD, the God of Shem!
May Canaan be the slave of Shem.
[27] May God extend the territory of Japheth;
may Japheth live in the tents of Shem,
and may Canaan be his slave."
[28] After the flood Noah lived 350 years. [29] Altogether, Noah lived 950 years, and then he died.

Genesis 10

The Table of Nations

[1] This is the account of Shem, Ham and Japheth, Noah's sons, who themselves had sons after the flood.

The Japhethites

[2] The sons of Japheth:
Gomer, Magog, Madai, Javan, Tubal, Meshech and Tiras.
[3] The sons of Gomer:
Ashkenaz, Riphath and Togarmah.
[4] The sons of Javan:
Elishah, Tarshish, the Kittim and the Rodanim. [5] (From these the maritime peoples spread out into their territories by their clans within their nations, each with its own language.)

The Hamites

[6] The sons of Ham:
Cush, Mizraim, Put and Canaan.
[7] The sons of Cush:
Seba, Havilah, Sabtah, Raamah and Sabteca.
The sons of Raamah:
Sheba and Dedan.
[8] Cush was the father of Nimrod, who grew to be a mighty warrior on the earth. [9] He was a mighty hunter before the LORD; that is why it is said, "Like Nimrod, a mighty hunter before the LORD." [10] The first centers of his kingdom were Babylon, Erech, Akkad and Calneh, in Shinar. [11] From that land he went to Assyria, where he built Nineveh, Rehoboth Ir, Calah [12] and Resen, which is between Nineveh and Calah; that is the great city.
[13] Mizraim was the father of
the Ludites, Anamites, Lehabites, Naphtuhites, [14] Pathrusites, Casluhites (from whom the Philistines came) and Caphtorites.
[15] Canaan was the father of
Sidon his firstborn, and of the Hittites, [16] Jebusites, Amorites, Girgashites, [17] Hivites, Arkites, Sinites, [18] Arvadites, Zemarites and Hamathites.
Later the Canaanite clans scattered [19] and the borders of Canaan reached from Sidon toward Gerar as far as Gaza, and then toward Sodom, Gomorrah, Admah and Zeboiim, as far as Lasha.
[20] These are the sons of Ham by their clans and languages, in their territories and nations.

The Semites

[21] Sons were also born to Shem, whose older brother was Japheth; Shem was the ancestor of all the sons of Eber.
[22] The sons of Shem:
Elam, Asshur, Arphaxad, Lud and Aram.
[23] The sons of Aram:
Uz, Hul, Gether and Meshech.
[24] Arphaxad was the father of Shelah,
and Shelah the father of Eber.
[25] Two sons were born to Eber:
One was named Peleg, because in his time the earth was divided; his brother was named Joktan.
[26] Joktan was the father of
Almodad, Sheleph, Hazarmaveth, Jerah, [27] Hadoram, Uzal, Diklah, [28] Obal, Abimael, Sheba, [29] Ophir, Havilah and Jobab. All these were sons of Joktan.
[30] The region where they lived stretched from Mesha toward Sephar, in the eastern hill country.
[31] These are the sons of Shem by their clans and languages, in their territories and nations.
[32] These are the clans of Noah's sons, according to their lines of descent, within their nations. From these the nations spread out over the earth after the flood.

Paul Mariani

The Republic

Midnight. For the past three hours
I've raked over Plato's *Republic*
with my students, all of them John
Jay cops, and now some of us
have come to Rooney's to unwind.
Boilermakers. Double shots and triples.
Fitzgerald's still in his undercover
clothes and giveaway white socks, and two
lieutenants—Seluzzi in the sharkskin suit
& D'Ambruzzo in the leather—have just
invited me to catch their fancy (and illegal)
digs somewhere up in Harlem, when
this cop begins to tell his story:

how he and his partner trailed
this pusher for six weeks before
they trapped him in a burnt-out
tenement somewhere down in SoHo,
one coming at him up the stairwell,
the other up the fire escape
and through a busted window. But by
the time they've grabbed him
he's standing over an open window
and he's clean. The partner races down
into the courtyard and begins going
through the garbage until he finds
what it is he's after: a white bag
hanging from a junk mimosa like
the Christmas gift it is, and which now

he plants back on the suspect.
Cross-examined by a lawyer who does his best
to rattle them, he and his partner
stick by their story, and the charges stick.
Fitzgerald shrugs. Business as usual.
But the cop goes on. Better to let
the guy go free than under oath
to have to lie like that.
And suddenly you can hear the heavy
suck of air before Seluzzi, who
half an hour before was boasting
about being on the take, staggers
to his feet, outraged at what he's heard,
and insists on taking the bastard
downtown so they can book him.

Which naturally brings to an end
the discussion we've been having,
and soon each of us is heading
for an exit, embarrassed by the awkward
light the cop has thrown on things.
Which makes it clearer now to me why
the State would offer someone like Socrates
a shot of hemlock. And even clearer
why Socrates would want to drink it.

Second thoughts make liars of the first resolution.
I would have vowed it would be long enough
before I came again, lashed hence by your threats.
But since the joy that comes past hope, and against all hope,
is like no other pleasure in extent,
I have come here, though I break my oath in coming.
I bring this girl here who has been captured
giving the grace of burial to the dead man.
This time no lot chose me; this was my jackpot,
and no one else's. Now, my lord, take her
and as you please judge her and test her; I
am justly free and clear of all this trouble.

Creon
This girl—how did you take her and from where?

Sentry
She was burying the man. Now you know all.

Creon
Do you know what you are saying? Do you mean it?

Sentry
She is the one; I saw her burying
the dead man you forbade the burial of.
Now, do I speak plainly and clearly enough?

Creon
How was she seen? How was she caught in the act?

Sentry
This is how it was. When we came there,
with those dreadful threats of yours upon us,
we brushed off all the dust that lay upon
the dead man's body, heedfully
leaving it moist and naked.
We sat on the brow of the hill, to windward,
that we might shun the smell of the corpse upon us.

Each of us wakefully urged his fellow
with torrents of abuse, not to be careless
in this work of ours. So it went on,
until in the midst of the sky the sun's bright circle
stood still; the heat was burning. Suddenly
a squall lifted out of the earth a storm of dust,
a trouble in the sky. It filled the plain,
ruining all the foliage of the wood
that was around it. The great empty air
was filled with it. We closed our eyes, enduring
this plague sent by the gods. When at long last
we were quit of it, why, then we saw the girl.

She was crying out with the shrill cry
of an embittered bird
that sees its nest robbed of its nestlings
and the bed empty. So, too, when she saw
the body stripped of its cover, she burst out in groans,
calling terrible curses on those that had done that deed;
and with her hands immediately
brought thirsty dust to the body; from a shapely brazen
urn, held high over it, poured a triple stream
of funeral offerings; and crowned the corpse.
When we saw that, we rushed upon her and
caught our quarry then and there, not a bit disturbed.
We charged her with what she had done, then and the first time.
She did not deny a word of it—to my joy,
but to my pain as well. It is most pleasant
to have escaped oneself out of such troubles
but painful to bring into it those whom we love.
However, it is but natural for me
to count all this less than my own escape.

Creon
You there, that turn your eyes upon the ground,
do you confess or deny what you have done?

Antigone

Yes, I confess; I will not deny my deed.

Creon (to the Sentry)

You take yourself off where you like.
You are free of a heavy charge.
Now, Antigone, tell me shortly and to the point,
did you know the proclamation against your action?

Antigone

I knew it; of course I did. For it was public.

Creon

And did you dare to disobey that law?

Antigone

Yes, it was not Zeus that made the proclamation;
nor did Justice, which lives with those below, enact
such laws as that, for mankind. I did not believe
your proclamation had such power to enable
one who will someday die to override
God's ordinances, unwritten and secure.
They are not of today and yesterday;
they live forever; none knows when first they were.
These are the laws whose penalties I would not
incur from the gods, through fear of any man's temper.

I know that I will die—of course I do—
even if you had not doomed me by proclamation.
If I shall die before my time, I count that
a profit. How can such as I, that live
among such troubles, not find a profit in death?
So for such as me, to face such a fate as this
is pain that does not count. But if I dared to leave
the dead man, my mother's son, dead and unburied,
that would have been real pain. The other is not.
Now, if you think me a fool to act like this,
perhaps it is a fool that judges so.

Chorus

The savage spirit of a savage father
shows itself in this girl. She does not know
how to yield to trouble.

Creon

I would have you know the most fanatic spirits
fall most of all. It is the toughest iron,
baked in the fire to hardness, you may see
most shattered, twisted, shivered to fragments.
I know hot horses are restrained
by a small curb. For he that is his neighbor's slave cannot
be high in spirit. This girl had learned her insolence
before this, when she broke the established laws.
But here is still another insolence
in that she boasts of it, laughs at what she did.
I swear I am no man and she the man
if she can win this and not pay for it.
No; though she were my sister's child or closer
in blood than all that my hearth god acknowledges
as mine, neither she nor her sister should escape
the utmost sentence—death. For indeed I accuse her,
the sister, equally of plotting the burial.
Summon her. I saw her inside, just now,
crazy, distraught. When people plot
mischief in the dark, it is the mind which first
is convicted of deceit. But surely I hate indeed
the one that is caught in evil and then makes
that evil look like good.

Antigone

Do you want anything
beyond my taking and my execution?

Creon

Oh, nothing! Once I have that I have everything.

Antigone
Why do you wait, then? Nothing that you say
pleases me; God forbid it ever should.
So my words, too, naturally offend you.
Yet how could I win a greater share of glory
than putting my own brother in his grave?
All that are here would surely say that's true,
if fear did not lock their tongues up. A prince's power
is blessed in many things, not least in this,
that he can say and do whatever he likes.

Creon
You are alone among the people of Thebes
to see things in that way.

Antigone
No, these do, too,
but keep their mouths shut for the fear of you.

Creon
Are you not ashamed to think so differently
from them?

Antigone
There is nothing shameful in honoring my brother.

Creon
Was not he that died on the other side your brother?

Antigone
Yes, indeed, of my own blood from father and mother.

Creon
Why then do you show a grace that must be impious
in *his* sight?

Antigone
That other dead man
would never bear you witness in what you say.

Creon
Yes he would, if you put him only on equality
with one that was a desecrator.

Antigone
It was his brother, not his slave, that died.

Creon
He died destroying the country the other defended.

Antigone
The god of death demands these rites for both.

Creon
But the good man does not seek an *equal* share only,
with the bad.

Antigone
Who knows
if in that other world this is true piety?

Creon
My enemy is still my enemy, even in death.

Antigone
My nature is to join in love, not hate.

Creon
Go then to the world below, yourself, if you
must love. Love *them*. When I am alive no woman shall rule.

Chorus
Here before the gates comes Ismene
shedding tears for the love of a brother.
A cloud over her brow casts shame
on her flushed face, as the tears wet
her fair cheeks.

Creon
You there, who lurked in my house, viper-like—
secretly drawing its lifeblood; I never thought

tearing the hair of the woods into the valley,
filling the air with fog, so that we had to blink,
yes, that was it, and rub our eyes; it was then
that we saw her, standing there crying out
In a sharp voice like a bird that mourns
when it sees the empty nest, without young ones.
She wailed because she saw the dead man naked;
and she spread the dust over him again,
out of the iron jug. Three times she sprinkled
dust on the dead man. We ran and held her,
and she didn't resist. And we accuse her
of these present things that we have witnessed.
But she denied nothing and was
gentle toward me and sad at the same time.

KREON
Do you admit or do you deny that you did it?

ANTIGONE
I say that I did it and I don't deny it.

KREON
Now tell me, and be brief:
are you aware of what was announced
in the open city about this particular corpse?

ANTIGONE
I knew it. How could I help it. It was clear enough.

KREON
And yet you dared to break my law?

ANTIGONE
Just because it was your law, a human law,
that's why a human being may break it—and
I am just as human as you and only slightly more
mortal. And if
I die before my time, I think it's
because it has its advantages; when you've lived
the way I have, surrounded by evil, isn't there some
slight advantage in death? And further, if I had let
my mother's
dead son lie unburied,

that would have made me unhappy; but this
does not make my unhappy. And if I seem crazy to you
because I fear the judgement of heaven,
which hates the bared sight of mangled bodies,
and I don't fear your judgement,
then let a crazy judge judge me.

THE ELDERS
Tough child of a tough father:
she hasn't learned how to be cautious.

KREON
The toughest iron yields
and loses its stubbornness, tempered
in the ovens. It happens every day.
But this one here enjoys
making fun of the laws of the land.
And to top this impertinence, now that
she's done it, she laughs about it and boasts
that she's done it. I hate that: when somebody's
caught in a crime and tries to make it look pretty.
And yet, though she insults me in spite of our family
ties,
I'll be slow to condemn her because of our family ties.
Therefore I ask you: since you did it in secret
and now it's out in the open, wouldn't you say,
to avoid severe punishment, that you're sorry you did
it?
(ANTIGONE *is silent*)

KREON
Tell me why you're so stubborn.

ANTIGONE
To set an example.

KREON
Doesn't it matter to you that I have you in my hands?

ANTIGONE
What more can you do to me, since you have me, than
kill me?

KREON
Nothing more. But having this, I have all.

ANTIGONE
What are you waiting for? I don't like
what you're saying and I won't like what you're going to say.
And I know you don't like me either.
Though there are those who do, because of what I did.

KREON
So you think there are others who see things as you do?

ANTIGONE
They see it too and they are moved by it.

KREON
Aren't you ashamed to claim their support without asking?

ANTIGONE
There's nothing wrong in honoring my brother.

KREON
But the one who died for his country was also your brother.

ANTIGONE
Yes. Both were my brothers. We are all of one family.

KREON
And the coward? Do you love him as much as the other?

KREON
He who was not your slave is dearer to me than a brother.

KREON
Of course, if good and evil are the same as one another.

ANTIGONE
The things are not the same: to die for you or to die for one's country.

KREON
Wasn't there a war?

ANTIGONE
Yes. Your war.

KREON
Not the country's?

ANTIGONE
A strange country. It wasn't enough for you
to rule over the brothers in their own city.
How beautiful Thebes was when we lived
under the trees, in peace and unafraid. But you
had to drag them all the way to Argos, so you could rule
over them there too. And you turned one of them into the
butcher of peaceful Argos. But the scared one
you lay out to feed the vultures and frighten his loved ones.

KREON
I advise you to say nothing. Don't say anything
to defend her. If you know what's good for you.

ANTIGONE
But I will appeal to you, for if you help me in my trouble
it will help you later. The man who's after power is like
the thirsty man who drinks salt-water; he can't hold it in,
but he has to have more. Yesterday it was my brother. Today it is I.

KREON
I am waiting
to see who stands by you.

ANTIGONE (*Since the Elders are silent*)
And you take it and let him shut you up.
It will be remembered.

KREON
She's keeping accounts!
Dissension. That's what she wants under the Theban roof.

ANTIGONE
You who cry for unity live by conflict.

KREON
I live by conflict here and on the Argive battlefield.

ANTIGONE
That's right. That's how it is. Anyone who uses violence
against his enemy will turn and use violence against his own people.

KREON
It seems the dear girl wouldn't grudge me to the vultures.
And what if Thebes fell, through our conflict,
to be devoured by the invaders?

ANTIGONE
The men in power always threaten us with the fall of The State.
It will fall by dissension, devoured by the invaders;
and so we give in to you, and give you our power, and bow down;
and, because of this weakness, the city falls and is devoured by the invaders.

KREON
Are you accusing *me* of throwing the city away to be devoured by the enemy?

ANTIGONE
The city threw herself away by bowing down before you.

because when a man bows down he can't see what's coming at him.
He only sees the earth—and ooh! she will get him.

KREON
Insult the whole earth, you monster, insult your country!

ANTIGONE
Wrong. Earth is an ordeal. But my country is not only the earth, or the house built by sweat that stands
helplessly in the path of the fire, not a place
where I can't hold my head up. I claim that's not my country.

KREON
Does it claim and not protect you?
Your country no longer claims you as her own,
but throws you out like the polluting filth that dirties all it touches.

ANTIGONE
Who throws me out? There are less in the city
since you rule it. And there will be still less.
Why do you come alone? You left with many.

KREON
Who's missing?

ANTIGONE
Where are the youngsters? The men? Aren't they coming back?

KREON
How she lies! Everyone knows they stayed behind
only to clear the battlefields of the last weapons.

ANTIGONE
And to do your last mischief
and become a horror, till their own fathers
wouldn't recognize them when
they are finally killed like beasts of prey.

KREON
She's insulting the dead!

ANTIGONE
How stupid you are! I'm in no mood
for winning arguments.

KREON
When have I ever concealed the sacrifice made for
the victory? 467a

THE ELDERS
Pity her. Don't hold her words against her.
But you in your ravings, don't let your tragedy make
you
disparage Thebes' glorious victory.

KREON
But she doesn't want the people of Thebes to live in
the houses of Argos. She'd rather 470
see Thebes destroyed.

ANTIGONE
We would sit more safely
in the ruins of our own city, than with you
in the enemies' houses.

KREON
There, she said it! You heard it!
She breaks every law, knows no limits, like a guest
reluctant to leave, who insolently
tampers with his luggage.

ANTIGONE
I only took what is mine. And I had to steal that. 480

KREON
You see as far as your nose. But you don't see
The State's divine order.

ANTIGONE
It may well be divine, but I'd rather
that it were human, Kreon, son of Menokeus.

KREON
Get out. You were always our enemy and even in hell
you shall be so;
like the mangled one, you shall be hated even in
hell, you nothing.

ANTIGONE
Who knows what the customs are down there?

KREON
The enemy, even when dead, does not become a
friend.

ANTIGONE
Of course he does. I don't live to hate, but to love.

KREON
Then go to hell, if you want to love, 490
and love down there. Under my rule,
your kind don't live long.
(*Enter* ISMENE)

THE ELDERS
But now Ismene comes,
the sweet one, who is for peace.
Her face is washed
with tears and flushed with pain.

KREON
Yes! You! You stay inside. Get home. I have
brought up two monsters. A pair of snakes.
Come, out with it.
Did you take part at the grave, or are you innocent? 500

ISMENE
I did it. If my sister will accept me.
I took part too, and I accept my guilt.

ANTIGONE
But your sister won't let you.
She didn't want to. I didn't take her with me.

KREON
Fight it out! I don't bicker over small things.

"Before the Law" by Franz Kafka

BEFORE THE LAW stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly, later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearlong contemplation of the doorkeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness he is now aware t of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper; "you are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."

Barbara Adams

Thieves

Swift as crafty Hermes,
Nimble fingers beneath a scarf
Pick £50 from my backpack.
"Stop, thief!" I yell at a tiny shade.

Her little sister by her side,
Nosey as Pandora,
Eyes each trick and treasure,
Her fingers itching to learn the trade.

A woman constable frisks them,
Children from nowhere,
Illiterate, mute, wise as cats
Roaming untamed in classic ruins.

Gypsy kids—no name or address—can't be jailed.
Instead, labeled and
Banned forever (so it's said)
From the British Museum.

The caryatids on the Elgin Marbles
Stare blindly from the walls,
Safe from thieves since 1816,
Looted from Athens by the British.

The next day, security finds my £50
Inside a book on stolen art
The gypsies know by heart
But will never read.

The United States Constitution:
Preamble, Article III, Bill of Rights, Fourteenth Amendment

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article III

Section 1
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3
Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Bill of Rights

Amendment 1
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 2
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 3
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE CONSTITUTION

***[Preamble]** WE THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.

ARTICLE I

BILL OF RIGHTS

[Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases]

Section 1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959; November 6, 2001.)**

[Trial by jury; how waived]

§2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Freedom of worship; religious liberty]

§3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 6, 2001.)

[Habeas corpus]

§4. The privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Bail; fines; punishments; detention of witnesses]

§5. Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal]

§6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959; November 6, 1973; November 6, 2001.)

[Compensation for taking private property; private roads; drainage of agricultural lands]

§7. (a) Private property shall not be taken for public use without just compensation.

(c) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefitted.

(d) The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefitted thereby; but no special laws shall be enacted for such purposes. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Subdivision (e) re-

*Section headings are enclosed in brackets throughout the constitution to indicate that they are not a part of the official text.

**Except where otherwise indicated, the section was re-enacted without change by the Constitutional Convention of 1938 and readopted by vote of the people November 8, 1938.

pealed by vote of the people November 5, 1963. Subdivision (b) repealed by vote of the people November 3, 1964.)

[Freedom of speech and press; criminal prosecutions for libel]

§8. Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. (Amended by vote of the people November 6, 2001.)

[Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent; pari-mutual betting on horse races permitted; games of chance, bingo or lotto authorized under certain restrictions]

§9. 1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutual betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section. (Amendment approved by vote of the people November 7, 1939; further amended by vote of the people November 5, 1957; November 8, 1966; November 4, 1975; November 6, 1984; November 6, 2001.)

[Section 10 which dealt with ownership of lands, yellowtail tenures and escheat was repealed by amendment approved by vote of the people November 6, 1962]

[Equal protection of laws; discrimination in civil rights prohibited]

§11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Security against unreasonable searches, seizures and interceptions]

§12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Section 13 which dealt with purchase of lands of Indians was repealed by amendment approved by vote of the people November 6, 1962]

[Common law and acts of the colonial and state legislatures]

§14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated. (Formerly §16. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Section 15 which dealt with certain grants of lands and of charters made by the king of Great Britain and the state and obligations and contracts not to be impaired was repealed by amendment approved by vote of the people November 6, 1962]

[Damages for injuries causing death]

§16. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable

shall not be subject to any statutory limitation. (Formerly §18. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Labor not a commodity; hours and wages in public work; right to organize and bargain collectively]

§17. Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

No laborer, worker or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Workers' compensation]

§18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or herself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his or her employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Formerly §19. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

ARTICLE II

SUFFRAGE

[Qualifications of voters]

Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 2, 1943; November 6, 1945; November 6, 1961; November 8, 1966; November 7, 1995.)

[Absentee voting]

§2. The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes. (Formerly §1-a. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 4, 1947; November 8, 1955; November 5, 1963.)

[Persons excluded from the right of suffrage]

§3. No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his or her vote, shall swear or affirm before such officers that he or she has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime. (Formerly §2. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Certain occupations and conditions not to affect residence]

§4. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison. (Formerly §3. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Registration and election laws to be passed]

§5. Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. (Formerly §4. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 1951; further amended by vote of the people November 8, 1955; November 8, 1966; November 7, 1995.)

[Permanent registration]

§6. The legislature may provide by law for a system or systems of registration whereby upon personal application a voter may be registered and his or her registration continued so long as he or she shall remain qualified to vote from an address within the jurisdiction of the board with which such voter is registered. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 7, 1995; November 6, 2001.)

tive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he or she has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he or she has received one appointment, either original entrance or promotion, from an eligible list on which he or she was allowed the additional credit granted by this section. (Formerly §6. Repealed and new section approved by vote of the people November 8, 1949; further amended by vote of the people November 3, 1964; November 3, 1987; November 4, 1997; November 6, 2001; November 4, 2008.)

[Membership in retirement systems; benefits not to be diminished nor impaired]

§7. After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

ARTICLE VI*

JUDICIARY

[Unified court system; organization; process]

Section 1. a. There shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court, as hereinafter provided. The legislature shall establish in and for the city of New York, as part of the unified court system for the state, a single, city-wide court of civil jurisdiction and a single, city-wide court of criminal jurisdiction, as hereinafter provided, and may upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The unified court system for the state shall also include the district, town, city and village courts outside the city of New York, as hereinafter provided.

b. The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record.

c. All processes, warrants and other mandates of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court may be served and executed in any part of the state. All processes, warrants and other mandates of the courts or court of civil and criminal jurisdiction of the city of New York may, subject to such limitation as may be prescribed by the legislature, be served and executed in any part of the state. The legislature may provide that processes, warrants and other mandates of the district court may be served and executed in any part of the state and that processes, warrants and other mandates of town, village and city courts outside the city of New York may be served and executed in any part of the county in which such courts are located or in any part of any adjoining county.

[Court of appeals; organization; designations; vacancies, how filled; commission on judicial nomination]

§2. a. The court of appeals is continued. It shall consist of the chief judge and the six elected associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, and such justices of the supreme court as may be designated for service in said court as hereinafter provided. The official terms of the chief judge and the six associate judges shall be fourteen years.

Five members of the court shall constitute a quorum, and the concurrence of four shall be necessary to a decision; but no more than seven judges shall sit in any case. In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act. The court shall have power to appoint and to remove its clerk. The powers and jurisdiction of the court shall not be suspended for want of appointment when the number of judges is sufficient to constitute a quorum.

b. Whenever and as often as the court of appeals shall certify to the governor that the court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate such number of justices of the supreme court as may be so certified to be necessary, but not more than four, to serve as associate judges of the court of appeals. The justices so designated shall be relieved, while so serving, from their duties as justices of the supreme court, and shall serve as associate judges of the court of appeals until the court shall certify that the need for the services of any such justices no longer exists, whereupon they shall return to the supreme court. The governor may fill vacancies among such designated judges. No such justices shall serve as associate judge of the court of appeals except while holding the office of justice of the supreme court. The designation of a justice of the supreme court as an associate judge of the court of appeals shall not be deemed to affect his or her existing office any longer than until the expiration of his or her designation as such associate judge, nor to create a vacancy.

c. There shall be a commission on judicial nomination to evaluate the qualifications of candidates for appointment to the court of appeals and to prepare a written report and recommend to the governor those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office. The legislature shall provide by law for the organization and procedure of the judicial nominating commission.

d. (l) The commission on judicial nomination shall consist of twelve members of whom four shall be appointed by the governor, four by the chief judge of the court of appeals, and one each by the speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly. Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. No member of the commission shall hold or have held any judicial office or hold any elected public office for which he or she receives compensation during his or her period of service, except that the governor and the chief judge may each appoint no more than one former judge or justice of the unified court system to such commission. No member of the commission shall hold any office in any political party. No member of the judicial nominating commission shall be eligible for appointment to judicial office in any court of the state during the member's period of service or within one year thereafter.

(2) The members first appointed by the governor shall have respectively one, two, three and four year terms as the governor shall designate. The members first appointed by the chief judge of the court of appeals shall have respectively one, two, three and four year terms as the chief judge shall designate. The member first appointed by the temporary president of the senate shall have a one-year term. The member first appointed by the minority leader of the senate shall have a two-year term. The member first appointed by the speaker of the assembly shall have a four-year term. The member first appointed by the minority leader of the assembly shall have a three-year term. Each subsequent appointment shall be for a term of four years.

(3) The commission shall designate one of their number to serve as chairperson.

(4) The commission shall consider the qualifications of candidates for appointment to the offices of judge and chief judge of the court of appeals and, whenever a vacancy in those offices occurs, shall prepare a written report and recommend to the governor persons who are well qualified for those judicial offices.

e. The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission, a person to fill the office of chief judge or associate judge, as the case may be, whenever a vacancy occurs in the court of appeals; provided, however, that no person may be appointed a judge of the court of appeals unless such person is a resident of the state and has been admitted to the practice of law in this state for at least ten years. The governor shall transmit to the senate the written report of the commission on judicial nomination relating to the nominee.

f. When a vacancy occurs in the office of chief judge or associate judge of the court of appeals and the senate is not in session to give its advice and consent to an appointment to fill the vacancy, the governor shall fill the vacancy by interim appointment upon the recommendation of a commission on judicial nomination as provided in this section. An interim appointment shall continue until the senate shall pass upon the governor's selection. If the senate confirms an appointment, the judge shall serve a term as provided in subdivision a of this section commencing from the date of his or her interim appointment. If the senate rejects an appointment, a vacancy in the office shall occur sixty days after such rejection. If an interim appointment to the court of appeals be made from among the justices of the supreme court or the appellate divisions thereof, that appointment shall not affect the justice's existing office, nor create a vacancy in the supreme court, or the appellate division thereof, unless such appointment is confirmed by the senate and the appointee shall assume such office. If an interim appointment of chief judge of the court of appeals be made from among the associate judges, an interim appointment of associate judge shall be made in like manner; in such case, the appointment as chief judge shall not affect the existing office of associate judge, unless such appointment as chief judge is confirmed by the senate and the appointee shall assume such office.

g. The provisions of subdivisions c, d, e and f of this section shall not apply to temporary designations or assignments of judges or justices. (Subdivision a amended, subdivision c repealed and new subdivisions c through g added by vote of the people November 8, 1977; further amended by vote of the people November 6, 2001.)

[Court of appeals; jurisdiction]

§3. a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him or her.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law

*New article adopted by vote of the people November 7, 1961; repealed and replaced former article adopted November 3, 1925, as amended.

certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York. (Paragraph (9) added by vote of the people November 5, 1985; further amended by vote of the people November 6, 2001.)

[Judicial departments; appellate divisions, how constituted; governor to designate justices; temporary assignments; jurisdiction]

§4. a. The state shall be divided into four judicial departments. The first department shall consist of the counties within the first judicial district of the state. The second department shall consist of the counties within the second, ninth, tenth and eleventh judicial districts of the state. The third department shall consist of the counties within the third, fourth and sixth judicial districts of the state. The fourth department shall consist of the counties within the fifth, seventh and eighth judicial districts of the state. Each department shall be bounded by the lines of judicial districts. Once every ten years the legislature may alter the boundaries of the judicial departments, but without changing the number thereof.

b. The appellate divisions of the supreme court are continued, and shall consist of seven justices of the supreme court in each of the first and second departments, and five justices in each of the other departments. In each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case.

c. The governor shall designate the presiding justice of each appellate division, who shall act as such during his or her term of office and shall be a resident of the department. The other justices of the appellate divisions shall be designated by the governor, from all the justices elected to the supreme court, for terms of five years or the unexpired portions of their respective terms of office, if less than five years.

d. The justices heretofore designated shall continue to sit in the appellate divisions until the terms of their respective designations shall expire. From time to time as the terms of the designations expire, or vacancies occur, the governor shall make new designations. The governor may also, on request of any appellate division, make temporary designations in case of the absence or inability to act of any justice in such appellate division, for service only during such absence or inability to act.

e. In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease.

f. A majority of the justices designated to sit in any appellate division shall at all times be residents of the department.

g. Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments, at a meeting called by the presiding justice of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination.

h. A justice of the appellate division of the supreme court in any department may be temporarily designated by the presiding justice of his or her department to the appellate division in another judicial department upon agreement by the presiding justices of the appellate division of the departments concerned.

i. In the event that the disqualification, absence or inability to act of justices in any appellate division prevents there being a quorum of justices qualified to hear an appeal, the justices qualified to hear the appeal may transfer it to the appellate division in another department for hearing and determination. In the event that the justices in any appellate division qualified to hear an appeal are equally divided, said justices may transfer the appeal to the appellate division in another department for hearing and determination. Each appellate division shall have power to appoint and remove its clerk.

j. No justice of the appellate division shall, within the department to which he or she may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division, except that the justice may decide causes or proceedings theretofore submitted, or hear and decide motions submitted by consent of counsel, but any such justice, when not actually engaged in performing the duties of such appellate justice in the department to which he or she is designated, may hold any term of the supreme court and exercise any of the powers of a justice of the supreme court in any judicial district in any other department of the state.

k. The appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article and such additional jurisdiction as may be prescribed by law, provided, however, that the right to appeal to the appellate divisions from a judgment or order which does not finally determine an action or special proceeding may be limited or conditioned by law. (Subdivision e amended by vote of the people November 8, 1977; further amended by vote of the people November 6, 2001.)

[Appeals from judgment or order; new trial]

§5. a. Upon an appeal from a judgment or an order, any appellate court to which the appeal is taken which is authorized to review such judgment or order may reverse or affirm, wholly or in part, or may modify the judgment or order appealed from, and each interlocutory judgment or intermediate or other order which it is authorized to review, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing.

b. If any appeal is taken to an appellate court which is not authorized to review such judgment or order, the court shall transfer the appeal to an appellate court which is authorized to review such judgment or order.

***[Judicial districts; how constituted; supreme court]**

§6. a. The state shall be divided into eleven judicial districts. The first judicial district shall consist of the counties of Bronx and New York. The second judicial district shall consist of the counties of Kings and Richmond. The third judicial district shall consist of the counties of Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan, and Ulster. The fourth judicial district shall consist of the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington. The fifth judicial district shall consist of the counties of Herkimer, Jefferson, Lewis, Oneida, Onondaga, and Oswego. The sixth judicial district shall consist of the counties of Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins. The seventh judicial district shall consist of the counties of Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates. The eighth judicial district shall consist of the counties of Allegany, Cattaraugus, Chautauqua,

*Chapter 1006, Laws of 1981 created the twelfth judicial district consisting of the county of Bronx, effective Jan. 1, 1983.

Erie, Genesee, Niagara, Orleans and Wyoming. The ninth judicial district shall consist of the counties of Dutchess, Orange, Putnam, Rockland and Westchester. The tenth judicial district shall consist of the counties of Nassau and Suffolk. The eleventh judicial district shall consist of the county of Queens.

b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.

c. The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the supreme court shall be fourteen years from and including the first day of January next after their election.

d. The supreme court is continued. It shall consist of the number of justices of the supreme court including the justices designated to the appellate divisions of the supreme court, judges of the county court of the counties of Bronx, Kings, Queens and Richmond and judges of the court of general sessions of the county of New York authorized by law on the thirty-first day of August next after the approval and ratification of this amendment by the people, all of whom shall be justices of the supreme court for the remainder of their terms. The legislature may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article.

e. The clerks of the several counties shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law.

[Supreme court; jurisdiction]

§7. a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.

b. If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts. (Subdivision b repealed and subdivision c relettered b by vote of the people November 8, 1977.)

[Appellate terms; composition; jurisdiction]

§8. a. The appellate division of the supreme court in each judicial department may establish an appellate term in and for such department or in and for a judicial district or districts or in and for a county or counties within such department. Such an appellate term shall be composed of not less than three nor more than five justices of the supreme court who shall be designated from time to time by the chief administrator of the courts with the approval of the presiding justice of the appropriate appellate division, and who shall be residents of the department or of the judicial district or districts as the case may be and the chief administrator of the courts shall designate the place or places where such appellate terms shall be held.

b. Any such appellate term may be discontinued and re-established as the appellate division of the supreme court in each department shall determine from time to time and any designation to service therein may be revoked by the chief administrator of the courts with the approval of the presiding justice of the appropriate appellate division.

c. In each appellate term no more than three justices assigned thereto shall sit in any action or proceeding. Two of such justices shall constitute a quorum and the concurrence of two shall be necessary to a decision.

d. If so directed by the appellate division of the supreme court establishing an appellate term, an appellate term shall have jurisdiction to hear and determine appeals now or hereafter authorized by law to be taken to the supreme court or to the appellate division other than appeals from the supreme court, a surrogate's court, the family court or appeals in criminal cases prosecuted by indictment or by information as provided in section six of article one.

e. As may be provided by law, an appellate term shall have jurisdiction to hear and determine appeals from the district court or a town, village or city court outside the city of New York. (Subdivisions a, b and d amended by vote of the people November 8, 1977.)

[Court of claims; jurisdiction]

§9. The court of claims is continued. It shall consist of the eight judges now authorized by law, but the legislature may increase such number and may reduce such number to six or seven. The judges shall be appointed by the governor by and with the advice and consent of the senate and their terms of office shall be nine years. The court shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide.

[County courts; judges]

§10. a. The county court is continued in each county outside the city of New York. There shall be at least one judge of the county court in each county and such number of additional judges in each county as may be provided by law. The judges shall be residents of the county and shall be chosen by the electors of the county.

b. The terms of the judges of the county court shall be ten years from and including the first day of January next after their election.

[County court; jurisdiction]

§11. a. The county court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such county court in the manner provided by law, except that actions and proceedings within the jurisdiction of the district court or a town, village or city court outside the city of New York may, as provided by law, be originated therein: actions and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of mechanics liens and liens on personal property where the amount sought to be recovered or the value of the property does not exceed twenty-five thousand dollars exclusive of interest and costs; over all crimes and other violations of law; over summary proceedings to recover possession of real property and to remove tenants therefrom; and over such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

b. The county court shall exercise such equity jurisdiction as may be provided by law and its jurisdiction to enter judgment upon a counterclaim for the recovery of money only shall be unlimited.

c. The county court shall have jurisdiction to hear and determine all appeals arising in the county in the following actions and proceedings: as of right, from a judgment or order of the district court or a town,

village or city court which finally determines an action or proceeding and, as may be provided by law, from a judgment or order of any such court which does not finally determine an action or proceeding. The legislature may provide, in accordance with the provisions of section eight of this article, that any or all of such appeals be taken to an appellate term of the supreme court instead of the county court.

d. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article. (Subdivision b repealed and subdivisions c, d and e relettered b, c and d by vote of the people November 8, 1977; subdivision a amended by vote of the people November 8, 1983.)

[Surrogate's courts; judges; jurisdiction]

§12. a. The surrogate's court is continued in each county in the state. There shall be at least one judge of the surrogate's court in each county and such number of additional judges of the surrogate's court as may be provided by law.

b. The judges of the surrogate's court shall be residents of the county and shall be chosen by the electors of the county.

c. The terms of the judges of the surrogate's court in the city of New York shall be fourteen years, and in other counties ten years, from and including the first day of January next after their election.

d. The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

e. The surrogate's court shall exercise such equity jurisdiction as may be provided by law.

f. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article.

[Family court; organization; jurisdiction]

§13. a. The family court of the state of New York is hereby established. It shall consist of at least one judge in each county outside the city of New York and such number of additional judges for such counties as may be provided by law. Within the city of New York it shall consist of such number of judges as may be provided by law. The judges of the family court within the city of New York shall be residents of such city and shall be appointed by the mayor of the city of New York for terms of ten years. The judges of the family court outside the city of New York, shall be chosen by the electors of the counties wherein they reside for terms of ten years.

b. The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court in the manner provided by law: (1) the protection, treatment, correction and commitment of those minors who are in need of the exercise of the authority of the court because of circumstances of neglect, delinquency or dependency, as the legislature may determine; (2) the custody of minors except for custody incidental to actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage; (3) the adoption of persons; (4) the support of dependents except for support incidental to actions and proceedings in this state for marital separation, divorce, annulment of marriage or dissolution of marriage; (5) the establishment of paternity; (6) proceedings for conciliation of spouses; and (7) as may be provided by law: the guardianship of the person of minors and, in conformity with the provisions of section seven of this article, crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household. Nothing in this section shall be construed to abridge the authority or jurisdiction of courts to appoint guardians in cases originating in those courts.

c. The family court shall also have jurisdiction to determine, with the same powers possessed by the supreme court, the following matters when referred to the family court from the supreme court: habeas corpus proceedings for the determination of the custody of minors; and in actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage, applications to fix temporary or permanent support and custody, or applications to enforce judgments and orders of support and of custody, or applications to modify judgments and orders of support and of custody which may be granted only upon the showing to the family court that there has been a subsequent change of circumstances and that modification is required.

d. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article. (Amended by vote of the people November 6, 1973.)

[Discharge of duties of more than one judicial office by same judicial officer]

§14. The legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and surrogate, or of county judge and judge of the family court, or of all three positions in any county.

[New York city; city-wide courts; jurisdiction]

§15. a. The legislature shall by law establish a single court of city-wide civil jurisdiction and a single court of city-wide criminal jurisdiction in and for the city of New York and the legislature may, upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The said city-wide courts shall consist of such number of judges as may be provided by law. The judges of the court of city-wide civil jurisdiction shall be residents of such city and shall be chosen for terms of ten years by the electors of the counties included within the city of New York from districts within such counties established by law. The judges of the court of city-wide criminal jurisdiction shall be residents of such city and shall be appointed for terms of ten years by the mayor of the city of New York.

b. The court of city-wide civil jurisdiction of the city of New York shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such court in the manner provided by law: actions and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of mechanics liens and liens on personal property where the amount sought to be recovered or the value of the property does not exceed twenty-five thousand dollars exclusive of interest and costs, or such smaller amount as may be fixed by law; over summary proceedings to recover possession of real property and to remove tenants therefrom and over such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law. The court of city-wide civil jurisdiction shall further exercise such equity jurisdiction as may be provided by law and its jurisdiction to enter judgment upon a counterclaim for the recovery of money only shall be unlimited.

c. The court of city-wide criminal jurisdiction of the city of New York shall have jurisdiction over crimes and other violations of law, other than those prosecuted by indictment, provided, however, that the legislature may grant to said court jurisdiction over misdemeanors prosecuted by indictment; and over such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

d. The provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this

article. (Subdivision b amended by vote of the people November 8, 1983; further amended by vote of the people November 7, 1995.)

[District courts; jurisdiction; judges]

§16. a. The district court of Nassau county may be continued under existing law and the legislature may, at the request of the board of supervisors or other elective governing body of any county outside the city of New York, establish the district court for the entire area of such county or for a portion of such county consisting of one or more cities, or one or more towns which are contiguous, or of a combination of such cities and such towns provided at least one of such cities is contiguous to one of such towns.

b. No law establishing the district court for an entire county shall become effective unless approved at a general election on the question of the approval of such law by a majority of the votes cast thereon by the electors within the area of any cities in the county considered as one unit and by a majority of the votes cast thereon by the electors within the area outside of cities in the county considered as one unit.

c. No law establishing the district court for a portion of a county shall become effective unless approved at a general election on the question of the approval of such law by a majority of the votes cast thereon by the electors within the area of any cities included in such portion of the county considered as one unit and by a majority of the votes cast thereon by the electors within the area outside of cities included in such portion of the county considered as one unit.

d. The district court shall have such jurisdiction as may be provided by law, but not in any respect greater than the jurisdiction of the courts for the city of New York as provided in section fifteen of this article, provided, however, that in actions and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of mechanics liens and liens on personal property, the amount sought to be recovered or the value of the property shall not exceed fifteen thousand dollars exclusive of interest and costs.

e. The legislature may create districts of the district court which shall consist of an entire county or of an area less than a county.

f. There shall be at least one judge of the district court for each district and such number of additional judges in each district as may be provided by law.

g. The judges of the district court shall be apportioned among the districts as may be provided by law, and to the extent practicable, in accordance with the population and the volume of judicial business.

h. The judges shall be residents of the district and shall be chosen by the electors of the district. Their terms shall be six years from and including the first day of January next after their election.

i. The legislature may regulate and discontinue the district court in any county or portion thereof. (Subdivision d amended by vote of the people November 8, 1983.)

[Town, village and city courts; jurisdiction; judges]

§17. a. Courts for towns, villages and cities outside the city of New York are continued and shall have the jurisdiction prescribed by the legislature but not in any respect greater than the jurisdiction of the district court as provided in section sixteen of this article.

b. The legislature may regulate such courts, establish uniform jurisdiction, practice and procedure for city courts outside the city of New York and may discontinue any village or city court outside the city of New York existing on the effective date of this article. The legislature may discontinue any town court existing on the effective date of this article only with the approval of a majority of the total votes cast at a general election on the question of a proposed discontinuance of the court in each such town affected thereby.

c. The legislature may abolish the legislative functions on town boards of justices of the peace and provide that town councilmen be elected in their stead.

d. The number of the judges of each of such town, village and city courts and the classification and duties of the judges shall be prescribed by the legislature. The terms, method of selection and method of filling vacancies for the judges of such courts shall be prescribed by the legislature, provided, however, that the justices of town courts shall be chosen by the electors of the town for terms of four years from and including the first day of January next after their election.

[Trial by jury; trial without jury; claims against state]

§18. a. Trial by jury is guaranteed as provided in article one of this constitution. The legislature may provide that in any court of original jurisdiction a jury shall be composed of six or of twelve persons and may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury, provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution.

b. The legislature may provide for the manner of trial of actions and proceedings involving claims against the state.

[Transfer of actions and proceedings]

§19. a. The supreme court may transfer any action or proceeding, except one over which it shall have exclusive jurisdiction which does not depend upon the monetary amount sought, to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties. As may be provided by law, the supreme court may transfer to itself any action or proceeding originated or pending in another court within the judicial department other than the court of claims upon a finding that such a transfer will promote the administration of justice.

b. The county court shall transfer to the supreme court or surrogate's court or family court any action or proceeding which has not been transferred to it from the supreme court or surrogate's court or family court and over which the county court has no jurisdiction. The county court may transfer any action or proceeding, except a criminal action or proceeding involving a felony prosecuted by indictment or an action or proceeding required by this article to be dealt with in the surrogate's court or family court, to any court, other than the supreme court, having jurisdiction of the subject matter within the county provided that such other court has jurisdiction over the classes of persons named as parties.

c. As may be provided by law, the supreme court or the county court may transfer to the county court any action or proceeding originated or pending in the district court or a town, village or city court outside the city of New York upon a finding that such a transfer will promote the administration of justice.

d. The surrogate's court shall transfer to the supreme court or the county court or the family court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the surrogate's court has no jurisdiction.

e. The family court shall transfer to the supreme court or the surrogate's court or the county court or the courts for the city of New York established pursuant to section fifteen of this article any action or proceeding which has not been transferred to it from any of said courts and over which the family court has no jurisdiction.

f. The courts for the city of New York established pursuant to section fifteen of this article shall transfer to the supreme court or the

surrogate's court or the family court any action or proceeding which has not been transferred to them from any of said courts and over which the said courts for the city of New York have no jurisdiction.

g. As may be provided by law, the supreme court shall transfer any action or proceeding to any other court having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties.

h. As may be provided by law, the county court, the surrogate's court, the family court and the courts for the city of New York established pursuant to section fifteen of this article may transfer any action or proceeding, other than one which has previously been transferred to it, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided that such other court has jurisdiction over the classes of persons named as parties.

i. As may be provided by law, the district court or a town, village or city court outside the city of New York may transfer any action or proceeding, other than one which has previously been transferred to it, to any court, other than the county court or the surrogate's court or the family court or the supreme court, having jurisdiction of the subject matter in the same or an adjoiningcounty provided that such other court has jurisdiction over the classes of persons named as parties.

j. Each court shall exercise jurisdiction over any action or proceeding transferred to it pursuant to this section.

k. The legislature may provide that the verdict or judgment in actions and proceedings so transferred shall not be subject to the limitation of monetary jurisdiction of the court to which the actions and proceedings are transferred if that limitation be lower than that of the court in which the actions and proceedings were originated.

[Judges and justices; qualifications; eligibility for other office or service; restrictions]

§20. a. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the court of appeals, justice of the supreme court, or judge of the court of claims unless he or she has been admitted to practice law in this state at least ten years. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the county court, surrogate's court, family court, a court for the city of New York established pursuant to section fifteen of this article, district court or city court outside the city of New York unless he or she has been admitted to practice law in this state at least five years or such greater number of years as the legislature may determine.

b. A judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York established pursuant to section fifteen of this article who is elected or appointed after the effective date of this article may not:

(1) hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the state of New York in which latter event the legislature may enact such legislation as it deems appropriate to provide for a temporary judge or justice to serve during the period of the absence of such judge or justice in the armed forces;

(2) be eligible to be a candidate for any public office other than judicial office or member of a constitutional convention, unless he or she resigns from judicial office; in the event a judge or justice does not so resign from judicial office within ten days after his or her acceptance of the nomination of such other office, his or her judicial office shall become vacant and the vacancy shall be filled in the manner provided in this article;

(3) hold any office or assume the duties or exercise the powers of any office of any political organization or be a member of any governing or executive agency thereof;

(4) engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his or her judicial duties.

Judges and justices of the courts specified in this subdivision shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.

c. Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York, other than such qualifications and restrictions specifically set forth in subdivision a of this section, shall be prescribed by the legislature, provided, however, that the legislature shall require a course of training and education to be completed by justices of town and village courts selected after the effective date of this article who have not been admitted to practice law in this state. Judges of such courts shall also be subject to such rules of conduct not inconsistent with laws as may be promulgated by the chief administrator of the courts with the approval of the court of appeals. (Amended by vote of the people November 8, 1977; November 6, 2001.)

[Vacancies; how filled]

§21. a. When a vacancy shall occur, otherwise than by expiration of term, in the office of justice of thesupreme court, of judge of the county court, of judge of the surrogate's court or judge of the family court outside the city of New York, it shall be filled for a full term at the next general election held not less than three months after such vacancy occurs and until the vacancy shall be so filled, the governor by and with the advice and consent of the senate, ifthe senate shall be in session, or, if the senate not be in session, the governor may fill such vacancy by an appointment which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

b. When a vacancy shall occur, otherwise than by expiration of term, in the office of judge of the court of claims, it shall be filled for the unexpired term in the same manner as an original appointment.

c. When a vacancy shall occur, otherwise than by expiration of term, in the office of judge elected to the city-wide court of civil jurisdiction of the city of New York, it shall be filled for a full term at the next general election held not less than three months after such vacancy occurs and, until the vacancy shall be so filled, the mayor of the city of New York may fill such vacancy by an appointment which shall continue until and including the last day of December next after the election at which the vacancy shall be filled. When a vacancy shall occur, otherwise than by expiration of term on the last day of December of any year, in the office of judge appointed to the family court within the city of New York or the city-wide court of criminal jurisdiction of the city of New York, the mayor of the city of New York shall fill such vacancy by an appointment for the unexpired term.

d. When a vacancy shall occur, otherwise than by expiration of term, in the office of judge of the district court, it shall be filled for a full term at the next general election held not less than three months after such vacancy occurs and, until the vacancy shall be so filled, the board of supervisors or the supervisor or supervisors of the affected district if such district consists of a portion of a county or, in counties

with an elected county executive officer, such county executive officer may, subject to confirmation by the board of supervisors or the supervisor or supervisors of such district, fill such vacancy by an appointment which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

[Commission on judicial conduct; composition; organization and procedure; review by court of appeals; discipline of judges or justices]

§22. a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office,persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his or her judicial duties. The commission shall transmit an* such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (l) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as the governor shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as the governor shall designate. The person first appointed by the temporary president of the senate shall have a one-year term. The person first appointed by the minority leader of the senate shall have a two-year term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him or her for such appointment. Membership shall also terminate if a member attains a position which would have rendered him or her ineligible for appointment at the time of appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivisiona of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his or her office while there is pending a determination by the commission on judicial conduct for his or her removal or retirement, or while the judge or justice is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, the judge or justice shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeals shall receive his or her judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that the judge or justice shall be paid his or her salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law. (Former §22 repealed and new §22 added by vote of the people November 8, 1977; amended by vote of the people November 6, 2001.)

[Removal of judges]

§23. a. Judges of the court of appealsand justices of the supreme court may be removed by concurrent resolution of both houses of the

* So in original. ("an should be "any".)

legislature, if two-thirds of all the members elected to each house concur therein.

b. Judges of the court of claims, the county court, the surrogate's court, the family court, the courts for the city of New York established pursuant to section fifteen of this article, the district court and such other courts as the legislature may determine may be removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein.

c. No judge or justice shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he or she shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal. (Amended by vote of the people November 6, 2001.)

[Court for trial of impeachments; judgment]

§24. The assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court. No judicial officer shall exercise his or her office after articles of impeachment against him or her shall have been preferred to the senate, until he or she shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law. (Amended by vote of the people November 6, 2001.)

[Judges and justices; compensation; retirement]

§25. a. The compensation of a judge of the court of appeals, a justice of the supreme court, a judge of the court of claims, a judge of the county court, a judge of the surrogate's court, a judge of the family court, a judge of a court for the city of New York established pursuant to section fifteen of this article, a judge of the district court or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed. Any judge or justice of a court abolished by section thirty-five of this article, who pursuant to that section becomes a judge or justice of a court established or continued by this article, shall receive without interruption or diminution for the remainder of the term for which he or she was elected or appointed to the abolished court the compensation he or she had been receiving upon the effective date of this article together with any additional compensation that may be prescribed by law.

b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his or her residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his or her reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of subdivision d of section six of this article.

c. The provisions of this section shall also be applicable to any judge or justice who has not reached the age of seventy-six and to whom it would otherwise have been applicable but for the fact that he or she reached the age of seventy and retired before the effective date of this article. (Subdivision b amended by vote of the people November 8, 1966; further amended by vote of the people November 6, 2001.)

[Temporary assignments of judges and justices]

§26. a. A justice of the supreme court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in any judicial district or to the court of claims. A justice of the supreme court in the city of New York may be temporarily assigned to the family court in the city of New York or to the surrogate's court in any county within the city of New York when required to dispose of the business of such court.

b. A judge of the court of claims may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in any judicial district.

c. A judge of the county court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to the surrogate's court in any county outside the city of New York or to a court for the city of New York established pursuant to section fifteen of this article.

d. A judge of the surrogate's court in any county within the city of New York may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence.

e. A judge of the surrogate's court in any county outside the city of New York may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to a court for the city of New York established pursuant to section fifteen of this article.

f. A judge of the family court may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to the surrogate's court in any county outside of the city of New York or to a court for the city of New York established pursuant to section fifteen of this article.

g. A judge of a court for the city of New York established pursuant to section fifteen of this article may perform the duties of office or hold court in any county and may be temporarily assigned to the supreme court in the judicial department of his or her residence or to the county court or the family court in any county or to the other court for the city of New York established pursuant to section fifteen of this article.

h. A judge of the district court in any county may perform the duties of office or hold court in any county and may be temporarily assigned to the county court in the judicial department of his or her residence or

to a court for the city of New York established pursuant to section fifteen of this article or to the district court in any county.

i. Temporary assignments of all the foregoing judges or justices listed in this section, and of judges of the city courts pursuant to paragraph two of subdivision j of this section, shall be made by the chief administrator of the courts in accordance with standards and administrative policies established pursuant to section twenty-eight of this article.

j. (1) The legislature may provide for temporary assignments within the county of residence or any adjoining county, of judges of town, village or city courts outside the city of New York.

(2) In addition to any temporary assignments to which a judge of a city court may be subject pursuant to paragraph one of this subdivision, such judge also may be temporarily assigned by the chief administrator of the courts to the county court, the family court or the district court within his or her county of residence or any adjoining county provided he or she is not permitted to practice law.

k. While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and jurisdiction of a judge or justice of the court to which assigned. After the expiration of any temporary assignment, as provided in this section, the judge or justice assigned shall have all the powers, duties and jurisdiction of a judge or justice of the court to which he or she was assigned with respect to matters pending before him or her during the term of such temporary assignment. (Subdivision i amended by vote of the people November 8, 1977; subdivision f amended by vote of the people November 8, 1983; further amended by vote of the people November 6, 2001.)

[Supreme court; extraordinary terms]

§27. The governor may, when in his or her opinion the public interest requires, appoint extraordinary terms of the supreme court. The governor shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his or her place to hold the term. (Amended by vote of the people November 6, 2001.)

[Administrative supervision of court system]

§28. a. The chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system. There shall be an administrative board of the courts which shall consist of the chief judge of the court of appeals as chairperson and the presiding justice of the appellate division of the supreme court of each judicial department. The chief judge shall, with the advice and consent of the administrative board of the courts, appoint a chief administrator of the courts who shall serve at the pleasure of the chief judge.

b. The chief administrator, on behalf of the chief judge, shall supervise the administration and operation of the unified court system. In the exercise of such responsibility, the chief administrator of the courts shall have such powers and duties as may be delegated to him or her by the chief judge and such additional powers and duties as may be provided by law.

c. The chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application throughout the state, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals. (Formerly §28. Repealed and new §28 added by vote of the people November 8, 1977; amended by vote of the people November 6, 2001.)

[Expenses of courts]

§29. a. The legislature shall provide for the allocation of the cost of operating and maintaining the court of appeals, the appellate division of the supreme court in each judicial department, the supreme court, the court of claims, the county court, the surrogate's court, the family court, the courts for the city of New York established pursuant to section fifteen of this article and the district court, among the state, the counties, the city of New York and other political subdivisions.

b. The legislature shall provide for the submission of the itemized estimates of the annual financial needs of the courts referred to in subdivision a of this section to the chief administrator of the courts to be forwarded to the appropriating bodies with recommendations and comment.

c. Insofar as the expense of the courts is borne by the state or paid by the state in the first instance, the final determination of the itemized estimates of the annual financial needs of the courts shall be made by the legislature and the governor in accordance with articles four and seven of this constitution.

d. Insofar as the expense of the courts is not paid by the state in the first instance and is borne by counties, the city of New York or other political subdivisions, the final determination of the itemized estimates of the annual financial needs of the courts shall be made by the appropriate governing bodies of such counties, the city of New York or other political subdivisions. (Subdivision b amended by vote of the people November 8, 1977.)

[Legislative power over jurisdiction and proceedings; delegation of power to regulate practice and procedure]

§30. The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him or her with the advice and consent of the administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules. (Amended by vote of the people November 8, 1977.)

[Inapplicability of article to certain courts]

§31. This article does not apply to the peacemakers courts or other Indian courts, the existence and operation of which shall continue as may be provided by law.

[Custodians of children to be of same religious persuasion]

§32. When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.

[Existing laws; duty of legislature to implement article]

§33. Existing provisions of law not inconsistent with this article shall continue in force until repealed, amended, modified or superseded in accordance with the provisions of this article. The legislature shall enact appropriate laws to carry into effect the purposes and provisions of this article, and may, for the purpose of implementing, supplementing or

clarifying any of its provisions, enact any laws, not inconsistent with the provisions of this article, necessary or desirable in promoting the objectives of this article.

[Pending appeals, actions and proceedings; preservation of existing terms of office of judges and justices]

§34. a. The court of appeals, the appellate division of the supreme court, the supreme court, the court of claims, the county court in counties outside the city of New York, the surrogate's court and the district court of Nassau county shall hear and determine all appeals, actions and proceedings pending therein on the effective date of this article except that the appellate division of the supreme court in the first and second judicial departments or the appellate term in such departments, if so directed by the appropriate appellate division of the supreme court, shall hear and determine all appeals pending in the appellate terms of the supreme court in the first and second judicial departments and in the court of special sessions of the city of New York and except that the county court or an appellate term shall, as may be provided by law, hear and determine all appeals pending in the county court or the supreme court other than an appellate term. Further appeal from a decision of the county court, the appellate term or the appellate division of the supreme court, rendered on or after the effective date of this article, shall be governed by the provisions of this article.

b. The justices of the supreme court in office on the effective date of this article shall hold their offices as justices of the supreme court until the expiration of their respective terms.

c. The judges of the court of claims in office on the effective date of this article shall hold their offices as judges of the court of claims until the expiration of their respective terms.

d. The surrogates, and county judges outside the city of New York, including the special county judges of the counties of Erie and Suffolk, in office on the effective date of this article shall hold office as judges of the surrogate's court or county judge, respectively, of such counties until the expiration of their respective terms.

e. The judges of the district court of Nassau county in office on the effective date of this article shall hold their offices until the expiration of their respective terms.

f. Judges of courts for towns, villages and cities outside the city of New York in office on the effective date of this article shall hold their offices until the expiration of their respective terms.

[Certain courts abolished; transfer of judges, court personnel, and actions and proceedings to other courts]

§35. a. The children's courts, the court of general sessions of the county of New York, the county courts of the counties of Bronx, Kings, Queens and Richmond, the city court of the city of New York, the domestic relations court of the city of New York, the municipal court of the city of New York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York are abolished from and after the effective date of this article and thereupon the seals, records, papers and documents of or belonging to such courts shall, unless otherwise provided by law, be deposited in the offices of the clerks of the several counties in which these courts now exist.

b. The judges of the county court of the counties of Bronx, Kings, Queens and Richmond and the judges of the court of general sessions of the county of New York in office on the effective date of this article shall, for the remainder of the terms for which they were elected or appointed, be justices of the supreme court in and for the judicial district which includes the county in which they resided on that date. The salaries of such justices shall be the same as the salaries of the other justices of the supreme court residing in the same judicial district and shall be paid in the same manner. All actions and proceedings pending in the county court of the counties of Bronx, Kings, Queens and Richmond and in the court of general sessions of the county of New York on the effective date of this article shall be transferred to the supreme court in the county in which the action or proceedings was pending, or otherwise as may be provided by law.

c. The legislature shall provide by law that the justices of the city court of the city of New York and the justices of the municipal court of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was elected or appointed, be judges of the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article and for such district as the legislature may determine.

d. The legislature shall provide by law that the justices of the court of special sessions and the magistrates of the city magistrates' courts of the city of New York in office on the date such courts are abolished shall, for the remainder of the term for which each was appointed, be judges of the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen provided, however, that each term shall expire on the last day of the year in which it would have expired except for the provisions of this article.

e. All actions and proceedings pending in the city court of the city of New York and the municipal court in the city of New York on the date such courts are abolished shall be transferred to the city-wide court of civil jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

f. All actions and proceedings pending in the court of special sessions of the city of New York and the city magistrates' courts of the city of New York on the date such courts are abolished shall be transferred to the city-wide court of criminal jurisdiction of the city of New York established pursuant to section fifteen of this article or as otherwise provided by law.

g. The special county judges of the counties of Broome, Chautauqua, Jefferson, Oneida and Rockland and the judges of the children's courts in all counties outside the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were elected or appointed, be judges of the family court in and for the county in which they hold office. Except as otherwise provided in this section, the office of special county judge and the office of special surrogate is abolished from and after the effective date of this article and the terms of the persons holding such offices shall terminate on that date.

h. All actions and proceedings pending in the children's courts in counties outside the city of New York on the effective date of this article shall be transferred to the family court in the respective counties.

i. The justices of the domestic relations court of the city of New York in office on the effective date of this article shall, for the remainder of the terms for which they were appointed, be judges of the family court within the city of New York.

j. All actions and proceedings pending in the domestic relations court of the city of New York on the effective date of this article shall be transferred to the family court in the city of New York.

k. The office of official referee is abolished, provided, however, that official referees in office on the effective date of this article shall, for the remainder of the terms for which they were appointed or certified, be official referees of the court in which appointed or certified or the successor court, as the case may be. At the expiration of the term of any official referee, his or her office shall be abolished and thereupon such former official referee shall be subject to the relevant provisions of section twenty-five of this article.

l. As may be provided by law, the non-judicial personnel of the courts affected by this article in office on the effective date of this article shall, to the extent practicable, be continued without diminution

of salaries and with the same status and rights in the courts established or continued by this article; and especially skilled, experienced and trained personnel shall, to the extent practicable, be assigned to like functions in the courts which exercise the jurisdiction formerly exercised by the courts in which they were employed. In the event that the adoption of this article shall require or make possible a reduction in the number of non-judicial personnel, or in the number of certain categories of such personnel, such reduction shall be made, to the extent practicable, by provision that the death, resignation, removal or retirement of an employee shall not create a vacancy until the reduced number of personnel has been reached.

m. In the event that a judgment or order was entered before the effective date of this article and a right of appeal existed and notice of appeal therefrom is filed after the effective date of this article, such appeal shall be taken from the supreme court, the county courts, the surrogate's courts, the children's courts, the court of general sessions of the county of New York and the domestic relations court of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located; from the court of claims to the appellate division of the supreme court in the third judicial department, except for those claims which arose in the fourth judicial department, in which case the appeal shall be to the appellate division of the supreme court in the fourth judicial department; from the city court of the city of New York, the municipal court of the city of New York, the court of special sessions of the city of New York and the city magistrates' courts of the city of New York to the appellate division of the supreme court in the judicial department in which such court was located, provided, however, that such appellate division of the supreme court may transfer any such appeal to an appellate term, if such appellate term be established; and from the district court, town, village and city courts outside the city of New York to the county court in the county in which such court was located, provided, however, that the legislature may require the transfer of any such appeal to an appellate term, if such appellate term be established. Further appeal from a decision of a county court or an appellate term or the appellate division of the supreme court shall be governed by the provisions of this article. However, if in any action or proceeding decided prior to the effective date of this article, a party had a right of direct appeal from a court of original jurisdiction to the court of appeals, such appeal may be taken directly to the court of appeals.

n. In the event that an appeal was decided before the effective date of this article and a further appeal could be taken as of right and notice of appeal therefrom is filed after the effective date of this article, such appeal may be taken from the appellate division of the supreme court to the court of appeals and from any other court to the appellate division of the supreme court. Further appeal from a decision of the appellate division of the supreme court shall be governed by the provisions of this article. If a further appeal could not be taken as of right, such appeal shall be governed by the provisions of this article. (Amended by vote of the people November 6, 2001.)

[Pending civil and criminal cases]

§36. No civil or criminal appeal, action or proceeding pending before any court or any judge or justice on the effective date of this article shall abate but such appeal, action or proceeding so pending shall be continued in the courts as provided in this article and, for the purposes of the disposition of such actions or proceedings only, the jurisdiction of any court to which any such action or proceeding is transferred by this article shall be coextensive with the jurisdiction of the former court from which the action or proceeding was transferred. Except to the extent inconsistent with the provisions of this article, subsequent proceedings in such appeal, action or proceeding shall be conducted in accordance with the laws in force on the effective date of this article until superseded in the manner authorized by law.

[Effective date of certain amendments to articles VI and VII]

§36-a. The amendments to the provisions of sections two, four, seven, eight, eleven, twenty, twenty-two, twenty-six, twenty-eight, twenty-nine and thirty of article six and to the provisions of section one of article seven, as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-six and entitled "Concurrent Resolution of the Senate and Assembly proposing amendments to articles six and seven of the constitution, in relation to the manner of selecting judges of the court of appeals, creation of a commission on judicial conduct and administration of the unified court system, providing for the effectiveness of such amendments and the repeal of subdivision c of section two, subdivision b of section seven, subdivision b of section eleven, section twenty-two and section twenty-eight of article six thereof relating thereto", shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative and the repeal of subdivision c of section two, section twenty-two and section twenty-eight shall not become effective until the first day of April next thereafter which date shall be deemed the effective date of such amendments and the chief judge and the associate judges of the court of appeals in office on such effective date shall hold their offices until the expiration of their respective terms. Upon a vacancy in the office of any such judge, such vacancy shall be filled in the manner provided in section two of article six. (New. Added by vote of the people November 8, 1977.)

[No section 36-b]

[Effective date of certain amendments to article VI, section 22]

§36-c. The amendments to the provisions of section twenty-two of article six as first proposed by a concurrent resolution passed by the legislature in the year nineteen hundred seventy-four and entitled "Concurrent Resolution of the Senate and Assembly proposing an amendment to section twenty-two of article six and adding section thirty-six-c to such article of the constitution, in relation to the powers of and reconstituting the court on the judiciary and creating a commission on judicial conduct", shall become a part of the constitution on the first day of January next after the approval and ratification of the amendments proposed by such concurrent resolution by the people but the provisions thereof shall not become operative until the first day of September next thereafter which date shall be deemed the effective date of such amendments. (New. Added by vote of the people November 4, 1975.)

[Effective date of article]

§37. This article shall become a part of the constitution on the first day of January next after the approval and ratification of this amendment by the people but its provisions shall not become operative until the first day of September next thereafter which date shall be deemed the effective date of this article.

ARTICLE VII

STATE FINANCES

[Estimates by departments, the legislature and the judiciary of needed appropriations; hearings]

Section 1. For the preparation of the budget, the head of each department of state government, except the legislature and judiciary, shall furnish the governor such estimates and information in such form and at such times as the governor may require, copies of which shall forthwith be furnished to the appropriate committees of the legislature. The governor shall hold hearings thereon at which the governor may require the attendance of heads of departments and their subordinates.

[Lease or transfer to federal government of barge canal system authorized]

§4. Notwithstanding the prohibition of sale, abandonment or other disposition contained in section one of this article, the legislature may authorize by law the lease or transfer to the federal government of the barge canal, consisting of the Erie, Oswego, Champlain, Cayuga and Seneca divisions and the barge canal terminals and facilities for purposes of operation, improvement and inclusion in the national system of inland waterways. Such lease or transfer to the federal government for the purposes specified herein may be made upon such terms and conditions as the legislature may determine with or without compensation to the state. Nothing contained herein shall prevent the legislature from providing annual appropriations for the state's share, if any, of the cost of operation, maintenance and improvement of the barge canal, the divisions thereof, terminals and facilities in the event of the transfer of the barge canal in whole to the federal government whether by lease or transfer.

The legislature, in determining the state's share of the annual cost of operation, maintenance and improvement of the barge canal, the several divisions, terminals and facilities, shall give consideration and evaluate the benefits derived from the barge canal for purposes of flood control, conservation and utilization of water resources. (Added by vote of the people November 3, 1959.)

ARTICLE XVI*

TAXATION

[Power of taxation; exemptions from taxation]

Section 1. The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

[Assessments for taxation purposes]

§2. The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. Assessments shall in no case exceed full value.

Nothing in this constitution shall be deemed to prevent the legislature from providing for the assessment, levy and collection of village taxes by the taxing authorities of those subdivisions of the state in which the lands comprising the respective villages are located, nor from providing that the respective counties of the state may loan or advance to any village located in whole or in part within such county the amount of any tax which shall have been levied for village purposes upon any lands located within such county and remaining unpaid.

[Situs of intangible personal property; taxation of]

§3. Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed.

[Certain corporations not to be discriminated against]

§4. Where the state has power to tax corporations incorporated under the laws of the United States there shall be no discrimination in the rates and method of taxation between such corporations and other corporations exercising substantially similar functions and engaged in substantially similar business within the state.

[Compensation of public officers and employees subject to taxation]

§5. All salaries, wages and other compensation, except pensions, paid to officers and employees of the state and its subdivisions and agencies shall be subject to taxation. (Amended by vote of the people November 6, 2001.)

[Public improvements or services; contract of indebtedness; creation of public corporations]

§6. Notwithstanding any provision of this or any other article of this constitution to the contrary, the legislature may by law authorize a county, city, town or village, or combination thereof acting together, to undertake the development of public improvements or services, including the acquisition of land, for the purpose of redevelopment of economically unproductive, blighted or deteriorated areas and, in furtherance thereof, to contract indebtedness. Any such indebtedness shall be contracted by any such county, city, town or village, or combination thereof acting together, without the pledge of its faith and credit, or the faith and credit of the state, for the payment of the principal thereof and the interest thereon, and such indebtedness may be paid without restriction as to the amount or relative amount of annual installments. The amount of any indebtedness contracted under this section may be excluded in ascertaining the power of such county, city, town or village to contract indebtedness within the provisions of this constitution relating thereto. Any county, city, town or village contracting indebtedness pursuant to this section for redevelopment of an economically unproductive, blighted or deteriorated area shall pledge to the payment thereof that portion of the taxes raised by it on real estate in such area which, in any year, is attributed to the increase in value of taxable real estate resulting from such redevelopment. The legislature may further authorize any county, city, town or village, or combination thereof acting together, to carry out the powers and duties conferred by this section by means of a public corporation created therefor. (New. Added by vote of the people November 8, 1983; amended by vote of the people November 6, 2001.)

ARTICLE XVII

SOCIAL WELFARE

[Public relief and care]

Section 1. The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[State board of social welfare; powers and duties]

§2. The state board of social welfare shall be continued. It shall visit and inspect, or cause to be visited and inspected by members of its staff, all public and private institutions, whether state, county, municipal, incorporated or not incorporated, which are in receipt of public funds and which are of a charitable, eleemosynary, correctional or reforma-

* New article adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

tory character, including all reformatories for juveniles and institutions or agencies exercising custody of dependent, neglected or delinquent children, but excepting state institutions for the education and support of the blind, the deaf and the dumb, and excepting also such institutions as are hereinafter made subject to the visitation and inspection of the department of mental hygiene or the state commission of correction. As to institutions, whether incorporated or not incorporated, having inmates, but not in receipt of public funds, which are of a charitable, eleemosynary, correctional or reformatory character, and agencies, whether incorporated or not incorporated, not in receipt of public funds, which exercise custody of dependent, neglected or delinquent children, the state board of social welfare shall make inspections, or cause inspections to be made by members of its staff, but solely as to matters directly affecting the health, safety, treatment and training of their inmates, or of the children under their custody. Subject to the control of the legislature and pursuant to the procedure prescribed by general law, the state board of social welfare may make rules and regulations, not inconsistent with this constitution, with respect to all of the functions, powers and duties with which the department and the state board of social welfare are herein or shall be charged. (New. Derived in part from former §11 of Art. 8. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Public health]

§3. The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Care and treatment of persons suffering from mental disorder or defect; visitation of institutions for]

§4. The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine. The head of the department of mental hygiene shall visit and inspect, or cause to be visited and inspected by members of his or her staff, all institutions either public or private used for the care and treatment of persons suffering from mental disorder or defect. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

[Institutions for detention of criminals; probation; parole; state commission of correction]

§5. The legislature may provide for the maintenance and support of institutions for the detention of persons charged with or convicted of crime and for systems of probation and parole of persons convicted of crime. There shall be a state commission of correction, which shall visit and inspect or cause to be visited and inspected by members of its staff, all institutions used for the detention of sane adults charged with or convicted of crime. (New. Derived in part from former §11 of Art. 8. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Amended by vote of the people November 6, 1973.)

[Visitation and inspection]

§6. Visitation and inspection as herein authorized, shall not be exclusive of other visitation and inspection now or hereafter authorized by law. (New. Derived from former §13 of Art. 8. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Loans for hospital construction]

§7. Notwithstanding any other provision of this constitution, the legislature may authorize the state, a municipality or a public corporation acting as an instrumentality of the state or municipality to lend its money or credit to or in aid of any corporation or association, regulated by law as to its charges, profits, dividends, and disposition of its property or franchises, for the purpose of providing such hospital or other facilities for the prevention, diagnosis or treatment of human disease, pain, injury, disability, deformity or physical condition, and for facilities incidental or appurtenant thereto as may be prescribed by law. (New. Added by vote of the people November 4, 1969.)

ARTICLE XVIII*

HOUSING

[Housing and nursing home accommodations for persons of low income; slum clearance]

Section 1. Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto. (Amended by vote of the people November 2, 1965.)

[*Idem*; powers of legislature in aid of]

§2. For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may: make or contract to make or authorize to be made or contracted capital or periodic subsidies by the state to any city, town, village, or public corporation, payable only with moneys appropriated therefor from the general fund of the state; authorize any city, town or village to make or contract to make such subsidies to any public corporation, payable only with moneys locally appropriated therefor from the general or other fund available for current expenses of such municipality; authorize the contracting of indebtedness for the purpose of providing moneys out of which it may make or contract to make or authorize to be made or contracted loans by the state to any city, town, village or public corporation; authorize any city, town or village to make or contract to make loans to any public corporation; authorize any city, town or village to guarantee the principal of and interest on, or only the interest on, indebtedness contracted by a public corporation; authorize and provide for loans by the state and authorize loans by any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities or nursing home accommodations; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income as defined by law; grant or authorize tax exemptions in whole or in part, except that no such exemption may be granted or authorized for a period of more than sixty years; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities.

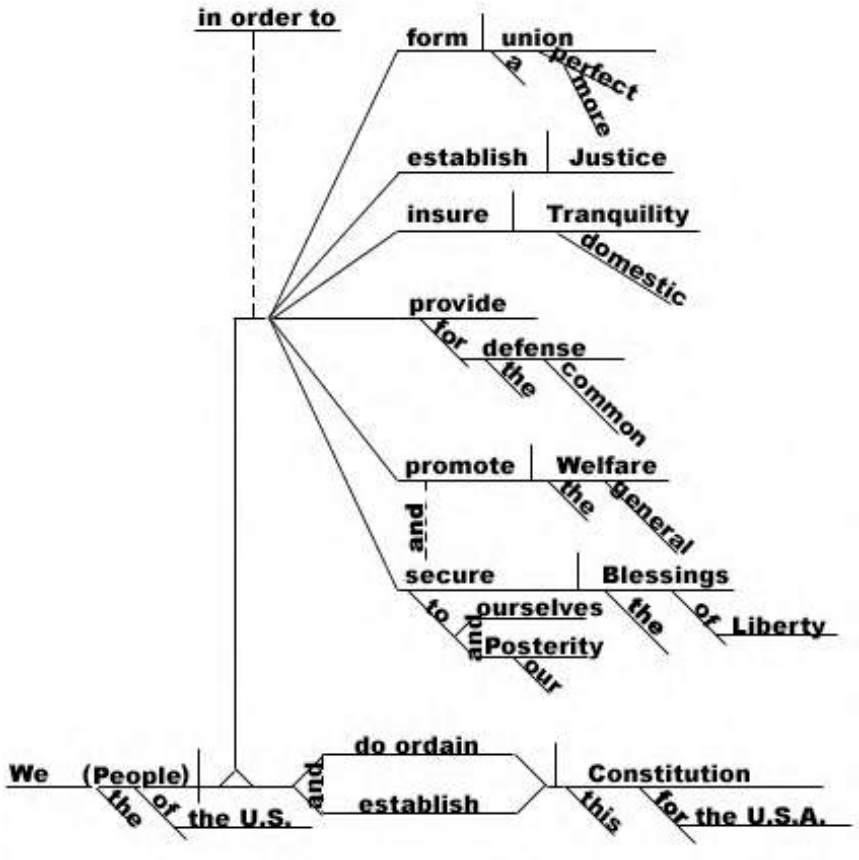
As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes

*Entire article new. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

Diagramming the Preamble to the Constitution of the United States

Here is our diagram of the Preamble to the Constitution of the United States. It is based on our understanding of the use of "in order to" as a subordinating conjunction that introduces a series of infinitival clauses (without subjects) that, in turn, modify the compound verbs "do ordain" and "establish."
See *A Grammar of Contemporary English* by Randolph Quirk, Sidney Greenbaum, Geoffrey Leech, and Jan Svartvik. Longman Group: London. 1978. p. 753.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.



E-mail If you have alternative rendering for this sentence, we would be

an area usable either for recreation, or for science, or for wildlife, but the creation of new wilderness in the full sense of the word is impossible.

It follows, then, that any wilderness program is a rear-guard action, through which retreats are reduced to a minimum. The Wilderness Society was organized in 1935 'for the one purpose of saving the wilderness remnants in America.'

It does not suffice, however, to have such a society. Unless there be wilderness-minded men scattered through all the conservation bureaus, the society may never learn of new invasions until the time for action has passed. Furthermore a militant minority of wilderness-minded citizens must be on watch throughout the nation, and available for action in a pinch.

In Europe, where wilderness has now retreated to the Carpathians and Siberia, every thinking conservationist bemoans its loss. Even in Britain, which has less room for land-luxuries than almost any other civilized country, there is a vigorous if belated movement for saving a few small spots of semi-wild land.

Ability to see the cultural value of wilderness boils down, in the last analysis, to a question of intellectual humility. The shallow-minded modern who has lost his rootage in the land assumes that he has already discovered what is important; it is such who prate of empires, political or economic, that will last a thousand years. It is only the scholar who appreciates that all history consists of successive excursions from a single starting-point, to which man returns again and again to organize yet another search for a durable scale of values. It is only the scholar who understands why the

raw wilderness gives definition and meaning to the human enterprise.

The Land Ethic

When god-like Odysseus returned from the wars in Troy, he hanged all on one rope a dozen slave-girls of his household whom he suspected of misbehavior during his absence.

This hanging involved no question of propriety. The girls were property. The disposal of property was then, as now, a matter of expediency, not of right and wrong.

Concepts of right and wrong were not lacking from Odysseus' Greece: witness the fidelity of his wife through the

long years before at last his black-prowed galleys clove the wine-dark seas for home. The ethical structure of that day covered wives, but had not yet been extended to human chattels. During the three thousand years which have since elapsed, ethical criteria have been extended to many fields of conduct, with corresponding shrinkages in those judged by expediency only.

The Ethical Sequence

This extension of ethics, so far studied only by philosophers, is actually a process in ecological evolution. Its sequences may be described in ecological as well as in philosophical terms. An ethic, ecologically, is a limitation on freedom of action in the struggle for existence. An ethic, philosophically, is a differentiation of social from anti-social conduct. These are two definitions of one thing. The thing has its origin in the tendency of interdependent individuals or groups to evolve modes of co-operation. The ecologist calls these symbioses. Politics and economics are advanced symbioses in which the original free-for-all competition has been replaced, in part, by co-operative mechanisms with an ethical content.

The complexity of co-operative mechanisms has increased with population density, and with the efficiency of tools. It was simpler, for example, to define the anti-social uses of sticks and stones in the days of the mastodons than of bullets and billboards in the age of motors.

The first ethics dealt with the relation between individuals; the Mosaic Decalogue is an example. Later accretions dealt with the relation between the individual and

society. The Golden Rule tries to integrate the individual to society; democracy to integrate social organization to the individual.

There is as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations.

The extension of ethics to this third element in human environment is, if I read the evidence correctly, an evolutionary possibility and an ecological necessity. It is the third step in a sequence. The first two have already been taken. Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong. Society, however, has not yet affirmed their belief. I regard the present conservation movement as the embryo of such an affirmation.

An ethic may be regarded as a mode of guidance for meeting ecological situations so new or intricate, or involving such deferred reactions, that the path of social expediency is not discernible to the average individual. Animal instincts are modes of guidance for the individual in meeting such situations. Ethics are possibly a kind of community instinct in-the-making.

The Community Concept

All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in that community, but his ethics prompt him also to

co-operate (perhaps in order that there may be a place to compete for).

The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.

This sounds simple: do we not already sing our love for and obligation to the land of the free and the home of the brave? Yes, but just what and whom do we love? Certainly not the soil, which we are sending helter-skelter downriver. Certainly not the waters, which we assume have no function except to turn turbines, float barges, and carry off sewage. Certainly not the plants, of which we exterminate whole communities without batting an eye. Certainly not the animals, of which we have already extirpated many of the largest and most beautiful species. A land ethic of course cannot prevent the alteration, management, and use of these 'resources,' but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state.

In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.

In human history, we have learned (I hope) that the conqueror role is eventually self-defeating. Why? Because it is implicit in such a role that the conqueror knows, *ex cathedra*, just what makes the community clock tick, and just what and who is valuable, and what and who is worthless, in community life. It always turns out that he knows neither, and this is why his conquests eventually defeat themselves.

In the biotic community, a parallel situation exists. Abra-

ham knew exactly what the land was for: it was to drip milk and honey into Abraham's mouth. At the present moment, the assurance with which we regard this assumption is inverse to the degree of our education.

The ordinary citizen today assumes that science knows what makes the community clock tick; the scientist is equally sure that he does not. He knows that the biotic mechanism is so complex that its workings may never be fully understood.

That man is, in fact, only a member of a biotic team is shown by an ecological interpretation of history. Many historical events, hitherto explained solely in terms of human enterprise, were actually biotic interactions between people and land. The characteristics of the land determined the facts quite as potently as the characteristics of the men who lived on it.

Consider, for example, the settlement of the Mississippi valley. In the years following the Revolution, three groups were contending for its control: the native Indian, the French and English traders, and the American settlers. Historians wonder what would have happened if the English at Detroit had thrown a little more weight into the Indian side of those tipsy scales which decided the outcome of the colonial migration into the cane-lands of Kentucky. It is time now to ponder the fact that the cane-lands, when subjected to the particular mixture of forces represented by the cow, plow, fire, and axe of the pioneer, became bluegrass. What if the plant succession inherent in this dark and bloody ground had, under the impact of these forces, given us some worthless sedge, shrub, or weed? Would Boone and Kenton have held out? Would there have been any overflow into Ohio, Indiana, Illinois, and Missouri? Any Louisiana Pur-

chase? Any transcontinental union of new states? Any Civil War?

Kentucky was one sentence in the drama of history. We are commonly told what the human actors in this drama tried to do, but we are seldom told that their success, or the lack of it, hung in large degree on the reaction of particular soils to the impact of the particular forces exerted by their occupancy. In the case of Kentucky, we do not even know where the bluegrass came from—whether it is a native species, or a stowaway from Europe.

Contrast the cane-lands with what hindsight tells us about the Southwest, where the pioneers were equally brave, resourceful, and persevering. The impact of occupancy here brought no bluegrass, or other plant fitted to withstand the bumps and buffetings of hard use. This region, when grazed by livestock, reverted through a series of more and more worthless grasses, shrubs, and weeds to a condition of unstable equilibrium. Each recession of plant types bred erosion; each increment to erosion bred a further recession of plants. The result today is a progressive and mutual deterioration, not only of plants and soils, but of the animal community subsisting thereon. The early settlers did not expect this: on the ciénegas of New Mexico some even cut ditches to hasten it. So subtle has been its progress that few residents of the region are aware of it. It is quite invisible to the tourist who finds this wrecked landscape colorful and charming (as indeed it is, but it bears scant resemblance to what it was in 1848).

This same landscape was 'developed' once before, but with quite different results. The Pueblo Indians settled the Southwest in pre-Columbian times, but they happened *not*

to be equipped with range livestock. Their civilization expired, but not because their land expired.

In India, regions devoid of any sod-forming grass have been settled, apparently without wrecking the land, by the simple expedient of carrying the grass to the cow, rather than vice versa. (Was this the result of some deep wisdom, or was it just good luck? I do not know.)

In short, the plant succession steered the course of history; the pioneer simply demonstrated, for good or ill, what successions inhered in the land. Is history taught in this spirit? It will be, once the concept of land as a community really penetrates our intellectual life.

The Ecological Conscience

Conservation is a state of harmony between men and land. Despite nearly a century of propaganda, conservation still proceeds at a snail's pace; progress still consists largely of letterhead pieties and convention oratory. On the back forty we still slip two steps backward for each forward stride.

The usual answer to this dilemma is 'more conservation education.' No one will debate this, but is it certain that only the *volume* of education needs stepping up? Is something lacking in the *content* as well?

It is difficult to give a fair summary of its content in brief form, but, as I understand it, the content is substantially this: obey the law, vote right, join some organizations, and practice what conservation is profitable on your own land; the government will do the rest.

Is not this formula too easy to accomplish anything worth-while? It defines no right or wrong, assigns no obliga-

From a Gulf Oyster, a Domino Effect

BAYOU GRAND CAILLOU, La.

In Gulf of Mexico waters deemed safe, at least for now, the two metal claws of a weather-beaten flatboat rake the muck below for those prehistoric chunks of desire, oysters. Then the captain and his two deckhands, their shirts flecked with the pewter mud of the sea, dump the dripping haul onto metal tables and begin the culling.

They hammer apart the clumps of attached oysters and toss back the empty shells and stray bits of Hurricane Katrina debris. They work quickly but carefully; a jagged oyster will slice your hand for not respecting its beautiful ugliness.

The men sweep their catch onto the boat's floor, not far from a pile of burlap sacks. Their day will be measured by the number of full sacks their boat, the Miss Allison, carries to shore. Each 100-pound sack means $14 for the captain and $3 apiece for the deckhands.

The rocklike oyster and the burlap sack. As basic as it gets in the gulf, yet both are integral to a complex system of recycling and ingenuity, a system now threatened, along with most everything else, by the continuing oil-spill catastrophe in the gulf.

The disaster's economic fallout has had a sneaky domino effect, touching the lives of everyone from the French Quarter shuckers who turn oyster-opening into theater to the Minnesota businessman who grinds the shells for chicken-feed supplement. Some victims were unaware that they were even tiles in the game, so removed were they from the damaged waters.

Take the burlap sacks on this oyster boat, for example, bearing the markings of Brazilian, Costa Rican and Mexican coffee companies. They come from a simple business, Steve's Burlap Sacks, run out of a hot warehouse in Waveland, Miss., 120 miles away. And if you were to go there today, you would find the warehouse quiet, and the work-hardened owner trying very hard to keep it together.

"I don't think the Lord's looking this way no more," he says.

Before a distant and fatal oil-rig explosion nearly three months ago, here is how the symbiotic sack-and-oyster system worked:

Coffee companies in Florida, Louisiana and Texas would unload the raw beans shipped from around the world, then sell their sacks in bulk to just about the only person who wanted them, a callused former oysterman from Louisiana named Steve Airhart.

Burlap sacks have long seemed almost divinely designed to hold oysters. Resilient, ventilated, able to handle the wet, and when past their use, they even burn well enough to keep the docks free of the pesky bugs called no-see-ums. But two decades ago, when Mr. Airhart was still raking for oysters, he could never find enough sacks.

After a friend's relative helped him get some sacks from a large coffee importer, Mr. Airhart sensed opportunity. Within a year, he was harvesting sacks rather than oysters, sorting and stacking them in his driveway and then reselling them to oyster operations. From Bayou La Batre, Ala., to Galveston, Tex., he became known as the burlap-sack guy.

He had to start all over after Hurricane Katrina, living in a tent for several months while building a new warehouse in Waveland. But soon his employees were unloading truckloads of sacks, then laying the

undamaged ones into a baler, 500 to a bale, each a ragged postcard from some faraway place.

“Produce of Indonesia.”

“Produce de Cote D’Ivoire.”

“Cafes do Brasil.”

Mr. Airhart’s six employees — Ben, Clyde, Jessica, Paula, Tommy and Tyler — would work from 7 a.m. until whenever, breathing in the fine coffee dust, sweeping up the stray green beans, taking in the smell that was like wet dog, earning $13 a bale. Then a trucker would deliver the baled sacks to Misho’s Oyster Company, in San Leon, Tex., or to Crystal Seas Seafood, in Pass Christian, Miss., or to Motivatit Seafoods, in Houma, La.

Motivatit is owned by two brothers, Mike and Steve Voisin, whose family has dedicated several generations to the pursuit of a living thing in a forbidding shell; a thing that poses a faint risk when consumed raw, yet evokes the wildness of the ocean.

“You’re getting a real bite of the sea,” Mike Voisin says.

Motivatit is one of the gulf’s dominant oyster operations. Before the spill, it managed 10,000 acres of oyster beds and processed 60,000 pounds of oysters a day. But to collect these craggy surprises of nature, the company hires boats like the Miss Allison.

Several times a week, the Miss Allison pulls away from a dock near a small place called Theriot, La., bound for where porpoises sometimes provide escort. Its captain, Santos Rodriguez, sun-baked and 44, has churned these waters for 26 years, long enough to wonder whether he’s raking up the same shells and bottles; long enough to measure a bag’s weight by hand rather than by scale.

And yes, the captain eats oysters. Using a short knife, he pops the seal of a just-harvested oyster with safecracker élan, makes a cut, and slurps the wild goop down.

But with the oil spill forcing the shutdown of oyster beds throughout the gulf — including about 60 percent of Motivatit’s acreage — he has never seen the catch so low. Yes, the price for a sack is up, but the total number of sacks is down. Normally, he and his crew will return to shore with about 60 sacks; now, a good day is 35.

His two muck-spattered deckhands, Luis Gomez, 24, and Cesar Badillo, 23, reflect the changed life, having recently moved to Houma after oyster beds elsewhere in Louisiana shut down. Mr. Gomez wears a cross around his neck, Mr. Badillo wears a burlap sack for an apron, and both wear gloves over their shell-scarred hands.

After a piece of machinery breaks, the Miss Allison turns around. By the time it reaches shore, to a dock paved with crushed oyster shells, the crew has 30 sacks filled and knotted — about $90 each for the deckhands, and about $420 for the captain, who has paid for the gas and food and must now fix the broken equipment.

Early the next morning, amid the din of the Motivatit plant in Houma, a stocky woman in a blue construction hat weighs these bags and others by hook. She then dumps their contents, which look like bits of construction debris, onto a conveyor belt to begin a process that involves tumblers, washers and dozens of employees. Wearing hairnets and aprons adorned with their first names and hand-drawn hearts, they shuck and shuck.

But because the oil spill has forced the shutdown of so many of Motivatit’s oyster beds — most of them out of precaution, some of them because of the presence of oil — these workers are processing about half the normal number of oysters. “With the lower amount of product, we’re having to cut most of the orders,” Mike Voisin

says. “We’ve had to minimize.”

This means that Motivatit now employs about 80 workers, two dozen fewer than usual. The entire night shift has been suspended.

This means that the weekly deliveries to Los Angeles, by way of El Paso, Tucson and Phoenix, have stopped, as have the deliveries to Las Vegas, where clients prefer smaller oysters from beds that are now off limits.

This means that Warehouse Shell Sales, in Newport, Minn., may have to adjust. Several times a year, it has 1,500 tons of gulf oyster shells, including many from Motivatit, barged up the Mississippi River to be crushed and sold as poultry feed mix; chickens draw calcium from the oyster-shell bits sitting in their gizzards, hardening the shells of the eggs they produce.

But the oil spill has the shell company’s owner, Gary Lund, worried about supply. He says he is now exploring other options.

Finally, this means disaster for the burlap-sack guy, Steve Airhart.

Four months ago, his hot and dusty warehouse in Waveland was humming, with loose sacks coming in and baled sacks going out: 135,000 sold in March, 139,000 in April, and the busy summer season coming up. Then it stopped.

Mr. Airhart, 49, did what he could for a few weeks, but finally he had to lay off Paula, Jessica and the others. “One of the hardest days of my life,” he says. “But they knew it was coming. They heard me on the phone, begging to make sales.”

Now the warehouse is mostly empty, save for the few stacks of bales no one wants, and a boat that Mr. Airhart suddenly had the time to finish. He says that BP, the oil company responsible for the spill, has paid him $20,000 so far for lost business, but that is nowhere near enough to cover the $320,000, plus sweat equity, that he has invested in the company.

The former oysterman is looking forward to sliding this boat he’s built into the damaged waters. He wants to help clean up what has broken so many fragile systems.

Christopher Stone and the Evolution of Environmental Justice
By Joseph J. Perkins, Jr.

A little over 30 years ago, Christopher D. Stone, a Professor of Law at the University of Southern California, authored one of the most elegant and provocative law review articles ever published on environmental law and humankind's place in the world: Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). (I will refer below to this article simply as Trees.) In arguing that natural objects and areas should have legal rights, Stone gave formal voice to the "land ethic" advocated a generation earlier by Aldo Leopold, and in so doing he changed the debate. Stone showed how the law has progressed over time to confer rights upon persons or entities that society previously had considered incapable or unworthy of having rights. Children, slaves, women, Native Americans, racial minorities, aliens, fetuses, endangered species—all have been the beneficiaries of this drive to give legal voice and legal rights to those who once lacked both voice and rights. So, too, argued Stone, has the law recognized corporations and other entities as having legal rights. It was not always so.

Stone's point was elegantly and succinctly made. But why did Trees not go the way of most law review articles and disappear into scholarly oblivion?

Trees survived because only days after it was published, Justice William O. Douglas cited the article in his famous dissent from the Supreme Court's decision in the Mineral King Valley case: Sierra Club v. Morton, 405 U.S. 727 (1972) (4-3 decision). On its face, the Court's decision in Sierra Club v. Morton was against the Sierra Club: The Court held that—because the Club had failed to allege that it would be injured—the Club lacked standing to challenge the Forest Service's issuance to Walt Disney Enterprises of a permit for a ski resort. But the Club's loss was short-lived. On remand the Club amended its complaint to make the necessary allegations of injury and to include a claim that the Forest Service had violated the recently enacted National Environmental Policy Act of 1969 (NEPA). Battles then were waged on many fronts until Congress ended all debate on the issue in 1978 when it added Mineral King Valley to Sequoia National Park in California.

Like the Sierra Club's effort to preserve Mineral King Valley, Trees succeeded too—at least in being noticed and read—where others failed. But what of the question asked in Trees: Has it been answered affirmatively? Neither Trees nor the Douglas dissent are cited much in judicial decisions, for the idea advanced by Stone has not been adopted in its pure form. But ideas first broached in court—even unsuccessfully—often find their most fertile ground in future actions by the other branches of the government. Such is the case with Stone, though in forms slightly different from the pure form.

Since 1972, laws have been enacted by both the federal government and many state governments that expressly allow citizens to bring suit—either directly or as if they were acting as attorneys general or public trustees—to challenge certain agency decisions or to recover damages for injuries to the environment. These laws provide increased protection to natural areas by helping to insure that reasoned decisions are made and by encouraging better environmental practices.

By far, however, the most significant change has been wrought by NEPA and its implementation. The "stop, look, and listen" directive given by Congress to federal agencies in NEPA has changed environmental decision-making forever. Through many lawsuits brought during the 1970s and 1980s, every federal agency learned that it cannot make a major decision having a significant effect on the human environment without first identifying the resources that would be affected, considering various alternatives to the proposed action, and taking comments from the public. This process has become institutionalized at the federal level not only in cases where

an agency is proposing to take action directly but also where an agency is proposing that Congress take action. This same basic process also has become the norm for most state and local decisions.

In my view, the path that government agencies must follow today in making decisions that affect the environment has been blazed in no small measure by Trees because Trees changed the debate over what constitutes resources. Sure, the debate on any particular proposal always has a "utilitarian" quality to it—but the language of that utilitarian debate has changed because people recognize that they receive real valuable benefits from nature "as is."

Where Stone's voice is heard most clearly, though, is in the debate over hotly-contested proposals to allow significant human activity in de facto wilderness: e.g., whether a gold mine should be developed adjacent to Yellowstone National Park or whether exploration for oil should occur on the Coastal Plain of the Arctic National Wildlife Refuge. In these cases the utilitarian debate always is clouded by someone arguing for the land itself. Always. Similar debates occur on the local level everywhere, over proposed developments affecting large or small tracts of woodlands, wetlands, waters, or the fauna or flora using them.

In no small measure, the manner in which these debates occur is due to Trees. That we should approach natural areas with humility, that we should acknowledge that natural areas have value as such—in their own right—and that therefore we should give nature the benefit of the doubt, is not yet the mainstream view. But that view no longer is considered absurd. This is Stone's doing.

But if Stone's view is not absurd, then what is its ethical and moral foundation? If natural areas are to be recognized as having legal standing, then it will be people that bestow that standing. But why? Will it be, fundamentally, because we have found it "useful" to do so, or will we choose to do so because some other fundamental ethical principle applies?

When he wrote Trees, Stone was under an incredible time constraint and thus provided to his readers only a rudimentary map to his underlying thinking. Thirteen years later Stone corrected this omission with the publication of Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective, 59 S. Cal. L. Rev. 1 (1985). In this article Stone argues for a "moral pluralism" in which one set of ethical principles may govern one group of moral activities (such as a person's relations with other persons) while another set of ethical principles may govern another group of moral activities (such as a person's relations with nature).

Whether Stone's views will find traction in the long run remains to be seen. The question asked by Trees remains a profound one, though—going as it does beyond not only our relations with each other but also our relations with future generations. Even in A Theory of Justice, John Rawls does not attempt to answer the question of whether natural objects or areas should be entitled to moral consideration. Rawls acknowledges (at the end of § 3 of A Theory of Justice) that his theory of justice "is not a complete contract theory" and that it "fails to embrace all moral relationships"—leaving out "how we are to conduct ourselves toward animals and the rest of nature."

But how much of a stretch is it to acknowledge that we are part of nature? And once we have done that, how much farther must we reach before acknowledging that we are but a small part—indeed only a recent small part—of nature? From that perspective comes humility—and with that humility comes a recognition that trees ought to have some standing.

Sierra Club v. Morton, 405 US 727 - Supreme Court 1972

405 U.S. 727 (1972)

SIERRA CLUB
v.
MORTON, SECRETARY OF THE INTERIOR, ET AL.

No. 70-34.

Supreme Court of United States.

Argued November 17, 1971.
Decided April 19, 1972.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasiwilderness area largely uncluttered by the products of civilization.

729*729 The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley 730*730 with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges,[2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

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The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

741*741 As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

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MR. JUSTICE DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing"[1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern 742*742 for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King* v. *Morton.*

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.[2] The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.[3] The ordinary corporation is a "person" for purposes of the adjudicatory processes, 743*743 whether it represents proprietary, spiritual, aesthetic, or charitable causes.[4]

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed "development"[5] notably Hano, Protectionists vs. recreationists—The Battle of Mineral King, 744*744 N. Y. Times Mag., Aug. 17, 1969, p. 25; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that "[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." The District Court held that this uncontested allegation made the Sierra Club "sufficiently aggrieved" to have "standing" to sue on behalf of Mineral King.

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp 745*745 in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National

Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.,* and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency 746*746 which in time develops between the regulator and the regulated.[6] As early as 1894, Attorney General Olney predicted that regulatory agencies might become "industry-minded", 747*747 as illustrated by his forecast concerning the Interstate Commerce Commission:

"The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." *Moss* v. *CAB,* 139 U. S. App. D. C. 150, 152, 430 F. 2d 891, 893. See also *Office of Communication of the United Church of Christ* v. *FCC,* 123 U. S. App. D. C. 328, 337-338, 359 F. 2d 994, 1003-1004; *Udall* v. *FPC,* 387 U. S. 428; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC,* 146 U. S. App. D. C. 33, 449 F. 2d 1109; *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 142 U. S. App. D. C. 74, 439 F. 2d 584; *Environmental Defense Fund, Inc.* v. *HEW,* 138 U. S. App. D. C. 381, 428 F. 2d 1083; *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F. 2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In Perspective: Administrative Limitations In A Political Setting, 11 B. C. Ind. & Com. L. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

748*748 The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[7]

749*749 The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal 750*750 agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[8]

751*751 Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the 752*752 Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life[9] which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand Country Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

753*753 APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Extract From Oral Argument of the Solicitor General

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"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected [a]nd that `it would be aggrieved' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions which must be decided by the courts? Why should not the courts decide any question which any citizen wants to raise?

"As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the Executive Branch should have wide powers.

"All these officers have great responsibilities. They are not less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words `case' and `controversy' in Article III of the Constitution.

754*754 "Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit, a good system.

"More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years, there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I've already mentioned the most ancient of all: case or controversy, which was early relied on to prevent the presentation of feigned issues to the court.

"But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, mootness in various aspects, statues of limitations and laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

"Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees.

"I might also mention the explosive development of class actions, which has thrown more and more issues into the courts.

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"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator, sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it's good for the 755*755 courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders.

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"I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

Under the U.S. Supreme Court: Testing the fairness of U.S. law

WASHINGTON, July 14 (UPI) -- The U.S. Supreme Court says it will visit the rights of the convicted again next term -- deciding whether death row inmates can use federal civil rights law to gain access to DNA evidence they contend would prove them innocent.

Whatever the court rules, the case is just one more landmark in a long journey that defines the basic fairness of U.S. law, or at least the appearance of it.

Post-conviction remedies are serious business. The Death Penalty Information Center, with headquarters in Washington, says since 1973, 138 people have been released from death row after new evidence showed their legal, if not actual, innocence.

The high court does not decide on guilt or innocence and at least two justices have said "actual innocence" is not even relevant. In a 2009 dissent after the other justices granted a new evidence hearing for a Georgia death row inmate, Justice Antonin Scalia, joined by Justice Clarence Thomas, wrote, "This court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a (constitutional) court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged 'actual innocence' is constitutionally cognizable."

In June 2009, the Supreme Court ruled 5-4 convicts had no constitutional right to access DNA evidence or other biological evidence held by the states, even if, only for arguments sake, you assume access can be reached through the federal civil rights statute.

The case involved a man named William Osborne, convicted of sexual assault and other crimes in Alaska. Years later, he asked for access to DNA evidence so he could have it tested at his own expense. Eventually, a federal appeals court agreed he had a constitutional right to the DNA evidence. The narrow Supreme Court majority disagreed.

Chief Justice John Roberts wrote in the majority opinion, "DNA testing ... has the potential to significantly improve both the criminal justice system and police investigative practices. The federal government and the states have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure -- usually but not always through legislation."

Forty-four states and the federal government have laws allowing inmates access to DNA and other biological evidence.

"Against this prompt and considered response ... William Osborne proposes a different approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. ... This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the (Constitution)."

Justice John Paul Stevens, now retired, had a different view in dissent. "The state of Alaska possesses physical evidence that, if tested, will conclusively establish whether ... William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence," Stevens wrote. "If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest and its results uniquely precise. Yet for reasons the state has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and

to thereby ascertain the truth once and for all."

Roberts and Stevens capture the essence of both sides of the ongoing debate on post-conviction remedies.

On one side, Roberts and his fellow conservatives warn that at some point, judicial proceedings have to be final, and that opening the floodgates of judicial review might take the justice system back to the days when death row inmates and others delayed their sentences for decades with claim after claim, despite the overwhelming evidence that convicted them in the first place.

On the other side, Stevens and his fellow liberals make the practical argument: If a DNA test or rape kit test can make a conviction even more certain, or expose a miscarriage of justice, why not do it?

Though a similar thread winds its way through Supreme Court cases over the years, no where was the dynamic more evident than in 1993's Herrera vs. Collins, where the justices ruled 6-3 that there is no constitutional right for inmates to introduce new evidence of "actual innocence" to challenge their convictions, or their death sentences.

In that Texas death penalty case, the late Justice Harry Blackmun took a death inmate's claims -- or at least the principle involved in the case -- seriously. Writing only for himself in dissent, Blackmun said, "The execution of a person who can show that he is innocent comes perilously close to simple murder."

Last May, the justices indicated they again will take up post-conviction relief in a case to be heard early in the new term, which begins in October.

This time around, in another Texas case, the high court will decide whether death row inmates can ask for DNA testing under federal civil rights law -- a proposition which was only assumed for the sake of argument in the Osborne case out of Alaska.

Death row inmate Henry W. Skinner has consistently maintained his innocence. His imminent execution was stayed at the last hour by the Supreme Court in March.

Skinner, now 48, was sentenced for the 1993 murders of his girlfriend and her two adult sons in the Texas Panhandle city of Pampa on New Year's Eve. The girlfriend, Twila Busby, was strangled and beaten with an ax handle and her mentally disabled sons, Elwin Caler and Randy Busby, were stabbed, the Houston Chronicle reported.

Skinner, who worked as a paralegal at the time of his arrest, has asked for new DNA testing on blood found on knives at the murder scene and material beneath the victim's fingernails, as well as rape kit samples, the Chronicle said. But Texas has denied new DNA testing.

Skinner's case has drawn considerable media attention.

Time magazine said Skinner has been trying for 10 years to get access to his girlfriend's rape kit and two knives that may have been used in the killings, but prosecutors have turned him down.

So is Skinner getting a raw deal?

Not so fast, say Texas prosecutors.

A letter to the media from Mark D. White, attorney for Lynn Switzer, district attorney of Gray County, Texas, said the issues in the Skinner case are not so black and white. Switzer is a party in the case, Skinner vs. Switzer, to be heard by the Supreme Court next term.

Sent to KVII-TV, the ABC television affiliate in Amarillo, Texas, and posted on connectamarillo.com, the letter said in part, "There have been many inquiries about why Lynn Switzer has opposed Mr. Skinner's request for post-trial DNA testing. It is important for the citizens of Gray County to view that request in light of the procedural background of this case."

Before Skinner's trial, prosecutors tested DNA from the crime scene and used the results against Skinner in court. Skinner's lawyers made the strategic decision not to pursue further DNA testing because they believed it would hurt their client, White's letter said.

"Years later on appeal, as he sat on death row, Mr. Skinner argued that his attorneys were ineffective for failing to pursue DNA testing," the letter said.

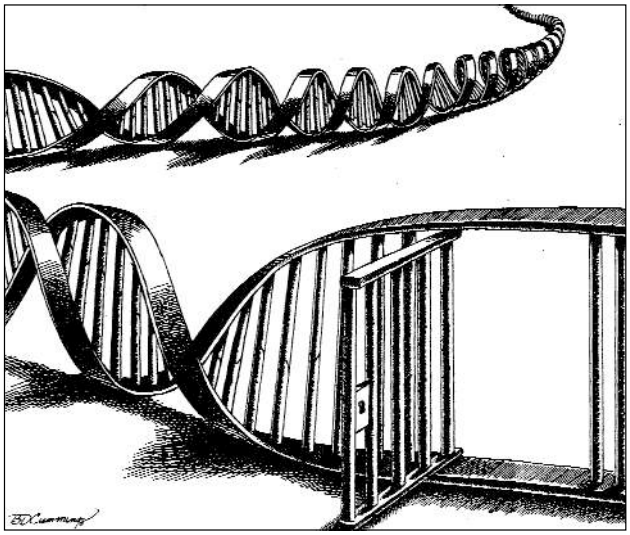
In November 2005, White's letter said, Skinner's lead trial attorney testified during a federal evidence hearing the defense's blood spatter expert "determined that widespread amounts of blood stains on the clothing Mr. Skinner was wearing when he was arrested a few hours after the murders were inconsistent with Mr. Skinner's story that he had lain comatose on the sofa only a few feet away from where Twila was beaten and strangled to death; and ... that Mr. Skinner's videotaped statement to police about how he and Twila had fought with a stick (which police found embedded with blood and hair, and laying near Twila's body) was also inconsistent with Mr. Skinner's alibi."

HUMAN GENETICS

Finding Criminals Through DNA of Their Relatives

Analyses of the DNA databases maintained by criminal justice systems might enable criminals to be caught by recognizing their kin, but this raises civil liberties issues.

Frederick R. Bieber,[1]* Charles H. Brenner,[2] David Lazer[3]



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DNA methods are now widely used for many forensic purposes, including routine investigation of serious crimes and for identification of persons killed in mass disasters or wars (*1*–*4*). DNA databases of convicted offenders are maintained by every U.S. state and nearly every industrialized country, allowing comparison of crime scene DNA profiles to one another and to known offenders (*5*). The policy in the United Kingdom stipulates that almost any collision with law enforcement results in the collection of DNA (*6*). Following the U.K. lead, the United States has shifted steadily toward inclusion of all felons, and federal and six U.S. state laws now include some provision for those arrested or indicted. At present, there are over 3 million samples in the U.S. offender/arrestee state and federal DNA databases (*7*). Statutes governing the use of such samples and protection against misuse vary from state to state (*8*).

Although direct comparisons of DNA profiles of known individuals and unknown biological evidence are most common, indirect genetic kinship analyses, using the DNA of biological relatives, are often necessary for humanitarian mass disaster and missing person identifications (*1*, *2*, *9*). Such methods could potentially be applied to searches of the convicted offender/arrestee DNA databases. When crime scene samples do not match anyone in a search of forensic databases, the application of indirect methods could identify individuals in the database who are close relatives of the potential suspects. This raises compelling policy questions about the balance between collective security and individual privacy (*10*).

To date, searching DNA databases to identify close relatives of potential suspects has been used in only a small number of cases, if sometimes to dramatic effect. For example, the brutal 1988 murder of 16-year-old Lynette White, in Cardiff, Wales, was finally solved in 2003. A search of the U.K. National DNA Database for individuals with a specific single rare allele found in the crime scene evidence that identified a 14-year-old boy with a similar overall DNA profile. This led police to his paternal uncle, Jeffrey Gafoor (*11*). Investigation of the 1984 murder of Deborah Sykes revealed a close, but not perfect, match to a man in the North Carolina DNA offender database, which led investigators to his brother, Willard Brown (*12*). Both Gafoor and Brown matched the DNA from the respective crime scenes, confessed, and were convicted.

Although all individuals have some genetic similarity, close relatives have very similar DNA profiles because of shared ancestry. We demonstrate the potential value of kinship analysis for identifying promising leads in forensic investigations on a much wider scale than has been used to date.

Let us assume that a sample from a crime scene has been obtained that is not an exact match to the profile of anyone in current DNA databases. Using Monte Carlo simulations (*13*, *14*), we investigated the chances of successfully identifying a biological relative of someone whose profile is in the DNA database as a possible source of crime scene evidence (*15*). Each Monte Carlo trial simulates a database of known offenders, a sample found at a crime scene, and a search. The search compares the crime sample with each catalogued offender in turn by computing likelihood ratios (LRs) that assess the likelihood of parent-child or of sibling relationships (*1*, *16*). We used published data on allele frequencies of the 13 short tandem repeat (STR) loci on which U.S. offender databases are based and basic genetic principles (*17*–*19*). A high LR is characteristic of related individuals and is an unusual but possible coincidence for unrelated individuals. The analysis of each simulation therefore assumes that investigators would follow these leads in priority order, starting with those in the offender database with the highest LR for being closely related to the owner of the crime scene DNA sample.

Our simulations demonstrate that kinship analysis would be valuable now for detecting potential suspects who are the parents, children, or siblings of those whose profiles are in forensic databases. For example, assume that the unknown sample is from the biological child of one of the 50,000 offenders in a typical-sized state database. Of the 50,000 LRs comparing the "unknown" sample to each registered offender in the database, the child corresponds to the largest LR about half the time, and has a 99% chance of appearing among the 100 largest LRs (see chart). An analysis of potential sibling relationships produced a similar curve (*13*).

These results could be refined by additional data—for example, large numbers of single-nucleotide polymorphisms (SNPs). Better and immediately practical, a seven-locus Y-STR haplotype analysis on the crime scene and the list of database leads would eliminate 99% of those not related by male lineage (*20*). Data-mining (vital records, genealogical and geographical data) for the existence of suitable suspects related to the leads can also help to refine the list.

The potential for improving effectiveness of DNA database searches is large. Consider a hypothetical state in which the "cold-hit" rate—the chance of finding a match between a crime scene sample and someone in the offender database—is 10%. Suppose that

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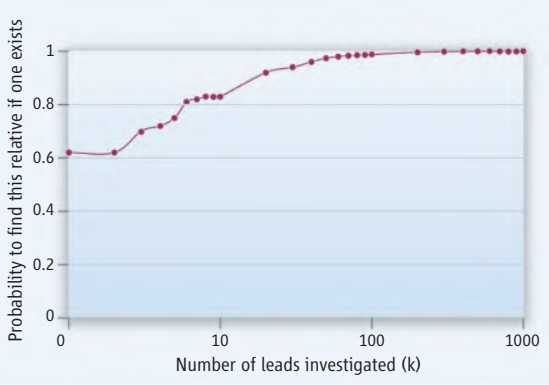
among criminals who are not (yet) in the database themselves, even 5% of them have a close (parent/child or sibling) relative who is. From our projections that up to 80% (counting the 10 best leads) of those 5% could be indirectly identified, it follows that the kinship analyses we describe could increase a 10% cold-hit rate to 14%—that is, by 40%. There have been 30,000 cold hits in the United States up to now (*5*). Kinship searching has the potential for thousands more.

Success of kinship searching depends most saliently on a close relative of the perpetrator actually being in the offender database. Studies clearly indicate a strong probabilistic dependency between the chances of conviction of parents and their children, as well as among siblings (*21*). Consistent with these studies, in a U.S. Department of Justice survey, 46% of jail inmates indicated that they had at least one close relative who had been incarcerated (*22*). Such observations do not define or delineate the possible complex roles of genetics, environment, and society in criminal behavior.



Finding the genetic needle in a large haystack. The probability of identifying a close relative (i.e., parent/child) of a known offender by kinship searching is shown. Crime scene evidence would be searched against each profile in a simulated offender DNA database. A parent/child would be identified 62% of the time as the very first lead, and 99% of the time among the first 100 leads. Although these familial searching methods do not invariably distinguish parent/child from siblings, they have a high chance of identifying close relatives, if they exist, among the database samples with the highest LRs.

The widespread implementation of genetic kinship analysis for indirect database searches would represent a critical shift in the use of government forensic data banks, as they could identify, as potential suspects, not just those in the database, but their close relatives as well. Genetic surveillance would thus shift from the individual to the family.

Challenges to forensic DNA data banking have been based largely on claims of U.S. constitutional protections from unreasonable search and seizure. Such challenges have not prevailed, as the courts have ruled that the interests of public safety outweigh individual privacy interests (*23*, *24*). These DNA collections have sparked considerable controversy, especially in light of recent trends to expand collections to arrestees and those convicted of minor crimes and misdemeanors (*25*). Although use of retained samples for other purposes is prohibited by federal and several state laws, sample retention also has been a controversial practice.

Debates on the expansion of the scope of DNA collections for offender and arrestee databases, as well as collections of volunteer samples, e.g., through DNA dragnets, have concentrated on the balance between society's interests in security and privacy interests of individuals who might be included in the database and on the fairness and equity of including some in the databases but not others (*26*, *27*). Privacy interests include genetic privacy [as DNA samples can yield medical and other information (*28*)] and locational privacy (where the contributor has been and left DNA). As with any investigative technique, these DNA matching strategies will lead to investigation of the innocent.

Existing state and federal statutes do not specifically address familial searches, and it is unlikely such search strategies were even considered at the time original statutes were written. Use of familial searching methods described herein could raise new legal challenges, as a new category of people effectively would be placed under lifetime genetic surveillance. Its composition would reflect existing demographic disparities in the criminal justice system, in which arrests and convictions differ widely based on race, ethnicity, geographic location, and social class. Familial searching potentially amplifies these existing disparities. These issues need to be confronted, as widespread use of various familial searching tools, including formal kinship analysis, is foreseeable. The de facto inclusion of kin into DNA data banks may lead some to oppose familial searching. It may lead others to support calls for a universal DNA database (*29*), which to date have been rejected. Other options include limiting familial searching methods to investigation of the most serious crimes and defining statistical thresholds that minimize intrusions on innocent parties (*30*).

The rapid proliferation and expansion of DNA collections along with the results of our analyses require careful consideration of the implications of familial searching methods. Every agency or country considering such methods should evaluate attendant policy, ethical, and legal implications, in addition to their valuable investigatory potential.

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[633 NE2d 451, 611 NYS2d 97]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GEORGE WESLEY, Appellant.

Argued January 12, 1994; decided March 29, 1994

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered October 22, 1992, which affirmed (1) a judgment of the Albany County Court (Joseph Harris, J.; *see,* 140 Misc 2d 306), rendered upon a verdict convicting defendant of murder in the second degree, rape in the first degree, attempted sodomy in the first degree and burglary in the second degree, and (2) an order of that court (Joseph Harris, J.), denying a motion by defendant pursuant to CPL 440.10 to vacate the judgment of conviction.

People v Wesley, 183 AD2d 75, affirmed.

HEADNOTE

Crimes — Evidence — DNA Identification Tests

The standard to be used in determining whether novel DNA profiling evidence was properly admissible at defendant's trial is whether the reliability of DNA evidence was generally accepted by the relevant scientific community at the time of the proceedings. DNA profiling evidence is today generally accepted as reliable by the relevant scientific community. Here, defendant's 1989 conviction for murder in the second degree and related crimes after a jury trial at which DNA profiling evidence was admitted is affirmed, with three Judges finding that the DNA profiling evidence was properly admitted at defendant's trial and two Judges finding that the admission of such DNA evidence was erroneous, but that the error was harmless beyond a reasonable doubt in the unusual circumstances of this case.

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By the Publisher's Editorial Staff

AM JUR 2d, Expert and Opinion Evidence, § 42.
CARMODY-WAIT 2d, Presentation of Case §§ 56:41-56:43.
NY JUR 2d, Evidence and Witnesses, § 432.

ANNOTATION REFERENCE

Admissibility of DNA identification evidence. 84 ALR4th 313.

Americans, Caucasoids, and Hispanics) were isolated and successfully hybridized to each DNA probe. The number of distinct DNA fragments identified for each of these regions varied from 30 to more than 80. The allele frequency distribution was determined for each locus. The results showed statistically significant differences, between ethnic groups, in some loci (D2S44, D14S1 and D14S13) but not in others (D17S79 and DXYS14). Overall, the studies concluded that there is a mean power of certainty of identification of 1 in 840 million for Caucasoids and 1 in 1.4 billion for American blacks. Before the population genetics studies were admitted into evidence in this trial, the over-all claimed mean power of identification was reduced by a factor of 10 in order to eliminate any possible Hardy-Weinberg equilibrium or linkage disequilibrium.

Chief Judge KAYE (concurring). We conclude that it was error to admit the DNA bloodstain analysis evidence in this case. We nevertheless agree that defendant's conviction should be affirmed, because that evidence comprised only a minor part of the People's case. Although the result is unaffected, we write separately out of concern, for future cases, that the principles governing admission of novel scientific evidence be correctly articulated and applied.

Lest we add to rather than ameliorate confusion, we begin by stating points on which the Court is unanimous.

The Court agrees unanimously that where the scientific evidence sought to be presented is novel, the test is that articulated in *Frye v United States* (293 F 1013, 1014), in essence whether there is general acceptance in the relevant scientific community that a technique or procedure is capable of being performed reliably *(People v Middleton,* 54 NY2d 42, 49).[1] In the present case, such an inquiry required assessment of whether the technique employed in forensic DNA analysis had gained scientific acceptance—that is, whether the six steps of the Restriction Fragment Length Polymorphic (RFLP) procedure, the procedure for declaring that two samples of DNA were identical (step seven), and assessment of the significance of a "match" (step eight) were generally accepted as reliable by experts in the field.

The Court is unanimous, moreover, in concluding that three

1. Even the new Federal test articulated in *Daubert v Merrell Dow Pharms.* (509 US —, 113 S Ct 2786) would require proof of reliability of novel scientific evidence.

inquiries are involved in the consideration of novel scientific evidence. The first—the *Frye* hearing—asks whether, theoretically, the accepted techniques, when performed as they should be, generate results generally accepted as reliable within the scientific community. Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered. Courts thereafter may take judicial notice of reliability of the general procedure.

Next, a foundational inquiry must be satisfied before such evidence is placed before the jury: in each case the court must determine that the laboratory actually employed the accepted techniques. This foundational inquiry also goes to admissibility of the evidence, not simply its weight *(People v Middleton,* 54 NY2d, at 45, 50, *supra*).[2] Finally, infirmities in collection and analysis of the evidence not affecting its trustworthiness go to weight, to be assessed by the jury.[3]

Where we part company with our colleagues is in the application of these principles. We do not agree that the eight steps of forensic analysis, then in its infancy, were shown to have been accepted as reliable within the scientific community. Rather, the standard for general acceptance of the new techniques was seen as commensurate with the standards adopted by Lifecodes, the commercial laboratory hired to conduct the actual tests and which virtually occupied the field of forensic DNA analysis. Additionally, the hearing court made very clear to the parties in its *Frye* decision that it

2. We disagree with the conclusion of the court in *People v Castro* (144 Misc 2d 956, 959) that the foundational inquiry is part of a special "DNA *Frye* test." Our cases have always required a foundational inquiry before scientific evidence can be admitted (*see, e.g., People v Middleton,* 54 NY2d, at 45, *supra*), even after a particular technique has passed out of the "twilight zone" of "novel" evidence that is the subject of *Frye* and is judicially noticed as reliable (*see, People v Knight,* 72 NY2d 481, 487 [radar speed detection]; *People v Campbell,* 73 NY2d 481, 485 [blood alcohol content test]; *People v Mertz,* 68 NY2d 136, 148 [same]; *People v Forcland,* 68 NY2d 699, 701 [same]; *Pereira v Pereira,* 35 NY2d 301, 307 [polygraph test used for investigative purposes]). While the *Frye* hearing and foundational inquiry may proceed simultaneously, in the present case the *Frye* inquiry was conducted before any samples were taken, so that a foundational inquiry was not possible at that time.

3. Brief gaps in the chain of custody, for example, may not affect trustworthiness of the test results, while challenges to the forensic laboratory analysis may go to the heart of reliability of results and require preclusion (Imwinkelreid, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misarrests,* 69 Wash U L Q 19, 25).

considered only the theory of forensic DNA analysis as going to admissibility, and relegated the remaining questions for weighing by the jury, including such foundational inquiries as whether Lifecodes' methodology and procedures were adequate to assure the reliability and accuracy of the results (140 Misc 2d 306, 317; *see also,* 183 AD2d 75, 78). In our view admission of this evidence was error.

The *Frye* Hearing in this Case

The *Frye* hearing in this case was virtually the first in the Nation to consider whether forensic application of DNA analysis had been generally accepted as reliable. While the mere fact that a court is the first to evaluate novel scientific evidence does not mean the evidence is unreliable, it increases the task of the hearing court. If no court opinions, texts, laboratory standards or scholarly articles have been issued on the technique—the types of materials relevant to a determination of general acceptability *(Matter of Lahey v Kelly,* 71 NY2d 135, 144; *People v Middleton,* 54 NY2d 42, 50, *supra; People v Leone,* 25 NY2d 511, 516-517; *People v Magri,* 3 NY2d 562)—the court may, as it did here, take the testimony of expert witnesses.[4]

The People offered detailed testimony concerning the RFLP procedure—an accepted procedure for separating strands of DNA and locating their unique fragments—which had been in use for research and diagnostic purposes long before its forensic application was proposed. Dr. Kenneth Kidd and Dr. Richard Roberts, experts in molecular biology and population genetics, and Dr. Sandra Nierzwicki-Bauer, a molecular biologist specializing in the study of blue-green algae, vouched on

4. It is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique. Premature acceptance of "revolutionary" forensic techniques has led to wrongful conviction *(see,* Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,* 80 Colum L Rev 1197, 1224-1225 [discussing belated discovery of inaccuracy of paraffin test]; Neufeld and Colman, *When Science Takes the Witness Stand,* 262 [No. 5] Scientific Am 46 [discussing belated discovery of inaccuracy of gunpowder detection test]). In *People v Leone* (25 NY2d 511, 517-518, *supra)* we also warned against introduction of scientific evidence before its general reliability have been resolved in the scientific community, because " 'the value of the test * * * could easily become the question in the trial rather than that person's guilt or credibility' " (quoting *People v Davis,* 343 Mich 348, 372, 72 NW2d 269, 282). Surely this case is an example of such diversion of focus.

behalf of the People for the reliability of RFLP procedure. None of these witnesses, however, was expert in forensic DNA analysis.

In defining the relevant scientific field, the court must seek to comply with the *Frye* objective of containing a consensus of the scientific community. If the field is too narrowly defined, the judgment of the scientific community will devolve into the opinion of a few experts. The field must still include scientists who would be expected to be familiar with the particular use of the evidence at issue, however, whether through actual or theoretical research (Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,* 80 Colum L Rev 1197, 1209-1210).

Focusing on DNA profiling in the forensic setting is crucial because "DNA fingerprinting is far more technically demanding than DNA diagnostics," particularly in the art of declaring a "match" between samples (Lander, *DNA Fingerprinting on Trial,* 339 Nature 501). Traditional RFLP procedure was developed to enable scientists to identify the DNA structure contained within a particular sample, and had been in use for more than a decade at the time of this hearing. Its forensic application—comparison of DNA between two or more samples, one from an unknown source—is far more susceptible to error *(id.).* Techniques must be adapted to the special requirements of crime scene samples, which are subject to contamination that can confuse results. Moreover, steps seven and eight —the steps unique to forensic analysis of DNA—were truly novel.

The theoretical use of DNA profiling as a method for identifying perpetrators of crimes was first posited in 1985 in a series of articles by British researchers (Jeffreys, Wilson and Thein, *Hypervariable Minisatellite Regions in Human DNA,* 314 Nature 67-69; Jeffreys, Wilson and Thein, *Individual-Specific "Fingerprints" of Human DNA,* 316 Nature 76; Gill, Jeffreys and Werrett, *Forensic Application of DNA 'Fingerprints',* 318 Nature 577). By 1988, the only practitioners of the technique in this country were the commercial laboratories Cellmark (founded by Dr. Jeffreys), Cetus and Lifecodes, which began forensic analysis just one year before the hearing in this case. Little peer review of their techniques had taken place by 1988 because these enterprises endeavored to keep their methods secret to protect their proprietary interests. According to the defense witness Dr. Neville Colman, the

procedures were still so new that there had not yet been efforts in the field to "validate by replication" the methods employed at Lifecodes; there had been neither refutation nor support of the technique in the professional literature.[5]

The point of noting controversy about the reliability of the forensic technique is not for our Court to determine whether the method was or was not reliable in 1988, but whether there was consensus in the scientific community as to its reliability. The *Frye* test emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion." (*Jones v United States*, 548 A2d 35, 42 [DC Ct App]; *accord, State v Montalbo*, 73 Haw 130, 828 P2d 1274, 1279.) Where controversy rages, a court may conclude that no consensus has been reached. Here, however, the problem was more subtle: absence of controversy reflected not the endorsement perceived by our colleagues, but the prematurity of admitting this evidence. Insufficient time had passed for competing points of view to emerge.[6]

The inquiry into forensic analysis of DNA in this case also demonstrates the "pitfalls of self-validation by a small group" (Hoeffel, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 Stan L Rev 465, 502, citing Black, *A Unified Theory of Scientific Evidence*, 56 Fordham L Rev 595, 625). Before bringing novel evidence to court, proponents of new techniques must subject their methods to the scrutiny of fellow scientists, unimpeded by commercial concerns (Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons From the "DNA War"*, 84 Crim L & Criminology 22, 95).

5. The earliest law review study of forensic DNA profiling, however, completed about the same time as the decision on the suppression motion in this case, warned that "[u]nforeseen exceptions to the test's reliability are already beginning to surface" and that it was not yet ready for *Frye* scrutiny, citing concerns raised by Dr. Alec Jeffreys himself (Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 Jurimetrics 455, 468, 470, n 68 [summer 1988]).

6. In the six years between the *Frye* hearing in this case and our review of it, debate within the scientific community has exploded about forensic application of DNA analysis. In New York, the Governor's Panel on Forensic DNA Analysis issued an interim report in September 1989 (Poklemba Report) with recommendations for a model program. No final recommendations have yet been issued. In April 1992, the National Research Council (NRC) issued its report, DNA Technology in Forensic Science, initiated in January 1990. In fall 1993, the NRC announced its intention to issue an amended report with modified recommendations.

A *Frye* court should be particularly cautious when—as here—"the supporting research is conducted by someone with a professional or commercial interest in the technique" (Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum L Rev 1197, 1213). DNA forensic analysis was developed in commercial laboratories under conditions of secrecy, preventing emergence of independent views. No independent academic or governmental laboratories were publishing studies concerning forensic use of DNA profiling. The Federal Bureau of Investigation did not consider use of the technique until 1989. Because no other facilities were apparently conducting research in the field, the commercial laboratory's unchallenged endorsement of the reliability of its own techniques was accepted by the hearing court as sufficient to represent acceptance of the technique by scientists generally. The sole forensic witness at the hearing in this case was Dr. Michael Baird, Director of Forensics at Lifecodes laboratory, where the samples were to be analyzed. While he assured the court of the reliability of the forensic application of DNA, virtually the sole publications on forensic use of DNA were his own or those of Dr. Jeffreys, the founder of Cellmark, one of Lifecodes' competitors. Nor had the forensic procedure been subjected to thorough peer review.

The absence of agreed-upon standards and laboratory protocol for the conduct of a technique can also serve to establish that the technique has not yet gained general acceptance (*People v Leone*, 25 NY2d 511, *supra*). Here, no laboratory conducting DNA analysis had been accredited for that purpose. As early as 1984, the Legislature set standards, in the Family Court Act, for admissibility of blood genetic marker tests. Analysis of DNA samples considered on the question of paternity—where laboratories must also declare that two samples "match"—must be shown to have been performed in accordance with proper procedures by a laboratory authorized by the Commissioner of Health to conduct such tests (Family Ct Act §§ 418, 532). As of July 1992, however, no laboratory, including Lifecodes, had yet been authorized by the Commissioner of Health to conduct DNA testing (*Matter of S.L.B. v K.A.*, 155 Misc 2d 458, 459). The defense introduced testimony from Dr. Anne Willey of the Department of Health establishing that no licensing or certification standards governing DNA profiling evidence had yet been developed in New York State, although discussions were ongoing. Lifecodes was licensed only

to conduct genetic tests of amniotic fluid. As defendant pointed out to the hearing court, the evidence proffered against him to prove murder would not have been admissible in this State on the question of paternity.

The opinions of two scientists, both with commercial interests in the work under consideration and both the primary developers and proponents of the technique, were insufficient to establish "general acceptance" in the scientific field *(People v Leone*, 25 NY2d 511, 514, *supra)*. The People's effort to gain a consensus by having their own witnesses "peer review" the relevant studies in time to return to court with supporting testimony was hardly an appropriate substitute for the thoughtful exchange of ideas in an unbiased scientific community envisioned by *Frye*. Our colleagues' characterization of a dearth of publications on this novel technique as the equivalent of unanimous endorsement of its reliability ignores the plain reality that this technique was not yet being discussed and tested in the scientific community.[7]

The hearing court also erred in failing to scrutinize the seventh and eighth steps of forensic DNA analysis pursuant to *Frye* standards. Our colleagues obscure this shortcoming by focusing on the wealth of evidence establishing the reliability of the first six steps of forensic analysis (the RFLP procedure) —a question that was not even disputed at the hearing. It is the absence of evidence concerning accepted standards for steps seven and eight that compels me to conclude admission of this evidence was error.

It is the declaration of a match between two samples of DNA, depicted on two separate autorads, that distinguishes forensic use of DNA from traditional, research-based application of RFLP procedure. The only evidence offered on this point was, again, the testimony of Dr. Michael Baird, who

7. While DNA evidence had been admitted in some criminal cases by mid-1988, the defense in this case was the very first to "mount * * * a serious challenge to DNA typing" (Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va L Rev 45, 46, n 4). Contrary to the observations of our colleagues, therefore (majority opn, at 426), the fact that Lifecodes DNA evidence had been admitted without objection prior to the time of the hearing in this case was of little significance. This is particularly so since Dr. Michael Baird was also the witness vouching for the reliability of the unopposed Lifecodes evidence in those cases as well (Thompson and Ford, *op. cit.*, 75 Va L Rev 45, 49, n 20). The mere fact that the same assertions he made here had been repeated elsewhere—without challenge—did not render those statements more reliable.

testified as to how a Lifecodes technician would visually compare the bands on two autorads to determine if they were the same. During the testimony of Dr. Borowsky, the court had the following exchange with the District Attorney:

> "Let me ask you this. Let's just keep on this field. Is there some person who looks at the autorad, gentlemen, and says 'All right, this is included, this one is not included?' or is the autorad read by computer or some kind of machine?
>
> "DISTRICT ATTORNEY: It's read by a person.
>
> "THE COURT: It's read by a person?
>
> "DISTRICT ATTORNEY: Yes.
>
> "THE COURT: All right. And a person with what expertise?
>
> "DISTRICT ATTORNEY: Well, Dr. Balasz from Lifecodes, who's a Ph.D., he has read the auto[rads]."

The People presented no evidence as to whether this was the procedure generally accepted as reliable in determining whether two DNA samples match beyond Dr. Baird's broad assertion that it was. Given the testimony from Dr. Borowsky indicating that autorad readings could lead to highly subjective results, it cannot be said that the People met their burden of clearly establishing that there were generally accepted procedures for "reading" autorads in the scientific community.

Moreover, we must take note that the "visual" matching technique was rejected as unreliable once it came to the attention of neutral peers in the scientific community (National Research Council, DNA Technology in Forensic Science ["NRC Report"] § 2.3.5).[8] We now know that "visual matches"

8. Because the question of admissibility of novel evidence is one of law, our determination as to what should acknowledge when subsequent developments have cast doubt upon the result of the *Frye* hearing *(see, e.g., People v Hughes*, 59 NY2d 523, 543; *People v Taylor*, 75 NY2d 277; *People v Williams*, 6 NY2d 18, 26; *People v Middleton*, 3 NY2d 562, 566). Defendant unsuccessfully brought a motion pursuant to CPL 440.10 (1) (g) to vacate the conviction on April 18, 1990, alleging that the technique for declaring a "match" employed in 1988 had been put on unreliable. Indeed, the slip opinion—relying on 1990 and 1992 [illegible] as including both visual studies and computer imaging analysis, the [illegible] was before the hearing court when it passed on the admissibility of the evidence as it dispensed with this crucial phase of determining that an autoradiograph is suitable for analysis, and that two samples match, in just one sentence: 'When comparing two DNA fragment patterns, one simply looks to see where the probe 'landed' " (140 Misc 2d 306, 317).

must be confirmed by a computerized measurement of the apparently matching bands. Only if these bands fall within certain defined parameters, called a "match window," will a match be declared (Attorney-General's *amicus* brief, at 20). Moreover, band appearance and position may be altered by testing conditions, environmental factors or sample contamination, compelling scientists to employ a wide "latitude of acceptance" to account for discrepancies between prints and to permit declaration of a match even where bands are not identical. This creates a danger that DNA prints of different individuals will be mistakenly declared to match, and no formal standards existed for declaring a match in 1988 (Thompson and Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Techniques*, 75 Va L Rev 45, 87-89 [1989]).

The People's failure to adduce evidence on the matching standards was pointed out by the defense at the hearing. In the course of examining Lifecodes' methods for assessing the statistical significance of a match, the defense witness Dr. Richard Borowsky, a population geneticist, repeatedly questioned the criteria employed by Lifecodes for determining that two autorads "matched." Defense counsel emphasized that "the way they read" autorads raises issues relevant to the reliability of the testing and that a negative result "may be just a matter of interpretation." Dr. Borowsky specifically cautioned that "the probability of error" in evaluating the frequency with which a particular gene will appear on an autorad band "has not been evaluated by the scientific community," and declared that "interpretation is as much as part of the print test as the molecular biology."

Our colleagues' conclusion that the reliability of the procedures employed in the instant case had been satisfactorily established overlooks that the samples had not been tested at the time of the *Frye* hearing, and the autoradiographs never examined prior to their admission at trial. Establishing a proper foundation requires at a minimum a determination that the autoradiographs were of a quality susceptible to interpretation (*People v Castro*, 144 Misc 2d 956, 967, 973-979), an inquiry that was here foreclosed by the court's erroneous determination in its *Frye* decision that all questions as to how a sample was tested go to weight, not admissibility.

Defendant also challenged the reliability of step eight, application of statistical methods to determine the significance

of a "match." In its written decision, the court summarized what it saw as part of "[t]he defense attack": "that Lifecodes' population studies are inadequate to establish a claimed power of identity for its results under the laws of population genetics" (140 Misc 2d, at 317). Dr. Borowsky sought to evaluate independently the autorads which comprised the population genetics database, warning that the absence of standards in the field led to subjective results.

Step eight is an integral part of DNA forensic analysis. Indeed, evidence of a "match" is virtually meaningless without resort to the statistical interpretation; population genetics is arguably the most crucial step of the analysis. It is the area of greatest controversy among the experts.[9] Whether the statistical technique employed by the laboratory meets the standards in the field and is capable of producing reliable results goes directly to admissibility. The hearing court erroneously characterized these concerns as affecting only the weight of the population genetics evidence.

We therefore conclude that the court erred in holding that DNA forensic analysis was generally accepted as reliable in 1988.

Harmless Error

Because of the overwhelming evidence of defendant's guilt, we join in affirming defendant's conviction in this instance where it can fairly be said that use of DNA evidence was harmless beyond a reasonable doubt (*People v Crimmins*, 36 NY2d 230, 237). At the time the People raised the possibility of introducing DNA evidence, they apparently hoped tests would establish that semen found on the body of the deceased originated from defendant, establishing his guilt of her sexual assault. It is unclear why the court instigated a *Frye* hearing

9. Some jurisdictions have barred DNA evidence altogether because of the uncertainty of the statistical significance of a match (*Commonwealth v Curnin*, 409 Mass 218, 565 NE2d 440, 443; *Ex parte Perry*, 586 So 2d 242, 254 [Ala]; *People v Barney*, 8 Cal App 4th 798, 10 Cal Rptr 2d 731, 742). Others have simply barred any statistical evidence of a match, while allowing testimony that the DNA test did not exclude the defendant as a suspect (*Prater v State*, 307 Ark 180, 820 SW2d 429; *State v Bible*, 175 Ariz 549, 858 P2d 1152; *State v Pennell*, 584 A2d 513 [Del]; *State v Schwartz*, 447 NW2d 422 [Minn]; *State v Houser*, 241 Neb 525, 490 NW2d 168; *State v Vandebogart*, 136 NH 365, 616 A2d 483; *State v Anderson*, 115 NM 433, 853 P2d 135; *Rivera v State*, 840 P2d 933 [Wyo]; *United States v Porter*, 618 A2d 629 [DC Ct App]).

before these tests had even been conducted, for it turned out that the DNA tests on the semen sample were inconclusive. While evidence concerning the source of the semen would have been probative, it never materialized and was not introduced at trial.

Instead, the People presented evidence that DNA contained in blood found on defendant's shirt matched that of the deceased and was not defendant's. This evidence added nothing to the People's case, however, since defendant admitted that he had been at the deceased's apartment at the time of her death and touched her body, albeit in an attempt to revive her (majority opn, at 421). Moreover, independent forensic analysis of fibers found at the crime scene also established that defendant had been present at the apartment. The DNA evidence, therefore, was simply cumulative on this point, as both parties acknowledged on summation:

> "[DEFENDANT'S LAWYER]: What does [the DNA evidence] establish? That Helen Kendrick's blood was on George Wesley's T-shirt. That's all it establishes. It establishes nothing else. What it establishes is exactly what George Wesley admitted, that he was there. * * *
>
> "[DISTRICT ATTORNEY]: In this case, as it turns out, [the DNA evidence's] significance is perhaps less than we anticipated, because it's unquestioned that the victim's blood is on the defendant's clothing."

Future Use of Forensic DNA Analysis

We join our colleagues in concluding that RFLP-based forensic analysis is today generally accepted as reliable. We know that, in principle, DNA polymorphisms provide a reliable method of comparing samples, that other than identical twins, each person has unique DNA, and that the current laboratory procedures for detecting DNA sequence variations are fundamentally sound. While the general acceptability of these techniques is no longer an open question, and trial courts may take judicial notice of their reliability, the adequacy of the methods used to acquire and analyze samples must be resolved case by case. As new forensic procedures are developed, *Frye* hearings will have to be conducted to assess the reliability of those methods.

The NRC panel called for formal quality-control programs

in all laboratories, called on Congress to require externa accreditation and proficiency testing of laboratories by a go ernmental body, and recommended the establishment of National Committee on Forensic DNA Typing to provic scientific and technical advice on new methods of DNA typi and related issues as they arise (Cornas, *Setting Standards f the Use of DNA-Typing Results in the Courtroom—The Sta of the Art*, 326 N Eng J of Med 1641, 1642). Such a call is useful reminder, even in 1994. As the NRC recommended:

> "[f]orensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation. Such high standards are appropriate for two reasons: the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial, and the procedures for DNA typing are complex, and judges and juries cannot properly assign and evaluate conclusions based on differing standards of rigor." (NRC § 2.1.)

Accordingly, we would affirm defendant's conviction, b only because, in the unusual circumstances of this case, t erroneous admission of the DNA evidence was harmless yond a reasonable doubt.

Judges SIMONS and BELLACOSA concur with Judge SMI Chief Judge KAYE concurs in result in a separate opinion which Judge CIPARICK concurs. Judges TITONE and LEV taking no part.

Order affirmed.

Jorge Luis Borges. *Collected Fictions.* Tr. Andrew Hurley. New York: Penguin Putnam, 1998. Pp. 101-106.

The Lottery in Babylon

Like all the men of Babylon, I have been proconsul; like all, I have been a slave. I have known omnipotence, ignominy, imprisonment. Look here—my right hand has no index finger. Look here—through this gash in my cape you can see on my stomach a crimson tattoo—it is the second letter, *Beth*. On nights when the moon is full, this symbol gives me power over men with the mark of Gimel, but it subjects me to those with the Aleph, who on nights when there is no moon owe obedience to those marked with the Gimel. In the half-light of dawn, in a cellar, standing before a black altar, I have slit the throats of sacred bulls. Once, for an entire lunar year, I was declared invisible—I would cry out and no one would heed my call, I would steal bread and not be beheaded. I have known that thing the Greeks knew not—uncertainty. In a chamber of brass, as I faced the strangler's silent scarf, hope did not abandon me; in the river of delights, panic has not failed me. Heraclides Ponticus reports, admiringly, that Pythagoras recalled having been Pyrrhus, and before that, Euphorbus, and before that, some other mortal; in order to recall similar vicissitudes, I have no need of death, nor even of imposture.

I owe that almost monstrous variety to an institution—the Lottery—which is unknown in other nations, or at work in them imperfectly or secretly. I have not delved into this institution's history. I know that sages cannot agree. About its mighty purposes I know as much as a man untutored in astrology might know about the moon. Mine is a dizzying country in which the Lottery is a major element of reality; until this day, I have thought as little about it as about the conduct of the indecipherable gods or of my heart. Now, far from Babylon and its beloved customs, I think with some bewilderment about the Lottery, and about the blasphemous conjectures that shrouded men whisper in the half-light of dawn or evening.

My father would tell how once, long ago—centuries? years?—the lottery in Babylon was a game played by commoners. He would tell (though whether this is true or not, I cannot say) how barbers would take a man's copper coins and give back rectangles made of bone or parchment and adorned with symbols. Then, in broad daylight, a drawing would be held; those smiled upon by fate would, with no further corroboration by chance, win coins minted of silver. The procedure, as you can see, was rudimentary.

Naturally, those so-called "lotteries" were a failure. They had no moral force whatsoever; they appealed not to all a man's faculties, but only to his hopefulness. Public indifference soon meant that the merchants who had founded these venal lotteries began to lose money. Someone tried something new: including among the list of lucky numbers a few *unlucky* draws. This innovation meant that those who bought those numbered rectangles now had a twofold chance: they might win a sum of money or they might be required to pay a fine—sometimes a considerable one. As one might expect, that small risk (for every thirty "good" numbers there was one ill-omened one) piqued the public's interest. Babylonians flocked to buy tickets. The man who bought none was considered a pusillanimous wretch, a man with no spirit of adventure. In time, this justified contempt found a second target: not just the man who didn't play, but also the man who lost and paid the fine. The Company (as it was now beginning to be known) had to protect the interest of the winners, who could not be paid their prizes unless the pot contained almost the entire amount of the fines. A lawsuit was filed against the losers: the judge sentenced them to pay the original fine, plus court costs, or spend a number of days in jail. In order to thwart the Company, they all chose jail. From that gauntlet thrown down by a few men sprang the Company's omnipotence—its ecclesiastical, metaphysical force.

Some time after this, the announcements of the numbers drawn began to leave out the lists of fines and simply print the days of prison assigned to each losing number. That shorthand, as it were, which went virtually unnoticed at the time, was of utmost importance: *It was the first appearance of nonpecuniary elements in the lottery*. And it met with great success—indeed, the Company was forced by its players to increase the number of unlucky draws.

As everyone knows, the people of Babylon are great admirers of logic, and even of symmetry. It was inconsistent that lucky numbers should pay off in round silver coins while

unlucky ones were measured in days and nights of jail. Certain moralists argued that the possession of coins did not always bring about happiness, and that other forms of happiness were perhaps more direct.

The lower-caste neighborhoods of the city voiced a different complaint. The members of the priestly class gambled heavily, and so enjoyed all the vicissitudes of terror and hope; the poor (with understandable, or inevitable, envy) saw themselves denied access to that famously delightful, even sensual, wheel. The fair and reasonable desire that all men and women, rich and poor, be able to take part equally in the Lottery inspired indignant demonstrations—the memory of which, time has failed to dim. Some stubborn souls could not (or pretended they could not) understand that this was a *novus ordo seclorum,* a necessary stage of history.... A slave stole a crimson ticket; the drawing determined that that ticket entitled the bearer to have his tongue burned out. The code of law provided the same sentence for stealing a lottery ticket. Some Babylonians argued that the slave deserved the burning iron for being a thief, others, more magnanimous, that the executioner should employ the iron because thus fate had decreed. There were disturbances, there were regrettable instances of bloodshed, but the masses of Babylon at last, over the opposition of the well-to-do, imposed their will; they saw their generous objectives fully achieved. First, the Company was forced to assume all public power. (The unification was necessary because of the vastness and complexity of the new operations.) Second, the Lottery was made secret, free of charge, and open to all. The mercenary sale of lots was abolished; once initiated into the mysteries of Baal, every free man automatically took part in the sacred drawings, which were held in the labyrinths of the god every sixty nights and determined each man's destiny until the next drawing. The consequences were incalculable. A lucky draw might bring about a man's elevation to the council of the magi or the imprisonment of his enemy (secret, or known by all to be so), or might allow him to find, in the peaceful dimness of his room, the woman who would begin to disturb him, or whom he had never hoped to see again; an unlucky draw: mutilation, dishonor of many kinds, death itself. Sometimes a single event—the murder of C in a tavern, B's mysterious apotheosis—would be the inspired outcome of thirty or forty drawings. Combining bets was difficult, but we must recall that the individuals of the Company were (and still are) all—powerful, and clever. In many cases, the knowledge that certain happy turns were the simple result of chance would have lessened the force of those outcomes; to forestall that problem, agents of the Company employed suggestion, or even magic. The paths they followed, the intrigues they wove, were invariably secret. To penetrate the innermost hopes and innermost fears of every man, they called upon astrologers and spies. There were certain stone lions, a sacred latrine called Qaphqa, some cracks in a dusty aqueduct—these places, it was generally believed, *gave access to the Company,* and well- or ill-wishing persons would deposit confidential reports in them. An alphabetical file held those *dossiers* of varying veracity.

Incredibly, there was talk of favoritism, of corruption. With its customary discretion, the Company did not reply directly; instead, it scrawled its brief argument in the rubble of a mask factory. This *apologia* is now numbered among the sacred Scriptures. It pointed out, doctrinally, that the Lottery is an interpolation of chance into the order of the universe, and observed that to accept errors is to strengthen chance, not contravene it. It also noted that those lions, that sacred squatting-place, though not disavowed by the Company (which reserved the right to consult them), functioned with no official guarantee.

This statement quieted the public's concerns. But it also produced other effects perhaps unforeseen by its author. It profoundly altered both the spirit and the operations of the Company. I have but little time remaining; we are told that the ship is about to sail—but I will try to explain.

However unlikely it may seem, no one, until that time, had attempted to produce a general theory of gaming. Babylonians are not a speculative people; they obey the dictates of chance, surrender their lives, their hopes, their nameless terror to it, but it never occurs to them to delve into its labyrinthine laws or the revolving spheres that manifest its workings. Nonetheless, the semiofficial statement that I mentioned inspired numerous debates of a legal and mathematical nature. From one of them, there emerged the following conjecture: If the Lottery is an intensification of chance, a periodic infusion of chaos into the cosmos, then is it not appropriate that chance intervene in *every* aspect of the drawing, not just one? Is it not ludicrous that chance should dictate a person's death while the circumstances of that death—whether

private or public, whether drawn out for an hour or a century—should *not* be subject to chance? Those perfectly reasonable objections finally prompted sweeping reform; the complexities of the new system (complicated further by its having been in practice for centuries) are understood by only a handful of specialists, though I will attempt to summarize them, even if only symbolically.

Let us imagine a first drawing, which condemns a man to death. In pursuance of that decree, another drawing is held; out of that second drawing come, say, nine possible executors. Of those nine, four might initiate a third drawing to determine the name of the executioner, two might replace the unlucky draw with a lucky one (the discovery of a treasure, say), another might decide that the death should be exacerbated (death with dishonor, that is, or with the refinement of torture), others might simply refuse to carry out the sentence. That is the scheme of the Lottery, put symbolically. *In reality, the number of drawings is infinite*. No decision is final; all branch into others. The ignorant assume that infinite drawings require infinite time; actually, all that is required is that time be infinitely subdivisible, as in the famous parable of the Race with the Tortoise. That infinitude coincides remarkably well with the sinuous numbers of Chance and with the Heavenly Archetype of the Lottery beloved of Platonists. Some distorted echo of our custom seems to have reached the Tiber: In his *Life of Antoninus Heliogabalus,* Aelius Lampridius tells us that the emperor wrote out on seashells the fate that he intended for his guests at dinner—some would receive ten pounds of gold; others, ten houseflies, ten dormice, ten bears. It is fair to recall that Heliogabalus was raised in Asia Minor, among the priests of his eponymous god.

There are also *impersonal* drawings, whose purpose is unclear. One drawing decrees that a sapphire from Taprobana be thrown into the waters of the Euphrates; another, that a bird be released from the top of a certain tower; another, that every hundred years a grain of sand be added to (or taken from) the countless grains of sand on a certain beach. Sometimes, the consequences are terrible.

Under the Company's beneficent influence, our customs are now steeped in chance. The purchaser of a dozen amphorae of Damascene wine will not be surprised if one contains a talisman, or a viper; the scribe who writes out a contract never fails to include some error; I myself, in this hurried statement, have misrepresented some splendor, some atrocity perhaps, too, some mysterious monotony.... Our historians, the most perspicacious on the planet, have invented a method for correcting chance; it is well known that the outcomes of this method are (in general) trust-worthy—although, of course, they are never divulged without a measure of deception. Besides, there is nothing so tainted with fiction as the history of the Company.... A paleographic document, unearthed at a certain temple, may come from yesterday's drawing or from a drawing that took place centuries ago. No book is published without some discrepancy between each of the edition's copies. Scribes take a secret oath to omit, interpolate, alter. *Indirect* falsehood is also practiced.

The Company, with godlike modesty, shuns all publicity. Its agents, of course, are secret; the orders it constantly (perhaps continually) imparts are no different from those spread wholesale by impostors. Besides—who will boast of being a mere impostor? The drunken man who blurts out an absurd command, the sleeping man who suddenly awakes and turns and chokes to death the woman sleeping at his side—are they not, perhaps, implementing one of the Company's secret decisions? That silent functioning, like God's, inspires all manner of conjectures. One scurrilously suggests that the Company ceased to exist hundreds of years ago, and that the sacred disorder of our lives is purely hereditary, traditional; another believes that the Company is eternal, and teaches that it shall endure until the last night, when the last god shall annihilate the earth. Yet another declares that the Company is omnipotent, but affects only small things: the cry of a bird, the shades of rust and dust, the half dreams that come at dawn. Another, whispered by masked heresiarchs, says that *the Company has never existed, and never will*. Another, no less despicable, argues that it makes no difference whether one affirms or denies the reality of the shadowy corporation, because Babylon is nothing but an infinite game of chance.

JOHN MCPHEE

The Search for Marvin Gardens

Go. I roll the dice—a six and a two. Through the air I move my token, the flatiron, to Vermont Avenue, where dog packs range.

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The dogs are moving (some are limping) through ruins, rubble, fire damage, open garbage. Doorways are gone. Lath is visible in the crumbling walls of the buildings. The street sparkles with shattered glass. I have never seen, anywhere, so many broken windows. A sign—"Slow, Children at Play"—has been bent backward by an automobile. At the lighthouse, the dogs turn up Pacific and disappear. George Meade, Army engineer, built the lighthouse—brick upon brick, six hundred thousand bricks, to reach up high enough to throw a beam twenty miles over the sea. Meade, seven years later, saved the Union at Gettysburg.

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I buy Vermont Avenue for $100. My opponent is a tall, shadowy figure, across from me, but I know him well, and I know his game like a favorite tune. If he can, he will always go for the quick kill. And when it is foolish to go for the quick kill he will be foolish. On the whole, though, he is a master assessor of percentages. It is a mistake to underestimate him. His eleven carries his top hat to St. Charles Place, which he buys for $140.

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The sidewalks of St. Charles Place have been cracked to shards by through-growing weeds. There are no buildings. Mansions, hotels once stood here. A few street lamps now drop cones of light on broken glass and vacant space behind a chain-link fence that some great machine has in places bent

to the ground. Five plane trees—in full summer leaf, flecking the light—are all that live on St. Charles Place.

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Block upon block, gradually, we are cancelling each other out—in the blues, the lavenders, the oranges, the greens. My opponent follows a plan of his own devising. I use the Hornblower & Weeks opening and the Zuricher defense. The first game draws tight, will soon finish. In 1971, a group of people in Racine, Wisconsin, played for seven hundred and sixty-eight hours. A game begun a month later in Danville, California, lasted eight hundred and twenty hours. These are official records, and they stun us. We have been playing for eight minutes. It amazes us that Monopoly is thought of as a long game. It is possible to play to a complete, absolute, and final conclusion in less than fifteen minutes, all within the rules as written. My opponent and I have done so thousands of times. No wonder we are sitting across from each other now in this best-of-seven series for the international singles championship of the world.

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On Illinois Avenue, three men lean out from second-story windows. A girl is coming down the street. She wears dungarees and a bright-red shirt, has ample breasts and a Hadendoan Afro, a black halo, two feet in diameter. Ice rattles in the glasses in the hands of the men.

"Hey, sister!"

"Come on up!"

She looks up, looks from one to another to the other, looks them flat in the eye.

"What for?" she says, and she walks on.

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I buy Illinois for $240. It solidifies my chances, for I already own Kentucky and Indiana. My opponent pales. If he had landed first on Illinois, the game would have been over then and there, for he has houses built on Boardwalk and Park Place, we share the railroads equally, and we have cancelled each other everywhere else. We never trade.

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In 1852, R. B. Osborne, an immigrant Englishman, civil engineer, surveyed the route of a railroad line that would run from Camden to Absecon Island, in New Jersey, traversing the state from the Delaware River to the barrier beaches of the sea. He then sketched in the plan of a "bathing village" that would surround the eastern terminus of the line. His pen flew glibly, framing and naming spacious avenues parallel to the shore—Mediterranean, Baltic, Oriental, Ventnor—and narrower transsecting avenues: North Carolina, Pennsylvania, Vermont, Connecticut, States, Virginia, Tennessee, New York, Kentucky, Indiana, Illinois. The place as a whole had no name, so when he had completed the plan Osborne wrote in large letters over the ocean, "Atlantic City." No one ever challenged the name, or the names of Osborne's streets. Monopoly was invented in the early nineteen-thirties by Charles B. Darrow, but Darrow was only transliterating what Osborne had created. The railroads, crucial to any player, were the making of Atlantic City. After the rails were down, houses and hotels burgeoned from Mediterranean and Baltic to New York and Kentucky. Properties—building lots—sold for as little as six dollars apiece and as much as a thousand dollars. The original investors in the railroads and the real estate called themselves the Camden & Atlantic Land Company. Reverently, I repeat their names: Dwight Bell, William Coffin, John DaCosta, Daniel Deal, William Fleming, Andrew Hay, Joseph Porter, Jonathan Pitney, Samuel Richards—founders, fathers, forerunners, archetypical masters of the quick kill.

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My opponent and I are now in a deep situation of classical Monopoly. The torsion is almost perfect—Boardwalk and Park Place versus the brilliant reds. His cash position is weak, though, and if I escape him now he may fade. I land on Luxury Tax, contiguous to but in sanctuary from his power. I have four houses on Indiana. He lands there. He concedes.

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Indiana Avenue was the address of the Brighton Hotel, gone now. The Brighton was exclusive—a word that no longer has retail value in the city. If you arrived by automobile and tried to register at the Brighton, you were sent away. Brighton-class people came in private railroad cars. Brighton-class people had other private railroad cars for their horses—dawn rides on the firm sand at water's edge, skirts flying. Colonel Anthony J. Drexel

Biddle—the sort of name that would constrict throats in Philadelphia—lived, much of the year, in the Brighton.

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Colonel Sanders' fried chicken is on Kentucky Avenue. So is Clifton's Club Harlem, with the Sepia Revue and the Sepia Follies, featuring the Honey Bees, the Fashions, and the Lords.

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My opponent and I, many years ago, played 2,428 games of Monopoly in a single season. He was then a recent graduate of the Harvard Law School, and he was working for a downtown firm, looking up law. Two people we knew—one from Chase Manhattan, the other from Morgan, Stanley—tried to get into the game, but after a few rounds we found that they were not in the conversation and we sent them home. Monopoly should always be *mano a mano* anyway. My opponent won 1,199 games, and so did I. Thirty were ties. He was called into the Army, and we stopped just there. Now, in Game 2 of the series, I go immediately to jail, and again to jail while my opponent seines property. He is dumbfoundingly lucky. He wins in twelve minutes.

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Visiting hours are daily, eleven to two; Sunday, eleven to one; evenings, six to nine. "NO MINORS, NO FOOD, Immediate Family Only Allowed in Jail." All this above a blue steel door in a blue cement wall in the windowless interior of the basement of the city hall. The desk sergeant sits opposite the door to the jail. In a cigar box in front of him are pills in every color, a banquet of fruit salad an inch and a half deep—leapers, co-pilots, footballs, truck drivers, peanuts, blue angels, yellow jackets, redbirds, rainbows. Near the desk are two soldiers, waiting to go through the blue door. They are about eighteen years old. One of them is trying hard to light a cigarette. His wrists are in steel cuffs. A military policeman waits, too. He is a year or so older than the soldiers, taller, studious in appearance, gentle, fat. On a bench against a wall sits a good-looking girl in slacks. The blue door rattles, swings heavily open. A turnkey stands in the doorway. "Don't you guys kill yourselves back there now," says the sergeant to the soldiers.

"One kid, he overdosed himself about ten and a half hours ago," says the M.P.

The M.P., the soldiers, the turnkey, and the girl on the bench are white. The sergeant is black. "If you take off the handcuffs, take off the belts," says the sergeant to the M.P. "I don't want them hanging themselves back there." The door shuts and its tumblers move. When it opens again, five minutes later, a young white man in sandals and dungarees and a blue polo shirt emerges. His hair is in a ponytail. He has no beard. He grins at the good-looking girl. She rises, joins him. The sergeant hands him a manila envelope. From it he removes his belt and a small notebook. He borrows a pencil, makes an entry in the notebook. He is out of jail, free. What did he do? He offended Atlantic City in some way. He spent a night in the jail. In the nineteen-thirties, men visiting Atlantic City went to jail, directly to jail, did not pass Go, for appearing in topless bathing suits on the beach. A city statute requiring all men to wear full-length bathing suits was not seriously challenged until 1937, and the first year in which a man could legally go bare-chested on the beach was 1940.

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Game 3. After seventeen minutes, I am ready to begin construction on overpriced and sluggish Pacific, North Carolina, and Pennsylvania. Nothing else being open, opponent concedes.

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The physical profile of streets perpendicular to the shore is something like a playground slide. It begins in the high skyline of Boardwalk hotels, plummets into warrens of "side-avenue" motels, crosses Pacific, slopes through church missions, convalescent homes, burlesque houses, rooming houses, and liquor stores, crosses Atlantic, and runs level through the bombed-out ghetto as far—Baltic, Mediterranean—as the eye can see. North Carolina Avenue, for example, is flanked at its beach end by the Chalfonte and the Haddon Hall (908 rooms, air-conditioned), where, according to one biographer, John Philip Sousa (1854–1932) first played when he was twenty-two, insisting, even then, that everyone call him by his entire name. Behind these big hotels, motels—Barbizon, Catalina—crouch. Between Pacific and Atlantic is an occasional house from 1910—wooden porch, wooden mullions,

old yellow paint—and two churches, a package store, a strip show, a dealer in fruits and vegetables. Then, beyond Atlantic Avenue, North Carolina moves on into the vast ghetto, the bulk of the city, and it looks like Metz in 1919, Cologne in 1944. Nothing has actually exploded. It is not bomb damage. It is deep and complex decay. Roofs are off. Bricks are scattered in the street. People sit on porches, six deep, at nine on a Monday morning. When they go off to wait in unemployment lines, they wait sometimes two hours. Between Mediterranean and Baltic runs a chain-link fence, enclosing rubble. A patrol car sits idling by the curb. In the back seat is a German shepherd. A sign on the fence says, "Beware of Bad Dogs."

Mediterranean and Baltic are the principal avenues of the ghetto. Dogs are everywhere. A pack of seven passes me. Block after block, there are three-story brick row houses. Whole segments of them are abandoned, a thousand broken windows. Some parts are intact, occupied. A mattress lies in the street, soaking in a pool of water. Wet stuffing is coming out of the mattress. A postman is having a rye and a beer in the Plantation Bar at nine-fifteen in the morning. I ask him idly if he knows where Marvin Gardens is. He does not. "HOOKED AND NEED HELP? CONTACT N.A.R.C.O." "REVIVAL NOW GOING ON, CONDUCTED BY REVEREND H. HENDERSON OF TEXAS." These are signboards on Mediterranean and Baltic. The second one is upside down and leans against a boarded-up window of the Faith Temple Church of God in Christ. There is an old peeling poster on a warehouse wall showing a figure in an electric chair. "The Black Panther Manifesto" is the title of the poster, and its message is, or was, that "the fascists have already decided in advance to murder Chairman Bobby Seale in the electric chair." I pass an old woman who carries a bucket. She wears blue sneakers, worn through. Her feet spill out. She wears red socks, rolled at the knees. A white handkerchief, spread over her head, is knotted at the corners. Does she know where Marvin Gardens is? "I sure don't know," she says, setting down the bucket. "I sure don't know. I've heard of it somewhere, but I just can't say where." I walk on, through a block of shattered glass. The glass crunches underfoot like coarse sand. I remember when I first came here—a long train ride from Trenton, long ago, games of poker in the train—to play basketball against Atlantic City. We were half black, they were all black. We scored forty points, they scored eighty, or something like it. What I remember most is that they had glass backboards—

glittering, pendent, expensive glass backboards, a rarity then in high schools, even in colleges, the only ones we played on all year.

I turn on Pennsylvania, and start back toward the sea. The windows of the Hotel Asroria, on Pennsylvania near Baltic, are boarded up. A sheet of unpainted plywood is the door, and in it is a triangular peephole that now frames an eye. The plywood door opens. A man answers my question. Rooms there are six, seven, and ten dollars a week. I thank him for the information and move on, emerging from the ghetto at the Catholic Daughters of America Women's Guest House, between Atlantic and Pacific. Between Pacific and the Boardwalk are the blinking vacancy signs of the Aristocrat and Colton Manor motels. Pennsylvania terminates at the Sheraton-Seaside—thirty-two dollars a day, ocean corner. I take a walk on the Boardwalk and into the Holiday Inn (twenty-three stories). A guest is registering. "You reserved for Wednesday, and this is Monday," the clerk tells him. "But that's all right. We have *plenty* of rooms." The clerk is very young, female, and has soft brown hair that hangs below her waist. Her superior kicks her.

He is a middle-aged man with red spiderwebs in his face. He is jackered and tied. He takes her aside. "Don't say 'plenty,'" he says. "Say 'You are fortunate, sir. We have rooms available.'"

The face of the young woman turns sour. "We have all the rooms you need," she says to the customer, and, to her superior, "How's that?"

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Game 4. My opponent's luck has become abrasive. He has Boardwalk and Park Place, and has sealed the board.

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Darrow was a plumber. He was, specifically, a radiator repairman who lived in Germantown, Pennsylvania. His first Monopoly board was a sheet of linoleum. On it he placed houses and hotels that he had carved from blocks of wood. The game he thus invented was brilliantly conceived, for it was an uncannily exact reflection of the business milieu at large. In its depth, range, and subtlety, in its luck-skill ratio, in its sense of infrastructure and socio-economic parameters, in its philosophical characteristics, it reached to the profundity of the financial community. It was as scientific as the stock market. It suggested the manner and means through which an underdeveloped

world had been developed. It was chess at Wall Street level. "Advance token to the nearest Railroad and pay owner twice the rental to which he is otherwise entitled. If Railroad is unowned, you may buy it from the Bank. Get out of Jail, free. Advance token to nearest utility. If unowned, you may buy it from Bank. If owned, throw dice and pay owner a total ten times the amount thrown. You are assessed for street repairs: $40 per house, $115 per hotel. Pay poor tax of $15. Go to Jail. Go directly to Jail. Do not pass Go. Do not collect $200."

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The turnkey opens the blue door. The turnkey is known to the inmates as Sidney K. Above his desk are ten closed-circuit-TV screens—assorted viewpoints of the jail. There are three cellblocks—men, women, juvenile boys. Six days is the average stay. Showers twice a week. The steel doors and the equipment that operates them were made in San Antonio. The prisoners sleep on bunks of butcher block. There are no mattresses. There are three prisoners to a cell. In winter, it is cold in here. Prisoners burn newspapers to keep warm. Cell corners are black with smudge. The jail is three years old. The men's block echoes with chatter. The man in the cell nearest Sidney K. is pacing. His shirt is covered with broad stains of blood. The block for juvenile boys is, by contrast, utterly silent—empty corridor, empty cells. There is only one prisoner. He is small and black and appears to be thirteen. He says he is sixteen and that he has been alone in here for three days.

"Why are you here? What did you do?"

"I hit a jitney driver."

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The series stands at three all. We have split the fifth and sixth games. We are scrambling for property. Around the board we fairly fly. We move so fast because we do our own banking and search our own deeds. My opponent grows tense.

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Ventnor Avenue, a street of delicatessens and doctors' offices, is leafy with plane trees and hydrangeas, the city flower. Water Works is on the mainland. The water comes over in submarine pipes. Electric Company gets

power from across the state, on the Delaware River, in Deepwater. States Avenue, now a wasteland like St. Charles, once had gardens running down the middle of the street, a horse-drawn trolley, private homes. States Avenue was as exclusive as the Brighton. Only an apartment house, a small motel, and the All Wars Memorial Building—monadnocks spaced widely apart—stand along States Avenue now. Pawnshops, convalescent homes, and the Paradise Soul Saving Station are on Virginia Avenue. The soul-saving station is pink, orange, and yellow. In the windows flanking the door of the Virginia Money Loan Office are Nikons, Polaroids, Yashicas, Sony TVs, Underwood typewriters, Singer sewing machines, and pictures of Christ. On the far side of town, beside a single track and locked up most of the time, is the new railroad station, a small hut made of glazed firebrick, all that is left of the lines that built the city. An authentic phrenologist works on New York Avenue close to Frank's Extra Dry Bar and a church where the sermon today is "Death in the Pot." The church is of pink brick, has blue and amber windows and two red doors. St. James Place, narrow and twisting, is lined with boarding houses that have wooden porches on each of three stories, suggesting a New Orleans made of salt-bleached pine. In a vacant lot on Tennessee is a white Ford station wagon stripped to the chassis. The windows are smashed. A plastic Clorox bottle sits on the driver's seat. The wind has pressed newspaper against the chain-link fence around the lot. Atlantic Avenue, the city's principal thoroughfare, could be seventeen American Main Streets placed end to end—discount vitamins and Vienna Corset shops, movie theatres, shoe stores, and funeral homes. The Boardwalk is made of yellow pine and Douglas fir, soaked in pentachlorophenol. Downbeach, it reaches far beyond the city. Signs everywhere—on windows, lampposts, trash baskets—proclaim "Bienvenue Canadiens!" The salt air is full of Canadian French. In the Claridge Hotel, on Park Place, I ask a clerk if she knows where Marvin Gardens is. She says, "Is it a floral shop?" I ask a cabdriver, parked outside. He says, "Never heard of it." Park Place is one block long, Pacific to Boardwalk. On the roof of the Claridge is the Solarium, the highest point in town—panoramic view of the ocean, the bay, the saltwater ghetto. I look down at the rooftops of the side-avenue motels and into swimming pools. There are hundreds of people around the rooftop pools, sunbathing, reading—many more people than are on the beach. Walls, windows, and a block of sky are all that is visible from these pools—no sand, no sea.

The pools are craters, and with the people around them they are countersunk into the motels.

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The seventh, and final, game is ten minutes old and I have hotels on Oriental, Vermont, and Connecticut. I have Tennessee and St. James. I have North Carolina and Pacific. I have Boardwalk, Atlantic, Ventnor, Illinois, Indiana. My fingers are forming a "V." I have mortgaged most of these properties in order to pay for others, and I have mortgaged the others to pay for the hotels. I have seven dollars. I will pay off the mortgages and build my reserves with income from the three hotels. My cash position may be low, but I feel like a rocket in an underground silo. Meanwhile, if I could just go to jail for a time I could pause there, wait there, until my opponent, in his inescapable rounds, pays the rates of my hotels. Jail, at times, is the strategic place to be. I roll boxcars from the Reading and move the flatiron to Community Chest. "Go to Jail. Go directly to Jail."

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The prisoners, of course, have no pens and no pencils. They take paper napkins, roll them tight as crayons, char the ends with matches, and write on the walls. The things they write are not entirely idiomatic; for example, "In God We Trust." All is in carbon. Time is required in the writing. "Only humanity could know of such pain." "God So Loved the World." "There is no greater pain than life itself." In the women's block now, there are six blacks, giggling, and a white asleep in red shoes. She is drunk. The others are pushers, prostitutes, an auto thief, a burglar caught with pistol in purse. A sixteen-year-old accused of murder was in here last week. These words are written on the wall of a now empty cell: "Laying here I see two bunks about six inches thick, not counting the one I'm laying on, which is hard as brick. No cushion for my back. No pillow for my head. Just a couple scratchy blankets which is best to use it's said. I wake up in the morning so shivery and cold, waiting and waiting till I am told the food is coming. It's on its way. It's not worth waiting for, but I eat it anyway. I know one thing when they set me free I'm gonna be good if it kills me."

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How many years must a game be played to produce an Anthony J. Drexel Biddle and chestnut geldings on the beach? About half a century was the original answer, from the first railroad to Biddle at his peak. Biddle, at his peak, hit an Atlantic City streetcar conductor with his fist, laid him out with one punch. This increased Biddle's legend. He did not go to jail. While John Philip Sousa led his band along the boardwalk playing "The Stars and Stripes Forever" and Jack Dempsey ran up and down in training for his fight with Gene Tunney, the city crossed the high curve of its parabola. Al Capone held conventions here—upstairs with his sleeves rolled, apportioning among his lieutenant governors the states of the Eastern seaboard. The natural history of an American resort proceeds from Indians to French Canadians via Biddles and Capones. French Canadians, whatever they may be at home, are Visigoths here. Bienvenue Visigoths!

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My opponent plods along incredibly well. He has got his fourth railroad, and patiently, unbelievably, he has picked up my potential winners until he has blocked me everywhere but Marvin Gardens. He has avoided, in the fifty-dollar zoning, my increasingly petty hotels. His cash flow swells. His railroads are costing me two hundred dollars a minute. He is building hotels on States, Virginia, and St. Charles. He has temporarily reversed the current. With the yellow monopolies and my blue monopolies, I could probably defeat his lavenders and his railroads. I have Atlantic and Ventnor. I need Marvin Gardens. My only hope is Marvin Gardens.

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There is a plaque at Boardwalk and Park Place, and on it in relief is the leonine profile of a man who looks like an officer in a metropolitan bank—"Charles B. Darrow, 1889–1967, inventor of the game of Monopoly." "Darrow," I address him, aloud. "Where is Marvin Gardens?" There is, of course, no answer. Bronze, impassive, Darrow looks south down the Boardwalk. "Mr. Darrow, please, where is Marvin Gardens?" Nothing. Not a sign. He just looks south down the Boardwalk.

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My opponent accepts the trophy with his natural ease, and I make, from notes, remarks that are even less graceful than his.

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Marvin Gardens is the one color-block Monopoly property that is not in Atlantic City. It is a suburb within a suburb, secluded. It is a planned compound of seventy-two handsome houses set on curvilinear private streets under yews and cedars, poplars and willows. The compound was built around 1920, in Margate, New Jersey, and consists of solid buildings of stucco, brick, and wood, with slate roofs, tile roofs, multi-mullioned porches, Giraldic towers, and Spanish grilles. Marvin Gardens, the ultimate outwash of Monopoly, is a citadel and sanctuary of the middle class. "We're heavily patrolled by police here. We don't take no chances. Me? I'm living here nine years. I paid seventeen thousand dollars and I've been offered thirty. Number one, I don't want to move. Number two, I don't need the money. I have four bedrooms, two and a half baths, front den, back den. No basement. The Atlantic is down there. Six feet down and you float. A lot of people have a hard time finding this place. People that lived in Atlantic City all their life don't know how to find it. They don't know where the hell they're going. They just know it's south, down the Boardwalk."

Baseball and Justice

Sportswriters who want to deprive Armando Galarraga of his perfect game have something in common with Antonin Scalia.

By Michael Miner

When I was 16 I spent a summer as an umpire in a kids' baseball league. I stood behind the pitcher so I could call the pitches and the bases, and I did the best I could. Which wasn't especially good. The coaches gave me long looks over an erratic strike zone, and the players kicked a lot of dirt. But who ever appreciates the ump?

Toward the end of the summer there was a team that did more than the usual amount of grumbling as it packed its gear. A week later I had this team again. They hadn't won a game all season, so no wonder they were surly. But this time they went into the final inning leading by a run, and the kids were beside themselves with excitement. My own fingers were crossed.

The opposition came up for its last at bats and the leadoff hitter singled. The pitcher gave the next batter a long stare and threw ball one. As the catcher was tossing the ball back to the mound the runner decided to light out for second. It was madness. It was the sort of foolhardy impulse some say separates ten-year-olds from their elders. The kid wasn't even especially fast. What does he think he's doing? I thought, as he chugged toward second. The pitcher took the catcher's toss, whirled, and threw to his second baseman. When the runner finally slid into the base the ball was waiting for him.

I made the mistake of thinking the moment through. This makes no sense! I thought, followed by He must know something I don't. And on that assumption, when the runner stopped sliding I called him safe.

There was a lot of screaming but I stuck to my guns. The runner went on to score, of course. In fact the floodgates opened. And when the game was lost, I drove home turning the matter over in my mind. My principled refusal to change my call had been admirable, but how much more admirable would it have been to get the call right in the first place?

Over the years there would be other incidents in which character outpointed competence, and eventually I drew a distinction: We all make mistakes. But there is a difference between making a mistake and really fucking up. The problem with really fucking up is that other people usually get hurt, and there's nothing you can do about it.

Yet once in a while something can be done. And when that's the case, get down on your knees, thank your lucky stars, and do whatever it takes to repair the damage.

Life teaches different people different things, and apparently kids who grow up to be sportswriters learn that to err is both human and sublime. As if reversing a call were as fraught with difficulties as deciding to go to war, sportswriters tell us to abide even the most egregious and correctable of fuckups—as we saw last week in their reaction to the call at first by umpire Jim Joyce that cost the Detroit Tigers' Armando Galarraga a perfect game.

Joyce called Cleveland batter Jason Donald safe on what should have been the last play of the game. Donald was out; everyone in Comerica Park but Joyce knew it, and as soon as Joyce watched the replays he knew it too. His heart full of remorse, he admitted his mistake and apologized to Galarraga.

Most fuckups are so swiftly followed by complications that there's no going back, but in Joyce's case, miraculously, there were none. If Joyce had reversed himself on the spot the Indians might have beefed: mistakes happen, and the Indians, trailing only 3-0, might have insisted on the opportunity to take advantage of Joyce's. But the call stuck and they got that opportunity, and Galarraga retired the next batter to end the game. This meant a postgame reversal of the call would have done justice to Galarraga at no cost to anyone or anything except our subservience to fate.

But that's not how the scribes saw it. "Since the 1850s, this was the worst call, ever," George Vecsey wrote on the front page of the New York Times. But you know what? "Imperfect umpires are as much a part of this sport as imperfect infielders . . . or imperfect runners." Vecsey sentimentalized imperfection to justify doing nothing about it. Suppose, he went on, baseball commissioner Bud Selig "tried to overturn Joyce's ghastly call; where would that lead? A commissioner sitting in the stands overturning a call in a World Series—or doing it the next day, when everybody is flying home?" This is the slippery-slope argument, which imagines every medicine in lethal doses.

Chris De Luca, the Sun-Times sports editor, wrote the same thing. "Baseball needs its human element," he reasoned. "It's a game full of imperfections. Just because we all know Galarraga was perfect doesn't make it so."

De Luca continued, "Had Selig deemed Galarraga's outing perfect—something that looked like a real possibility when the commissioner agreed to study the idea—baseball would've been bracing for utter chaos."

And in the *Tribune*, Phil Rogers explained, "You can't change what happened. Donald reached first base, and that means Galarraga did not throw a perfect game. You can't change the call after the fact. The rules of baseball say that judgment calls cannot be appealed."

And on to the slippery slope. "If Selig had announced Galarraga, in fact, did have a perfect game, he would have to make a few other changes too. The Cardinals would be awarded the 1985 World Series, which was changed forever by a Don Denkinger call. Milt Pappas would get his perfect game, because everyone knows Bruce Froemming squeezed him . . ."

Rogers gave more examples, but these will do. Denkinger's fuckup (which he conceded) put the tying runner on first in the ninth inning of the sixth game of the World Series, which the Cardinals would lose in seven games. Denkinger's call unleashed a cascade of contingencies, and these determined the series. Pappas walked the 27th batter on a 3-2 count, and he and Froemming, the home plate umpire, will go to their graves disagreeing about the pitch. So what can you do? Joyce's fuckup was uniquely correctable, and anyone who doesn't see that doesn't want to.

A couple years ago I wrote something that now I'm not so sure of: "The law is one thing, common sense another, but we like to think of the two of them as living together in harmony, each the other's biggest supporter." My subject was Alton Logan, who'd spent 26 years in prison for a murder he hadn't committed while two attorneys whose client had admitted to the crime remained silent because of the attorney-client privilege. Their knowledge tortured them—the agony of Jim Joyce is surely a small thing by comparison—but they saw no way out. And my point was that their silence offended common sense, and when law and common sense go their separate ways most people side with common sense.

Herrera v. Collins was a capital punishment case in Texas 17 years ago. The condemned man asked for a hearing on the grounds that he had new proof of his innocence. The Supreme Court turned him down, but the majority was willing to give him this: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." But even that sop was too much for Justice Antonin Scalia, who wrote his own opinion: "There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Nor did he think there should be. I want to believe Scalia's cold-blooded assessment strikes most of us, not just me, as a violation of common sense.

But perhaps the occasional execution of an innocent man is the sort of serious fuckup that most people believe we need to abide because some sort of higher wisdom demands it. The law, they may feel, is as mysterious and mighty as the baseball rule book, and we flout its internal logic at our peril. And if the law, like the mysterious

and mighty gods of yore, requires the occasional human sacrifice, rather than mourn the sacrificial victim we should hail him if he's stoic and compliant.

In recent years a spate of innocent men have been cut loose after years in Illinois prisons, and the more docile and forgiving they are the more we like them. Joyce was apologetic and Galarraga forgiving, and the media promptly turned the fuckup into a celebration of character. "We Need More Jim Joyces in the World," read an AOL headline. Joyce "did something highly unusual in this day and age," columnist David Fagin wrote under it. "He accepted responsibility and apologized." Phil Rogers wrote that "one of the beauties of sports is that it provides us teaching moments," and explained that we'd just been seen a rare one. In a gesture of reconciliation, the next day Tigers manager Jim Leyland had Galarraga bring out the Tigers' lineup card to Joyce, who was that day's home plate umpire, and Galarraga gave the ump a pat on the back. "It was one of the great moments of the season," Rogers wrote.

Every so often, sports insult the laws of probability. There have been 20 perfect games in the history of the major leagues going back to the 1870s, but Galarraga's would have been the third in a month and the fourth in less than a year. Something similar once happened in horse racing. There have been just 11 Triple Crown winners, none since 1978, yet there were three in a six-year period in the 70s. If the perfect game Galarraga was rooked out of had been the first in 33 years, maybe the press box wouldn't have been so quick to find sportsmanship even more precious than perfection.

For me, Joyce's apology didn't go far enough. Once he'd checked the TV monitors after the game he should have said, "Sorry, I was wrong, so I'm changing my call. The batter was out. Statisticians, make the necessary corrections." Wouldn't that have been interesting? Instead of sympathy, he'd have stirred up consternation and given us a different kind of teaching moment.

Kids, there's an old saying your parents hold dear. It goes, "God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference." When you hear that you can tell them this: "Swell, but if there were more wisdom in the world there'd be less serenity."

Perfectly Unfair

As I write this, Detroit Tigers pitcher Armando Galarraga is preparing to make his first appearance on the mound since last Wednesday, when he was famously denied a perfect game by an umpire's botched call on what should have been the final out of the ninth inning.

It's a safe bet that when the game is over, an hour or two after this column is posted, he won't have pitched a perfect game. And it's a safe bet that he'll never pitch one. A perfect game — in which no opposing batter reaches base — has been achieved only 20 times in the century-plus history of major league baseball.

Paul Sancya/Associated Press When Jim Joyce called Jason Donald of the Cleveland Indians safe, the Detroit Tigers pitcher Armando Galarraga lost his bid for a perfect game.

It's sad that Galarraga won't ever have what is rightfully his — so sad that some people are now saying baseball should do what pro football does: review close plays via video and reverse bad calls.

Please, no. Bringing justice to baseball would defeat the whole point of the game. I'm not kidding.

I like it when sports metaphorically embody some aspect of real life. This lets us purport to be learning valuable life lessons when in fact we're just playing kids' games. Plus, the kids themselves can actually learn valuable life lessons while playing those games. And, above all, this helps columnists fulfill their professional obligation to write a corny homily every year or so.

Let's get started!

Football teaches us that group success often depends on unsung heroes. Sure, in the age of instant replay, an offensive lineman can get credit for a crucial block. But in football's primordial, pre-TV age, the offensive lineman labored in relentless obscurity — whereas in baseball, basketball, hockey and soccer, every player has a chance to do something conspicuously great.

Golf teaches us . . . well, what it's taught *me* is that I shouldn't play golf. But those who succeed at it learn this lesson: focus; live in the moment; if you're mired in regret over past mistakes, or carried away by dreams of future success, you'll screw up the task at hand.

And baseball teaches us that *life isn't fair*. Sure, unjust officiating is evident in all sports, but not the way it is

in baseball.

For one thing, baseball offers unrivaled opportunity for injustice. Judgment calls pervade the sport. An umpire passes binary judgment — ball or strike — on every pitch that isn't swung at. And without these judgments, the pitches have no meaning. You can watch long stretches of football, basketball, hockey or soccer, cheering or bemoaning your team's successes or failures, with no awareness of the officials. In baseball, official judgments mediate your moment-by-moment perception of the game, defining success and failure.

And in other sports, when officials *do* intervene consequentially, they're often judging things that few fans saw. Penalties for holding or clipping in football, a three-second violation in basketball — these things happen away from the ball and so don't invoke the fan's sense of justice. In baseball, the big calls take place at center stage — not just when a pitch crosses home plate, but when a line drive lands right on the foul line, when a pitcher balks or when a runner barely beats a tag at second. Everyone in the ballpark is watching.

And everyone was watching last week when a pitcher who *thought* he had just pitched a perfect game stepped on first base with ball in hand, half a step ahead of the runner.

Hey, that's life. And it really is. Injustice happens, but usually there's nothing you can do about it, and dwelling on it will only hurt your performance. Galarraga, rather than whine about the call, returned placidly to the mound and finished his job, winding up with a one-hit shutout. For that alone, he deserves the standing ovation he'll get tonight.

The point here isn't just that bad breaks happen. Bad breaks, and good breaks, figure heavily in lots of sports; golf balls bounce off of mid-fairway sprinkler covers into a greenside pond, and they bounce off of trees onto the green. But in baseball it's bad *calls* that are so engrained in the game; human-mediated justice gets miscarried time and time again.

This is what prepares you for life — for performance evaluations by idiot bosses, reviews by nasty book reviewers, flirtations that go unreciprocated by people of dull aesthetic sensibility. But, in spite of it all, if you keep plugging away, things will in the long run work out not-all-that-catastrophically. (Probably.)

So an attentive Little Leaguer — especially if guided by a wise, mature coach (which is the case, oh, 30 percent of the time) — gets the picture: Don't dwell on the little injustices that afflict you; focus on the next opportunity.

Yes, certain kinds of unfairness are worth pursuing. When an umpire's interpretation of the rules is in question, you can play the game "under protest" and later seek reversal. But by and large you should just shut up and play the game. The good calls and the bad calls, and the good breaks and the bad breaks, tend to even out.

In fact, only two outs before the call that doomed Galarraga, he had benefited from amazing good fortune. His center fielder, Austin Jackson, caught up with a seemingly uncatchable ball and made an over-the-shoulder grab, robbing a Cleveland Indians batter of what by all rights should have been a base hit.

Many pitchers aren't backed up by such talent, so in that sense it wasn't fair that Galarraga made it through that moment with perfection intact — a prerequisite for his later being denied a perfect game with such prominent injustice that he'll be remembered long after pitchers who actually pitch perfect games have been forgotten. Lucky him!

Text of Justice David Souter's speech

Harvard Commencement remarks (as delivered)

By Justice David H. Souter
Thursday, May 27, 2010

Justin Ide/Harvard Staff Photographer

Justice David H. Souter signs the guest book inside Massachusetts Hall prior to the Morning Exercises at Harvard's 359th Commencement.

When I was younger, I used to hear Harvard stories from a member of the class of 1885. Back then, old graduates of the College who could get to Cambridge on Commencement Day didn't wait for reunion years to come back to the Yard. They'd just turn up, see old friends, look over the new crop, and have a cup of Commencement punch under the elms. The old man remembered one of those summer days when he was heading for the Square after lunch and crossed paths with a newly graduated senior, who had enjoyed quite a few cups of that punch. As the two men approached each other the younger one thrust out his new diploma and shouted, "Educated, by God."

Even with an honorary Harvard doctorate in my hands, I know enough not to shout that across the Yard, but the University's generosity does make me bold enough to say that over the course of 19 years on the Supreme Court, I learned some lessons about the Constitution of the United States, and about what judges do when they apply it in deciding cases with constitutional issues. I'm going to draw on that experience in the course of the next few minutes, for it is as a judge that I have been given the honor to speak before you.

The occasion for our coming together like this aligns with the approach of two separate events on the judicial side of the national public life: the end of the Supreme Court's term, with its quickened pace of decisions, and a confirmation proceeding for the latest nominee to fill a seat on the court. We will as a consequence be hearing and discussing a particular sort of criticism that is frequently aimed at the more controversial Supreme Court decisions: criticism that the court is making up the law, that the court is announcing constitutional rules that cannot be found in the Constitution, and that the court is engaging in activism to extend civil liberties. A good many of us, I'm sure a good many of us here, intuitively react that this sort of commentary tends to miss the mark. But we don't often pause to consider in any detail the conceptions of the Constitution and of constitutional judging that underlie the critical rhetoric, or to compare them with the notions that lie behind our own intuitive responses. I'm going to try to make some of those comparisons this afternoon.

The charges of lawmaking and constitutional novelty seem to be based on an impression of the Constitution, and on a template for deciding constitutional claims, that go together something like this. A claim is made in court that the government is entitled to exercise a power, or an individual is entitled to claim the benefit of a right, that is set out in the terms of some particular provision of the Constitution. The claimant quotes the provision and provides evidence of facts that are said to prove the entitlement that is claimed. Once they have been determined, the facts on their face either do or do not support the claim. If they do, the court gives judgment for the claimant; if they don't, judgment goes to the party contesting the claim. On this view, deciding constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively.

There are, of course, constitutional claims that would be decided just about the way this fair reading model would have it. If one of today's 21-year-old college graduates claimed a place on the ballot for one of the United States Senate seats open this year, the claim could be disposed of simply by showing the person's age, quoting the constitutional provision that a senator must be at least 30 years old, and interpreting that requirement to forbid access to the ballot to someone who could not qualify to serve if elected. No one would be apt to respond that lawmaking was going on, or object that the age requirement did not say anything about ballot access. The fair reading model would describe pretty much what would happen. But cases like this do not usually come to court, or at least the Supreme Court. And for the ones that do get there, for the cases that tend to raise the national blood pressure, the fair reading model has only a tenuous connection to reality.

Even a moment's thought is enough to show why it is so unrealistic. The Constitution has a good share of deliberately open-ended guarantees, like rights to due process of law, equal protection of the law, and freedom from unreasonable searches. These provisions cannot be applied like the requirement for 30-year-old senators; they call for more elaborate reasoning to show why very general language applies in some specific cases but not in others, and over time the various examples turn into rules that the Constitution does not mention.

But this explanation hardly scratches the surface. The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time. Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. Yet another reason is that the facts that determine whether a constitutional provision applies may be very different from facts like a person's age or the amount of the grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them. And this can be tricky. To show you what I'm getting at, I've picked two examples of what can really happen, two stories of two great cases. The two stories won't, of course, give anything like a complete description either of

the Constitution or of judging, but I think they will show how unrealistic the fair reading model can be.

The first story is about what the Constitution is like. It's going to show that the Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.

The story is about a case that many of us here remember. It was argued before the Supreme Court of the United States on June 26, 1971, and is known as the Pentagon Papers. The New York Times and the Washington Post had each obtained copies of classified documents prepared and compiled by government officials responsible for conducting the Vietnam War. The newspapers intended to publish some of those documents, and the government sought a court order forbidding the publication.

The issue had arisen in great haste, and had traveled from trial courts to the Supreme Court, not over the course of months, but in a matter of days. The time was one of high passion, and the claim made by the United States was the most extreme claim known to the constitutional doctrines of freedom to speak and publish. The government said it was entitled to a prior restraint, an order forbidding publication in the first place, not merely one imposing a penalty for unlawful publication after the words are out. The argument included an exchange between a great lawyer appearing for the government and a great judge, and the colloquy between them was one of those instances of a grain of sand that reveals a universe.

The great lawyer for the United States was a man who had spent many Commencement mornings in this Yard. He was Erwin Griswold, dean of the Law School for 21 years, who was serving a stint as solicitor general of the United States. The great judge who questioned the dean that day was Mr. Justice Black, the first of the New Deal justices, whom Justice Cardozo described as having one of the most brilliant legal minds he had ever met with. The constitutional provision on which their exchange centered was the First Amendment, which includes the familiar words that "Congress shall make no law … abridging the freedom of speech, or of the press." Although that language by its literal terms forbade Congress from legislating to abridge free expression, the guarantees were understood to bind the whole government, and to limit what the president could ask a court to do. As for the remainder of the provision, though, Justice Black professed to read it literally. When it said there shall be no law allowed, it left no room for any exception; the prohibition against abridging freedom of speech and press was absolute. And in fairness to him, one must say that on their face the First Amendment clauses seem as clear as the requirement for 30-year-old senators, and that no guarantee of the Bill of Rights is more absolute in form.

But that was not the end of the matter for Dean Griswold. Notwithstanding the language, he urged the court to say that a restraint would be constitutional when publication threatened irreparable harm to the security of the United States, and he contended there was enough in the record to show just that; he argued that the intended publications would threaten lives, and jeopardize the process of trying to end the war and recover prisoners, and erode the government's capacity to negotiate with foreign governments and through foreign governments in the future.

Justice Black responded that if a court could suppress publication when the risk to the national interest was great enough, the judges would be turned into censors. Dean Griswold said he did not know of any alternative. Justice Black shot back that respecting the First Amendment might be the alternative, and to that, Dean Griswold replied in words I cannot resist quoting:

“The problem in this case,” he said, “is the construction of the First Amendment.

“Now Mr. Justice, your construction of that is well-known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that “no law” does not mean “no law,” and I would seek to persuade the Court that that is true.

“As Chief Justice Marshall said, so long ago, it is a Constitution we are interpreting….”

The government lost the case and the newspapers published, but Dean Griswold won his argument with Justice Black. To show, as he put it, that “no law” did not mean “no law,” Dean Griswold had pointed out that the First Amendment was not the whole Constitution. The Constitution also granted authority to the government to provide for the security of the nation, and authority to the president to manage foreign policy and command the military.

And although he failed to convince the court that the capacity to exercise these powers would be seriously affected by publication of the papers, the court did recognize that at some point the authority to govern that Dean Griswold invoked could limit the right to publish. The court did not decide the case on the ground that the words “no law” allowed of no exception and meant that the rights of expression were absolute. The court’s majority decided only that the government had not met a high burden of showing facts that could justify a prior restraint, and particular members of the court spoke of examples that might have turned the case around, to go the other way. Threatened publication of something like the D-Day invasion plans could have been enjoined; Justice Brennan mentioned a publication that would risk a nuclear holocaust in peacetime.

Even the First Amendment, then, expressing the value of speech and publication in the terms of a right as paramount as any fundamental right can be, does not quite get to the point of an absolute guarantee. It fails because the Constitution has to be read as a whole, and when it is, other values crop up in potential conflict with an unfettered right to publish, the value of security for the nation and the value of the president’s authority in matters foreign and military. The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises. The guarantee of the right to publish is unconditional in its terms, and in its terms the power of the government to govern is plenary. A choice may have to be made, not because language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice. And choices like the ones that the justices envisioned in the Papers case make up much of what we call law.

Let me ask a rhetorical question. Should the choice and its explanation be called illegitimate law making? Can it be an act beyond the judicial power when a choice must be made and the Constitution has not made it in advance in so many words? You know my answer. So much for the notion that all of constitutional law lies there in the Constitution waiting for a judge to read it fairly.

Now let me tell a second story, not one illustrating the tensions within constitutional law, but one showing the subtlety of constitutional facts. Again the story is about a famous case, and a good many of us here remember this one, too: Brown v. Board of Education from 1954, in which the

Supreme Court unanimously held that racial segregation in public schools imposed by law was unconstitutional, as violating the guarantee of equal protection of the law.

Brown ended the era of separate-but-equal, whose paradigm was the decision in 1896 of the case called Plessy v. Ferguson, where the Supreme Court had held it was no violation of the equal protection guarantee to require black people to ride in a separate railroad car that was physically equal to the car for whites. One argument offered in Plessy was that the separate black car was a badge of inferiority, to which the court majority responded that if black people viewed it that way, the implication was merely a product of their own minds. Sixty years later, Brown held that a segregated school required for black children was inherently unequal.

For those whose exclusive norm for constitutional judging is merely fair reading of language applied to facts objectively viewed, Brown must either be flat-out wrong or a very mystifying decision. Those who look to that model are not likely to think that a federal court back in 1896 should have declared legally mandated racial segregation unconstitutional. But if Plessy was not wrong, how is it that Brown came out so differently? The language of the Constitution's guarantee of equal protection of the laws did not change between 1896 and 1954, and it would be hard to say that the obvious facts on which Plessy was based had changed, either. While Plessy was about railroad cars and Brown was about schools, that distinction was no great difference. Actually, the best clue to the difference between the cases is the dates they were decided, which I think lead to the explanation for their divergent results.

As I've said elsewhere, the members of the Court in Plessy remembered the day when human slavery was the law in much of the land. To that generation, the formal equality of an identical railroad car meant progress. But the generation in power in 1954 looked at enforced separation without the revolting background of slavery to make it look unexceptional by contrast. As a consequence, the judges of 1954 found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see. That meaning is not captured by descriptions of physically identical schools or physically identical railroad cars. The meaning of facts arises elsewhere, and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own. Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page. And when the judges in 1954 read the record of enforced segregation it carried only one possible meaning: It expressed a judgment of inherent inferiority on the part of the minority race. The judges who understood the meaning that was apparent in 1954 would have violated their oaths to uphold the Constitution if they had not held the segregation mandate unconstitutional.

Again, a rhetorical question. Did the judges of 1954 cross some limit of legitimacy into law making by stating a conclusion that you will not find written in the Constitution? Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as Plessy's facts 60 years before? Again, you know my answer. So much for the assumption that facts just lie there waiting for an objective judge to view them.

Let me, like the lawyer that I am, sum up the case I've tried to present this afternoon. The fair reading model fails to account for what the Constitution actually says, and it fails just as badly to understand what judges have no choice but to do. The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the

significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.

The fair reading model misses that, but it has even more to answer for. Remember that the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the creatures of our aspirations: to value liberty, as well as order, and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises. That is why the simplistic view of the Constitution devalues our aspirations, and attacks that our confidence, and diminishes us. It is a view of judging that means to discourage our tenacity (our sometimes reluctant tenacity) to keep the constitutional promises the nation has made.

So, it is tempting to dismiss the critical rhetoric of lawmaking and activism as simply a rejection of too many of the hopes we profess to share as the American people. But there is one thing more. I have to believe that something deeper is involved, and that behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the fair reading model seems to promise. And who has not felt that same hunger? Is there any one of us who has not lived through moments, or years, of longing for a world without ambiguity, and for the stability of something unchangeable in human institutions? I don't forget my own longings for certainty, which heartily resisted the pronouncement of Justice Holmes, that certainty generally is illusion and repose is not our destiny.

But I have come to understand that he was right, and by the same token I understand that I differ from the critics I've described not merely in seeing the patent wisdom of the Brown decision, or in espousing the rule excluding unlawfully seized evidence, or in understanding the scope of *habeas corpus*. Where I suspect we differ most fundamentally is in my belief that in an indeterminate world I cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future. And to me, the future of the Constitution as the Framers wrote it can be staked only upon that same trust. If we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.

That is how a judge lives in a state of trust, and I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States.

D.H.S.

Retiring Chief Justice Roberts's umpire analogy

Between some astonishingly awful refereeing at the World Cup and MLB umpire Jim Joyce's infamous, perfect game-robbing miscall last month, it's been a rough summer for the world's arbiters of sport. So as Supreme Court nomineeElena Kagan prepares for her confirmation hearings this week, it's an appropriate time to revisit -- and retire -- the famous "justice-as-umpire" analogy that Chief Justice John Roberts trotted out at his own confirmation hearings in 2005.

"Judges are like umpires," Roberts said. "Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire."

It has become gospel that an American Supreme Court justice is supposed to check her life experience and her values at the door when she hears a case -- just as an umpire is supposed to apply an objective strike zone to adjudicate pitches, a simple "who came first?" test when making calls on the basepath. But this is patently impossible.

Speaking at Harvard's commencement in May, Justice David Souter dismantled the fallacy that a justice could perform his duty and still maintain absolute sterility and an unflagging devotion to the "facts" of a case. Souter contrasted *Plessy v. Ferguson*, the 1896 case that upheld segregation, with *Brown v. Board of Education*, the 1954 case that found it unconstitutional. "[T]he members of the Court in *Plessy* remembered the day when human slavery was the law in much of the land," Souter said. "To that generation, the formal equality of an identical railroad car meant progress. But the generation in power in 1954 looked at enforced separation without the more revolting background of slavery to make it look unexceptional by contrast. As a consequence, the judges of 1954 found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see."

Souter then asked rhetorically, "Did the judges of 1954 cross some line of legitimacy into law making, stating a conclusion that you will not find written in the Constitution? Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as *Plessy's* facts 60 years before?" In other words, how is it that one slate of justices could see nothing wrong with the concept of segregation, while another saw it as antithetical to equality?

In his 1921 "Nature of the Judicial Process" lecture series, Benjamin Cardozo provided a simple answer: "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment." Essentially, Cardozo says, the march of history and the evolution of human values necessitate that a judge be a product of her time and place. The corollary is that this necessarily entails making periodic adjustments to the strike zone (just as baseball has repeatedly done over the years).

A crucial aspect of the court's mission is to uphold fairness; that is, its jurisprudence is supposed to work for us, not in spite of us. Yet as Souter demonstrates with his Plessy/Brown example, fairness -- and perceptions of fairness -- is a notion as fluid and ever-changing as society itself. If the Supreme Court is to maintain it, then it is ridiculous to force its members to play with a 1787 -- or even a 2009 -- rulebook.

For her part, Kagan acknowledges this type of reasoning, having written in 1995, "It should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value." Preserving the Supreme Court as a "judicial monastery" practically invites warped decisions that, while juridically sound, are divorced from the reality on the ground. It's difficult to look past the practical, popular experience Earl Warren garnered as governor of California when looking at his court's landmark Civil Rights decisions of the 1960s.

No one is suggesting that Kagan play by her own rules if and when she sits on the court. But we must expect her -- and her eight colleagues -- to consider the 300 million Americans who live and work beyond the walls of the court. These Americans, after all, still rely on the court to preserve their notions of what "America" is, and what it could and should be.

By Katrina vanden Heuvel | June 28, 2010; 5:16 PM ET
Categories: vanden Heuvel | Tags: Katrina vanden Heuvel

Barbara Wiedemann

The Wealthiest Nation

He rides slowly on his bicycle
looking at houses and at yards
on a rainy afternoon,
a steady rain
because of a hurricane in the gulf.
He rides
looking for something—
a hose,
a child's basketball,
a lawnmower—
something left out
for him
to come by later
and get.
When confronted,
he says
he does yard work
and he would.

Meet the Wealth Gap

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PETER O. ZIERLEIN

For a delivery worker, perched on a bicycle with plastic bags of food dangling from each handlebar, Manhattan's East Side offers many opportunities for a trip to the emergency room. I learn this one May afternoon as I trail 26-year-old Apolinar Perez, a chubby-faced Mexican immigrant who skillfully steers his black mountain bike through the chaos. A taxi switches lanes without warning, nearly clipping my front wheel. Suit-clad men and women stride purposefully into the street, too wrapped up in their phone conversations to notice they're crossing against the light. A black Suburban with tinted windows screeches to a halt in front of us, directly in the path of the bike lane.

Perez arrived in New York City five years ago, after crossing the Texas border in the back of a truck while hidden beneath a pile of children's toys. Since then, he's delivered food for the same Italian restaurant, working eleven hours a day, six days a week. Pay couldn't be simpler: before heading home each night, one of the managers hands him a $20 bill. That's an hourly wage of $1.82--well below the state's $4.85 minimum wage for delivery workers. The rest of his earnings come through tips, which average $60 a shift. There's no overtime or healthcare, no sick days or workers' comp. I inquire about any benefits I might be forgetting. "For Christmas they give me $50," he says. "Sometimes."

I first encounter Perez as he is locking up his bike in front of 500 Park Avenue, a large, glassy building that serves as the headquarters for the hedge fund Caxton Associates, which manages more than $11 billion. Caxton was founded in 1983 by Bruce Kovner, a broad-shouldered 63-year-old with bushy eyebrows and a ruddy face who was among the top-ten highest-paid hedge-fund managers in 2006, with an income of $715 million. Though he has never shied away from public involvement--Kovner is chair of the American Enterprise Institute (AEI)--he does shy away from the press (an assistant told me he never speaks to the media). Perez wraps a chain around his bike's frame and attaches it to a post, then grabs two orders of pasta and heads through the revolving doors. Every lunch hour in Manhattan, the very poor meet the very rich. Today, wealth will be distributed downward, slightly: Perez emerges with a $2 tip. "I usually don't get very good tips from the fancy buildings," he will later tell me.

Four blocks away from the offices of Caxton Associates is 590 Madison Avenue, a forty-three-story building made of steel and granite, boasting a backup generator that can service its corporate tenants for four days without refueling. Behind a desk on the first floor stands security guard Timothy Williams. Williams, who has

About the Author

Gabriel Thompson

Gabriel Thompson, a Brooklyn-based journalist, is the author of There's No José Here and Calling All Radicals....

Current proposals for immigration reform might fall short, but massive protest turnout breathed new life into a movement that had fallen by the wayside.

Gabriel Thompson

Around the country, the temperature in immigrant communities is rising--and on Sunday, Washington, DC, felt the heat.

Gabriel Thompson

been an employee of TNM Protection for a year, is a 24-year-old African-American who, like Perez, lives in the Bronx, the borough with the lowest rents in New York City. After graduating from high school in 2002 he joined the Army, partly in the hope that it would help pay for college. He served in Iraq from August 2004 to July 2005, fighting the war that Kovner's AEI so aggressively pushed. AEI "Freedom Scholar" Michael Ledeen hoped the United States would turn the Middle East "into a caldron," and AEI fellow Richard Perle promised that Iraq's oil would pay for the reconstruction. "Maybe it won't work perfectly," admitted AEI vice president Danielle Pletka on the eve of the invasion, "but does that mean we shouldn't try?"

Williams, though, is disillusioned. "I was for going into Afghanistan, but I'm against Iraq," he tells me at the beginning of a noon-to-midnight shift. Wearing a dark suit with an American flag pin affixed to his lapel, he says that his time in Iraq convinced him that the mission wasn't working, which is one of the reasons he cast his primary vote for Obama.

Now back home, he's earning $12.50 an hour, with no union and no healthcare. "This is just a job I'll have for a little bit," he explains. He's able to get by with the help of the $1,300 monthly checks he receives from the GI Bill, which also covers his tuition at Monroe College, a private school in the Bronx geared toward working students, where he's pursuing an associate's degree. He plans to join the NYPD and hopes one day to become a lawyer. In the meantime, he has joined the National Guard--"I see the military as a place where I can actually have a career"--and recently learned he'll be sent back to Iraq next year.

Journey twenty-nine floors up from where Williams stands guard and the growing disparities of wealth again come into stark contrast. Here you will find the headquarters of Paulson & Company, a $32 billion hedge fund, this one run by John Paulson, the highest-paid individual in 2007. By short-selling the subprime market, he earned $3.7 billion last year. (In January, after a year in which 2.2 million households filed for foreclosure, Paulson told the *Wall Street Journal*, "I've never been involved in a trade with such unlimited upside.")

For Williams, who would likely shepherd Paulson to safety in the event of a building emergency, that upside is hard to discern: he would have to work more than twenty years as a security guard to earn what Paulson made last year in one hour.

On the East Side of Manhattan two very distinct classes of New Yorkers cross paths every day: the working poor (undocumented immigrants and citizens alike), who cook, deliver, secure and protect--for little money and no benefits--and the titans of finance, hedge-fund executives and heads of private-equity firms, who stare at numbers on screens while moving other people's money in and out of stocks and commodities or buying and selling companies, and whose wealth is expanding so quickly they have difficulty figuring out what to do with it.

While workers in the first group struggle to survive on wages that don't get much higher than $10 an hour, the financial elite continue to break income records. The just-released 2007 earnings figures find the top five hedge-fund managers all clearing $1.5 billion. As *Alpha* magazine notes, "The top 25 on the list earned an average $892 million, up from $532 million in 2006"--in a year when the economy began to stall, the group needing no help ended up nearly doubling its income. The top ten earners alone made a combined $16.1 billion, more than the GDP of Nicaragua.

Some hedge funds took a hit with the downturn: Kovner of Caxton Associates saw his annual earnings drop to a measly $100 million. But even in a down year, an executive like Kovner has plenty of money to spend--and he isn't shy about protecting his interests. Along with being the chair of AEI, he's also a trustee of the conservative Manhattan Institute and a supporter of the conservative *New York Sun*. Called "George Soros's Right-Wing Twin" by *New York* magazine, Kovner has a commitment to neoconservatism that is unsurpassed. His fund is reported to manage much of AEI's investments, and he has been a major donor to the Republican

National Committee; in recent years he has sent checks to candidates Rudy Giuliani, John McCain and Joe Lieberman. In 2004 he donated $110,000 to Softer Voices, a conservative group supporting Senator Rick Santorum in what would prove to be a failed 2006 re-election bid, and he sent a quarter of a million dollars last year to All Children Matter, a 527 group that advocates school choice. The group was recently fined a record $5.2 million by the Ohio Elections Committee for illegally transferring money to Republican candidates.

Although Kovner donates to candidates and causes, his real desire is to transform the world through sweeping ideas--the sort of ideas that set the stage for the invasion and occupation of Iraq and that now urge confrontation with Iran. Along with its nation-conquering agenda, AEI is also a voice for an unfettered free market that abhors any sacrifice from the wealthiest among us. Articles in AEI's *American* magazine have titles that seem to be taken from the pages of the *Onion*, such as The Upside of Income Inequality and Why Do We Underpay Our Best CEOs? One AEI scholar, on the op-ed pages of the *Wall Street Journal*, bemoans "the left's 'inequality' obsession."

The "upside" of income inequality is best considered from above: for example, with a view from the fifth floor of Kovner's mansion overlooking Central Park, which he purchased in 1999 from the International Center of Photography for $17.5 million. With the infusion of another $10 million in renovations, the structure--which had contained two floors of gallery space, the museum school and offices--was transformed into his private fortress. In the basement is a rare-book vault, where Kovner presumably keeps copies of an edition of the King James Bible that he financed, with a price tag in excess of $20,000 per volume. Other vantage points from which to assess the benefits of growing income inequality in a clear-eyed fashion might include Kovner's 200-acre estate in Millbrook, New York, or his twelve acres of linked oceanfront properties in Carpinteria, California, which he purchased last year for $70 million in what the *Wall Street Journal* called "among the largest U.S. residential real-estate deals."

For the fortunate like Kovner, being on the winning end of inequality isn't just about flipping through expensive Bibles in a personal book vault or owning a large chunk of the West Coast; it's about the vast political power conferred by wealth, which can be deployed to support institutions pushing policies that, in turn, magnify the wealth divide.

One simple step to mitigate income inequality would be to raise the earnings of workers like Perez and Williams. But as a trustee of the Manhattan Institute, Kovner subsidizes senior fellows like Steven Malanga, who sees something sinister in a living-wage movement that "seeks to force urban firms to pay up to double the minimum wage." The idea that companies would have to pay their workers up to $12 an hour sends Malanga over the edge; he calls the movement a "sneaky way of bringing socialist economics to America's cities." One wonders if Malanga has ever survived on such a puny paycheck; with funding from the superrich like Kovner, it's unlikely.

Over at AEI, labor unions are a target of visiting scholar Richard Vedder. In 2002 he co-wrote a report with Lowell Gallaway that concluded, with the help of a number of confusing charts, that between 1947 and 2000 unions cost the US economy more than $50 trillion in lost income and output. As an example of how unions damage our economy with their burdensome demands, the authors link the decline of the coal industry not primarily to a shift in other energy sources like oil and gas but to the militancy of the United Mine Workers. Another way to evaluate the worth of the UMW would be to study the number of lives saved through union-won protections, but such calculations hold little interest for Vedder. Vedder is also an enthusiastic cheerleader for Wal-Mart; he penned a book about the virtues of the company and has argued that Wal-Mart is a "force for good" that is "saving America."

The living wage as socialist plot, unions as massive drain on the economy and Wal-Mart as corporate savior: this is the sort of scholarship that Kovner subsidizes. Without squinting too hard, the outlines of such a

capitalistic dream world--imagined by well-paid fellows and funded by a billionaire--comes into focus: out from under the thumb of Big Labor, workers are free to work long hours for whatever wages a boss feels like paying. If they fall ill, they're free to visit the emergency room. If they're really sick, they're free to declare bankruptcy. With Wal-Mart as the model, all workers become associates, free from the bonds of health coverage and overtime pay.

Like Malanga and Vedder, Ivan Shelley is an expert on low-wage work; that's because, unlike them, he's a low-wage worker. This tends to shape one's perspective. Now 44, Shelley has been a security officer for the Long Island-based firm Pro Quest Security for nearly six years. When he was hired to guard 280 Park Avenue, another large building on Manhattan's East Side, he made $9 an hour; since then, he has received an annual 50-cent raise. "$11.50 an hour shouldn't get me out of bed, but it does," he says ruefully, then cracks a smile. "I've got dogs to feed."

"It's rough, but somebody's got to do it," he says. "At my age, though, it's time to slow down." Shelley's notion of "slowing down" means that he gets off early on Fridays, bringing his workweek down to a mere fifty-seven hours. Like that of most security guards, Shelley's healthcare is "whatever I have in my medicine cabinet."

Shelley is now a leader in the fight to organize security officers in New York City, a campaign directed by the Service Employees International Union's Local 32BJ. "The security officer industry has historically been one of extremely low wages, where companies compete against each other in how little they could pay," says Kevin Doyle, 32BJ's executive vice president. The race to the bottom has left the guards who protect some of the most valuable real estate in Manhattan with a median wage of $10.14 an hour. SEIU is currently targeting office buildings south of Fifty-ninth Street, an area, it says, where 70 percent of the security guards lack a union.

In April 32BJ was able to realize Malanga's worst fears in Washington. After gaining leverage by pushing through a living-wage bill for guards in the District, the union inked a contract with four companies, covering 1,500 security guards. The contract provides workers a minimum wage of $12.40 an hour or, for people already earning that, a 50-cent raise, plus employer-paid healthcare. After a four-year campaign, three-quarters of the District's office security guards have a union.

In May the Center for Economic and Policy Research released a report that found the benefits of union membership were greatest for low-wage workers. Among workers in New York State in the lowest wage bracket, being in a union meant earning a wage 16 percent higher than that of nonunion workers with similar backgrounds. "Too often, people think there's not much we can do to reverse polarization in our economy," says David Dyssegaard Kallick, senior fellow at the Fiscal Policy Institute. "Here's clear evidence that unionization helps: it raises wages for all workers, and it raises them especially among lower-wage workers."

But unions do more than raise wages and provide healthcare. For the working class, unions are one of the few ways to exert economic and political power. People like Kovner can buy power with their individual largesse, which allows them to propagate their views far and wide through political contributions and the support of think tanks. In the past ten years, Kovner has given nearly $500,000 to conservative candidates and PACs, along with an untold amount to AEI, the Manhattan Institute and the *New York Sun*. He's only one citizen, but he shapes the political landscape according to his worldview.

A security officer like Williams might see his life profoundly affected by the efforts of people like Kovner--after all, Williams fought their war in Iraq--but his lone vote just can't compare with the vast network Kovner subsidizes. (And a noncitizen like Perez, the delivery worker, lacks even the power of the ballot.) Belonging to a union like SEIU would connect Williams to a movement that could amplify his concerns; instead of registering his opposition to the war simply by voting for Obama, Williams would join 1.9 million members

throwing their organizational muscle behind ending the war, winning national healthcare and supporting sympathetic Congressional candidates. In the 2007-08 election cycle, for example, SEIU was the largest donor to 527s, spending more than $6 million. The union was the top donor to Progressive Majority--a political action committee that works to elect progressive local and state representatives--and has given more than $3.5 million to America Votes, a voter registration and mobilization project focusing on the November election.

"I see the union as a way to get good benefits, a pension and somebody to speak up for me," says Shelley. Even though he works most days from 6 am to 6 pm, the union drive has added a bounce to his step. He was quoted recently in the New York *Daily News* and did an interview with a prominent radio station. He tells me with a smile that his newfound activism has caused his bosses to pay him visits while at work. One of the owners of Pro Quest, an ex-cop, has tried to discourage workers at the building from signing union cards with 32BJ. Shelley found this ironic. "I told him, 'You of all people should know how important it is to have a strong union behind you.'"

Despite being one of the richest and most powerful Americans, Kovner maintains a low profile. Like the hedge-fund industry in which he made his money, he wields wide influence but operates mostly below the radar. For tycoons like Kovner, the more that is known about the industry--especially about the compensation of its managers--the more people will wonder why so few earn so much. Indeed, the earnings of hedge-fund and private-equity executives have quietly left regular CEOs in the dust. According to *Executive Excess*, a report published by the Institute for Policy Studies and United for a Fair Economy, the average income in 2006 of the top twenty highest-paid CEOs of publicly held companies was $36 million--impressive, but only 5 percent of the average raked in by the hedge-fund and private-equity executives. That's not the sort of information that executives like to boast about, however, as it seems a bit, well, excessive. Hedge funds turn an axiom on its head: for them, all press is bad press. Most of their websites are bare-bones affairs, a single page with a banal description, frequently not even a phone number to call. Unless you're rich, they don't need you; if you are rich, you already know about them.

Hedge funds are simple structures that engage in extremely complex investments. Essentially, they are nothing more than a group of wealthy individual and institutional investors. Because these rich investors are presumed to know how to handle their money intelligently--and absorb losses--the Securities and Exchange Commission leaves the funds largely unregulated, and the managers are able to guard their investments carefully. They can move money in and out of stocks or commodities rapidly around the globe in response to market trends and fresh analysis. Investing with borrowed money (leverage) is a trademark of hedge funds, allowing for exponential returns on investment.

But with light regulation, nothing keeps a fund from becoming dangerously leveraged--which has implications not just for a fund's investors (which include pension funds) but also for our increasingly integrated economy (the ripples from the implosion of Bear Stearns being the obvious recent example). In September 1998 the sudden collapse of hedge fund Long-Term Capital Management threatened the banking system and led to a bailout by investment banks. The collapse came as such a shock--as a hedge fund, LTCM didn't have to report its shaky investment practices--that it led to a call from politicians for larger hedge funds to report their activities. The move for transparency was defeated, though, and hedge funds remain largely unregulated; Federal Reserve chair Ben Bernanke has insisted that the market will regulate itself.

Private-equity firms are related to hedge funds--both rely on borrowed money--but private-equity funds focus on taking over companies perceived to be underperforming, which they restructure and usually manage for several years and then sell. In the process, the companies typically see their debt load double or triple and often lay off a significant number of workers. The debt-saddled corporations also serve as a tax-avoidance strategy: companies are able to deduct from their taxes the interest on the debt. Last year SEIU launched a

private-equity project highlighting the growth of the buyout industry and contrasting the highly compensated private-equity firm managers with the stagnant wages of workers at the companies they own.

The two industries became powerful political actors last year, after a bill was introduced by Representative Sander Levin that proposed closing a loophole in the tax code that allows billionaire fund managers to pay taxes at a lower rate than their secretaries. Private-equity and hedge-fund managers' income arrives through a "two-and-twenty" system--they typically receive a managerial fee of 2 percent of the amount invested, along with a performance fee of 20 percent of the earnings made on the investment, called carried interest.

"Carried interest is no different than giving a bonus to a restaurant manager for being successful," explains Leo Hindery, head of a private-equity company, InterMedia Partners, and the former economic policy adviser to John Edwards. The difference is how carried-interest income is taxed: instead of paying an income tax, which for the wealthy is 35 percent, a manager pays only the 15 percent capital gains tax. In 2006 the loophole allowed Kovner to avoid paying $28.6 million in taxes; last year, it allowed Paulson to pocket an additional $150 million.

The nonpartisan Joint Committee on Taxation estimated that Levin's bill, which also eliminated the ability of fund managers to shift compensation to offshore havens, would bring in nearly $50 billion to the Treasury within ten years. Edwards, Clinton and Obama all came out in support of the legislation; even *Fortune* magazine concluded it was a sensible proposal. On November 9 it passed the House.

The industry responded aggressively. A primary target was Senator Charles Schumer, who sits on both the Banking and Finance committees and is close to the hedge-fund industry. Checks started flowing in to the Democratic Senatorial Campaign Committee (DSCC), which Schumer chairs. Schumer, author of a book whose subtitle is *Winning Back the Middle-Class Majority*, publicly expressed his opposition to the bill, arguing that it unfairly targeted the two industries. In December the Senate overwhelmingly signed a bill leaving the tax loopholes in place.

On the day before the Senate vote, Frederick Iseman, then head of the private-equity arm of Caxton Associates, donated $28,500 to the DSCC. The day after the bill was passed, Paulson wrote the DSCC another $25,000 check. The gifts made up what was a record year for hedge-fund contributions, with individual giving more than doubling to nearly $10 million in the 2007-08 election cycle, according to the Center for Responsive Politics. About three-quarters of those donations went to Democrats. Private-equity lobbying also had a watershed year, with spending rising from $740,000 in 2006 to $10 million in 2007, according to *Congressional Quarterly*.

The giving patterns at Paulson & Company illustrate the newfound political muscle of the industries. During the 2005-06 election cycle, only one employee of the company made a donation, giving $1,500 to the Women's Campaign Fund. The 2007-08 cycle, which covers the period when legislation was introduced to close the loopholes, finds employees making more than seventy donations, totaling more than $200,000. These included $105,000 to the DSCC; $20,700 to Max Baucus, chair of the Senate Finance Committee; $19,400 to Richard Durbin, chair of the Subcommittee on Financial Services and General Government; and $8,000 to the Managed Funds Association, the industry's PAC.

Hindery supports closing the tax loopholes (he tells me some of his peers in the private-equity industry have called him a traitor for taking this stance), and he's been frustrated by the ability of industry lobbyists to decisively influence Congress. Still, he holds out hope that in "a country that's nearly broke" and suffering from "pervasive income inequality," the loopholes benefiting the richest Americans can't be ignored forever.

At a House hearing on the bill, Bruce Rosenblum, managing director of the Carlyle Group and chair of the

Private Equity Council, the industry's new lobby group, argued that the risks taken by fund managers are "significant." Primarily, they "forgo other opportunities that provide greater security and guaranteed returns in exchange for the greater upside potential." In other words, for the risk of forgoing the chance to earn lots of money in investment banking in order to potentially earn even more money in private equity, firm managers deserve to be taxed at lower rates than your average teacher or janitor. Perhaps sensing that this argument wasn't persuasive enough, Rosenblum went on to highlight the other "assets" that managers stand to lose if their funds perform poorly, namely "good will, business relationships and reputations."

The brave risk-takers of the hedge-fund and private-equity worlds are on my mind as I listen to Timothy Williams, the security guard who protects John Paulson, describe his tour of duty in Iraq. Much of the time was spent in Anbar province, conducting raids and patrols and manning traffic checkpoints. His battalion lost nine soldiers, but it could have been worse.

"During one patrol I saw my lieutenant's Humvee get hit with an IED right next to us," Williams recounts. "The Humvee was completely destroyed, but somehow everyone survived. In Iraq, things are always exploding. The first week I was nervous all the time, but you get used to it. My mom, though, never wanted me to sign up."

Williams, uninsured and working for a nonunion company, sees taking these risks as his only means to a stable career. That's why, despite his opposition to the war, he signed up for a six-year term with the National Guard. "After that," he says, "I only need ten more years to retire." Meanwhile, Kovner, who never served in the military, is chair of a think tank that aggressively pushed the United States to invade Iraq and is now fighting (from desks in air-conditioned offices) to maintain troop levels until "late 2009," in the words of AEI resident scholar Frederick Kagan. Domestically, Kovner funds groups that rail against the living wage and unions alike, curtailing the chances for working people like Williams ever to earn a decent living as civilians. Kovner's daughter hasn't ever faced such a choice; her path eased by her father's connections, she worked as a reporter for the paper he funds, the *Sun*, and now clerks for conservative Supreme Court Justice Antonin Scalia.

For Williams, higher wages and generous benefits can't be found guarding buildings in Manhattan, and without union organizing, the security guard industry will continue to be made up of the working poor. And when jobs like these--which have replaced the unionized, decently compensated blue-collar jobs of old--remain union-free, with stagnating wages, the military can become the best option for advancement. Someone needs to provide the "vigilant and effective defense" that is AEI's mission, after all, and it certainly isn't going to be the children of people like Kovner.

The Spirit Level: Why Greater Equality Makes Societies Stronger, Richard Wilkinson + Kate Pickett, Bloomsbury Press, 2009

"Is this birds and bees chat going to take long? I'm late for my pre-natal class."

9

Teenage births: recycling deprivation

> Just saying 'No' prevents teenage pregnancy the way 'Have a nice day' cures chronic depression.
>
> Faye Wattleton, Conference speech, Seattle, 1988

In the summer of 2005, three sisters hit the headlines of Britain's tabloid newspapers – all three were teenage mothers. The youngest was the first of the girls to become pregnant and had her baby at the age of 12. 'We were in bed at my mum's house messing around and sex just sort of happened,' she said; 'I didn't tell anyone because I was too scared and didn't know what to do ... I wish it had happened to someone else.'[169] Soon after, the next older sister had a baby at age 14. 'It was just one of those things. I thought it would never happen to me,' she said. 'At first I wanted an abortion because I didn't want to be like [my sister], but I couldn't go through with it.' The oldest sister, the last of the girls to find out she was pregnant, gave birth aged 16; unlike her sisters she seemed to welcome motherhood. 'I left school ... as I wasn't really interested,' she admitted, 'all my friends were having babies and I wanted to be a mum, too'. At the time their stories became news, the girls were all living at home with their mother, sharing their bedrooms with their babies, the youngest two struggling with school, and all three trying to get by on social security benefits. With no qualifications and no support from the fathers of their babies, their futures were bleak. Media commentators and members of the public were quick to condemn the sisters and their mother, portraying them as feckless scroungers. 'Meet the kid sisters ... benefit bonanza' ... 'Girls' babies are the

real victims,' exclaimed the newspapers.[170-71] Their mother blamed the lack of sex education in school.

WHY IT MATTERS

The press furore brings society's fears and concerns around teenage motherhood into sharp focus. Often described as 'babies having babies', teenage motherhood is seen as bad for the mother, bad for the baby and bad for society.

There is no doubt that babies born to teenage mothers are more likely to have low birthweight, to be born prematurely, to be at higher risk of dying in infancy and, as they grow up, to be at greater risk of educational failure, juvenile crime and becoming teenage parents themselves.[172-3] Girls who give birth as teenagers are more likely to be poor and uneducated. But are all the bad things associated with teenage birth really caused by the *age* of the mother? Or are they simply a result of the cultural world in which teenage mothers give birth?

This issue is hotly debated. On the one hand, some argue that teenage motherhood is *not* a health problem because young age is not in itself a cause of worse outcomes.[174] In fact, among poor African-Americans, cumulative exposure to poverty and stress across their lifetimes compromises their health to such an extent that their babies do better if these women have their children at a young age.[175-6] This idea is known as 'weathering' and suggests that, for poor and disadvantaged women, postponing pregnancy until later ages doesn't actually mean that they have healthier babies. Others have shown that the children of teenage mothers are more likely to end up excluded from mainstream society, with worse physical and emotional health and more deprivation. This is true even after taking account of other childhood circumstances such as social class, education, whether the parents were married or not, the parents' personalities, and so on.[177] But although we can sometimes separate out the influences of maternal age and economic circumstances in research studies, in real life they often seem inextricably intertwined

and teenage motherhood is associated with an inter-generational cycle of deprivation.[178]

But how exactly are young women's individual experiences and choices – their personal choices about sleeping with their boyfriends, choices around contraception and abortion, choices about qualifications and careers, shaped by the society they live in? Like the issues discussed in earlier chapters, the teenage birth rate is strongly related to relative deprivation and to inequality.

BORN UNEQUAL

There are social class differences in both teenage *conceptions* and *births* but the differences are smaller for conceptions than for births, because middle-class young women are more likely to have abortions. Teenage birth rates are higher in communities that also have high divorce rates, low levels of trust and low social cohesion, high unemployment, poverty, and high crime rates.[173] It has been suggested by others that teenage motherhood is a choice that women make when they feel they have no other prospects for achieving the social credentials of adulthood, such as a stable intimate relationship or rewarding employment.[179] Sociologist Kristin Luker claims that it is 'the discouraged among the disadvantaged' who become teenage mothers.[180]

But it is important to remember that it isn't only poor young women who become teenage mothers: like all the problems we have looked at, inequality in teenage birth rates runs right across society. In Figure 9.1, we show the percentage of young British women who become teenage mothers in relation to household income. Each year almost 5 per cent of teenagers living in the poorest quarter of homes have a first baby, four times the rate in the richest quarter. But even in the second richest quarter of households the rate is double that of the richest quarter (2.4 per cent and 1.2 per cent). Similar patterns are seen in the United States. Although most of these births are to older teenagers, aged 18–19 years, the pattern is evident, and even stronger, for the 15–17-year-olds.

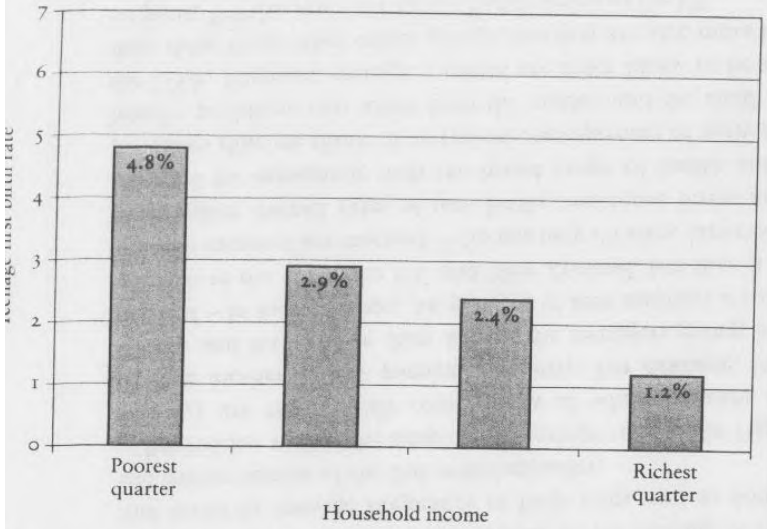


Figure 9.1 *There is a gradient in teenage birth rates by household income, from poorest to richest.*[181]

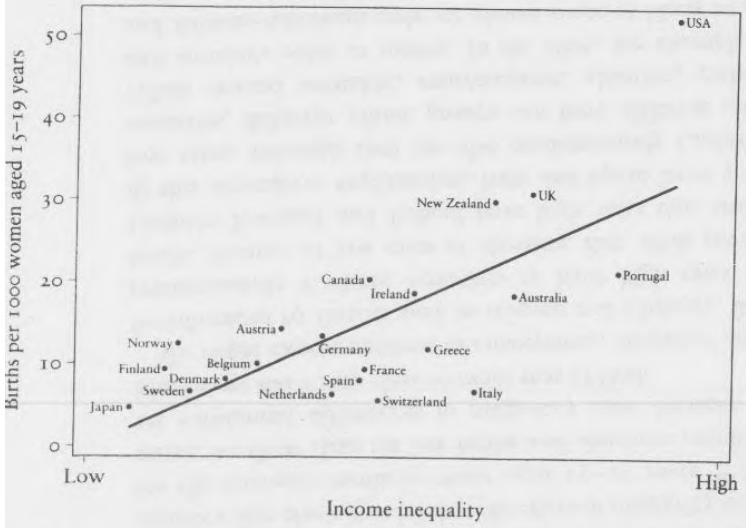
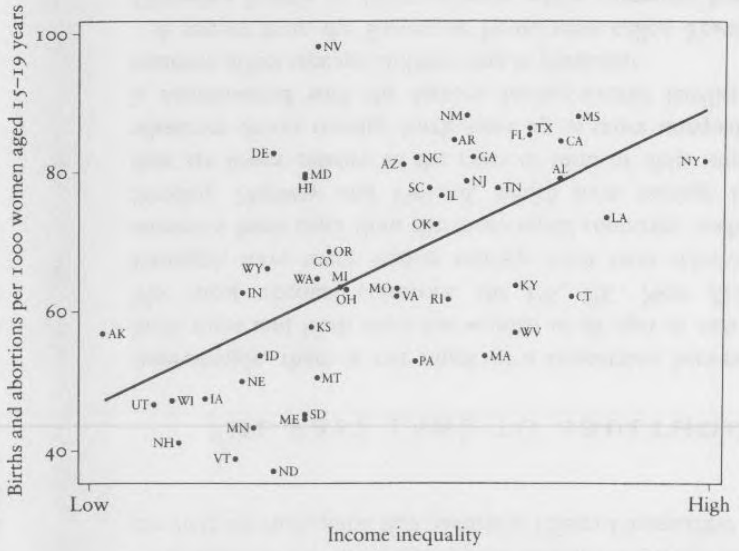


Figure 9.2 *Teenage birth rates are higher in more unequal countries.*[185]

Figure 9.2 shows that the international teenage birth rates provided by UNICEF[182] are related to income inequality and Figure 9.3 shows the same relationship for the fifty states of the USA, using teen pregnancy rates from the US National Vital Statistics System[183] and the Alan Guttmacher Institute.[184] There is a strong tendency for more unequal countries and more unequal states to have higher teenage birth rates – much too strong to be attributable to chance. The UNICEF report on teenage births showed that at least one and a quarter million teenagers become pregnant each year in the rich OECD countries and about three-quarters of a million go on to become teenage mothers.[182] The differences in teen birth rates between countries are striking. The USA and UK top the charts. At the top of the league in our usual group of rich countries, the USA has a teenage birth rate of 52.1 (per 1,000 women aged 15–19), more than four times the EU average and more than ten times higher than that of Japan, which has a rate of 4.6.

Rachel Gold and colleagues have studied income inequality and teenage births in the USA, and shown that teen birth rates are



Fgure 9.3 *Teenage pregnancy rates are higher in more unequal US states.*

highest in the most unequal, as well as the most relatively deprived counties. She also reported that the effect of inequality was strongest for the youngest mothers, those aged 15–17 years.[186] For the US states, we show data for live births and abortions combined. There are substantial differences in pregnancy rates between US states. Mississippi has a rate close to twice that of Utah.

We might expect patterns of conceptions, abortions and births to be influenced by factors such as religion and ethnicity. We'd expect predominantly Catholic countries to have high rates of teenage births, because of low rates of abortion. But, while predominantly Catholic Portugal and Ireland have high rates that would indeed fit this alternative explanation, Italy and Spain have unexpectedly low rates, although they are also predominantly Catholic. Within countries, different ethnic groups can have different cultures and values around sexuality, contraception, abortion, early marriage and women's roles in society. In the USA, for example, Hispanic and African-American girls are almost twice as likely to be teenage mothers as white girls, and in the UK similarly, comparatively high rates are seen in the Bangladeshi and Caribbean communities.[182] But, because these communities are minority populations, these differences don't actually have much impact on the ranking of countries and states by teenage pregnancy or birth rates, and so don't affect our interpretation of the link with inequality.

But hidden within the simple relationships revealed in Figures 9.2 and 9.3 are the real-life complexities of what it means to be a teenage mother in any particular country. For example, in Japan, Greece and Italy, more than half of the teenagers giving birth are married – in fact in Japan, 86 per cent of teen mothers are married, whereas in the USA, the UK and New Zealand, less than a quarter of these mothers are married.[182] So not only do these latter countries have higher overall rates of teen births, but those births are more likely to be associated with the broad range of health and social problems that we think of as typical consequences of early motherhood – problems that affect both the mother and the child. Within the USA, Hispanic teenage mothers are more likely to be married than those from other ethnic groups, but they are also more likely to be poor;[187–8] the same is true for Bangladeshis in the UK.

So what do we know about who becomes a teenage mother that can help us understand this particular effect of inequality?

THE FAST LANE TO ADULTHOOD

Interestingly, there is not much of a connection between *teenage* birth rates and birth rates for women of *all ages* in rich countries. The most unequal countries, the US, UK, New Zealand and Portugal, have much higher teenage birth rates relative to older women's birth rates than the more equal countries, such as Japan, Sweden, Norway and Finland, which have teenage birth rates that are lower relative to the rates of birth of older women.[182] So whatever drives teenage birth rates up in more unequal countries is unconnected with the factors driving overall fertility. Unequal societies affect teenage childbearing in particular.

A report from the Rowntree Foundation called *Young People's Changing Routes to Independence*, which compares how children born in 1958 and 1970 grew up, describes a 'widening gap between those on the fast and the slow lanes to adulthood'.[189] In the slow lane, young people born into families in the higher socio-economic classes spend a long time in education and career training, putting off marriage and childbearing until they are established as successful adults. For young people on the fast track, truncated education often leads them into a disjointed pattern of unemployment, low-paid work and training schemes, rather than an ordered, upward career trajectory.

As sociologists Hilary Graham and Elizabeth McDermott point out, teenage motherhood is a pathway through which women become excluded from the activities and connections of the wider society, and a way in which generations become trapped by inequality.[190] But as well as the constraints that relative poverty imposes on life chances for young people, there seem to be additional reasons why teenage motherhood is sensitive to degrees of inequality in society.

EARLY MATURITY AND ABSENT FATHERS

The first of these additional reasons was touched on in Chapter 8, where we discussed the impact of inequality on family relationships and stress in early life. Experiences in early childhood may be just as relevant to teenage motherhood as the educational and economic opportunities available to adolescents. In 1991, psychologist Jay Belsky at the University of London and his colleagues proposed a theory, based on evolutionary psychology, in which experiences in early childhood would lead individuals towards either a *quantity* or a *quality* reproductive strategy, depending on how stressful their early experiences had been.[191] They suggested that people who learned, while growing up, 'to perceive others as untrustworthy, relationships as opportunistic and self-serving, and resources as scarce and/or unpredictable' would reach biological maturity earlier, be sexually active earlier, be more likely to form short-term relationships and make less investment in parenting. In contrast, people who grow up learning 'to perceive others as trustworthy, relationships as enduring and mutually rewarding and resources more or less constantly available' would mature later, defer sexual activity, be better at forming long-term relationships and invest more heavily in their children's development.

In the world in which humans evolved, these different strategies make sense. If you can't rely on your mate or other people, and you can't rely on resources, then it may once have made sense to get started early and have lots of children – at least some will survive. But if you can trust your partner and family to be committed to you and to provide for you, it makes sense to have fewer children and to devote more attention and resources to each one.

Rachel Gold and colleagues found that the relationship between inequality and teenage birth rates in the USA might be acting through the impact of inequality on social capital, which we discussed in Chapter 4.[192] Among US states, that is, those with lower levels of social cohesion, civic engagement and mutual trust – exactly

the conditions which might favour a quantity strategy – teenage birth rates are higher.

Several studies have also shown that early conflict and the absence of a father *do* predict earlier maturation – girls in such a situation become physically mature and start their periods earlier than girls who grow up without those sources of stress.[193–4] And reaching puberty earlier increases the likelihood of girls becoming sexually active at an early age and of teenage motherhood.[195]

Father absence may be particularly important for teenage pregnancy. In a study of two large samples in the USA and New Zealand, psychologist Bruce Ellis and his colleagues followed girls from early childhood through to adulthood.[196] In both countries, the longer a father was absent from the family, the more likely it was that his daughter would have sex at a young age and become a teenage mother – and this strong effect could not be explained away by behavioural problems of the girls, by family stress, parenting style, socio-economic status, or by differences in the neighbourhoods in which the girls grew up. So there may be deep-seated adaptive processes which lead from more stressful and unequal societies – perhaps particularly from low social status – to higher teenage birth rates. Unfortunately, while we can obtain international data on single-parent households, being a single parent means very different things in different countries, and there are no international data that tell us how many fathers are absent from their children's lives.

WHAT ABOUT THE DADS?

Throughout this chapter, we've been discussing the problem of teenage parenting exclusively in terms of teenage mothers, but what about the fathers? Let's return to the story of the three sisters. The father of the 12-year-old girl's baby left her shortly after his son was born. The boy named by the middle sister as the father of her little girl denied having sex with her and demanded a paternity test. And the 38-year-old father of the oldest sister's baby already had at least four other children.

Sociologists Graham and McDermott discuss what has been learned from studies where researchers talk at length to young women about their experiences. What they show is that these sisters' experiences with their babies' fathers are typical.[190] Motherhood is a way in which young women in deprived circumstances join adult social networks – networks which usually include their own mothers and other relatives, and these supportive networks help them transcend the social stigma of being a teenage mother. According to Graham and McDermott, young women prioritize their relationships with the babies, over their often difficult relationships with the babies' fathers, because they feel this relationship is a 'more certain source of intimacy than the heterosexual relationships they had ... experienced'.

Young men living in areas of high unemployment and low wages often can't offer much in the way of stability or support. In communities with high levels of teenage motherhood, young men are themselves trying to cope with the many difficulties that inequality inflicts on their lives, and young fatherhood adds to those stresses.

10

Violence: gaining respect

> Where justice is denied, where poverty is enforced, where ignorance prevails and where any one class is made to feel that society is in an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.
>
> Frederick Douglas, Speech on the 24th anniversary of emancipation, Washington, DC, 1886

As we began to write this chapter, violence was in the headlines on both sides of the Atlantic. In the USA, an 18-year-old man with a shotgun entered a shopping mall in Salt Lake City, Utah, killing five people and wounding four others, apparently at random, before being shot dead by police. In the UK, there was a wave of killings in South London, including the murder of three teenage boys in less than a fortnight. But perhaps the story that best illustrates what this chapter is about occurred in March 2006, in a quiet suburb of Cincinnati, Ohio. Charles Martin, a 66-year-old, telephoned the emergency services.[197] 'I just killed a kid,' he told the operator, 'I shot him with a goddamn 410 shotgun twice.' Mr Martin had shot his 15-year-old neighbour. The boy's crime? He had run across Mr Martin's lawn. 'Kid's just been giving me a bunch of shit, making the other kids harass me and my place.'

Violence is a real worry in many people's lives. In the most recent British Crime Surveys, 35 per cent of people said they were very worried or fairly worried about being a victim of mugging, 33 per cent worried about physical attack, 24 per cent worried about rape,

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Want Amid Plenty: From Hunger to Inequality

Janet Poppendieck

"Scouting has some unacceptables," the Executive Director of the Jersey Shore Council of the Boy Scouts of America told me, "and one of them is hunger."[1] We were talking in the entrance to the Ciba Geigy company cafeteria in Toms River, New Jersey, where several hundred Boy Scouts, their parents, grandparents, siblings, and neighbors were sorting and packing the 280,000 pounds of canned goods that the scouts of this Council had netted in their 1994 Scouting For Food drive. The food would be stored on the Ciba Geigy corporate campus, where downsizing had left a number of buildings empty, and redistributed to local food pantries to be passed along to the hungry. The scouting executive was one of several hundred people I interviewed as part of a study of charitable food programs—so called "emergency food" in the United States. In the years since the early 1980s, literally millions of Americans have been drawn into such projects: soup kitchens and food pantries on the front lines, and canned goods drives, food banks, and "food rescue" projects that supply them.

Hunger Has a "Cure"

What makes hunger in America unacceptable, to Boy Scouts and to the rest of us, is the extraordinary abundance produced by American agriculture. There is no shortage of food here, and everybody knows it. In fact, for much of this century, national agricultural policy has been preoccupied with surplus, and individual Americans have been preoccupied with avoiding, losing, or hiding the corporeal effects of overeating. Collectively, and for the most part individually, we have too much food, not too little. To make matters worse, we waste food in spectacular quantities. A study recently released by USDA estimates that between production and end use, more than a quarter of the food produced in the United States goes to waste, from fields planted but not harvested to the bread molding on top of my refrigerator or the lettuce wilting at the back of the vegetable bin. Farm waste, transport waste, processor waste, wholesaler waste, supermarket waste, institutional waste, household waste, plate waste; together in 1995 they totaled a startling 96 billion pounds, or 365 pounds—a pound a day—for every person in the nation.[2]

The connection between abundant production and food waste on the one hand, and hunger on the other, is not merely abstract and philosophical. Both public and private food assistance efforts in this country have been shaped by efforts to find acceptable outlets for food that would otherwise go to waste. These include the wheat surpluses stockpiled by Herbert Hoover's Federal Farm Board and belatedly given to the Red Cross for distribution to the unemployed, the martyred piglets of the New Deal agricultural adjustment (which led to the establishment of federal surplus commodity distribution), and the cheese that Ronald Reagan finally donated to the needy to quell the criticism of mounting storage costs. Accumulation of large supplies of food in public hands, especially in times of economic distress and privation, has repeatedly resulted in the creation of public programs to distribute the surplus to the hungry. And in the private sphere as well, a great deal of the food that supplies today's soup kitchens and food pantries is food that would otherwise end up as waste: corporate over-production or labeling errors donated to the food bank, farm and orchard extras gleaned by volunteers after the commercial harvest, and the vast quantities of leftovers generated by hospital, school, government and corporate cafeterias, and caterers and restaurants. All of this is food that is now rescued and recycled through the type of food recovery programs urged by Vice President Al Gore and Agriculture Secretary Dan Glickman at their 1997 National Summit on Food Recovery and Gleaning. "There is simply no excuse for hunger in the most agriculturally abundant country in the world," said Glickman, who urged a 33 percent increase in food recovery by the year 2000 that would enable social service agencies to feed an additional 450,000 Americans each day.[3] For Americans reared as members of the "clean plate club" and socialized to associate our own uneaten food with hunger in faraway places, such programs have enormous appeal. They provide a sort of moral relief from the discomfort that ensues when we are confronted with images of hunger in our midst, or when we are reminded of the excesses of consumption that characterize our culture. They offer what appear to be old-fashioned moral absolutes in a sea of shifting values and ethical uncertainties. Many of the volunteers I interviewed for my study told me that they felt that their work at the soup kitchen or food pantry was the one unequivocally good thing in their lives, the one point in the week in which they felt sure they were on the side of the angels. Furthermore, they perceive hunger as one problem that is solvable—precisely because of the abundant production—one problem about which they can do something concrete and meaningful. "Hunger has a cure," is the new slogan developed by the Ad Council for Second Harvest, the National Network of Foodbanks. It is not surprising, then, that hunger in America has demonstrated an enormous capacity to mobilize both public and private action. There are fourteen separate federal food assistance programs, numerous state and local programs, and thousands upon thousands of local, private charitable feeding projects which elicit millions of hours of volunteer time as well as enormous quantities of donated funds and food. In one random survey in the early 1990s, nearly four-fifths of respondents indicated that they, personally, had done something to alleviate hunger in their communities in the previous year.[4]

The Seductions of Hunger

Progressives have not been immune to the lure of hunger-as-the-problem. We have been drawn into the anti-hunger crusade for several reasons. First, hunger in America shows with great clarity the absurdity of our distribution system, of capitalism's approach to meeting basic human needs. Poor people routinely suffer for want of things that are produced in abundance in this country, things that gather dust in warehouses and inventories, but the bicycles and personal computers that people desire and could use are not perishable and hence are not rotting in front of their eyes in defiance of their bellies. The Great Depression of the 1930s, with its startling contrasts of agricultural surpluses and widespread hunger, made this terrible irony excruciatingly clear, and many people were able to perceive the underlying economic madness: "A breadline knee-deep in wheat," observed commentator James Crowther, "is surely the handiwork of foolish men."[5] Progressives are attracted to hunger as an issue because it reveals in so powerful a way the fundamental shortcomings of unbridled reliance on markets.

Second, progressives are drawn to hunger as a cause by its emotional salience, its capacity to arouse sympathy and mobilize action. Hunger is, as George McGovern once pointed out, "the cutting edge of poverty," the form of privation that is at once the easiest to imagine, the most immediately painful, and the most far-reaching in its damaging consequences.[6] McGovern was writing in the aftermath of the dramatic rediscovery of hunger in America that occurred in the late 1960s when a Senate subcommittee, holding hearings on anti-poverty programs in Mississippi, encountered the harsh realities of economic and political deprivation in the form of empty cupboards and malnourished children in the Mississippi Delta. Hunger was in the news, and journalist Nick Kotz reports that a coalition of civil rights and anti-poverty activists made a conscious decision to keep it there. They perceived in hunger "the one problem to which the public might respond. They reasoned that 'hunger' made a higher moral claim than any of the other problems of poverty."[7] The anti-hunger movement—or "hunger lobby" that they initiated—was successful in enlisting Congressional support for a major expansion of food assistance and the gradual creation of a food entitlement through food stamps, the closest thing to a guaranteed income that we have ever had in this country.

The broad appeal of the hunger issue and its ability to evoke action are also visible in the more recent proliferation of emergency food programs. "I think the reason . . . that you get the whole spectrum of people involved in this is because it's something that is real basic for people to relate to. You know, you're busy, you skip lunch, you feel hungry. On certain levels, everyone has experienced feeling hungry at some point in the day or the year," explained Ellen Teller, an attorney with the Food Research and Action Center whose work brings her into frequent contact with both emergency food providers and anti-hunger policy advocates. The food program staff and volunteers I interviewed recognized the difference between their own, essentially voluntary and temporary hunger and hunger that is externally imposed and of unpredictable duration, but the reservoir of common human experience is there. Hunger is not exotic and hard to imagine; it stems from the failure to meet a basic and incontrovertible need that we all share.

Furthermore, the failure to eliminate hunger has enormous consequences. As the research on the link between nutrition and cognition mounts, the social costs of failing to ensure adequate nutrition for pregnant women and young children become starkly obvious. And this, too, contributes to the broad spectrum that Ellen Teller mentioned. There is something for everyone here—a prudent investment in human capital for those concerned about the productivity of the labor force of tomorrow, a prevention of suffering for the tender hearted, a unifying concern for would-be organizers, a blatant injustice for critics of our social structure. Many anti-hunger organizations with relatively sophisticated critiques of the structural roots of hunger in America have engaged with the "feeding movement," the soup kitchens and the food pantries, in the belief that, as the Bread for the World Institute once put it, "Hunger can be the 'door' through which people enter an introduction to larger problems of poverty, powerlessness, and distorted public values."[8] For those progressives seeking common ground with a wider range of American opinion, hunger is an attractive issue precisely because of the breadth of the political spectrum of people who are moved by it.

Third, progressive have been drawn into the hunger lobby by the utility of hunger as a means of resisting, or at least documenting the effects of, government cuts in entitlements. In the early 1980s, especially, when Ronald Reagan began his presidential assault on the nation's meager safety net of entitlement programs for the poor, progressives of all sorts pointed to the lengthening soup kitchen lines as evidence that the cuts in income supports, housing subsidies, food assistance, and a host of other public programs were cuts that neither the poor nor the society could afford. While Reagan and his team claimed that they were simply stripping away waste and fat from bloated programs, critics on the left kept track of mounting use of emergency food programs as a means of documenting the suffering caused by the erosion of the welfare state. The scenario is being replayed, this time amid an expanding economy, as soup kitchens and food pantries register the effects of "the end of welfare as we know it."

Finally, of course, progressive are drawn to the hunger issue by a sense of solidarity with those in need. Most of us became progressives in the first place because we cared about people and wanted a fairer society that would produce less suffering. Few of us can stomach an argument that says that we should leave the hungry to suffer without aid while we work for a more just future. "People don't eat in the long run," Franklin Roosevelt's relief czar Harry Hopkins is reported to have said; "they eat every day."[9] Many of the more activist and progressive people I interviewed in the course of my emergency food study articulated similar sentiments. A woman who worked in the early eighties helping churches and community groups in southern California set up soup kitchens and food pantries to cope with the fallout from the budget cuts in Washington recalled the dilemma as she had experienced it. "As far as I was concerned, the people in Washington had blood on their hands . . . but I wasn't going to stand by and watch people suffer just to make a political point." As one long-time left activist in Santa Cruz put it when questioned about her work as a member of the local food bank board, "There are numbers of people who are very compatible with my radical philosophy who also feel that foodbanking is very important, because the reality is that there are ever increasing homeless and poor, including working poor,

who need to be fed . . . the need for food has increased and the resources for providing it haven't. And if there weren't foodbanks, I think a lot of people would starve."

It is easy to see why progressive people have been drawn into anti-hunger activity in large numbers, and why they have been attracted to the soup kitchens, food pantries, and food banks, despite misgivings about these private charitable projects. I, personally, have counted myself an anti-hunger activist since the nation rediscovered hunger in the late 1960s. Nevertheless, after three decades in the "hunger lobby," and nearly a decade of observing and interviewing in soup kitchens, food pantries, food banks, and food recovery projects, I would like to offer a caution about defining hunger as the central issue.

The Case Against Hunger

The very emotional response that makes hunger a good organizing issue, and the felt absurdity of such want amid massive waste, makes our society vulnerable to token solutions—solutions that simply link together complementary symptoms without disturbing the underlying structural problems. The New Deal surplus commodity distribution program, which laid the political and administrative groundwork for most subsequent federal food programs, purchased surplus agricultural commodities from impoverished farmers in danger of going on relief and distributed them to the unemployed already receiving public help. It responded to what Walter Lippmann once called the "sensational and the intolerable paradox of want in the midst of abundance," by using a portion of the surplus to help some of the needy, without fundamentally changing the basis for access to food.[10] As Norman Thomas put it in 1936, "We have not had a reorganization of production and a redistribution of income to end near starvation in the midst of potential plenty. If we do not have such obvious 'breadlines knee deep in wheat' as under the Hoover administration, it is because we have done more to reduce the wheat and systematize the giving of crusts than to end hunger."[11]

For the general public, however, the surplus commodity programs were common sense, and they made well-fed people feel better. Few asked how much of the surplus was being transferred to the hungry, or how much of their hunger was thus relieved. As the *New York Times* predicted in an editorial welcoming the program: "It will relieve our minds of the distressing paradox."[12] And with the moral pressure relieved, with consciences eased, the opportunity for more fundamental action evaporated. Thus the token program served to preserve the underlying status quo.

Something very similar appears to be happening with the private food rescue, gleaning, and other surplus transfer programs that have expanded and proliferated to supply emergency food programs since the early 1980s. The constant fund-raising and food drives that characterize such programs keep them in the public eye, and few people ask whether the scale of the effort is proportional to the scale of the need. With the Boy Scouts collecting in the fall and the letter carriers in the spring, with the convenient barrel at the grocery store door and the opportunity to "check out hunger" at the checkout counter, with the Taste of the Nation and the enormous

array of other hunger-related fundraisers, with the Vice President and the Secretary of Agriculture assuring us that we can simultaneously feed more people and reduce waste through food recovery, with all this highly visible activity, it is easy to assume that the problem is under control. The double whammy, the moral bargain of feeding the hungry and preventing waste, makes us feel better, thus reducing the discomfort that might motivate more fundamental action. The same emotional salience that makes hunger so popular a cause in the first place makes us quick to relieve our own discomfort by settling for token solutions.

In the contemporary situation, the danger of such tokenism is even more acute. There is more at stake than the radicalizing potential of the contradictions of waste amid want. The whole fragile commitment to public income supports and entitlements is in jeopardy. Food programs not only make the well fed feel better, they reassure us that no one will starve, even if the nation ends welfare and cuts gaping holes in the food stamp safety net. By creating an image of vast, decentralized, kind-hearted effort, an image that is fueled by every fund-raising letter or event, every canned goods drive, every hunger walk, run, bike, swim, or golf-a-thon, every concert or screening or play where a can of food reduces the price of admission, we allow the right wing to destroy the meager protections of the welfare state and undo the New Deal. Ironically, these public appeals have the effect of creating such comforting assurances even for those who do not contribute.

Promoting hunger as a public issue, of course, does not necessarily imply support for the private, voluntary approach. There are undoubtedly social democrats and other progressives who support expanded food entitlements without endorsing the emergency food phenomenon. Unfortunately, however, much of the public makes little distinction. If we raise the issue of hunger, we have no control over just how people will choose to respond. As the network of food banks, food rescue organizations, food pantries, and soup kitchens has grown, so have the chances that people confronted with evidence of hunger in their midst will turn to such programs in an effort to help.

Many private food charities make a point of asserting that they are not a substitute for public food assistance programs and entitlements. Nearly every food banker and food pantry director I interviewed made some such assertion, and the national organizations that coordinate such projects, Second Harvest, Food Chain, Catholic Charities, even the Salvation Army, are on record opposing cuts in public food assistance and specifying their own role as supplementary. When it is time to raise funds, however, such organizations, from the lowliest food pantry in the church basement to national organizations with high-powered fund raising consultants or departments, tend to compare themselves with public programs in ways that reinforce the ideology of privatization. You simply cannot stress the low overhead, efficiency, and cost effectiveness of using donated time to distribute donated food without feeding into the right-wing critique of public programs in general and entitlements in particular. The same fund-raising appeals that reassure the public that no one will starve, even if public assistance is destroyed, convince many that substitution of charitable food programs for public entitlements might be a good idea.

Furthermore, as the programs themselves have invested in infrastructure—in walk-in freezers and refrigerated trucks, in institutional stoves and office equipment,

in pension plans and health insurance—their stake in the continuation of their efforts has grown as well, and with it, their need for continuous fund raising, and thus for the perpetuation of hunger as an issue. While many food bankers and food recovery staff argue that there would be a role for their organizations even if this society succeeded in eliminating hunger, that their products also go to improve the meal quality at senior citizen centers or lower the cost of daycare and rehabilitation programs, they clearly realize that they need hunger as an issue in order to raise their funds. Cost effectiveness and efficient service delivery, even the prevention of waste, simply do not have the same ability to elicit contributions. Hunger is, in effect, their bread and butter. The result is a degree of hoopla, of attention getting activity, that I sometimes think of as the commodification of hunger. As Laura DeLind pointed out in her insightful article "Celebrating Hunger in Michigan," the hunger industry has become extraordinarily useful to major corporate interests, but even without such public relations and other benefits to corporate food and financial donors, hunger has become a "product" that enables its purveyors to compete successfully for funds in a sort of social issues marketplace.[13] It does not require identification with despised groups—as does AIDS, for example. Its remedy is not far off, obscure, or difficult to imagine—like the cure for cancer. The emotional salience discussed above, and the broad spectrum of people who have been recruited to this cause in one way or another, make hunger—especially the soup kitchen, food pantry, food recycling version of hunger—a prime commodity in the fund-raising industry, and a handy, inoffensive outlet for the do-gooding efforts of high school community service programs and corporate public relations offices, of synagogues and churches, of the Boy Scouts and the Letter Carriers, of the Rotarians and the Junior League: the taming of hunger.

As we institutionalize and expand the response, of course, we also institutionalize and reinforce the problem definition that underlies it. Sociologists have long argued that the definitional stage is the crucial period in the career of a social problem. Competing definitions vie for attention, and the winners shape the solutions and garner the resources. It is important, therefore, to understand the competing definitions of the situation that "hunger" crowds out. What is lost from public view, from our operant consciousness, as we work to end hunger? In short, defining the problem as hunger contributes to the obfuscation of the underlying problems of poverty and inequality. Many poor people are indeed hungry, but hunger, like homelessness and a host of other problems, is a symptom, not a cause, of poverty. And poverty, in turn, in an affluent society like our own, is fundamentally a product of inequality.

Defining the problem as hunger ignores a whole host of other needs. Poor people need food, but they also need housing, transportation, clothing, medical care, meaningful work, opportunities for civic and political participation, and recreation. By focusing on hunger, we imply that the food portion of this complex web of human needs can be met independently of the rest, can be exempted or protected from the overall household budget deficit. As anyone who has ever tried to get by on a tight budget can tell you, however, life is not so compartmentalized. Poor people are generally engaged in a daily struggle to stretch inadequate resources over a range of competing demands. The "heat-or-eat" dilemma that arises in the winter months,

or the situation reported by many elderly citizens of a constant necessity to choose between food and medications are common manifestations of this reality.

In this situation, if we make food assistance easier to obtain than other forms of aid—help with the rent, for example, or the heating bill—then people will devise a variety of strategies to use food assistance to meet other needs. It is not really difficult to convert food stamps to cash: pick up a few items at the store for a neighbor, pay with your stamps, collect from her in cash. Some landlords will accept them, at a discounted rate of course, then convert them through a friend or relative who owns a grocery store. Drug dealers will also accept them, again at lower than face value, and you can resell the drugs for cash. The list goes on and on. Converting soup kitchen meals is almost impossible, but there are items in many pantry bags that can be resold. In either case, eating at the soup kitchen or collecting a bag from the food pantry frees up cash for other needs, not only the rent, but also a birthday present for a child or a new pair of shoes. By offering help with food, but refusing help with other urgent needs, we are setting up a situation in which poor people are almost required to take steps to convert food assistance to cash.

Conservative critics of entitlements will then seize on these behaviors to argue that poor people are "not really hungry." If they were really hungry, the argument goes, they would not resell items from the pantry bag or convert their food stamps. Such behavioral evidence fits into a whole ideologically driven perception that programs for poor people are bloated, too generous, and full of fraud and abuse; it allows conservatives to cut programs while asserting that they are preserving a safety net for the "truly needy." Progressives meanwhile are forced into a defensive position in which we argue that people are indeed "really hungry," thereby giving tacit assent to the idea that the elimination of hunger is the appropriate goal. In a society as wealthy as ours, however, aiming simply to eliminate hunger is aiming too low. We not only want a society in which no one suffers acute hunger or fails to take full advantage of educational and work opportunities due to inadequate nutrition. We want a society in which no one is excluded, by virtue of poverty, from full participation, in which no one is too poor to provide a decent life for his or her children, no one is too poor to pursue happiness. By defining the problem as "hunger," we set too low a standard for ourselves.

Where to?

The question of where we should direct our organizational efforts is inextricably tied up with the underlying issue of inequality. Above some absolute level of food and shelter, need is a thoroughly relative phenomenon. In an affluent society, the quality of life available at a given level of income has everything to do with how far from the mainstream that level is, with the extent to which any given income can provide a life that looks and feels "normal" to its occupants. In many warm parts of the world, children routinely go barefoot, and no mother would feel driven to convert food resources into cash to buy a pair of shoes, or to demean herself by seeking a charity handout to provide them. In the United States, where children are bombarded with hours of television advertising daily, and where apparel manufacturers trade on

"coolness," a mother may well make the rounds of local food pantries, swallowing her pride and subsisting on handouts, to buy not just a pair of shoes, but a particular name brand that her child has been convinced is essential for social acceptance at the junior high school.

In this context, the issue is not whether people have enough to survive, but how far they are from the median and the mainstream, and that is a matter of how unequal our society has become. By every measure, inequality has increased in the United States, dramatically, since the early 1970s, with a small group at the top garnering an ever increasing share of net marketable worth, and the bottom doing less and less well. And it is this growing inequality which explains the crying need for soup kitchens and food banks today, even at a relatively high level of employment that reflects the current peak in the business cycle. Unfortunately, however, a concept like hunger is far easier to understand, despite its ambiguities of definition, than an abstraction like inequality. Furthermore, Americans have not generally been trained to understand the language of inequality nor the tools with which it is measured. Just what is net marketable worth, and do I have any? As the statistics roll off the press, eyes glaze over, and the kindhearted turn to doing something concrete, to addressing a problem they know they can do something about: hunger. Once they begin, and get caught up in the engrossing practical challenges of transferring food to the hungry and the substantial emotional gratifications of doing so, they lose sight of the larger issue of inequality. The gratifications inherent in "feeding the hungry" give people a stake in maintaining the definition of the problem as hunger; the problem definition comes to be driven by the available and visible response in a sort of double helix.

Meanwhile, with anti-hunger activists diverted by the demands of ever larger emergency food systems, the ascendant conservatives are freer than ever to dismantle the fragile income protections that remain and to adjust the tax system to concentrate ever greater resources at the top. The people who want more inequality are getting it, and well-meaning people are responding to the resulting deprivation by handing out more and more pantry bags, and dishing up more and more soup. It is time to find ways to shift the discourse from undernutrition to unfairness, from hunger to inequality.

Notes

1. All quotations not otherwise attributed come from the transcripts of interviews I conducted in conjunction with my study of emergency food. For a more extensive treatment, see Janet Poppendieck, *Sweet Charity? Emergency Food and the End of Entitlement* (New York: Viking, 1998).
2. Foodchain, the National Food Rescue Network, *Feedback* (Fall, 1997), 2–3.
3. Ibid.
4. Vincent Breglio, *Hunger in America: The Voter's Perspective*. (Lanham, MD: Research /Strategy/Management Inc., 1992), 14–16.
5. For a discussion of the so called paradox of want amid plenty in the great depression, see Janet Poppendieck, *Breadlines Knee Deep in Wheat: Food Assistance in the Great Depression*. (New Brunswick, NJ: Rutgers University Press, 1986).
6. George McGovern, "Foreword," in Nick Kotz, *Let Them Eat Promises: The Politics of Hunger in America* (Englewood Cliffs, NJ: Prentice-Hall, 1969) viii.
7. Nick Kotz, "The Politics of Hunger," *The New Republic* (April 30, 1984), 22.
8. Bread for the World Institute, *Hunger 1994: Transforming the Politics of Hunger*. Fourth Annual Report on the State of World Hunger (Silver Spring, MD, 1993), 19.

9. Quoted in Edward Robb Ellis, *A Nation in Torment: The Great American Depression, 1929–1939*. (New York: Capricorn Books, 1971), 506.
10. Walter Lippmann, "Poverty and Plenty," Proceedings of the National Conference of Social Work, 59th Session, 1932 (Chicago: University of Chicago Press, 1932), 234–35.
11. Norman Thomas, *After the New Deal, What?* (New York: Macmillan, 1936), 33.
12. "Plenty and Want," editorial, *New York Times*, September 23, 1933.
13. Laura B. DeLind, "Celebrating Hunger in Michigan: A Critique of an Emergency Food Progeam and an Alternative for the Future," *Agriculture and Human Values* (Fall, 1994), 58–68.

"The Lonesome Death Of Hattie Carroll" by Bob Dylan

William Zanzinger killed poor Hattie Carroll
With a cane that he twirled around his diamond ring finger
At a Baltimore hotel society gath'rin'
And the cops were called in and his weapon took from him
As they rode him in custody down to the station
And booked William Zanzinger for first-degree murder
But you who philosophize disgrace and criticize all fears
Take the rag away from your face
Now ain't the time for your tears.

William Zanzinger who at twenty-four years
Owns a tobacco farm of six hundred acres
With rich wealthy parents who provide and protect him
And high office relations in the politics of Maryland
Reacted to his deed with a shrug of his shoulders
And swear words and sneering and his tongue it was snarling
In a matter of minutes on bail was out walking
But you who philosophize disgrace and criticize all fears
Take the rag away from your face
Now ain't the time for your tears.

Hattie Carroll was a maid in the kitchen
She was fifty-one years old and gave birth to ten children
Who carried the dishes and took out the garbage
And never sat once at the head of the table
And didn't even talk to the people at the table
Who just cleaned up all the food from the table
And emptied the ashtrays on a whole other level
Got killed by a blow, lay slain by a cane
That sailed through the air and came down through the room
Doomed and determined to destroy all the gentle
And she never done nothing to William Zanzinger
And you who philosophize disgrace and criticize all fears
Take the rag away from your face
Now ain't the time for your tears.

In the courtroom of honor, the judge pounded his gavel
To show that all's equal and that the courts are on the level
And that the strings in the books ain't pulled and persuaded
And that even the nobles get properly handled
Once that the cops have chased after and caught 'em
And that ladder of law has no top and no bottom
Stared at the person who killed for no reason
Who just happened to be feelin' that way witout warnin'
And he spoke through his cloak, most deep and distinguished
And handed out strongly, for penalty and repentance
William Zanzinger with a six-month sentence
Oh, but you who philosophize disgrace and criticize all fearsv
Bury the rag deep in your face
For now's the time for your tears.

Franklin D. Roosevelt, State of the Union Address, February 11, 1944

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.

The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter
From the Coalition for the Homeless

The landmark victory in the 1979 lawsuit *Callahan v. Carey* paved the way for further legal victories that ensured the right to shelter for homeless men, women, children, and families in New York City.

Callahan v. Carey

When modern homelessness first emerged in the late 1970s, thousands of homeless New Yorkers were forced to fend for themselves on the streets, and many died or suffered terrible injuries. In 1979 a lawyer named Robert Hayes, who co-founded Coalition for the Homeless, brought a class action lawsuit in New York State Supreme Court against the City and State called *Callahan v. Carey*, arguing that a constitutional right to shelter existed in New York. In particular, the lawsuit pointed to Article XVII of the New York State Constitution, which declares that "the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions...."

The Coalition brought the lawsuit on behalf of all homeless men in New York City. The lead plaintiff in the lawsuit, Robert Callahan, was a homeless man suffering from chronic alcoholism whom Hayes had discovered sleeping on the streets in the Bowery section of Manhattan.

On December 5, 1979, the New York State Supreme Court ordered the City and State to provide shelter for homeless men in a landmark decision that cited Article XVII of the New York State Constitution.

In August 1981, after nearly two years of intensive negotiations between the plaintiffs and the government defendants, *Callahan v. Carey* was settled as a consent decree. By entering into the decree, the City and State agreed to provide shelter and board to all homeless men who met the need standard for welfare or who were homeless "by reason of physical, mental, or social dysfunction." Thus the decree established a right to shelter for all homeless men in New York City, and also detailed the minimum standards which the City and State must maintain in shelters, including basic health and safety standards. In addition, Coalition for the Homeless was appointed monitor of shelters for homeless adults.

However, one tragic footnote to the history of the litigation is the fate of Robert Callahan himself. The autumn before the consent decree bearing his name was signed, Callahan died on the streets of Manhattan's Lower East Side while sleeping rough on the streets. Thus Robert Callahan himself was one of the last homeless victims of an era with no legal right to shelter.

In the early years after the *Callahan* consent decree was entered, a number of subsequent proceedings were brought by both plaintiffs and the City. Plaintiffs challenged the City's non-compliance with numerous provisions of the consent decree. These challenges have, among other things, secured orders requiring the City to open 400 new shelter beds within a 24-hour period; increase the plumbing facilities in certain shelters; and reduce the population in other shelters. In 1982, the City attempted to secure judicial approval for a lowering of the living standards in shelters. The court rejected this appeal as a "cruel

and unacceptable hoax" on the homeless.

In the three decades since the *Callahan* consent decree was entered, numerous violations of the decree have been documented and several have resulted in court action. For instance, the court has instructed the City to address violations of the *Callahan* decree that involved insufficient shelter capacity for homeless men during the winter of 1996-1997, and persistent flooding of sleeping areas at a 400-bed shelter for homeless veterans in 1998. In recent years, plaintiffs and the Coalition have challenged the City's persistent denial of stable shelter placements, through the use of single-night shelter placements for thousands of homeless men and women.

In 1999, the City attempted to modify the *Callahan* consent decree to allow implementation of State regulations that would terminate or deny shelter to homeless adults due to non-compliance with social service plans and administrative rules. In February 2000 the court issued a ruling prohibiting the City's implementation of the shelter termination regulations. In October 2002, the City filed an appeal of that ruling, and in June 2003 the Appellate Division overturned the trial court's earlier ruling. In October 2003 the Court of Appeals denied a request to review the appellate court ruling on the grounds that that ruling was not a final decision.

Therefore, in late 2003 the City of New York began implementing shelter termination rules for homeless single adults, but was required by court order to provide Coalition for the Homeless and the Legal Aid Society with copies of each individual's shelter termination notice, allowing the Coalition and the Legal Aid Society to provide legal assistance, housing assistance, and social services to threatened homeless adults.

In 2006 the City initiated legal action to stop providing shelter termination notices to the Coalition and the Legal Aid Society. After three years of litigation and appeals, in 2009 the New York State Court of Appeals found for plaintiffs and the Coalition, and ordered the City and State to continue providing copies of termination notices.

In 2009 the number of homeless individuals in municipal shelters rose dramatically, in part as a result of the historic economic recession and high unemployment. Coalition for the Homeless and the Legal Aid Society warned City officials that the shelter system was at the breaking point and faced a severe shortage of beds, but City officials failed to heed the warnings.

By December 2009, Coalition shelter monitors had witnessed hundreds of homeless men and women forced to sleep on the floors of waiting rooms, or transported in the middle of the night to distant shelter facilities only to get a few hours of sleep before being shipped back. And due to the City's failure to plan, these crisis conditions existed even before the onset of winter.

On December 9, 2009, the Coalition and the Legal Aid Society, with the pro bono legal assistance of attorneys from Wilmer Cutler Pickering Hale LLP, filed a motion in New York State Supreme Court seeking enforcement of the *Callahan* consent decree. On December 20th, Justice Judith Gische issued two vital temporary orders that required the City (1) to shelter vulnerable men and women and (2) to halt the systemic, repeated use of overnight-only beds -- thus banning the City's longstanding practice of "overnighting" hundreds of homeless men and women each night.

As a result of those orders, over the course of the 2009-2010 winter months the City was forced to add hundreds of shelter beds and to implement new procedures to ensure that homeless New Yorkers entering the shelter system get stable shelter placements. Indeed, by May 2010 when the motion was settled, the City had added more than 800 beds for homeless men and women to address a remarkable 12 percent increase in the adult shelter population. Once again, if not for the *Callahan* consent decree and the efforts of the Coalition and its partners, hundreds of homeless New Yorkers would have been denied emergency shelter during the coldest months of the year.

The Legacy of Callahan: Legal Victories for Homeless Women, Children, and Families

When the *Callahan* consent decree was signed, then-Mayor Koch publicly promised that it would be applied equally to homeless men and women. (*Callahan* was filed on behalf of homeless men largely because of the vast differences in the men's and women's shelter systems in the late 1970s.) Several months after the *Callahan* decree was finalized, it became clear that shelters for homeless single women were not meeting the qualitative standards set by the decree.

In February 1982, a new case was brought on behalf of homeless women, *Eldredge v. Koch*. The New York State Supreme Court ruled that the *Callahan* decree must be applied to shelters for homeless women. On appeal, the Appellate Division ruled that more evidence was needed on the question of specific violations (the City reduced shelter capacities and increased plumbing facilities after the case was filed), but affirmed that the *Callahan* decree applies to homeless women. The *Eldredge* case is now used, much like *Callahan*, to challenge sub-standard conditions in women's shelters.

In 1983, attorney Steven Banks of the Legal Aid Society sought to protect homeless families with children with the filing of the landmark *McCain v. Koch* lawsuit.

The *McCain* litigation involving homeless families continued for over two decades. The plaintiffs and the Legal Aid Society won numerous protections for vulnerable children and families, including a landmark 1986 appellate court ruling affirming the right to shelter for homeless families, improved conditions in shelter facilities, and court orders prohibiting the City from forcing homeless children and families to sleep on the floors and benches of intake offices.

In related litigation, the Legal Aid Society won additional protections for children and families. In *Cosentino v. Perales*, for instance, the court ruled that children could not be separated from their parents and placed into foster care solely due to the family's lack of housing.

In late 2008, after years of City officials' refusal to agree to an enforceable legal right to shelter for families, the City and State of New York finally agreed to a settlement of litigation involving homeless families. The final judgment in *Boston v. City of New York* ensures the legal right to shelter for homeless families with children.

Over the past three decades, Coalition for the Homeless, working in close partnership with the Legal Aid Society, has defended the right to shelter against numerous threats by City and State officials. Learn more about the ongoing struggle to defend the right to shelter here.

The Legal Right to Shelter: Court Orders and Documents

Following are some of the court orders, key documents, and news reports involving the right to shelter:

• *Callahan v. Carey* - New York State Supreme Court, consent decree (1981)

• *Callahan v. Carey* -- New York State Supreme Court, plaintiffs' amended complaint (1980)

• *Callahan v. Carey* -- New York State Supreme Court, first decision (1979)

• *New York Times* -- article about first decision in *Callahan v. Carey* (1979)

• *New York Times* - article about *Callahan v. Carey* consent decree (1981)

• *Callahan v. Carey* - New York State Supreme Court, decision blocking Mayor Giuliani's shelter-ejection plan (2000)

• *Weiser v. Koch* - stipulation (1986)

• *Boston v. City of New York* - New York State Supreme Court, plaintiffs' verified class action complaint (2008)

• *Boston v. City of New York* (and related litigation) - New York State Supreme Court, final judgments (2008)

• *Callahan v. Carey* - New York State Supreme Court, plaintiffs' motion challenging shortage of shelter for homeless adults (2009)

U.S. Copyright Law
§ 107. Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Dr. Freund's Playlist:

1. DJ EZ Rock and Rob Bass, It Takes Two
2. The Female Preachers, Think (About it)
3. Public Enemy, Fear of a Black Planet
4. Jay-Z, Hard Knock Life
5. Danger Mouse, Track 4
6. Public Enemy, Show 'Em Whatcha Got
7. Ice Cube, I'm Scared
8. Puff Diddy and Faith Evans, I'll Be Missing You
9. The Police, Every Breath You Take
10. Girl Talk, Let Me See You
11. 3rd Bass, Pop Goes the Weasel

I took much of the thinking behind this playlist from an *On the Media* radio program.
The first song is a fairly early rap song, which borrows heavily from the 2nd. The 3rd song was part of a type of rap music, which used lots of samples to put together a track. Song 5 is part of an album by Danger Mouse, who created an internet sensation with his Grey Album, which took significant parts of the Beetles' White Album and combined it with Jay-Z's black album (for your information, Paul McCartney said Danger Mouse was not allowed to use his music; Jay-Z didn't care). Songs 6 and 7 are kind of interesting because they contain samples of speeches (one of famous folks one of not so famous folks). The late 1980s saw the first of a series of lawsuits against rap groups for sampling (one of the texts is of the judge's decision in the most significant of those suits, and I would love to include the songs but they are very hard to find in a downloadable version; you can hear them at: http://cip.law.ucla.edu/cases/case_grandwarner.html).

These cases had a chilling effect on DJ creativity; they now had an incentive to sample from only one or two places (since they had to pay for the rights to use music). Songs 8 and 9 are examples of a **heavily** derivative song (9 is the rap song that sampled 10). Gregg Gillis (the person behind Girl Talk) has been bucking this trend, putting together songs that are really samples from hundreds of different tracks (our kids will, no doubt, be able to pick out where he's getting parts of his song). Nobody really knows why record execs haven't gone after Gillis. The final two tracks are songs we all know well that are not hip-hop but bring up similar issues.

Measuring Fair Use: The Four Factors
Stanford University Libraries

1. The Transformative Factor: The Purpose and Character of Your Use

In a 1994 case, the Supreme Court emphasized this first factor as being a primary indicator of fair use. At issue is whether the material has been used to help create something new, or merely copied verbatim into another work. When taking portions of copyrighted work, ask yourself the following questions:

* Has the material you have taken from the original work been transformed by adding new expression or meaning?
* Was value added to the original by creating new information, new aesthetics, new insights and understandings?

In a parody, for example, the parodist transforms the original by holding it up to ridicule. Purposes such as scholarship, research or education may also qualify as transformative uses because the work is the subject of review or commentary.

EXAMPLE: Roger borrows several quotes from the speech given by the CEO of a logging company. Roger prints these quotes under photos of old-growth redwoods in his environmental newsletter. By juxtaposing the quotes with the photos of endangered trees, Roger has transformed the remarks from their original purpose and used them to create a new insight. The copying would probably be permitted as a fair use.

2. The Nature of the Copyrighted Work

Because the dissemination of facts or information benefits the public, you have more leeway to copy from factual works such as biographies than you do from fictional works such as plays or novels.

In addition, you will have a stronger case of fair use if the material copied is from a published work than an unpublished work. The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his expression.

3. The Amount and Substantiality of the Portion Taken

The less you take, the more likely that your copying will be excused as a fair use. However, even if you take a small portion of a work, your copying will not be a fair use if the portion taken is the "heart" of the work. In other words, you are more likely to run into problems if you take the most memorable aspect of a work. For example, it would not probably not be a fair use to copy the opening guitar riff and the words "I can't get no satisfaction" from the song, "Satisfaction."

This rule--less is more--is not necessarily true in parody cases. In a parody, the parodist is borrowing in order to comment upon the original work. A parodist is permitted to borrow quite a bit, even the heart of the original work, in order to conjure up the original work. That's because, as the Supreme Court has acknowledged, "the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim. " (Campbell v. Acuff-Rose Music , 510 U.S. 569 (1994).)

4. The Effect of the Use Upon the Potential Market

Another important fair use factor is whether your use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. As we indicated previously, depriving a copyright owner of income is very likely to trigger a lawsuit. This is true even if you are not competing directly with the original work.

For example, in one case an artist used a copyrighted photograph without permission as the basis for wood sculptures, copying all of the elements of the photo. The artist earned several hundred thousand dollars selling the sculptures. When the photographer sued, the artist claimed his sculptures were a fair use because the photographer would never have considered making sculptures. The court disagreed, stating that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed. (Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).)

Grand Upright v. Warner
In this case, rapper Biz Markie was sued by Raymond “Gilbert” O’Sullivan for Sampling their song “Along Again.”

Opinion by Judge Kevin Thomas Duffy

"Thou shalt not steal." has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.

[1] This proceeding was instituted by Order To Show Cause to obtain a preliminary injunction against the defendants for the improper and unlicensed use of a composition "Alone Again (Naturally)" written and performed on records by Raymond "Gilbert" O'Sullivan. Defendants admit "that the Biz Markie album 'I Need A Haircut' embodies the rap recording 'Alone Again' which uses three words from 'Alone Again (Naturally)' composed by Gilbert O'Sullivan and a portion of the music taken from the O'Sullivan recording." Defendants' Post-Hearing Memorandum at 2. The only issue, therefore, seems to be who owns the copyright to the song "Alone Again (Naturally)" and the master recording thereof made by Gilbert O'Sullivan.

Three categories of proof lead me to the conclusion that the plaintiff is the true owner of these copyrights: (1) copies of the original copyrights made out to NAM Music, Inc., along with a deed vesting title to the copyrights in Gilbert O'Sullivan and another deed transferring the copyrights to the plaintiff corporation; and (2) the testimony of Gilbert O'Sullivan the acknowledged writer of the composition "Alone Again (Naturally)" and the performer who is featured on the master recording pirated by the defendants; and (3) the defendants' actions both before and after the issuance of the defendant album in contacting Gilbert O'Sullivan and his brother/agent in an attempt to obtain a license to use the copyrighted material.

[2] Defense counsel objected to the admission of copies of the certificates of copyright because they were not "authenticated." It was apparent that defense counsel was not using this term "authenticate" in the sense that it is normally used in the law, particularly in the law of evidence. Since the original copyright was in the name of NAM Music, Inc., defense counsel seemed to argue that someone authorized by NAM Music, Inc. would have to identify the certificates in order to "authenticate" them.

Of course, the reader should be aware that NAM Music, Inc. had long been dissolved, as defense counsel knew. It was clear to me that the use of the word "authenticate" by defense counsel had nothing whatsoever to do with self-authentication of public records under Rule 902 of the Federal Rules of Evidence. Nor did counsel believe that the certificate was anything less than a true and complete copy of the public record.

[3] Counsel for the defendants also attempted to keep out evidence of the transfer to the plaintiff of copyrights in the work at issue. Defense counsel did not conduct any discovery in the time between the institution of this lawsuit and the hearing on the preliminary injunction and claimed to be surprised when the plaintiff produced documentation of the transfer. However, that defense counsel did not adequately prepare for this hearing does not give the court cause to reject evidence of the transfer.

Defense counsel also objected to the admission of the transfer documents on the grounds that, since they had not been filed with the Registrar of Copyrights, they were without legal effect. This is not the law and the specific section upon which the defense counsel relied has long been repealed. These documents, taken together, prove valid copyrights vested in the plaintiff.

In addition to the documents offered into evidence by the plaintiff, Gilbert O'Sullivan -- who the defendants acknowledge was the composer, lyricist and first performer of the piece at issue -- testified that plaintiff is the owner of the copyright. There can be no one more interested in the question of valid copyright than a person in Gilbert O'Sullivan's position and he was a thoroughly credible and believable witness. Defense counsel did not effectively controvert O'Sullivan's testimony in any way. Indeed, the thrust of the cross-examination of O'Sullivan went to the artist's motive for refusing to give the defendants a license to use the song.

However, the most persuasive evidence that the copyrights are valid and owned by the plaintiff comes from the actions and admissions of the defendants. Prior to the time that Biz Markie's album was released, the various defendants apparently discussed among themselves the need to obtain a license. They decided to contact O'Sullivan and wrote to his brother/agent, enclosing a copy of the tape. In this letter, an attorney for the defendant states:

This firm represents a recording artist professionally known as Biz Markie, who has recorded a composition for Cold Chillin' Records entitled "Alone Again" which incorporates portions of the composition entitled "Alone Again Naturally" originally recorded by Gilbert O'Sullivan (the "Original Composition").

Biz Markie would like to obtain your consent to the use of the "Original Composition."

In writing this letter, counsel for Biz Markie admittedly was seeking "terms" for the use of the material. One would not agree to pay to use the material of another unless there was a valid copyright! What more persuasive evidence can there be!

Each defendant who testified knew that it is necessary to obtain a license -- sometimes called a "clearance" -- from the holder of a valid copyright before using the copyrighted work in another piece. Warner Bros. Records, Inc. had a department set up specifically to obtain such clearances. Brown Deposition of 11/19/91 at 30 et seq.; Tillman Deposition of 11/22/91 at 7. WEA International, Inc. knew it had to obtain "consents, permissions or clearances. . . ." Rossi Deposition of 11/22/91 at 10-11. /Cold Chillin' Records, Inc. knew that such clearances were necessary. Fitchelberg Deposition of 11/21/91 at 34 et seq.

Clearly, the attorneys representing Biz Markie and acting on his behalf also knew of this obligation. Biz Markie's attorneys sent copies of an August 16 letter, addressed to counsel for Cold Chillin' Records, Inc., to the other defendants. That letter contains the following:

In light of the fact that Cold Chillin' knew that other sample clearance requests were pending at that time, it follows that Cold Chillin' should have known that similar denials of permission by rightsholders of other samples used on the album and single might be forthcoming, for which similar action would have been appropriate. Nevertheless, instead of continuing to communicate with our client and us and otherwise cooperating to ensure that all rights were secured prior to release of the album and single, as it did in the situation involving the Eagles samples, Cold Chillin' unilaterally elected to release the album and single, perhaps with the thought that it would look to Biz for resolution of any problems relating to sampling rights, or the failure to secure such rights, that may arise in the future.

Consequently, if any legal action arises in connection with the samples in question, such action will not arise due to the fact that Biz used the samples in his recorded compositions, but rather, due to the fact that Cold Chillin' released such material prior to the appropriate consents being secured in connection with such samples.

[4] From all of the evidence produced in the hearing, it is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records. This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.

The application for the preliminary injunction is granted. The plaintiff is to submit within five (5) days hereof an appropriate decree. This matter is respectfully referred to the United States Attorney for the Southern District of New York for consideration of prosecution of these defendants under 17 U.S.C. § 506(a) and 18 U.S.C. § 2319.

Plagiarism Lines Blur for Students in Digital Age
By Trip Gabriel, *New York Times*, August 1, 2010

At Rhode Island College, a freshman copied and pasted from a Web site's frequently asked questions page about homelessness — and did not think he needed to credit a source in his assignment because the page did not include author information.

At DePaul University, the tip-off to one student's copying was the purple shade of several paragraphs he had lifted from the Web; when confronted by a writing tutor his professor had sent him to, he was not defensive — he just wanted to know how to change purple text to black.

And at the University of Maryland, a student reprimanded for copying from Wikipedia in a paper on the Great Depression said he thought its entries — unsigned and collectively written — did not need to be credited since they counted, essentially, as common knowledge.

Professors used to deal with plagiarism by admonishing students to give credit to others and to follow the style guide for citations, and pretty much left it at that.

But these cases — typical ones, according to writing tutors and officials responsible for discipline at the three schools who described the plagiarism — suggest that many students simply do not grasp that using words they did not write is a serious misdeed.

It is a disconnect that is growing in the Internet age as concepts of intellectual property, copyright and originality are under assault in the unbridled exchange of online information, say educators who study plagiarism.

Digital technology makes copying and pasting easy, of course. But that is the least of it. The Internet may also be redefining how students — who came of age with music file-sharing, Wikipedia and Web-linking — understand the concept of authorship and the singularity of any text or image.

"Now we have a whole generation of students who've grown up with information that just seems to be hanging out there in cyberspace and doesn't seem to have an author," said Teresa Fishman, director of the Center for Academic Integrity at Clemson University. "It's possible to believe this information is just out there for anyone to take."

Professors who have studied plagiarism do not try to excuse it — many are champions of academic honesty on their campuses — but rather try to understand why it is so widespread.

In surveys from 2006 to 2010 by Donald L. McCabe, a co-founder of the Center for Academic Integrity and a business professor at Rutgers University, about 40 percent of 14,000 undergraduates admitted to copying a few sentences in written assignments.

Perhaps more significant, the number who believed that copying from the Web constitutes “serious cheating” is declining — to 29 percent on average in recent surveys from 34 percent earlier in the decade.

Sarah Brookover, a senior at the Rutgers campus in Camden, N.J., said many of her classmates blithely cut and paste without attribution.

“This generation has always existed in a world where media and intellectual property don’t have the same gravity,” said Ms. Brookover, who at 31 is older than most undergraduates. “When you’re sitting at your computer, it’s the same machine you’ve downloaded music with, possibly illegally, the same machine you streamed videos for free that showed on HBO last night.”

Ms. Brookover, who works at the campus library, has pondered the differences between researching in the stacks and online. “Because you’re not walking into a library, you’re not physically holding the article, which takes you closer to ‘this doesn’t belong to me,’ ” she said. Online, “everything can belong to you really easily.”

A University of Notre Dame anthropologist, Susan D. Blum, disturbed by the high rates of reported plagiarism, set out to understand how students view authorship and the written word, or “texts” in Ms. Blum’s academic language.

She conducted her ethnographic research among 234 Notre Dame undergraduates. “Today’s students stand at the crossroads of a new way of conceiving texts and the people who create them and who quote them,” she wrote last year in the book “My Word!: Plagiarism and College Culture,” published by Cornell University Press.

Ms. Blum argued that student writing exhibits some of the same qualities of pastiche that drive other creative endeavors today — TV shows that constantly reference other shows or rap music that samples from earlier songs.

In an interview, she said the idea of an author whose singular effort creates an original work is rooted in Enlightenment ideas of the individual. It is buttressed by the Western concept of intellectual property rights as secured by copyright law. But both traditions are being challenged.

“Our notion of authorship and originality was born, it flourished, and it may be waning,” Ms. Blum said.

She contends that undergraduates are less interested in cultivating a unique and authentic identity — as their 1960s counterparts were — than in trying on many different personas, which the Web enables with social networking.

“If you are not so worried about presenting yourself as absolutely unique, then it’s O.K. if you say other people’s words, it’s O.K. if you say things you don’t believe, it’s O.K. if you write papers you couldn’t care less about because they accomplish the task, which is turning something in and getting a grade,” Ms. Blum said, voicing student attitudes. “And it’s O.K. if you put words out there without getting any credit.”

The notion that there might be a new model young person, who freely borrows from the vortex of information to mash up a new creative work, fueled a brief brouhaha

earlier this year with Helene Hegemann, a German teenager whose best-selling novel about Berlin club life turned out to include passages lifted from others.

Instead of offering an abject apology, Ms. Hegemann insisted, “There’s no such thing as originality anyway, just authenticity.” A few critics rose to her defense, and the book remained a finalist for a fiction prize (but did not win).

That theory does not wash with Sarah Wilensky, a senior at Indiana University, who said that relaxing plagiarism standards “does not foster creativity, it fosters laziness.”

“You’re not coming up with new ideas if you’re grabbing and mixing and matching,” said Ms. Wilensky, who took aim at Ms. Hegemann in a column in her student newspaper headlined “Generation Plagiarism.”

“It may be increasingly accepted, but there are still plenty of creative people — authors and artists and scholars — who are doing original work,” Ms. Wilensky said in an interview. “It’s kind of an insult that that ideal is gone, and now we’re left only to make collages of the work of previous generations.”

In the view of Ms. Wilensky, whose writing skills earned her the role of informal editor of other students’ papers in her freshman dorm, plagiarism has nothing to do with trendy academic theories.

The main reason it occurs, she said, is because students leave high school unprepared for the intellectual rigors of college writing.

“If you’re taught how to closely read sources and synthesize them into your own original argument in middle and high school, you’re not going to be tempted to plagiarize in college, and you certainly won’t do so unknowingly,” she said.

At the University of California, Davis, of the 196 plagiarism cases referred to the disciplinary office last year, a majority did not involve students ignorant of the need to credit the writing of others.

Many times, said Donald J. Dudley, who oversees the discipline office on the campus of 32,000, it was students who intentionally copied — knowing it was wrong — who were “unwilling to engage the writing process.”

“Writing is difficult, and doing it well takes time and practice,” he said.

And then there was a case that had nothing to do with a younger generation’s evolving view of authorship. A student accused of plagiarism came to Mr. Dudley’s office with her parents, and the father admitted that he was the one responsible for the plagiarism. The wife assured Mr. Dudley that it would not happen again.

Writers' block: County inmates work through emotions in poetry class
By Cathy Hamilton, *Lawrence Journal World and News*, February 10, 2010

Shown are charcoal sketches of inmates by Kerri Niemann from "Jail Time," a book of poems about the jail experience by Brian Daldorph.

February 7, 2010

They file into the classroom wearing uniforms of orange, blue and white - for medium, low and work release custody, respectively. It's 1 p.m. Thursday afternoon, time for the men's poetry class, one of the most popular programs at Douglas County Jail.

Fifteen inmates take their places at desks arranged in a semi-circle. On the floor in the center are a box of freshly sharpened No. 2 pencils, several sheets of loose-leaf notebook paper, and a small stack of dictionaries and thesauri.

"There are 23 pencils in that box," Mike Caron, programs director, announces. "I want every one of them back at the end of class. You may not take a pencil back to the pod. If you do, you won't be allowed back in class."

Pods are where the prisoners live. Pencils are potential weapons.

When all are seated and supplied, Caron begins by repeating the class rules for the four newcomers and the regulars who, he says, "tend to have ADD about these things":

• No writing to settle a score or pay back old grudges.

• Disrespect will not be tolerated.

• No writing about other inmates' cases. Don't use the class to air grievances. There's a standard procedure for that.

• No porn, or words like "bitches," "whores" and "snitches." Some profanity is OK, if it's essential to the work.

There will be female inmates walking through the classroom to the learning center during the hour. Act out, and you won't get back in.

With ground rules established, Caron turns the class over to Brian Daldorph, a mild-mannered, bespectacled Brit with a kind face and intense eyes. Daldorph, a Kansas University English professor, has taught the class, without pay, for more than nine years. He never misses a week - not even Thanksgiving or Christmas - unless he's out of the country.

Daldorph passes out writings from last week's session, which he has typed up and assembled into packets. The inmates take turns reading their work aloud in voices ranging from loud and clear to barely audible.

Crazy C goes first: "Šyellow light just makes me see, green light is just for speed, red light is me just as I plead ..."

"Very good," Daldorph says, catching Crazy's eyes. "Nice reading."

Then, it's Tony's turn: "Red lights and green lights, that's all my life has been. Coming and going, always ending up in the same place again ..."

Daldorph takes a beat, absorbing the words.

"Nice work," he says.

Next, a reading from last week's newcomer, DL: "This new room of mine is small and not too spacious. It's cold and not homely (sic). But what am I to do, we'll make the best of it. It's home now for a while ..."

"That's my first poem ever," DL exclaims proudly, at the end.

"I thought it was good," Daldorph replies.

"Me, too. I was surprised," DL says with a wide grin.

After the read-through, Daldorph scribbles several phrases on the board - "something's wrong," "the best thing I ever did," "what really matters," "starting over." He calls them prompts or suggested themes for free writing, the next section of the class.

Caron puts a disc on the CD player: Highlights from the Julian Bream Edition. Faint strains of classical guitar filter through the air.

Daldorph gives few instructions and no rules. For the next 20 minutes, these 15 men - convicted of battery, burglary and attempted murder, among other crimes - are to sit quietly and pour their souls onto the page.

Some inmates write non-stop for the duration, hunched over their desks; others stare into space, searching for inspiration. An older man named Iron Eyes, hindered by vision trouble, gets up and approaches the board within inches, jotting down Daldorph's prompts. A younger man fidgets,

his leg bouncing frenetically non-stop.

When free writing is over, it's time to read their new work.

"Starting over as I sit here. In this lonely place only thinking of my dear. As days go by, I can only wait to fly. As I think of the wrong I've done, I can only wish on what I'll become ..."

"Something's wrong. I look around and I can tell. Everyone looks depressed and mad like they're in hell ..."

"Sunday afternoon. BBQs and football. Long walks in the twilight breeze, hand in hand with my little teeze. Actually, she was a sleeze. I really don't miss the memories ..."

"Written in blood success or failure. Highways at sunlight or moonlight sorrow. Death is its name."

After class, some inmates stay behind to explain why they keep coming back week after week.

Four months into a stint for conspiracy to commit aggravated robbery, B.J. says the class helps him connect with others on a deeper level.

"When people write, they write the truth," he says. "They write about what they're going through personally. And when you know that about them, you sort of treat them differently. Maybe you can relate to them, or something."

"Fix," currently incarcerated for parole violation and DUI, had trouble coming up with the two preliminary poems required for entry to the first class. Now, he's nothing less than prolific.

"I'll set in my cell after lockdown and I'll start writing," he says. "If something happened that bothered me that day, I'll write it on paper. I write about my feelings about it, and how someone else might see me through their eyes."

Daldorph, whose book, "Jail Time," is a collection of his own poems inspired by his experiences at the jail, says he receives far more than he gives for his time inside.

"It's a very profound experience," he explains, "and for the sort of work I do - I mean, my great interest in literature - I like to think it has an important social value, and sort of helps us to live our lives. And I think I've seen that most clearly in the work that I do in the jail."

Fall
Brian Daldorph

He needs this cell. It was getting cold
out there and he'd done all the drugs he could buy.
It was either jail or die.
Sometimes he thinks he's getting too old
for this shit, but it's too late to start over
with some sweet-eyed lover
who says, "You and only you are the man I love."
He'd be late for his wedding again,
and what woman would choose a man with a cracked brain?
He sees the young punks in here scared
about what they've gotten into, not
the cocky kids they were on the street who dared
to run faster than the cops. He ended up in this cell
where it's warm enough. And three hot meals.

Since the end of World War II, survivors of the Holocaust and other injustices have published memoirs recounting their horrific experiences. [n271] Some of the children of survivors of the Holocaust and other injustices also have written about the impact of these injustices on them and their parents. One poignant book by a child of Holocaust survivors is After Such Knowledge, a memoir published in 2004 by Eva Hoffman. Born shortly after World War II to two Polish Jewish Holocaust survivors, Hoffman emigrated to Canada in 1959 with her **[*195]** family. [n272] Hoffman now lives in London, England and Cambridge, Massachusetts after having spent a great deal of her adult life in the United States. Movingly, Hoffman writes that "the statute of limitations on the great cataclysms of the twentieth century is running out." [n273] She emphasizes "that mourning must ... come to its end." [n274] "Sixty years later, ... and after all that can be done has been done, it may also be time to turn away, gently, to let" go of the Holocaust. [n275] Hoffman by no means is urging that the Holocaust be forgotten. Nevertheless, she suggests that the moral right to demand redress for it is fading as time passes. According to Hoffman, the moral rights of individuals like her to make demands of Germany are not as strong as those of the direct victims of the Holocaust. [n276]

By definition, advocates of redress for historical injustices resist the idea that the statute of limitations has run on the wrongs for which they seek redress. [n277] At the same time, they, like Hoffman, often would prefer to leave the past behind. But to do so, they argue, it is first necessary for society to undertake additional remedial measures to address the present effects of past wrongs. For example, in a well-known article advocating reparations as a progressive tool of legal change, Mari Matsuda argues that "reparations claims are based on continuing stigma and economic harm. The wounds are fresh and the action timely given ongoing discrimination." [n278] More recently, in arguing that there is a moral obligation to remedy slavery and past discrimination against African Americans, Kim Forde-Mazrui expresses a profound concern with the vast present-day disparities between African Americans and whites. [n279]

But the argument for addressing current injustices by revisiting the past discounts the complex moral issues raised by attempts to redress past injustices many years later. The historical wrongs for which redress has been sought in the United States are grievous, and they deserve to be condemned loudly. Sometimes redress requiring a significant commitment of resources also may be justified, even many years after the event. But as I have argued, it may be difficult to justify redress measures as a deterrent strategy, as **[*196]** consistent with distributive justice, or as a form of corrective justice. Moreover, even if redressing a particular injustice could be justified on one or more of these bases, to justify fully redressing that injustice, it also would be necessary to defend pursuing that basis. In this article, I have not broached the complex task of defending the pursuit of deterrence, distributive justice, or corrective justice. [n280]

I conclude with a suggestion. In light of the difficulty of justifying the redress of historical injustices, maybe we should concentrate more on tackling present injustices, rather than focusing on the past and how it affects the present. [n281] There is certainly no shortage of pressing current injustices in the United States and elsewhere to which we could devote our attention. Recall, for instance, the aftermaths of Hurricane Katrina and the Asian tsunami and the genocide in Darfur. While it is important to memorialize the past and honor its victims, it is also vital to remember our obligations to the present and the future.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesCompensationLabor & Employment LawDiscriminationReligious DiscriminationFederal & State InterrelationshipsPublic Health & Welfare LawSocial ServicesInstitutionalized IndividualsConfinement Conditions

FOOTNOTES:

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ADARAND CONSTRUCTORS, INC. v. PENA, SECRETARY OF TRANSPORTATION, et al.

No. 93–1841. Argued January 17, 1995—Decided June 12, 1995

...

Justice O'Connor delivered an opinion...which was for the Court except insofar as it might be inconsistent with the views expressed in Justice Scalia's concurrence, concluding that:

...

2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.

...

(c) The propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed...

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest... It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ``narrow tailoring" test set out in this Court's previous cases.

...

Justice Scalia agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a ``compelling interest" in discriminating on the basis of race in order to ``make up" for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government.

...

Parsing the High Court's Ruling on Race and Schools

NPR, June 28, 2007

Written by Maria Godoy, with additional reporting and analysis by Mark Walsh, Washington editor/Supreme Court correspondent for Education Week. *The Associated Press contributed to this report.*

The Supreme Court on Thursday struck down two public school plans that used race as a factor in deciding where students attend classes. The 5-4 ruling on plans from two major public school districts — in Seattle and Louisville, Ky. — is likely to prompt revisions of similar plans in schools across the country.

Here, a look at the ruling and its impact.

Why did the Supreme Court strike down the racial diversity plans?

The court's conservative majority found that plans in Seattle and Louisville that considered race when assigning students to schools went too far to achieve racial diversity. In announcing the 5-4 decision, which split the court along ideological lines, Chief Justice John Roberts said the districts "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."

Justice Stephen Breyer wrote a dissent that was joined by the court's three other liberal justices.

In a concurring opinion, Justice Anthony Kennedy agreed that the Seattle and Louisville plans went too far. But Kennedy would not go as far as the other court conservatives, who suggested that race may almost never be considered as a factor. Instead, Kennedy said race *may* be a component of school plans designed to achieve diversity. To the extent that Roberts' opinion could be interpreted as foreclosing the use of race in *any* circumstance, Kennedy wrote, "I disagree with that reasoning."

What does this decision mean for other public school plans that consider race as a factor?

The decision narrows the arsenal of tools available to public school districts seeking to achieve or maintain racial diversity. However, because of Kennedy's concurring opinion, the decision does leave the door open for race to be used as a factor in limited circumstances.

Recent high court rulings have addressed diversity plans in higher education. Thursday's decision applies specifically to K-12 public education. However, even the majority justices disagreed on whether and how race may be considered as a factor in public school admissions. So, it isn't clear how this ruling will affect programs and circumstances in which a student's race is considered — such as admissions to competitive magnet programs. That uncertainty leaves school districts some room to maneuver.

What *is* clear is that school districts cannot classify students by race for the purpose of school assignments, as the Seattle and Louisville school plans did. Using race for other educational purposes, such as to track enrollment, is still permissible, based on Kennedy's concurring opinion.

What kind of school diversity plans did Seattle and Louisville have in place?

Both the Seattle and Louisville school districts used school assignment plans to maintain racial diversity, though the plans varied slightly.

The 98,000-student Jefferson County district, which includes the city of Louisville, formerly was under a court-supervised desegregation plan, but in 2001, it was declared to be "unitary," or free of the vestiges of past racial segregation.

After that, Jefferson County voluntarily adopted a "managed choice" plan that allowed race to be considered as

a factor for some student assignments to schools. The plan sought to maintain black enrollment at no less than 15 percent and no more than 50 percent at each school.

The 46,000-student Seattle school district was never ordered to desegregate. But in 2000, it adopted a plan that weighed race as one of several "tiebreakers" in deciding admissions to the district's 10 high schools when there are more applicants than spaces.

Why were these school plans challenged?

Both school districts' plans were challenged by parents as a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. A majority of the Supreme Court agreed that the plans were unconstitutional.

In Jefferson County, the district's race-conscious plan was challenged by a white parent whose son was denied a transfer to his neighborhood school in 2000 because of his race.

The Seattle policy was challenged in 2000 by several white families whose children were denied admission to a new neighborhood high school. The white families were later joined in the suit by black families whose children were denied assignment to traditionally black-majority high schools.

Both plans previously were upheld by federal appeals courts as being narrowly tailored to achieve racial diversity.

How does this ruling compare with other recent Supreme Court cases on diversity and education?

The opinion is the first to touch on the issue of diversity and education since 2003, when a 5-4 ruling upheld the limited consideration of race in college admissions to attain a diverse student body. Since then, Justice Sandra Day O'Connor, who approved of the limited use of race, has retired. Her replacement, Justice Samuel Alito, was in the majority that struck down the school districts' plans in Louisville and Seattle.

The 2003 cases looked at the undergraduate and law-school admissions policies at the University of Michigan. In those cases, the court upheld affirmative action in college admissions in principle, and it supported the idea that using race as one factor to promote classroom diversity is a permissible goal.

Does the ruling affect the use of affirmative action in colleges and universities?

No. The majority opinion explicitly does not reverse the court's 2003 decision upholding the right of colleges and universities to use race as one of several factors in achieving a diverse student body. In introducing the decision on public schools, Roberts noted that there are "considerations unique to institutions of higher education." Those considerations, Roberts said, make it appropriate to take race into account as part of a "holistic review" of a university applicant's qualifications.

How does this decision affect the legacy of *Brown v. Board of Education*, the landmark 1954 decision that outlawed segregation in public schools?

Whether the ruling upholds the spirit of *Brown* depends on whom you ask.

In a separate opinion siding with the majority, Justice Clarence Thomas, the court's only black member, said that school assignment plans based on race are just as unconstitutional as race-based segregation was in 1954. "What was wrong in 1954 cannot be right today," Thomas said.

But the court's dissenters said the decision reneges on the promise of *Brown*. In a separate dissent, Justice John Paul Stevens called the majority's reliance on *Brown* to rule against integration "a cruel irony."

Why Do Math?

Your Half's Bigger Than My Half!

MATHEMATICAL RECREATIONS by Ian Stewart

Scientific American, 1998

A big man and a small man were sitting in the restaurant car of a train, and both ordered fish. When the waiter brought the food, there was one big fish and one small one. The big man, served first, promptly took the big fish; the small man complained that this was extremely impolite. 'What would you have done if you'd been offered first choice, then?' asked the big man, in a tone of annoyance. 'I would have been polite and taken the small fish,' said the small man smugly. 'Well, that's what you've got!' As this ancient joke illustrates, different people place different values on things under different circumstances, and some folk are very hard to please. For the last fifty years, mathematicians have grappled with problems of fair division — usually formulated in terms of a cake rather than fish — and there is now an extensive and surprisingly deep theory. Jack Robertson and William Webb have recently published a fascinating book *Cake Cutting Algorithms* (A K Peters, Natick, Massachusetts) which surveys the entire field. In this and next month's column we'll take a look at some of the ideas that have emerged from the deceptively simple question of dividing a cake so that everybody is happy with their share.

The simplest case involves just two people, who wish to share a cake so that each is satisfied that they have a fair share. 'Fair' here means 'more than half by *my* valuation', and the recipients may disagree on the value of any given bit of cake. For example, Alice may like cherries while Bob prefers icing. One of the more curious insights that has emerged from the theory of cake cutting is that it is *easier* to divide the cake when the recipients disagree on what parts of it are worth. You can see this makes sense here, because we can give Bob the icing and Alice the cherries and we're well on the way to satisfying both of them. If they both wanted icing, the problem would be harder.

Not that it's terribly hard when there are two players. The solution 'Alice cuts, Bob chooses' has been traced back 2800 years! Both players find this fair in the sense that they have no right to complain about the end result. If Alice dislikes the piece that Bob leaves, it's her own fault for not being more careful to make equal cuts (according to her valuation). If Bob doesn't like his piece, he made the wrong choice.

The whole area began to get interesting when people looked at what happens with three players. Robertson and Webb approach this variant by analysing a plausible but incorrect answer, which goes like this. Tom, Dick and Harry want to divide a cake so that each is satisfied he's got at least one third of it, according to his own private valuation. In all such matters, by the way, the cake is assumed to be infinitely divisible, although much of the theory works if the cake has valuable 'atoms' — single points to which at least one recipient attaches a non-zero value. For simplicity, though, I'll assume there are no atoms. OK, what about this algorithm?

It's clear that Harry will be satisfied, because he has first pick. Tom is also satisfied, for slightly more complex reasons. If Harry picks X, then Tom can pick whichever of Y and Z he considers more valuable (or either if they are equal in his eyes). Since he thinks they are worth $2/3$ in total, he must think at least one of them is worth $1/3$. On the other hand, if Harry chooses Y or Z, then Tom can choose X.

However, Dick may not be so happy with the result. If he disagrees with Tom about the first cut, then he might think W is worth less than $1/3$, meaning that the only piece that will satisfy him is X. But Harry could choose Y, say, and Tom X, so Dick has to take Z — which he doesn't want.

The first solution to fair three-person division was given in 1944 by Hugo Steinhaus, one of a group of Polish mathematicians who met regularly in a café in Lvov. His method involves a technique called 'trimming'.

STEP 1: Tom cuts the cake into two pieces X and W, where he thinks that X is worth $1/3$ and W $2/3$.

STEP 2: He passes X to Dick and asks him to trim it so that Dick values it at $1/3$, if he thinks it's worth more than that, and to leave it alone if not. Call the resulting piece X': this is either X or smaller.

STEP 3: Dick passes X' to Harry, who can either agree to take it, or not.

STEP 4: (a) If Harry accepts X' then Tom and Dick pile the rest of the cake —W plus any trimmings from X — in a heap, and treat this as a single (messy) cake. They play 'I cut you choose' on that. (b) If Harry does not accept X' and Dick has trimmed X, then Dick takes X', and Tom and Harry play 'I cut you choose' on the rest. (c) If Harry does not accept X' and Dick has not trimmed X, then Tom takes X, and Dick and Harry play 'I cut you choose' on the rest.

That's one answer — I'll leave it to you to verify the logic. Basically, anyone who isn't satisfied with what he gets must have made a bad choice, or a poorly judged cut, at an earlier stage, in which case he has only himself to blame.

In 1961 Leonard Dubins and Edwin Spanier proposed a rather different solution involving a moving knife. Sit the cake on a table, and arrange for a knife to move smoothly and gradually across it, starting completely to its left. At a given instant, let L be the part to the left of the knife. Tom, Dick, and Harry are all told to shout 'Stop!' as soon as the value of L, in their opinion, becomes $1/3$. The first to shout gets L, and the other two divide the rest either by 'I cut you choose' or by moving the knife again and shouting as soon as the perceived value reaches $1/2$. (What should they do if two players shout simultaneously? Think about it.) The great feature of this method is that it extends readily to n recipients. Move the knife across, and tell everyone to shout as soon as L reaches $1/n$ in their estimation. The first person to shout gets L, and the remaining $n-1$ players repeat the process on the remaining cake, only of course they now shout when the perceived value reaches $1/(n-1)$ ... and so on.

I must say that I'm never terribly happy with moving-knife algorithms — I think because of the time-lag involved in the players' reactions. The best way to get round this quibble is to move the knife slowly. *Very* slowly.

Let's call the first kind of answer a 'fixed knife' algorithm, the second a 'moving knife' algorithm. There is a fixed knife algorithm for three-person division that also extends readily to n people. Tom is sitting on his own, staring at 'his' cake, when Dick shows up and asks for a share. So Tom cuts what he thinks are halves and Dick chooses a piece. Before they can eat anything, Harry arrives and demands a fair share too. Tom and Dick independently cut their pieces into three parts, each of which they consider to be of equal value. Harry chooses one of Tom's pieces and one of Dick's. It's not hard to see why this 'successive pairs' algorithm works, and the extension to any number of people is relatively straightforward. The trimming method can also be extended to n people by offering everyone round the table a chance to trim a piece if they are willing to accept the result, and insisting that they do if nobody else wants to trim it further.

When the number of people is large, the successive pairs algorithm require a very large number of cuts. Which method requires the fewest cuts? The moving knife method uses $n-1$ cuts to get its n pieces, and that's as small as you can get. But the fixed knife methods don't succumb as readily. With n people, a generalisation of the trimming algorithm uses $(n2-n)/2$ cuts. The successive pairs algorithm uses $n!-1$, where $n!=n(n-1)(n-2)...3.2.1$ is the factorial. This is bigger than the number of cuts used in the trimming algorithm

(except when n=2).

However, trimming is not the best method. The more efficient 'divide and conquer' algorithm works roughly like this: try to divide the cake using one cut so that roughly half the people would be happy to have a fair share of one piece, while the rest would be happy to have a fair share of the other piece. Then repeat the same idea on the two separate subcakes. The number of cuts needed here is about $n\log 2n$. The exact formula is $nk-2k+1$ where k is the unique integer such that $2k-1<n\leq 2k$. It is conjectured that this is about as good as you can get.

These ideas could eventually go beyond mere recreation. There are many situations in real life where it is important to divide assets in a manner that seems fair to all recipients. Negotiations over territory and commercial interests are examples. In principle the kind of method that solves the cake-cutting problem can be applied to such situations. Indeed when for administrative purposes Germany was divided among The Allies (USA, Britain, France) and Russia, the first attempt created leftovers (Berlin) and then Berlin had to be divided as a separate step, so negotiators intuitively apply similar methods. Something rather similar is causing problems in Israeli-Palestinian relations right now, with Jerusalem as the main 'leftovers' and the West Bank as another bone of contention. Might the mathematics of fair allocation assist the negotiations? It would be nice to think we lived in a world that was sufficiently rational for such an approach, but politics seldom works that way. In particular, people's valuations of things tend to change *after* tentative agreements have been reached, in which case what we've just discussed won't work.

Still, it could be worth giving rational methods a try.

circles and n vertical ones, where we make the convention that $m \leq n$. Then each vertical circle crosses all but two of the horizontal circles *twice*. It meets the others – the 'inner' and 'outer' horizontal circles – once, at a node. For the other circles, one such crossing is a real crossing on the torus, hence a node; the other, however, is a result of trying to draw the picture in the plane. So each vertical circle contributes $m - 2$ crossings. In total, therefore, we find $(m - 2)n$ crossings.

It is widely believed that this is the minimal number; that is, that the crossing number of the torus-grid graph $C_m \times C_n$ is $(m - 2)n$. However, this '(m,n)-conjecture' has never been proved. It *is* known to be true for the cases listed above, the most recent being $C_7 \times C_7$. (See Myers's article for the details and references.) The smallest unsolved case is therefore $C_7 \times C_8$, for which the conjectured number of crossings is 40.

Can you find a way to redraw Figure 41 in the plane with 39 or fewer crossings? No cheating, no clever 'cookery' of the problem, please! This is mathematics, not a puzzle. If so, the (m,n)-conjecture would be *false*. Experiment.

It may seem astonishing that the combined brainpower of the world's mathematicians can't determine whether Figure 41 can be redrawn with fewer crossings – but it provides graphic illustration (pun intended) of the difference between a question that is simple to ask and one that is simple to answer.

Even if improvements are possible, they ought to be minor. In 1997 G. Salazar (Carleton University) proved that if the crossing number of $C_m \times C_n$ is *less* than $(m - 2)n$, then it cannot be *much* less. Assuming one technical condition (the number of times any two n-cycles cross cannot exceed some stated bound), the crossing number divided by $(m - 2)n$ approaches 1 as n becomes arbitrarily large. Nevertheless, this result leaves room for a reduction in the conjectured value $(m - 2)n$ for any particular choice of m, n. If the conjecture is false, that would help explain why it seems so hard to prove. On the other hand, it might be like Fermat's Last Theorem, the Kepler Problem, and the Four-Colour Conjecture: *true* but hard to prove!

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Division without Envy

Whichever way you cut it, the issue keeps coming back to how to divide the cake fairly, equitably, while respecting human rights and providing equal opportunities for all. This chapter is committed to fair shares for every citizen, irrespective of colour, creed, gender, age, or mathematical orientation.
So why are you *still* not satisfied?

In the opening chapter we took a look at some of the mathematical issues arising from the deceptively simple problem of dividing a cake fairly – meaning that if there are n people then each is convinced that their share is at least $1/n$ of the cake. Now we'll pick up the story and take a look at some of the more modern parts of the theory.

A brief reminder of where we'd got. With two people, the time-honoured algorithm 'I cut, you choose' leads to fair division. With three or more people, there are several possibilities. The 'trimming' method allows successive participants to reduce the size of a purportedly fair share of the cake, with the proviso that if nobody else trims that piece, then the last person to trim it has to accept it. In the 'successive pairs' algorithm, the first two people divide the cake equally, and then the third person secures what they consider to be at least 1/3 of each piece by negotiating with each of the first two separately. And with the 'divide and conquer' algorithm, participants try to divide the cake using one cut so that roughly half the people would be happy to have a fair share of one piece, while the rest would be happy to have a fair share of the other piece. The same idea is then repeated on the two separate subcakes, and so on.

These algorithms are all fair, but there is a more subtle issue. Even if everybody is convinced that they have a fair share of the cake, some participants may still feel hard done by, thanks to the Deadly Sin of envy. For example, Tom, Dick, and Harry may all be satisfied that they've got at least 1/3 of the cake; nevertheless, Tom may feel that Dick's piece is bigger than his. Tom's share is 'fair', but he doesn't feel

quite so happy any more. A division of the cake is 'envy-free' if no person thinks that someone else has got a larger piece than they have. An envy-free division is always fair, but a fair division need not be envy-free. So finding an algorithm for envy-free division is a more difficult problem than finding a fair one.

Cut-and-choose for two people is easily seen to be envy-free, but none of the other algorithms mentioned above is – not for all possible sets of three valuations of the cake. An envy-free algorithm for three people was first found by John Selfridge and John Conway in the early 1960s:

STEP 1: Tom cuts the cake into three pieces that he considers to be of equal value.

STEP 2: Dick may either (a) do nothing, if he thinks that two or more pieces are tied for largest, or (b) trim what he perceives to be the largest piece to create such a tie. Set aside any trimmings: call the accumulated trimmings 'leftovers'.

STEP 3: Harry, Dick, and Tom, in that order, choose a piece – one that they consider to be either the largest or tied for largest. If Dick trimmed a piece in step 2 then he must choose the trimmed piece *unless* Harry has already done so.

At this stage part of the cake has been divided in an envy-free manner. So it remains to divide up the leftovers in an envy-free manner too.

STEP 4: If Dick did nothing at step 2 there are no leftovers and the cake has been divided. If not, either Dick or Harry took the trimmed piece. Suppose Dick took it (if Harry did, interchange those two people from now on in the description of what to do). Then Dick divides the leftovers into three pieces that he considers equal.

STEP 5: All that remains is for Harry, Tom, and Dick to choose one piece from the leftovers, in that order. Then Harry has first choice so has no reason to be envious. Tom will not envy Harry *however* the leftovers are divided, because the most that Harry can get is a piece that Tom is already convinced is worth 1/3. And he won't envy Dick because he chooses before Dick does. Dick has no grounds for complaint since it was he who divided the leftovers anyway.

At this point everyone got stuck for thirty years. Is there an envy-free protocol for n people? In 1995 Steven Brams and Alan Taylor discovered a remarkable envy-free protocol for any number of players. It is distinctly complicated and I won't give it here: see either their article in the *American Mathematical Monthly* or the marvellous book *Cake Cutting Algorithms* by Jack Robertson and William Webb, both listed in Further Reading.

What other related questions are there? One possibility is to assign *unequal* shares. For example, Alice and Bob may want to divide the cake so that Alice is convinced she gets 3/5 or more, while Bob is convinced he gets 2/5 or more – that is, both seek a ratio of 3:2. It turns out that this problem has very different solutions depending on whether the desired ratio is expressible in whole numbers, or whether it is an irrational ratio like $\sqrt{2}:1$. In the former case, Alice could be replaced by three clones and Bob by two, who then divide the cake fairly. In the latter case, this approach doesn't work because you can't make $\sqrt{2}$ clones of somebody. Nonetheless, in the irrational case the division can still be achieved in a finite number of cuts, though you can't predict in advance how many will be needed.

One of the most interesting features of the theory of cake division is what Robertson and Webb call the 'serendipity of disagreement'. At first sight it might seem that fair division is simplest when everybody is in agreement about what each bit of the cake is worth – after all, there can then be no disputes about the value of a given share. Actually,

the reverse is true: as soon as participants disagree about values, it becomes *easier* to keep them all happy.

Suppose, for example, that Tom and Dick are using the cut-and-choose algorithm. Tom cuts the cake into two pieces, which he views as having equal value, 1/2 each. If Dick agrees with those valuations, nothing more can be done. But suppose that Dick values the two pieces at 3/5 and 2/5. Then he might, for some altruistic reason, decide to give Tom 1/12 of what he considers to be the larger piece (which he values at 1/20 of the whole cake). He still has $3/5 - 1/20 = 11/20$ of the cake, according to his valuation. One way to do this is for Dick to divide the larger piece, in his estimation, into 12 parts that he considers of equal value. Then he offers Tom the choice of just one of them. Whichever one Tom chooses, Dick still thinks he is left with 11/20. Tom, on the other hand, is faced with 12 choices, and he values their total as 1/2. Therefore at least one of them is worth 1/24 in his estimation. By choosing that one, he ends up with what he considers to be at least 13/24 of the cake. So now both Tom and Dick are satisfied that they have *more* than a fair share.

The intuition here is not that disagreement about values must lead to disagreement about what constitutes fair division. That might happen if a third party divided the cake and then insisted that Tom and Dick accepted one of those predetermined shares, but it can easily be avoided if Tom and Dick do the dividing themselves. Because in that case, if Tom places more value on a piece than Dick does, then Tom will be *more* easily satisfied. The trick is to make the cuts and choices in the right manner, that's all. There is a message for political disputes here: a solution is more easily found if the parties concerned can be brought to the negotiating table to thrash out the deal *themselves*. A deal imposed by an outside body, however fair it may seem to be to a disinterested observer, may not be acceptable to the actual participants.

Another instance of the same principle arises in the problem of dividing beachfront property. Suppose that a straight road runs east–west past a lake, and that the land in between the road and the lake is

to be divided by north–south property lines. The problem is to divide the property among n people, so that each of them gets a connected plot of land that they consider to be at least $1/n$ of the total value. The solution is disarmingly simple. Make an aerial photograph of the property and ask each participant to draw north–south lines on it, so that in their estimation the land is divided into n plots of equal value (Figure 42). If all participants draw their lines in the same places, then any allocation will satisfy them all. If there is any disagreement at all about where the lines go, however, then it is possible to satisfy all of them that they have a fair share, *and* to have some of the property left over. Figure 43 shows a typical case where Tom, Dick, and Harry have carried out such a procedure. Clearly we can let Tom have his first plot, Dick his second, and Harry his third – with some bits left over. Figure 44 shows a more complicated example in which Tom, Dick, Harry, Marcia, and Becky each seek 1/5 of the land. In 1969 Hugo Steinhaus proved that the same thing happens for any choices of dividing lines where there is the slightest disagreement. A proof, using the principle of mathematical induction, can be found in the book by Robertson and Webb.

You might like to consider whether a similar method would work with a cake. Ask each player to mark radial lines on a photograph of the cake, dividing it into what they consider to be pieces worth $1/n$. Then compare their choices. It's a very similar problem but with one

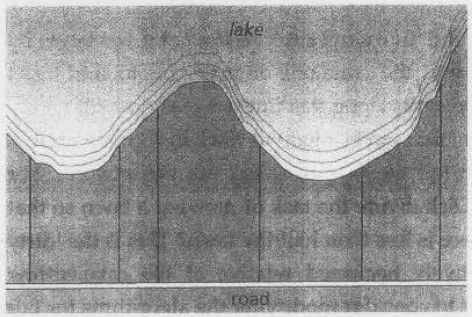

Figure 42
One person's division of a lakeside property.

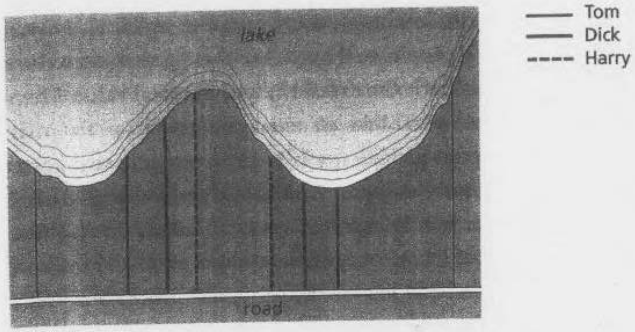

Figure 43 Keeping three people happy, with land to spare.

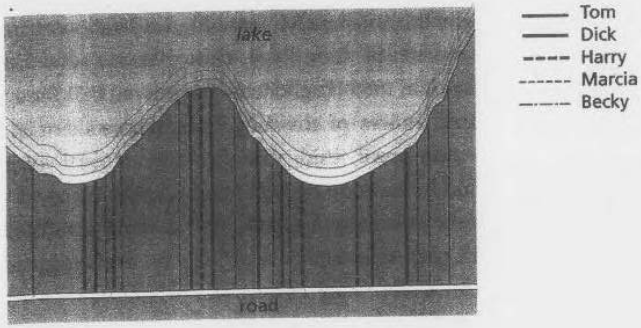

Figure 44 Keeping five people happy, with land to spare.

snag: the cake 'wraps round' into a full circle. But what if you begin by marking a single radial line, the same one on every photo, and insist that they make one of their cuts along that line?

Disagreements in valuation can be made to work the other way, too. Sometimes people want not the biggest share, but the smallest. For example, can Tom and Dick divide the task of mowing a lawn so that they each think their piece is less than half the lawn? This is the 'dirty work' problem, a relatively neglected relative of the cake-cutting problem. You might like to consider modifying the algorithms for fair

division of the cake so that each of n persons mowing a lawn considers that their bit is *at most* $1/n$ of the lawn.

Sadly, not all chores can be divided fairly, at least, not with reasonable restrictions. Take washing-up. If each person must wash and/or dry a complete dish, then in extreme cases no fair allocation is possible. Imagine two participants with one huge dish and one small one. Both will want to deal with the small one, and won't accept the huge one. So even in a perfect world, where all disputes are settled by negotiation, some disagreements seem unavoidable.

FEEDBACK

James Fradgley sent an amusing comment on the realities that underlie the issue of cake division. I reproduce it in its entirety:

> A delightful mathematical approach, but it simply doesn't work, as many individuals have an 'other man's grass is always greener' approach to life. So what may seem fair at one time, may not a few minutes later. When my children were aged about 4 and 5, my wife divided a small cake and gave each of them an estimated 50% share. My daughter (the older) immediately said: 'His is larger than mine'. So my wife asked our son if he thought his was larger than his sister's. He replied he didn't think so, and agreed that he was happy if they were swapped. My wife then swapped them, in the simple belief that both would be happy.
>
> *But ...*
>
> Our daughter looked at the swapped plates and said 'His is still larger than mine'. Alas, division without envy is nothing to do with maths or calculation!

Veiled Threats?

The Stone is a forum for contemporary philosophers on issues both timely and timeless.

In Spain earlier this month, the Catalonian assembly narrowly rejected a proposed ban on the Muslim burqa in all public places — reversing a vote the week before in the country's upper house of parliament supporting a ban. Similar proposals may soon become national law in France and Belgium. Even the headscarf often causes trouble. In France, girls may not wear it in school. In Germany (as in parts of Belgium and the Netherlands) some regions forbid public school teachers to wear it on the job, although nuns and priests are permitted to teach in full habit. What does political philosophy have to say about these developments? As it turns out, a long philosophical and legal tradition has reflected about similar matters.

What is it to treat people with equal respect in areas touching on religious belief and observance?

Let's start with an assumption that is widely shared: that all human beings are equal bearers of human dignity. It is widely agreed that government must treat that dignity with equal respect. But what is it to treat people with equal respect in areas touching on religious belief and observance?

We now add a further premise: that the faculty with which people search for life's ultimate meaning — frequently called "conscience" — is a very important part of people, closely related to their dignity. And we add one further premise, which we might call the vulnerability premise: this faculty can be seriously damaged by bad worldly conditions. It can be stopped from becoming active, and it can even be violated or damaged within. (The first sort of damage, which the 17th-century American philosopher Roger Williams compared to imprisonment, happens when people are prevented from outward observances required by their beliefs. The second sort, which Williams called "soul rape," occurs when people are forced to affirm convictions that they may not hold, or to give assent to orthodoxies they don't support.)

The vulnerability premise shows us that giving equal respect to conscience requires tailoring worldly conditions so as to protect both freedom of belief and freedom of expression and practice. Thus the framers of the United States Constitution concluded that protecting equal rights of conscience requires "free exercise" for all on a basis of equality. What does that really mean, and what limits might reasonably be placed upon religious activities in a pluralistic society? The philosophical architects of our legal tradition could easily see that when peace and safety are at stake, or the equal rights of others, some reasonable limits might be imposed on what people do in the name of religion. But they grasped after a deeper and more principled rationale for these limits and protections.

Here the philosophical tradition splits. One strand, associated with another 17-century English philosopher, John Locke, holds that protecting equal liberty of conscience requires only two things: laws that do not penalize religious belief, and laws that are non-discriminatory about practices, applying the same laws to all in matters touching on religious activities. An example of a discriminatory law, said Locke, would be one making it illegal to speak Latin in a Church, but not restricting the use of Latin in schools. Obviously, the point of such a law would be to persecute Roman Catholics. But if a law is not persecutory in this way, it may stand, even though it may incidentally impose burdens on some religious activities more than on others. If people find that their conscience will not permit them to obey a certain law (regarding military service, say, or work days), they had better follow their conscience, says Locke, but they will have to pay the legal penalty. A modern Lockean case, decided by the U. S. Supreme Court in 1993, concerned an ordinance passed by the city of Hialeah, Fla., which made "ritual animal sacrifice" illegal, but permitted the usual ways of killing animals for food. The Court, invalidating the law, reasoned that it was a deliberate form of persecution directed at Santeria worshippers.

Another tradition, associated with Roger Williams, the founder of the colony of Rhode Island and the author of copious writings on religious freedom, holds that protection for conscience must be stronger than this. This tradition reasons that laws in a democracy are always made by majorities and will naturally embody majority ideas of convenience. Even if such laws are not persecutory in intent, they may turn out to be very unfair to minorities. In cases in which such laws burden liberty of conscience — for example by requiring people to testify in court on their holy day, or to perform military service that their religion forbids, or to abstain from the use of a drug required in their sacred ceremony — this tradition held that a special exemption, called an "accommodation," should be given to the minority believer.

Do the arguers really believe that domestic violence is a peculiarly Muslim problem? If they do, they are dead wrong.

On the whole, the accommodationist position has been dominant in U. S. law and public culture — ever since George Washington wrote a famous letter to the Quakers explaining that he would not require them to serve in the military because the "conscientious scruples of all men" deserve the greatest "delicacy and tenderness." For a time, modern constitutional law in the U. S. applied an accommodationist standard, holding that government may not impose a "substantial burden" on a person's "free exercise of religion" without a "compelling state interest" (of which peace and safety are obvious examples, though not the only ones). The landmark case articulating this principle concerned a woman, Adell Sherbert, who was a Seventh-Day Adventist and whose workplace introduced a sixth workday, Saturday. Fired because she refused to work on that day, she sought unemployment compensation from the state of South Carolina and was denied on the grounds that she had refused "suitable work." The U. S. Supreme Court ruled in her favor, arguing that the denial of benefits was like fining Mrs. Sherbert for her nonstandard practices: it was thus a denial of her equal freedom to worship in her own way. There was nothing wrong in principle with choosing Sunday as the day of rest, but there was something wrong with not accommodating Mrs. Sherbert's special religious needs.

I believe that the accommodationist principle is more adequate than Locke's principle, because it reaches subtle forms of discrimination that are ubiquitous in majoritarian democratic life. It has its problems, however. One (emphasized by Justice Scalia, when he turned our constitutional jurisprudence toward the Lockean standard in 1990) is that it is difficult for judges to administer. Creating exemptions to general laws on a case by case basis struck Scalia as too chaotic, and beyond the competence of the judiciary. The other problem is that the accommodationist position has typically favored religion and disfavored other reasons people may have for seeking an exemption to general laws. This is a thorny issue that requires lengthy discussion, for which there is no room here. But we don't need it, because the recent European cases all involve discriminatory laws that fail to pass even the weaker Lockean test. Let's focus on the burqa; arguments made there can be adapted to other cases.

Five arguments are commonly made in favor of proposed bans. Let's see whether they treat all citizens with equal respect. First, it is argued that security requires people to show their faces when appearing in public places. A second, closely related, argument says that the kind of transparency and reciprocity proper to relations between citizens is impeded by covering part of the face.

What is wrong with both of these arguments is that they are applied inconsistently. It gets very cold in Chicago – as, indeed, in many parts of Europe. Along the streets we walk, hats pulled down over ears and brows, scarves wound tightly around noses and mouths. No problem of either transparency or security is thought to exist, nor are we forbidden to enter public buildings so insulated. Moreover, many beloved and trusted professionals cover their faces all year round: surgeons, dentists, (American) football players, skiers

and skaters. What inspires fear and mistrust in Europe, clearly, is not covering per se, but Muslim covering.

A reasonable demand might be that a Muslim woman have a full face photo on her driver's license or passport. With suitable protections for modesty during the photographic session, such a photo might possibly be required. However, we know by now that the face is a very bad identifier. At immigration checkpoints, eye-recognition and fingerprinting technologies have already replaced the photo. When these superior technologies spread to police on patrol and airport security lines, we can do away with the photo, hence with what remains of the first and second arguments.

A third argument, very prominent today, is that the burqa is a symbol of male domination that symbolizes the objectification of women (that they are being seen as mere objects). A Catalonian legislator recently called the burqa a "degrading prison." The first thing we should say about this argument is that the people who make it typically don't know much about Islam and would have a hard time saying what symbolizes what in that religion. But the more glaring flaw in the argument is that society is suffused with symbols of male supremacy that treat women as objects. Sex magazines, nude photos, tight jeans — all of these products, arguably, treat women as objects, as do so many aspects of our media culture. And what about the "degrading prison" of plastic surgery? Every time I undress in the locker room of my gym, I see women bearing the scars of liposuction, tummy tucks, breast implants. Isn't much of this done in order to conform to a male norm of female beauty that casts women as sex objects? Proponents of the burqa ban do not propose to ban all these objectifying practices. Indeed, they often participate in them. And banning all such practices on a basis of equality would be an intolerable invasion of liberty. Once again, then, the opponents of the burqa are utterly inconsistent, betraying a fear of the different that is discriminatory and unworthy of a liberal democracy. The way to deal with sexism, in this case as in all, is by persuasion and example, not by removing liberty.

Once again, there is a reasonable point to be made in this connection. When Turkey banned the veil long ago, there was a good reason in that specific context: because women who went unveiled were being subjected to harassment and violence. The ban protected a space for the choice to be unveiled, and was legitimate so long as women did not have that choice. We might think of this as a "substantial burden" justified (temporarily) by a "compelling state interest." But in today's Europe women can dress more or less as they please; there is no reason for the burden to religious liberty that the ban involves.

A fourth argument holds that women wear the burqa only because they are coerced. This is a rather implausible argument to make across the board, and it is typically made by people who have no idea what the circumstances of this or that individual woman are. We should reply that of course all forms of violence and physical coercion in the home are illegal already, and laws against domestic violence and abuse should be enforced much more zealously than they are. Do the arguers really believe that domestic violence is a peculiarly Muslim problem? If they do, they are dead wrong. According to the U. S. Bureau of Justice Statistics, intimate partner violence made up 20 percentof all nonfatal violent crime experienced by women in 2001. The National Violence Against Women Survey, cited on the B.J.S. Web site, reports that 52 percent of surveyed women said they were physically assaulted as a child by an adult caretaker and/or as an adult by any type of perpetrator. There is no evidence that Muslim families have a disproportionate amount of such violence. Indeed, given the strong association between domestic violence and the abuse of alcohol, it seems at least plausible that observant Muslim families will turn out to have less of it.

Suppose there were evidence that the burqa was strongly associated, statistically, with violence against women. Could government could legitimately ban it on those grounds? The U. S. Supreme Court has held that nude dancing may be banned on account of its contingent association with crime, including crimes against women, but it is not clear that this holding was correct. College fraternities are very strongly associated with

violence against women, and some universities have banned all or some fraternities as a result. But private institutions are entitled to make such regulations; a total governmental ban on the male drinking club (or on other places where men get drunk, such as soccer matches) would certainly be a bizarre restriction of associational liberty. What is most important, however, is that anyone proposing to ban the burqa must consider it together with these other cases, weigh the evidence, and take the consequences for their own cherished hobbies.

Societies are certainly entitled to insist that all women have a decent education and employment opportunities that give them exit options from any home situation they may dislike If people think that women only wear the burqa because of coercive pressure, let them create ample opportunities for them, at the same time enforce laws making primary and secondary education compulsory, and then see what women actually do.

Finally, I've heard the argument that the burqa is per se unhealthy, because it is hot and uncomfortable. (Not surprisingly, this argument is made in Spain.) This is perhaps the silliest of the arguments. Clothing that covers the body can be comfortable or uncomfortable, depending on the fabric. In India I typically wear a full salwaar kameez of cotton, because it is superbly comfortable, and full covering keeps dust off one's limbs and at least diminishes the risk of skin cancer. It is surely far from clear that the amount of skin displayed in typical Spanish female dress would meet with a dermatologist's approval. But more pointedly, would the arguer really seek to ban all uncomfortable and possibly unhealthy female clothing? Wouldn't we have to begin with high heels, delicious as they are? But no, high heels are associated with majority norms (and are a major Spanish export), so they draw no ire.

All five arguments are discriminatory. We don't even need to reach the delicate issue of religiously grounded accommodation to see that they are utterly unacceptable in a society committed to equal liberty. Equal respect for conscience requires us to reject them.

[For more on this issue, visit the Times Topics page on Muslim veiling.]

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The Anosognosic's Dilemma: Something's Wrong but You'll Never Know What It Is (Part 1)

By ERROL MORRIS

Existence is elsewhere.
— André Breton, "The Surrealist Manifesto"

1. The Juice

David Dunning, a Cornell professor of social psychology, was perusing the 1996 World Almanac. In a section called Offbeat News Stories he found a tantalizingly brief account of a series of bank robberies committed in Pittsburgh the previous year. From there, it was an easy matter to track the case to the Pittsburgh Post-Gazette, specifically to an article by Michael A. Fuoco:

ARREST IN BANK ROBBERY,
SUSPECT'S TV PICTURE SPURS TIPS

At 5 feet 6 inches and about 270 pounds, bank robbery suspect McArthur Wheeler isn't the type of person who fades into the woodwork. So it was no surprise that he was recognized by informants, who tipped detectives to his whereabouts after his picture was telecast Wednesday night during the Pittsburgh Crime Stoppers Inc. segment of the 11 o'clock news.

At 12:10 a.m. yesterday, less than an hour after the broadcast, he was arrested at 202 S. Fairmont St., Lincoln-Lemington. Wheeler, 45, of Versailles Street, McKeesport, was wanted in [connection with] bank robberies on Jan. 6 at the Fidelity Savings Bank in Brighton Heights and at the Mellon Bank in Swissvale. In both robberies, police said, Wheeler was accompanied by Clifton Earl Johnson, 43, who was arrested Jan. 12.[1]

Wheeler had walked into two Pittsburgh banks and attempted to rob them in broad daylight. What made the case peculiar is that he made no visible attempt at disguise. The surveillance tapes were key to his arrest. There he is with a gun, standing in front of a teller demanding money. Yet, when arrested, Wheeler was completely disbelieving. "But I wore the juice," he said. Apparently, he was under the deeply misguided impression that rubbing one's face with lemon juice rendered it invisible to video cameras.

In a follow-up article, Fuoco spoke to several Pittsburgh police detectives who had been involved in Wheeler's arrest. Commander Ronald Freeman assured Fuoco that Wheeler had not gone into "this thing" blindly but had performed a variety of tests prior to the robbery. Sergeant Wally Long provided additional details — "although Wheeler reported the lemon juice was burning his face and his eyes, and he was having trouble (seeing) and had to squint, he had tested the theory, and it seemed to work." He had snapped a Polaroid picture of himself and wasn't anywhere to be found in the image. It was like a version of Where's Waldo with no Waldo. Long tried to come up with an explanation of why there was no image on the Polaroid. He came up with three possibilities:

(a) the film was bad;
(b) Wheeler hadn't adjusted the camera correctly; or
(c) Wheeler had pointed the camera away from his face at the critical moment when he snapped the photo.[2]

As Dunning read through the article, a thought washed over him, an epiphany. If Wheeler was too stupid to be a bank robber, perhaps he was also too stupid to know that he was too stupid to be a bank robber — that is, his stupidity protected him from an awareness of his own stupidity.

Dunning wondered whether it was possible to measure one's self-assessed level of competence against something a little more objective — say, actual competence. Within weeks, he and his graduate student, Justin Kruger, had organized a program of research. Their paper, "Unskilled and Unaware of It: How Difficulties of Recognizing One's Own Incompetence Lead to Inflated Self-assessments," was published in 1999.[3]

Dunning and Kruger argued in their paper, "When people are incompetent in the strategies they adopt to achieve success and satisfaction, they suffer a dual burden: Not only do they reach erroneous conclusions and make unfortunate choices, but their incompetence robs them of the ability to realize it. Instead, like Mr. Wheeler, they are left with the erroneous impression they are doing just fine."
It became known as the Dunning-Kruger Effect — our incompetence masks our ability to recognize our incompetence. But just how prevalent is this effect? In search of more details, I called David Dunning at his offices at Cornell:
DAVID DUNNING: Well, my specialty is decision-making. How well do people make the decisions they have to make in life? And I became very interested in judgments about the self, simply because, well, people tend to say things, whether it be in everyday life or in the lab, that just couldn't possibly be true. And I became fascinated with that. Not just that people said these positive things about themselves, but they really, really believed them. Which led to my observation: if you're incompetent, you can't know you're incompetent.
ERROL MORRIS: Why not?
DAVID DUNNING: If you knew it, you'd say, "Wait a minute. The decision I just made does not make much sense. I had better go and get some independent advice." But when you're incompetent, the skills you need to produce a right answer are exactly the skills you need to recognize what a right answer is. In logical reasoning, in parenting, in management, problem solving, the skills you use to produce the right answer are exactly the same skills you use to evaluate the answer. And so we went on to see if this could possibly be true in many other areas. And to our astonishment, it was very, very true.
ERROL MORRIS: Many other areas?
DAVID DUNNING: If you look at our 1999 article, we measured skills where we had the right answers. Grammar, logic. And our test-subjects were all college students doing college student-type things. Presumably, they also should know whether or not they're getting the right answers. And yet, we had these students who were doing badly in grammar, who didn't know they were doing badly in grammar. We believed that they should know they were doing badly, and when they didn't, that really surprised us.
ERROL MORRIS: The students that were unaware they were doing badly — in what sense? Were they truly oblivious? Were they self-deceived? Were they in denial? How would you describe it?
DAVID DUNNING: There have been many psychological studies that tell us what we see and what we hear is shaped by our preferences, our wishes, our fears, our desires and so forth. We literally see the world the way we want to see it. But the Dunning-Kruger effect suggests that there is a problem beyond that. Even if you are just the most honest, impartial person that you could be, you would still have a problem — namely, when your knowledge or expertise is imperfect, you really don't know it. Left to your own devices, you just don't know it. We're not very good at knowing what we don't know.
ERROL MORRIS: Knowing what you don't know? Is this supposedly the hallmark of an intelligent person?

DAVID DUNNING: That's absolutely right. It's knowing that there are things you don't know that you don't know. [4] Donald Rumsfeld gave this speech about "unknown unknowns." It goes something like this: "There are things we know we know about terrorism. There are things we know we don't know. And there are things that are unknown unknowns. We don't know that we don't know." He got a lot of grief for that. And I thought, "That's the smartest and most modest thing I've heard in a year."
Rumsfeld's famous "unknown unknowns" quote occurred in a Q&A session at the end of a NATO press conference.[5] A reporter asked him, "Regarding terrorism and weapons of mass destruction, you said something to the effect that the real situation is worse than the facts show…" Rumsfeld replied, "Sure. All of us in this business read intelligence information. And we read it daily and we think about it, and it becomes in our minds essentially what exists. And that's wrong. It is not what exists." But what is Rumsfeld saying here? That he can be wrong? That "intelligence information" is not complete? That it has to be viewed critically? Who would argue? Rumsfeld's "known unknowns" and "unknown unknowns" seem even less auspicious. Of course, there are known unknowns. I don't know the melting point of beryllium.
http://www.green-planet-solar-energy.com
And I know that I don't know it. There are a zillion things I don't know. And I know that I don't know them. But what about the unknown unknowns? Are they like a scotoma, a blind spot in our field of vision that we are unaware of? I kept wondering if Rumsfeld's real problem was with the unknown unknowns; or was it instead some variant of self-deception, thinking that you know something that you don't know. A problem of hubris, not epistemology. [6]

And yet there was something in Rumsfeld's unknown unknowns that had captured Dunning's imagination. I wanted to know more, and so I e-mailed him: why are you so obsessed with Rumsfeld's "unknown unknowns?" Here is his answer:

The notion of unknown unknowns really does resonate with me, and perhaps the idea would resonate with other people if they knew that it originally came from the world of design and engineering rather than Rumsfeld.

If I were given carte blanche to write about any topic I could, it would be about how much our ignorance, in general, shapes our lives in ways we do not know about. Put simply, people tend to do what they know and fail to do that which they have no conception of. In that way, ignorance profoundly channels the course we take in life. And unknown unknowns constitute a grand swath of everybody's field of ignorance.

To me, unknown unknowns enter at two different levels. The first is at the level of risk and problem. Many tasks in life contain uncertainties that are known — so-called "known unknowns." These are potential problems for any venture, but they at least are problems that people can be vigilant about, prepare for, take insurance on, and often head off at the pass. Unknown unknown risks, on the other hand, are problems that people do not know they are vulnerable to.

Unknown unknowns also exist at the level of solutions. People often come up with answers to problems that are o.k., but are not the best solutions. The reason they don't come up with those solutions is that they are simply not aware of them. Stefan Fatsis, in his book "Word Freak," talks about this when comparing everyday Scrabble players to professional ones. As he says: "In a way, the living-room player is lucky . . . He has no idea how miserably he fails with almost every turn, how many possible words or optimal plays slip by unnoticed. The idea of Scrabble greatness doesn't exist for him." (p. 128)

Unknown unknown solutions haunt the mediocre without their knowledge. The average detective does not realize the clues he or she neglects. The mediocre doctor is not aware of the diagnostic possibilities or treatments never considered. The run-of-the-mill lawyer fails to recognize the winning legal argument that is out there. People fail to reach their potential as professionals, lovers, parents and people simply because they are not aware of the possible. This is one of the reasons I often urge my student advisees to find out who the smart professors are, and to get themselves in front of those professors so they can see what smart looks like.

So, yes, the idea resonates. I would write more, and there's probably a lot more to write about, but I haven't a clue what that all is.

I can readily admit that the "everyday Scrabble player" has no idea how incompetent he is, but I don't think that Scrabble provides an example of the unknown unknowns. An unknown unknown is not something like the word "ctenoid," a difficult word by most accounts, or any other obscure, difficult word.[7] [8] Surely, the everyday Scrabble player knows that there are words he doesn't know. Rumsfeld could have known about the gaps in his intelligence information. How are his unknown unknowns different from plain-old-vanilla unknowns? The fact that we don't know something, or don't bother to ask questions in an attempt to understand things better, does that constitute anything more than laziness on our part? A symptom of an underlying complacency rather than a confrontation with an unfathomable mystery?

I found myself still puzzled by the unknown unknowns. Finally, I came up with an explanation. Using the expressions "known unknowns" and "unknown unknowns" is just a fancy — even pretentious — way of talking about questions and answers. A "known unknown" is a known question with an unknown answer. I can ask the question: what is the melting point of beryllium? I may not know the answer, but I can look it up. I can do some research. It may even be a question which no one knows the answer to. With an "unknown unknown," I don't even know what questions to ask, let alone how to answer those questions. But there is the deeper question. And I believe that Dunning and Kruger's work speaks to this. Is an "unknown unknown" beyond anything I can imagine? Or am I confusing the "unknown unknowns" with the "unknowable unknowns?" Are we constituted in such a way that there are things we cannot know? Perhaps because we cannot even frame the questions we need to ask?

DAVID DUNNING: People will often make the case, "We can't be that stupid, or we would have been evolutionarily wiped out as a species a long time ago." I don't agree. I find myself saying, "Well, no. Gee, all you need to do is be far enough along to be able to get three square meals or to solve the calorie problem long enough so that you can reproduce. And then, that's it. You don't need a lot of smarts. You don't have to do tensor calculus. You don't have to do quantum physics to be able to survive to the point where you can reproduce." One could argue that evolution suggests we're not idiots, but I would say, "Well, no. Evolution just makes sure we're not blithering idiots. But, we could be idiots in a lot of different ways and still make it through the day."

ERROL MORRIS: Years ago, I made a short film ("I Dismember Mama") about cryonics, the freezing of people for future resuscitation. [9]

DAVID DUNNING: Oh, wow.

ERROL MORRIS: And I have an interview with the president of the Alcor Life Extension Foundation, a cryonics organization, on the 6 o'clock news in Riverside, California. One of the executives of the company had frozen his mother's head for future resuscitation. (It's called a "neuro," as opposed to a "full-body" freezing.) The prosecutor claimed that they may not have waited for her to die. In answer to a reporter's question, the president of the Alcor Life Extension Foundation said, "You know, we're not stupid . . . " And then corrected himself almost immediately, "We're not that stupid that we would do something like that."
DAVID DUNNING: That's pretty good.
ERROL MORRIS: "Yes. We're stupid, but we're not that stupid."
DAVID DUNNING: And in some sense we apply that to the human race. There's some comfort in that. We may be stupid, but we're not that stupid.
ERROL MORRIS: Something I have wondered about: Is there a socio-biological account of what forces in evolution selected for stupidity and why?
DAVID DUNNING: Well, there's no way we could be evolutionarily prepared for doing physics and doing our taxes at the end of the year. These are rather new in our evolutionary history. But solving social problems, getting along with other people, is something intrinsic to our survival as a species. You'd think we would know where our inabilities lie. But if we believe our data, we're not necessarily very good at knowing what we're lousy at with other people.
ERROL MORRIS: Yes. Maybe it's an effective strategy for dealing with life. Not dealing with it. David Dunning, in his book "Self-Insight," calls the Dunning-Kruger Effect "the anosognosia of everyday life."[10] When I first heard the word "anosognosia," I had to look it up. Here's one definition: Anosognosia is a condition in which a person who suffers from a disability seems unaware of or denies the existence of his or her disability. [11]
Dunning's juxtaposition of anosognosia with everyday life is a surprising and suggestive turn of phrase. After all, anosognosia comes originally from the world of neurology and is the name of a specific neurological disorder.
DAVID DUNNING: An anosognosic patient who is paralyzed simply does not know that he is paralyzed. If you put a pencil in front of them and ask them to pick up the pencil in front of their left hand they won't do it. And you ask them why, and they'll say, "Well, I'm tired," or "I don't need a pencil." They literally aren't alerted to their own paralysis. There is some monitoring system on the right side of the brain that has been damaged, as well as the damage that's related to the paralysis on the left side. There is also something similar called "hemispatial neglect." It has to do with a kind of brain damage where people literally cannot see or they can't pay attention to one side of their environment. If they're men, they literally only shave one half of their face. And they're not aware about the other half. If you put food in front of them, they'll eat half of what's on the plate and then complain that there's too little food. You could think of the Dunning-Kruger Effect as a psychological version of this physiological problem. If you have, for lack of a better term, damage to your expertise or imperfection in your knowledge or skill, you're left literally not knowing that you have that damage. It was an analogy for us.[12]
This brings us in this next section to Joseph Babinski (1857-1932), the neurologist who gave anosognosia its name.
(This is the first of a five-part series.)

FOOTNOTES:
1. Michael A. Fuoco, "Arrest in Bank Robbery, Suspect's Picture Spurs Tips," Pittsburgh Post-Gazette, April 21, 1995.
2. Michael A. Fuoco, "Trial and Error: They had Larceny in their Hearts, but little in their Heads," Pittsburgh Post-Gazette, March 21, 1996. The article also includes several other impossibly stupid crimes, e.g., the criminal-to-be who filled out an employment application at a fast-food restaurant providing his correct name, address and social security number. A couple of minutes later he decided to rob the place.
3. Justin Kruger and David Dunning, "Unskilled and Unaware of It: How Difficulties of Recognizing One's Own Incompetence Lead to Inflated Self-assessments," Journal of Personality and Social Psychology, 1999, vol. 77, no. 6, pp. 1121-1134.
4. David Dunning may be channeling Socrates. "The only true wisdom is to know that you know nothing." That's too bad; Socrates gives me a headache.
5. NATO HQ, Brussels, Press Conference by U.S. Secretary of Defense Donald Rumsfeld, June 6, 2002. The exact quote: "There are known unknowns. That is to say, there are things we now know we don't know. But there are also unknown unknowns. These are the things we do not know we don't know."
6. O.K. I looked it up on Wikipedia. The melting point of beryllium, the fourth element, is 1278 °C.

7. “Ctenoid” comes from one of my favorite books, “Jarrold’s Dictionary of Difficult Words.” I challenged a member of the Mega Society [a society whose members have ultra-high I.Q.s], who claimed he could spell anything, to spell “ctenoid.” He failed. It’s that silent “c” that gets them every time. “Ctenoid” means “having an edge with projections like the teeth of a comb.” It could refer to rooster combs or the scales of certain fish.
8. For the inner logoleptic in all of us, allow me to recommend the Web site:
http://www.kokogiak.com/logolepsy/
One of the site’s recommended words is “epicaricacy.” I read somewhere that the German word “schadenfreude” has no equivalent in English. I am now greatly relieved.
9. Errol Morris, “First Person: I Dismember Mama.”
10. Dunning, David, “Self-Insight: Roadblocks and Detours on the Path to Knowing Thyself (Essays in Social Psychology),” Psychology Press: 2005, p. 14-15.
11. http://en.wikipedia.org/wiki/Anosognosia.
12. A purist would no doubt complain that anosognosia has been taken out of context, that it has been removed from the world of neurology and placed in an inappropriate and anachronistic social science setting. But something does remain in translation, the idea of an invisible deficit, the infirmity that cannot be known nor perceived. I can even imagine a cognitive and psychological version of anosodiaphoria. The idea of an infirmity that people neglect, that they do not pay any attention to.

Just To Be Good.
By James Whitcomb Riley

Just to be good —
This is enough — enough!
O we who find sin's billows wild and
rough,
Do we not feel how more than any
gold
Would be the blameless life we led of
old
While yet our lips knew but a mother's
kiss?
Ah! though we miss
All else but this,
To be good is enough!

It is enough —
Enough — just to be good!
To lift our hearts where they are un-
derstood;
To let the thirst for worldly power and
place
Go unappeased; to smile back in God's
face
With the glad lips our mothers used to
kiss.
Ah! though we miss
All else but this,
To be good is enough!

James Whitcomb Riley
a.k.a. J. W. Riley
Born: Oct. 7, 1849 - Greenfield, Indiana, USA
Died: Jul. 22, 1916 - Indianapolis, Indiana, USA

In 1865, Riley left school at the age of 16 and worked for a time as a sign painter. In 1872, he published some poetry in the *Indianapolis Saturday Mirror*. In 1873, he joined the local Greenfield newspaper and in 1877 moved on to become an associate editor of the *Andersen Democrat*. While his poetry was very popular in his native state of Indiana, he was frustrated at the lack of enthusiasm from eastern periodicals. To prove his point, he wrote a poem styled after Edgar Allan Poe entitled *Leonainie* and claimed that it was a long-lost Poe original. He easily persuaded the *Kokomo Dispatch* to print it and thus proved his point, but the resulting scandal lost him his job. He moved on to the *Indianapolis Journal*, where his work, *When the Frost is on the Punkin*, first appeared in serial form. Collected into a book in 1883, it met with a resounding success. The series introduced many memorable characters including The Raggedy Man and Little Orphant Annie. His fame grew and he became one of the wealthiest authors of his era. The "Hoosier" poet, as Riley became known, is still popular and very readable today. His other works include *Afterwhiles* (1888), *Old-Fashioned Roses* (1888), *Rhymes of Childhood* (1891), *Green Fields and Running Brooks* (1893), *Riley Love-Lyrics* (1899), *His Pa's Romance* (1903), *While the Heart Beats Young* (1906), *Knee Deep in June* (1912) and *Fugitive Pieces* (1914).

Wild Geese

You do not have to be good.
You do not have to walk on your knees
for a hundred miles through the desert, repenting.
You only have to let the soft animal of your body
love what it loves.
Tell me about despair, yours, and I will tell you mine.
Meanwhile the world goes on.
Meanwhile the sun and the clear pebbles of the rain
are moving across the landscapes,
over the prairies and the deep trees,
the mountains and the rivers.
Meanwhile the wild geese, high in the clean blue air,
are heading home again.
Whoever you are, no matter how lonely,
the world offers itself to your imagination,
calls to you like the wild geese, harsh and exciting--
over and over announcing your place
in the family of things.

PROFILES

SHERIFF JOE

Joe Arpaio is tough on prisoners and undocumented immigrants. What about crime?

BY WILLIAM FINNEGAN

Joe Arpaio, the sheriff of Maricopa County, Arizona, looked disappointed. Al Sharpton was supposed to come to Arizona to lead a march demanding Arpaio's resignation. But Sharpton had other plans. "He's going to Alabama this weekend instead," Arpaio told Lisa Allen, his media-relations director. They were riding in the back of the Sheriff's car, a big black Chrysler with tinted windows. "He'll never come," the Sheriff said bleakly. "Alabama—isn't that where Bull Connor was, that they're always comparing me of?" Two silent, extra-large deputies rode in the front seat. Arpaio, who is seventy-seven, thick-bodied, and restless, studied the strip malls and waste grounds streaming past. He wore a gray suit, no badge, a tie clip in the shape of a pistol. "But Shaq is coming tonight?" he asked. Allen thought he was. The occasion was the première of the film "X-Men Origins: Wolverine," at a mall in Tempe, where Arpaio looked forward to walking the red carpet with Shaquille O'Neal.

Arpaio is known as "America's Toughest Sheriff." He even wrote (or caused to have written) a book with that title, as well as a second one, published last year, "Joe's Law: America's Toughest Sheriff Takes On Illegal Immigration, Drugs, and Everything Else That Threatens America." When he's not taking on everything that threatens America, Arpaio pursues his passion for being in the vicinity of celebrities. He made a point of visiting Charles Barkley when Barkley was in his jail on a D.U.I. earlier this year. After it was reported that the Los Angeles County jail was having trouble with overcrowding, he offered to put Paris Hilton into his lockup after her D.U.I. (No luck.)

Tempe had been awarded the "Wolverine" première in an online vote. A modest outdoor stage had been thrown together, under a billboard for Hastings & Hastings, discount accident lawyers, and the mall parking lot was mobbed. "Where's the red carpet?" Arpaio asked. It turned out to be a long, dirty, maroon rug. The crowd, craning to catch a glimpse of Hugh Jackman, seemed to be mainly teen-agers. A sunburned middle-aged couple approached Arpaio and asked for a photograph with him. He obliged—this was more like it.

The first celebrity arrived, a big guy in heavy stage makeup, with well-muscled arms and long blond hair and extremely white teeth. He bared his teeth and flexed his biceps, mugging for the cameras. I asked a gangly teen-ager in a tuxedo who he was. Clearly astounded by my ignorance, the teen-ager said, "That's Sabretooth, from 'American Gladiator'!" The actor, Hollywood Yates, later told me that his character on "American Gladiator" was, in fact, Wolf.

People who were actually in "Wolverine"—Jackman, Liev Schreiber, Will.i.am—started arriving, each bounding onto the little stage to raucous applause.

Shaquille O'Neal never showed.

I asked Hollywood Yates what he thought of Arpaio.

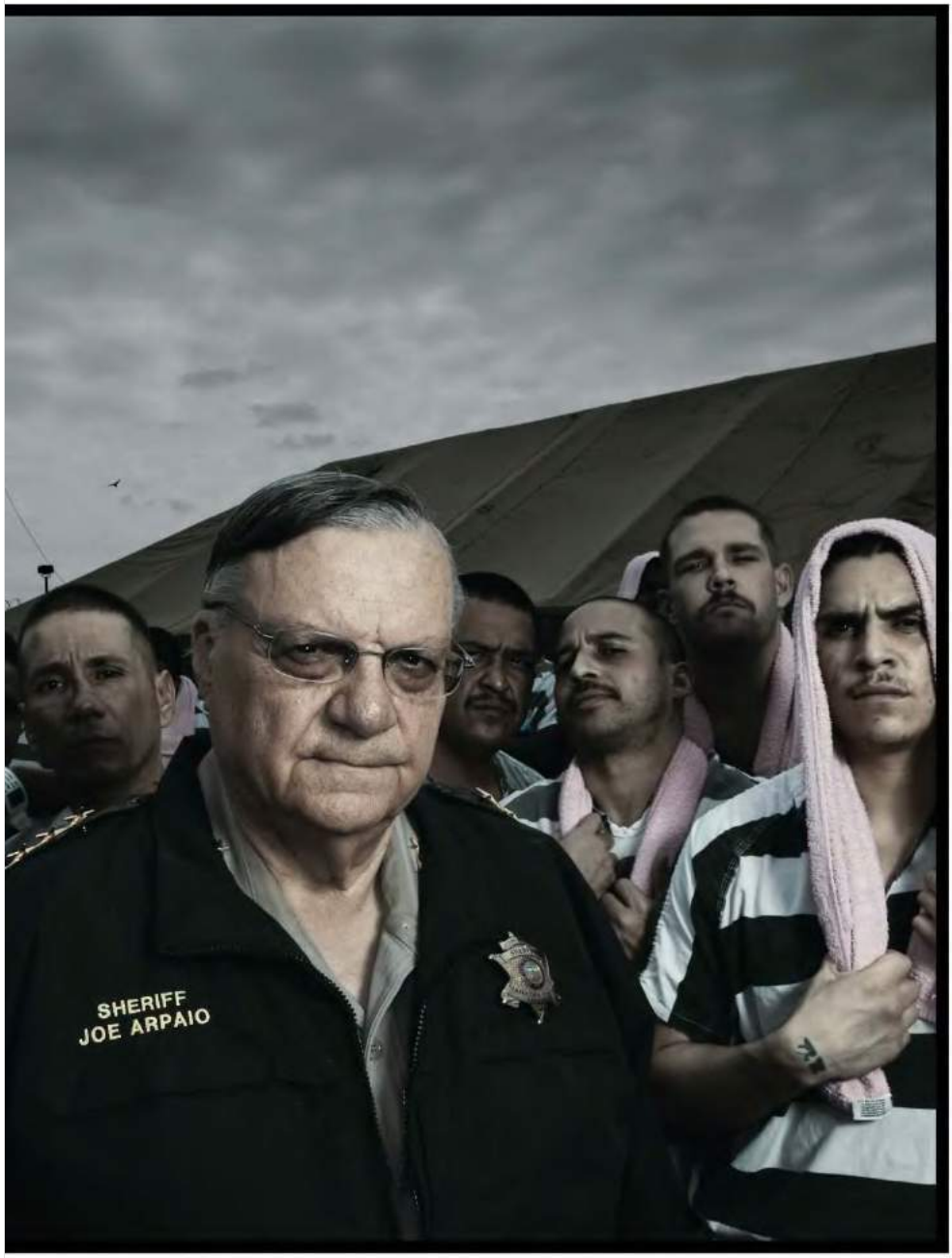
"He's awesome!"

Yates's wife, Shari, who had joined us, grimaced. She was slim, blond, in her late thirties. She wore much less makeup than her husband. "Joe is too hard-core for me," she said.

"Well, I love it," Yates said. "Those people are in jail for a reason."

Maricopa County is not a modest, out-of-the-way place. It includes Phoenix, covers more than nine thousand square miles, and has a population of nearly four million. Joe Arpaio has been sheriff there since 1993. He has four thousand employees, three thousand volunteer posse members, and an overworked media-relations unit of five. Like

Arpaio and inmates at the Tent City jail. Photograph by Dan Winters.


SHERIFF
JOE ARPAIO

most sheriffs in America, he is elected. He is currently enjoying his fifth four-year term, and looking forward to winning a sixth in 2012. Maricopa sheriff's races are, in the age of Arpaio, not lighthearted affairs. Stephen Lemons, a political reporter for the weekly Phoenix *New Times*, told me with some chagrin that Barack Obama's victory in November was actually overshadowed, in his mind, by Arpaio's reëlection.

Arpaio always wanted to be a cop. His parents were immigrants from Naples. "They came through Ellis Island *legally*," he says. His mother died giving birth to him in Springfield, Massachusetts. His father owned grocery stores there, and Joe was raised mostly by friends and relatives. After a hitch in the Army, he became a patrolman in Washington, D.C.—"Black neighborhood," he told me. He later worked as a federal narcotics agent in Turkey and Mexico and, finally, Arizona, where he retired. He and his wife, Ava, who have two children, ran a small travel agency in a suburb north of Phoenix. Then, in the early nineties, Joe decided to run for sheriff against an incumbent weakened by scandal. In Maricopa County, where the population has more than quadrupled since 1970, it is not always a disadvantage to lack local roots. Arpaio wasn't eloquent, but he spoke in short, quotable bursts, and he pummelled opponents with gusto. He promised to crack down on crime and to serve only one term. He won the Republican primary, which is traditionally all one needs in Maricopa.

The biggest part of the sheriff's job is running the jails, and Arpaio saw that there was political gold to be spun there. The voters had declined to finance new jail construction, and so, in 1993, Arpaio, vowing that no troublemakers would be released on his watch because of overcrowding, procured a consignment of Army-surplus tents and had them set up, surrounded by barbed wire, in an industrial area in southwest Phoenix. "I put them up next to the dump, the dog pound, the waste-disposal plant," he told me. Phoenix is an open-air blast furnace for much of the year. Temperatures inside the tents hit a hundred and thirty-five degrees. Still, the tents were a hit with the public, or at least with the conservative majority that voted. Arpaio put up more tents, until Tent City jail held twenty-five hundred inmates, and he stuck a neon "VACANCY" sign on a tall guard tower. It was visible for miles.

"I can't afford to lose my phone. I've assigned it talismanic properties."

His popularity grew. What could he do next? Arpaio ordered small, heavily publicized deprivations. He banned cigarettes from his jails. Skin magazines. Movies. Coffee. Hot lunches. Salt and pepper—Arpaio estimated that he saved taxpayers thirty thousand dollars a year by removing salt and pepper. Meals were cut to two a day, and Arpaio got the cost down, he says, to thirty cents per meal. "It costs more to feed the dogs than it does the inmates," he told me. Jail, Arpaio likes to say, is not a spa—it's punishment. He wants inmates whose keenest wish is never to get locked up again. He limits their television, he told me, to the Weather Channel, C-SPAN, and, just to aggravate their hunger, the Food Network. For a while, he showed them Newt Gingrich speeches. "They hated him," he said cheerfully. Why the Weather Channel, a British reporter once asked. "So these morons will know how hot it's going to be while they are working on my chain gangs."

Arpaio wasn't kidding about chain gangs. Foreign television reporters couldn't get enough footage of his inmates shuffling through the desert. New ideas for the humiliation of people in custody—whom the Sheriff calls, with persuasive disgust, "criminals," although most are actually awaiting trial, not convicted of any crime—kept occurring to him. He put his inmates in black-and-white striped uniforms. The shock value of these retro prisoner outfits was powerful and complex. There was comedy, nostalgia, dehumanization, even a whiff of something annihilationist. He created female chain gangs, "the first in the history of the world," and, eventually, juvenile chain gangs. The chain gangs' tasks include burying the indigent at the county cemetery, but mainly they serve as spectacles in Arpaio's theatre of cruelty. "I put them out there on the main streets," he told me. "So everybody sees them out there cleaning up trash, and parents say to their kids, 'Look, that's where you're going if you're not good.'" The law-and-order public loved it, and the Sheriff's fame spread. Rush Limbaugh praised him, and blurbed his book. Phil Donahue berated him.

Arpaio's one-term campaign promise had to be shelved. Opinion polls found that Sheriff Joe, as he was called, was the most popular politician in Arizona. The Democrats didn't even bother running a candidate against him in

1996. In fact, he often says, the governorship has long been his for the taking. But he likes being sheriff—he pronounces it "shurf." He got a tank from the Army, had the howitzer muzzle painted with flames, and "Sheriff Arpaio's War on Drugs" emblazoned on the sides, and rode in it, with Ava, in the Fiesta Bowl Parade. He decreed that all of his inmates—there are now roughly ten thousand of them, double the number when he took office—must wear pink underwear. And pink socks and pink flip-flops. Even pink handcuffs. Pink, he explains, mock-sincerely, is a soothing color.

"I know just how far I can go," Arpaio told me. "That's the thing."

His deputies, particularly his jail guards, seem to have less sense of how far they can go. Thousands of lawsuits and legal claims alleging abuse have been filed against Arpaio's department by inmates—or, in the case of deaths in detention, by their families. A federal investigation found that deputies had used stun guns on prisoners already strapped into a "restraint chair." The family of one man who died after being forced into the restraint chair was awarded more than six million dollars as the result of a suit filed in federal court. The family of another man killed in the restraint chair got $8.25 million in a pre-trial settlement. (This deal was reached after the discovery of a surveillance video that showed fourteen guards beating, shocking, and suffocating the prisoner, and after the sheriff's office was accused of discarding evidence, including the crushed larynx of the deceased.) To date, lawsuits brought against Arpaio's office have cost Maricopa County taxpayers forty-three million dollars, according to some estimates. But the Sheriff has never acknowledged any wrongdoing in his jails, never apologized to victims or their families. In fact, many of the officers involved have been promoted.

Other jails get sued, of course. The Phoenix *New Times* found that, between 2004 and 2008, the county jails of New York, Chicago, Los Angeles, and Houston, which together house more than six times as many inmates as Maricopa, were sued a total of forty-three times. During the same period, Arpaio's department was sued over jail conditions almost twenty-two hundred times in federal district court. Last year, the National Commission on Correctional Health Care withdrew the health accreditation of Maricopa County's jails for failing to meet its standards, and a federal judge refused to lift a long-standing consent decree on the jails, finding that conditions remained unconstitutional for pre-trial detainees. (The consent decree mandates that the jails be monitored. But it hasn't had much effect.)

Remarkably, Arpaio has paid almost no political price for running jails that are so patently dangerous and inadvertently expensive. Indeed, until recently there were few local or state politicians willing to criticize him publicly. Those who have, including members of the county board of supervisors, which controls his budget, tend to find themselves under investigation by the sheriff's office. Local journalists who perturb Arpaio have also been targeted. The Phoenix *New Times* ran an investigation of Arpaio's real-estate dealings that included Arpaio's home address, which he argued was possibly a violation of state law. When the paper revealed that it had received an impossibly broad subpoena, demanding, among other things, the Internet records of all visitors to its Web site in the previous two and a half years, sheriff's deputies staged late-night raids on the homes of Michael Lacey and James Larkin, executives of Village Voice Media, which owns the *New Times*. The deputies arrested both men for, they said, violating grand-jury secrecy. (The county attorney declined to prosecute, and it turned out that the subpoenas were issued unlawfully.)

Outspoken citizens also take their chances. Last December, remarks critical of Arpaio were offered during the public-comment period at a board of supervisors meeting, and four members of the audience were arrested and charged with disorderly conduct—for clapping. Their cases are pending.

Some local politicians have begun to speak up. Phil Gordon, the mayor of Phoenix, publicly denounced Arpaio last year for abuses of power. Gordon told me in his office recently that the Sheriff has imposed "a reign of terror" on Maricopa County. But the Mayor was referring neither to the jails nor to the intimidation of critics. He was mainly talking about a wide-ranging campaign, carried out by Arpaio in recent years, against undocumented immigrants in Maricopa County.

Arizona is a major corridor for Latin Americans sneaking into the United States, and the Phoenix area is both a stopover and a destination. Roughly half a million undocumented immigrants live in the state. Arizona is also full of retirees from the Midwest and the Northeast—Sun City is in Maricopa County—and these elderly Americans are, by and large, not completely delighted to find themselves among folk, mostly poor and brown, who don't speak English. The state is home to an array of nativist groups, and its legislature has passed perhaps the harshest anti-immigrant laws in the country. Arpaio, always a discerning student of conservative voter sentiment, surveyed all this a few years back and decided to transform his sheriff's department, with a crucial assist from the Bush Administration's Department of Homeland Security, into a sort of freelance immigration-enforcement agency.

His deputies conduct extensive raids in Latino towns and neighborhoods. They say they have investigated and arrested more than thirty thousand undocumented aliens. This campaign has landed Arpaio on Lou Dobbs's show, on CNN, where he is treated as a conquering hero, and has drawn support from ultra-right and racist groups, including neo-Nazis and the Ku Klux Klan. It has also brought Arpaio critical attention from civil-rights organizations.

In March, the U.S. Department of Justice, at the request of members of Congress, launched an investigation into charges of discriminatory conduct by the sheriff's office in Maricopa County. "It's garbage," Arpaio says—grandstanding by politically correct bureaucrats afraid to enforce the laws, Obama Democrats throwing their weight around. Certainly, it has not slowed the pace of his roundups. "Since I got my letter March 12th, we've locked up another hundred fifty," he told me in April. In the world accord-

ing to Sheriff Joe, almost every problem in America these days can somehow be traced back to "illegals."

That was presumably why Arpaio seemed so excited to hear the early news about swine flu: *it was coming from Mexico*. "We gotta get something out!" he said. He meant a press release. The Sheriff gathered eight or nine aides around a big table in his office. "Illegal Immigration Breeds Crime, Disease," Arpaio suggested. "Can we get masks for the deputies at the tents? ICE"—Immigration and Customs Enforcement—"has masks, don't they? We should close the border."

The press-release team included Lisa Allen and other members of the media-relations unit; a jail administrator; a public-health specialist; and two deputies from the Sheriff's human-smuggling unit, who had brought with them a map of Mexico. "Ninety, ninety-five per cent of the people we apprehend are from Guerrero, Oaxaca, Chiapas," one of the deputies said, spreading out the map. "The south." He and his partner were the odd men out at the meeting. Everyone else was in business attire; the deputies wore bluejeans and black T-shirts and carried pistols on their hips. Both deeply tanned, with sunglasses pushed up on crewcuts, they were also the only Latinos present. People silently studied the map. Finally, Lisa Allen said, "Mexico City is where?"

Arpaio was getting impatient. Len Sherman, who co-wrote both of the Sheriff's books, said firmly, "The story here is that Homeland Security is doing nothing about this, just like New Orleans. So we're taking action."

The public-health specialist said gently, "Surgical masks do nothing to combat this virus."

Arpaio erupted. "This is my press release! I'm the sheriff! I have some knowledge! I'm not just some little old sheriff!" He told a complicated story about a Nixon-era anti-narcotics program called Operation Intercept, which he said he ran with G. Gordon Liddy, and which nearly closed the border with Mexico for ten days in 1969.

Len Sherman nodded thoughtfully. "So you're saying that swine flu is an opportunity to solve other problems."

"Yes!"

The meeting went on for close to an hour. The Sheriff was called away to an

MEATLOAF

1.
Twenty-five years ago, Kurt Schwitters,
I tried to instruct you in baseball
but kept getting distracted, gluing
bits and pieces of world history
alongside personal anecdote
instead of explicating baseball's
habits. I was K.C. (for Casey)
in stanzas of nine times nine times nine.
Last year the Sox were ahead by twelve

2.
in May, by four in August—collapsed
as usual—then won the Series.
Jennifer, who loved baseball, enjoyed
the game on TV but fell asleep
by the fifth inning. She died twelve years
ago, and thus would be sixty now
watching baseball as her hair turned white.
I see her tending her hollyhocks,
gazing west at Eagle Pond, walking

3.
to the porch favoring her right knee.
I live alone with baseball each night
but without poems. One of my friends
called "Baseball" *almost* poetry. No
more vowels carrying images
leap suddenly from my excited
unwitting mind and purple Bic pen.
As he aged, Auden said that methods
of dry farming may also grow crops.

4.
When Jennifer died I had nightmares
that she left me for somebody else.
I bought condoms, looking for affairs,
as distracting as Red Sox baseball
and even more subject to failure.
There was love, there was comfort; always
something was wrong, or went wrong later
—her adultery, my neediness—
until after years I found Lauren.

5.
When I was named Poet Laureate,
the kids of Danbury School painted
baseballs on a kitchen chair for me,
with two lines from "Casey at the Bat."
In fall I lost sixty pounds, and lost
poetry. I studied only "Law

and Order." My son took from my house
the eight-sided Mossberg .22
my father gave me when I was twelve.

6.
Buy two pounds of cheap fat hamburger
so the meatloaf will be sweet, chop up
a big onion, add leaves of basil,
Tabasco, newspaper ads, soy sauce,
quail eggs, driftwood, tomato ketchup,
and library paste. Bake for ten hours
at thirty-five degrees. When pitchers
hit the batter's head, Kurt, it is called
a beanball. The batter takes first base.

7.
After snowdrifts melted in April,
I gained pounds back, and with Lauren flew
to Paris, eating all day: croissants
warm, crisp, and buttery, then baguettes
Camembert, at last bœuf bourguignon
with bottles of red wine. Afternoons
we spent in the Luxembourg Gardens
or in museums: the Marmottan!
The Pompidou! The Orangerie!

8.
The Musée de la Vie Romantique!
The Louvre! The d'Orsay! The Jeu de
Paume! The Musée Maillol! The Petit
Palais! When the great Ted Williams died,
his son detached his head and froze it
in a Scottsdale depository.
In summer, enduring my dotage,
I try making this waterless farm,
Meatloaf, with many ingredients.

9.
In August Lauren climbs Mt. Kearsarge,
where I last clambered in middle age,
while I sit in my idle body
in the car, in the cool parking lot,
revising these lines for Kurt Schwitters,
counting nine syllables on fingers
discolored by old age and felt pens,
my stanzas like ballplayers sent down
to Triple A, too slow for the bigs.

—Donald Hall

interview, which he conducted on speakerphone from his desk. His department's executive offices are situated, strangely, on two high floors of a bank tower in downtown Phoenix. They command a tremendous view of suburban sprawl in all directions. Outside, it was hot and hazy; inside, it was icy. The Sheriff's office is the size of a midrange convenience store, its dark wood-panelled walls crowded with memorabilia, including an illustration celebrating the 2001 World Series victory of the Arizona Diamondbacks, with Arpaio's face drawn bigger than even Randy Johnson's, as if the Sheriff had been the Series M.V.P.

The interviewer on the phone wanted to know if Arpaio thought schoolchildren should be asked about their immigration status.

"Yeah. Anything."

"Aren't you concerned about putting schools in that position?"

The Sheriff waved at Sherman, stage-whispering, "What do I say here?"

Sherman: "Drugs in schools."

"I can equate that to drug testing," Arpaio told the interviewer. "It's controversial."

Sherman, who is from New York, later told me, "He's an idiot savant. What he knows, he knows, and that's all he knows. I once saw him debate Alan Dershowitz, and I thought Dershowitz's head was going to explode."

Arpaio walked back to the press-release meeting, interrupting a recitation of facts by the public-health specialist. "Forget this medical stuff," he said. "We're talking about drop houses and human smuggling. I think we should start off with a paragraph about how I'm concerned about the illegals coming over the border. We can't say they're all Mexicans. That would be racial profiling."

Later, Arpaio said, "Can we throw 287(g) in there, give it a little credit?" He was referring to a federal program that allows state and local officers to be cross-trained by Homeland Security and work in immigration enforcement. The Maricopa County sheriff's office has had more people trained under 287(g) than any other police agency in the country. Arpaio suggested a line: "Arpaio ordered that every detainee be asked by a 287(g) officer what country they came from." Allen and Sherman wrote that down.

A deputy in the media-relations unit

checked his BlackBerry and announced, "Gordon went out at two o'clock." He meant that the Phoenix mayor had held a press conference.

"About the flu?"

"Yeah."

"That piece of shit! What did he say?"

"I don't know."

The deputies from the human-smuggling unit left with their map of Mexico. I followed them out, and we talked in a conference room. They were Detective Carlos Rangel and Sergeant Manny Madrid. They had been doing this work for two or three years, they said, and 287(g) had made a big difference. "We can now determine alienage," Madrid said.

Rangel, who grew up in the border town of Mexicali, said, "I thought it would change, that the numbers we catch would drop because people would hear Maricopa was a tough county. But it hasn't."

Madrid disagreed. He thought smuggling vans were getting harder to find. "Maybe they're changing their tactics."

Rangel said, "Plenty of people come up and thank us for our work." Madrid nodded. Then Rangel added, "But those people are a hundred per cent Caucasian. I've never had a non-Caucasian thank me."

The Sheriff took me to the tents the next day. But first he gave me the swine-flu press release that his staff had produced the night before. He has a stagy way of speaking out of the side of his mouth when he wants to share something possibly confidential. "If you got any buddies in New York, throw this to 'em," he said, handing me the press release. "I always send my stuff national."

Arpaio seems to live and die by the press release. When I met up with him in New York, before an appearance on "The Colbert Report," he was under attack back home, he told me, "for going on a comedy show when I could be testifying" at a Senate hearing on border violence that was being held in Arizona. The problem, he explained, was that the hearing, which was being held by Senators John McCain and Joe Lieberman, was taking place in Phoenix City Hall—the headquarters of his enemy Mayor Gordon. "Why would I go to Gordon's office when he's calling me a racist? I did a nice media release, saying I didn't want to disrupt the dignity of the proceedings—because there are demonstrators out there every day, demonstrating against me. But nobody's printing my press release." He sounded almost hurt. I later heard him tell a journalism class at Arizona State University, "I used to have trust with reporters. Give them scoops. Those were the old days. It's very strange, when you give a story and it doesn't come out the right way."

The swine-flu press release didn't call for closing the U.S.-Mexico border (Maricopa County is not, incidentally, on the border) but it did note Arpaio's "unwavering fight to slow the tide of illegal immigration" and warn that the swine flu should "serve as a wake-up call." Arpaio's "instrumental part" in Operation Intercept, in 1969, also got a mention.

At the entrance to Tent City Jail is a sign: "ILLEGAL ALIENS ARE PROHIBITED FROM VISITING ANYONE IN THIS JAIL."

We swept through an outbuilding, past startled deputies, and into a dusty yard full of rows of twenty-two-man canvas tents. "I'm risking my life for you," Arpaio said—referring, I gathered, to swine flu. The sides of the tents had been rolled up in the heat. Prisoners in striped outfits lay on bunks, watching us approach. We went into the first tent. The Sheriff and one of his men hurried down the narrow passage between the bunks and out the other side. I stopped midway, and asked the inmates if they felt like talking. They did.

They were all Latinos. They came from Mexico, Honduras, California, Arizona. Some had been in the tents for nearly a year. Their families were afraid to visit them, because they didn't have papers. They were all facing deportation. The jail food was very bad, they said, and they were always hungry. A slender eighteen-year-old named José Aguilar said that he had lost fifty pounds since being locked up. He showed me a photograph of himself, taken when he was arrested, which had been laminated on a plastic I.D. bracelet, and he had certainly lost weight since then. Aguilar said that he had been in Phoenix since he was a baby, and knew no one in Mexico; his first language was English. An older guy craned his head around to make sure no guards could hear him, then said, "Arpaio is illegal. He's not really from North America."

I asked if Arpaio had any nicknames in the tents.

"Hitler."

"Hitler."

A fan was moving air around at one end of the tent, but the heat was ferocious, and it was not yet summer. I could hear Arpaio yelling for me to come out. He sent a guard in to get me. Outside, I found the Sheriff talking to a local TV news crew. I made the mistake of mentioning that I had interviewed, inside the tent, an inmate from Mexico City. The Sheriff sent a guard back in to fetch him. Mexico City was, in Arpaio's mind, the epicenter of swine flu. He wanted this guy on TV. And so Fidel Sánchez found himself being questioned by a bilingual newswoman about his infected home town while Sheriff Joe stood by, arms folded, staring balefully into the camera. Arpaio has a big, round head, and there is something turtle-like about his posture.

"The Sheriff, he's a dynamo," a guard murmured to me. "He can stay out here all day, go on sweeps at night, and be ready to go in the morning with a cup of coffee. Puts the rest of us to shame."

Arpaio, with his inhuman energy, had probably escorted hundreds of camera crews and reporters through his beloved tent jail. Many had been appalled, and produced unflattering stories. Plenty of others had simply served up the Toughest Sheriff shtick with relish—the British tabloid the *Sun*, in a 2007 story, seemed ready to buy out Arpaio's contract and take him with them to straighten out the bad guys back home. Arpaio's main concern seems to be just that he is covered. When I first met Lisa Allen at his offices, she looked at my business card and said, "You'll probably tear us a new one, but come on in." Arpaio admits that he gets tired of being called a publicity hound, but says he simply has to get his message out—"I don't have the budget to do it myself." He does have the budget, though, to employ Allen and the rest of his unusually serious media-relations unit.

On the way back to Phoenix from the tents, the Sheriff got a call, which he put on speakerphone. Someone named Jim, who sounded like a deputy, was calling from the courthouse. He said he was observing jury selection in a case there. "Sheriff, there was a lady who said, 'Let's

put it this way. Joe's my hero.' So the next lady says, 'Joe is *not* my hero.' Then she says she's the wife of the mayor of Mesa."

"I knew it!" Arpaio said to one of his men. "I never trusted that mayor. He's pro-immigrant. He's never going to fire that chief. We gotta raid Mesa again."

There are at least twenty-five law-enforcement agencies in Maricopa County. All utilize the county jail. The sheriff's office is responsible for policing unincorporated areas as well as those smaller communities which contract for its services. In towns and cities with their own police, the sheriff's deputies must, in theory, tread lightly. Arpaio has had a number of run-ins with his fellow-lawmen, and his present obsession with illegal immigrants has made things even more tense.

Some of the disagreements are basic. For instance, Arpaio and the county attorney, Andrew Thomas, who shares his views, have settled on a novel interpretation of a state law against human smuggling. The law's target is, of course, smugglers, known as coyotes, but Arpaio and Thomas charge undocumented immigrants, the coyotes' cargo, as "co-conspirators" in their own smuggling. This is a Class 4 felony, which makes the suspects ineligible for bond, and is one reason that Arpaio's jails are so full. Maricopa is the only one of Arizona's fifteen counties that interprets the law this way, and the sheriff's office is the only agency among the twenty-five in Maricopa that does so. The others figure—and a few are vocal about it—that their limited resources are better spent fighting more serious crime.

George Gascón, the chief of police in Mesa—the man whom, Arpaio had bitterly remarked, the mayor was "never going to fire"—has stoutly opposed Arpaio. Mesa is a big town, east of Phoenix, with a population of half a million—larger than that of Cleveland. Gascón, who was an assistant police chief in Los Angeles before taking the Mesa job, three years ago, has had great success in crime reduction in Mesa, using the CompStat crime-mapping model, developed by William Bratton in New York and Los Angeles. But his first challenge in Mesa, he told me, had been to gain the trust of minority communities, particularly Latinos. "They need to believe that you're ethical and honest, that you're not the enemy," he said. In Los Angeles, he had seen what happened when

"Our next speaker looked into the abyss and made a few notes."

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that trust was broken by corrupt officers. No one would talk to the cops, "gang members filled the power void," and crime flourished. With victims and witnesses, or with people stopped for civil violations, Gascón's officers do not inquire about immigration status. "We focus on people who are committing predatory crimes."

Gascón, a Cuban-American, is tall, silver-haired, soft-spoken. He is a member of the California bar. He declined to discuss Arpaio. He did say, however, "I'm not an open-borders man. I believe we have a problem with illegal immigration. But I want to make sure we don't throw away the Constitution in the process of solving it." Gascón made it clear from the start that Arpaio's military-style immigration sweeps were not welcome in Mesa.

That didn't stop Sheriff Joe. Last October, he sent sixty detectives and posse volunteers into Mesa after midnight. The plan was to raid the Mesa city hall and the public library, to look for undocumented janitors who, according to the sheriff's office, were suspected of identification theft. Gascón was not notified beforehand. (Arpaio claims that he did inform someone at Mesa police headquarters about the raid.) A Mesa police officer spotted a large group of heavily armed men in flak jackets gathering silently in a downtown park. Gascón, when I asked about the episode, took a deep breath. "It was a very, very dangerous scenario," he said. "In my entire law-enforcement career, I have never heard of anything close to this." His officers managed to identify the armed men, but then had trouble getting a straight story from them. The raid eventually went forward, monitored by the Mesa police, and resulted in the arrests of three middle-aged cleaning women. (Arpaio's press release said that another thirteen suspected illegal immigrants were arrested later at their homes.) This was the context for Arpaio's remark "We gotta raid Mesa again."

Two reporters at the *East Valley Tribune*, a Maricopa County paper, did a five-part study last year of the operations of the sheriff's office. They found that, with the diversion of resources to pursuing undocumented immigrants, response times on emergency calls to the sheriff's office had increased significantly, arrest rates had dropped, and dozens of violent crimes were never investigated. The series won a Pulitzer Prize for local reporting. Arpaio rejected its findings and, four months after it was published, won reëlection.

His local opponents, including church groups, the N.A.A.C.P., ACORN, and other community organizations, not to mention Mayor Gordon, of Phoenix, have asked the federal government to investigate possible civil-rights violations by Arpaio's office. Large-scale street protests, including mass marches to the jails, are mounted every few months. Al Sharpton did eventually show up in Phoenix, for

one day in mid-June. He denounced racial profiling, met privately with the Sheriff, and announced plans to stage modern-day "freedom rides" in Maricopa County. That evening, he and Arpaio appeared together on Lou Dobbs's show.

The immediate goal of Arpaio's opponents is to persuade the Department of Homeland Security to cancel its 287(g) contract with Maricopa County. Modest as that sounds, activists believe it would make a difference, reducing the power of sheriff's deputies and crimping, however slightly, the culture of impunity that has flourished under Arpaio.

But Janet Napolitano, President Obama's Secretary of Homeland Security, has a history with Arpaio. She was the U.S. Attorney for Arizona when conditions in Arpaio's jails were first investigated by the Justice Department, in the mid-nineteen-nineties. Her performance then was memorably weak. Despite receiving a devastating federal report on brutality inside the jails, she held a friendly press conference with Arpaio in which she announced the settlement of the case against him and, according to the *Arizona Republic*, passed the time "trading compliments with the sheriff." Later, as the state's attorney general, she stood by as Sheriff Joe ran his jails any way he pleased. Then, when she ran for governor in 2002, Arpaio returned the favor by crossing party lines—Napolitano is a Democrat—and making a last-minute campaign commercial for her that, by all accounts, helped her eke out a victory. In 2008, in her second term as governor, Napolitano, a moderate on immigration, finally opposed Arpaio, ordering that $1.6 million in state funds going to his office be used not for immigration sweeps but for the investigation of felonies. Arpaio was furious and later got his funding reinstated. His opponents in Maricopa County wonder privately about Napolitano's willingness to defy him again, even from a Cabinet position. Last week, she announced a revision of the 287(g) program, intended to make local agencies more accountable. But, according to her office, ending Homeland Security's partnership with Arpaio is not under consideration.

I met a large family west of Phoenix whom I'll call the Ortegas. Two brothers—both husbands, fathers, and homeowners—had been arrested during a raid on a company where they worked. The men were still in jail, awaiting trial on charges of using invented Social Security numbers. Both were undocumented immigrants from western Mexico. A third brother, who has residence papers, was able to visit them in jail. I talked to him and his wife, and to the wife and the oldest son of one of the jailed men, in a cream-colored suburban living room.

"My husband has been here in Arizona since 1992," the wife of the jailed man said in Spanish. She wore a green T-shirt and, as she spoke, slowly wrung her hands. "He's been working and working, paying his taxes. He doesn't drink, gamble—nothing. Our children were born here. It's very hard with them. We tell the little ones he's in Mexico, taking care of his mother. But their cousins tell them he's in jail. They don't understand why their father, who's a good man, is in jail. They say, 'Is he bad? Don't lie to me, Mama.' " She added, "We've paid three thousand dollars to lawyers. We had to stop making house payments, but I don't care. We're living off his tax return now."

Her sister-in-law said, "Everything that's happening here is the fault of the federal government, because they empowered Arpaio."

The third brother cleared his throat, as if he might not agree. He was legal and had a solid job, as a farm supervisor, but most of the field hands at the farm were undocumented. He said, "Everybody's just trying to keep their noses clean, hoping there will be an immigration reform."

"Arpaio gets egged on by the national publicity he gets," his wife said. To her sister-in-law, she said, "If you lose your house, you can come and sleep here on the couch."

I asked the son of the jailed man, who was sitting with us but kept his eyes on the floor, his age. "I'm thirteen," he said, in English. He was tall and skinny, with huge eyes and a child's mouth. He wore a black baseball cap inscribed "Drug Free and Proud." He spoke very softly. "Who's going to pay the house bills? Where are we going to live? Am I still going to go to school?" Tears began rolling down his face.

"All he does is study," his mother said to me.

There was talk about legal strategies, about what could be tried. "We're just hoping to get in front of Immigration and get *un permiso*."

"I'm not as strong as I want to be," the wife of the jailed man said. "But I'm trying to keep the faith. We're not going to give up. *Sí se puede*."

Her sister-in-law turned to me and said, "We're like this." She held up her fingers, framing something the size of an ant. "*Como así.* Small. And Arpaio is a giant—*un gigante*."

The Ortegas asked me again not to identify them. Arpaio, they said, "does retaliation." They seemed terrified that he might show up at their door.

Russell Pearce is a state legislator from Mesa. His specialty is anti-immigrant legislation. Much of what he introduces is beyond the pale, even in Arizona. He has tried to force landlords to ascertain the immigration status of their tenants, couples to produce Social Security numbers and proof of citizenship before they can be married, and even hospitals to stop issuing birth certificates—never mind the Fourteenth Amendment of the Constitution—if there is a question about the immigration status of the parents. (Pearce can be outré in other areas as well. One law that he supported would have allowed concealed weapons in schools.) Yet Pearce has had some success: he helped pass a law that imposes sanctions on businesses that employ illegal immigrants—the toughest such law in the nation—and ballot measures making English the official state language and blocking access for the undocumented to day care and in-state college tuition.

"They should get nothing, nothing," Pearce told me. "Not K-12, nothing. Disneyland learned this a long time ago. You want the people to go home? Turn out the lights. Shut down the rides."

America, Pearce often says, has been "invaded," and the Fifth Column that abets this invasion is, he told me, an unusual alliance of "big business, folks with thick checkbooks on K Street, the corporate oligarchy," and "anarchists and seditionists."

I hadn't noticed many anarchists in Arizona.

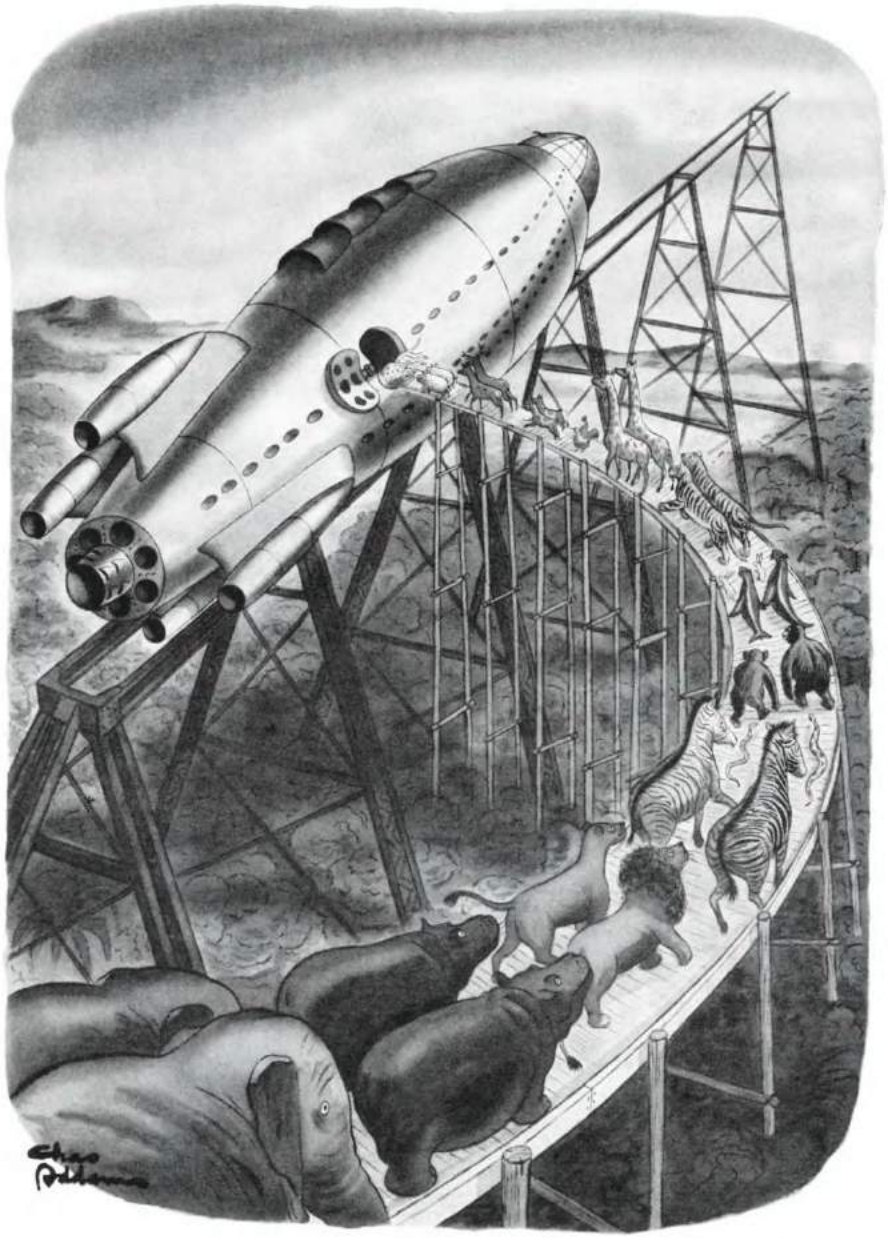
Pearce said, "They're huge. La Raza, the A.C.L.U."

More self-evident is the appeal of cheap labor to employers. Whether the Arizona economy could survive without undocumented immigrants picking lettuce and cleaning hotel rooms is an open question.

In any case, Pearce and Arpaio are allies. They are heroes to the same nativist

7/13/1946

FROM THE ARCHIVES BY CHARLES ADDAMS



groups. They even have the same painting, "The Prayer at Valley Forge," which shows George Washington kneeling in the snow next to his horse, on their respective office walls.

But Arpaio and Pearce were not always buddies. Pearce worked at the Maricopa County sheriff's office for twenty-three years, rising to chief deputy, and he reportedly clashed with Arpaio there. (Pearce still claims that the Tent City jail was his idea.) In 2004, Pearce's son, Sean, also a sheriff's deputy, was wounded by an illegal immigrant during a raid, and Sean's wife, Melissa, angry with the Sheriff, decided to attend a meeting for a group called Mothers Against Arpaio, which was seeking a special recall election. Most of the members of Mothers Against Arpaio were relatives of victims of abuse inside Maricopa County jails. (The recall effort was unsuccessful.)

There is also the awkward fact that Arpaio came late to the issue of illegal immigration. Indeed, he for many years publicly assumed the same attitude toward immigration-law enforcement that most local police chiefs do: more serious crimes deserve precedence. Arpaio was always tougher on prisoners than he was on crime, but he also immersed himself in a series of high-profile campaigns—the war on drugs, reducing cruelty to animals, driving prostitution out of Maricopa. A 2003 anti-prostitution sweep backfired when some members of his vast volunteer posse got naked, on video, with prostitutes they were supposedly arresting. This went sufficiently far beyond the call of duty that the county attorney was unable to file charges. Arpaio, struggling to put this embarrassment behind him, and seeing the success with which other local conservative politicians were wielding the anti-immigrant club, soon picked it up himself.

Mary Rose Wilcox, who is Latina and the only Democrat on the Maricopa County board of supervisors, remembers a quite different sheriff. "Arpaio was not like this before," she told me. "He was flamboyant. But I don't know this guy." For Wilcox, the last straw came this February, when Arpaio marched more than two hundred undocumented immigrants, shackled together, to a new tent jail, parading them before news cameras. Arpaio had staged prisoner marches before. In 2005, he forced nearly seven hundred prisoners, wearing nothing but pink underwear and flip-flops, to shuffle four blocks through the Arizona heat, pink-handcuffed together, to a new jail. When they arrived, one prisoner was made to cut a pink ribbon for the cameras. This elaborate degradation, which is remembered fondly by Sheriff Joe's fans, was ostensibly in the name of security—the men were strip-searched both before and after the march. But Arpaio also told reporters, "I put them on the street so everybody could see them." He marched another nine hundred this April.

Wilcox is a restaurant owner with an earnest, matronly air. She told me about a youth program she runs in inner-city Phoenix. "It's for fifth-grade kids who live near the ballpark but would never be able to afford to go to a Diamondbacks game," she said. "They all do community-service work, about a thousand of them, and then they get to go to a game. Sheriff's deputies always helped me with the program till two years ago. But I had to ask them to stop. The kids are just too afraid of those brown shirts. That's what their teachers told me. And I hate to say it but the Sheriff is responsible for all this fear."

We were eating chiles rellenos in Wilcox's restaurant, a modest family-run place with portraits of César Chávez and Martin Luther King, Jr., on the walls. Wilcox stopped eating. "It's like a big joke to him," she said. "He has no idea the harm he's doing—to children, families, communities."

"Be a real sheriff," the producer said. "You don't want to be a clown sheriff."

Arpaio seemed to take this advice in stride. We were in New York, and he was about to be interviewed on "The Colbert Report." "Is this the greenroom?" he asked. "These walls are blue. Are they going to powder me?"

The producer, an intense young woman, persisted. "Don't try to be funny," she said. "He will be funnier than you."

Arpaio shrugged. He wasn't familiar with Colbert's show. "I'm pretty funny," he said. From a rumpled manila envelope, he pulled two pairs of pink boxer shorts. "I brought the underwear," he said.

The producer stared. An assistant looked on helplessly. Then the producer reached for the shorts. "Thanks," she said.

"Don't you want me to take these on the show?"

"No."

Arpaio looked nonplussed. "Well, at least let me sign 'em." He autographed the shorts—one pair for Colbert ("Stay out of jail!"), one for the producer's son.

Stephen Colbert popped in and introduced himself. "I will be in character out there," he warned Arpaio. "My character is an idiot. He doesn't understand *anything*." While he spoke, the producer and the assistant chanted at Arpaio, "Set him straight! Set him straight!"

"First marriage?"

Arpaio wanted to make sure his new book would be plugged on the show. That was why he had come to New York. Colbert assured him that it would, and left to start taping.

Arpaio watched the opening monologue on a monitor, but soon grew bored. He is not accustomed to meeting people who don't know about the pink underwear. "Where's my powder?" he called out the doorway. No one replied.

Colbert's first guest got the Sheriff's attention. It was Ken Quinn, a second mate from the American container ship that was hijacked off Somalia in April. Quinn barely got to speak, between Colbert's jokes, but he had a good-natured grin and broad shoulders, and the studio audience gave him a standing ovation. Arpaio seemed jealous. "The *Republic* did a poll last week, 'Who's your hero?,' and I beat out Tillman," he said. He meant Pat Tillman, the Arizona Cardinals football star who joined the Army Rangers and was killed in Afghanistan. "I beat out all these guys. I'm not bragging. I'm just saying." (The poll, published in May, actually shows Tillman as the winner and Arpaio as a runner-up.)

Except for the ovation, Arpaio's turn with Colbert went much like Quinn's: the Sheriff hardly got a word in. He did manage to growl one stock line: "I'm an equal-opportunity law-enforcement guy—I lock everybody up." Colbert, having mentioned that Arpaio is often accused of racial profiling, kept asking the Sheriff for I.D.

As Arpaio left the studio, by an unmarked door on West Fifty-fourth Street, a bushy-haired young man waiting outside turned and bellowed, "Never come back here again! Fuck you!" Arpaio ducked into a town car, which sped away into the night. "Scumbag," he muttered. The Sheriff hadn't thought much of Colbert. He hadn't thought much of Conan O'Brien, either, he said. "I'm working on Leno. He's from my home state, Massachusetts. And my home country, Italy. I said, 'Hey, Jay, why don't you have me on your show? Afraid I'll be funnier than you?' "

Back in Maricopa County, the Justice Department was pursuing the investigation requested by Congress in March. Other federal officials were also snooping around. I heard Sheriff Joe tell his jail supervisor about an awkward interview he had just had with someone from Homeland Security. "He wouldn't even take my underwear."

"He's a bean counter," the supervisor said.

David Hendershott, Arpaio's chief deputy, seemed to be in charge of handling the Justice people. Hendershott is an enormous man, with enormous self-confidence and an office nearly as enormous as Arpaio's. He polishes the Sheriff's image at every opportunity. Not realizing, for instance, that I had already been to the Tent City jail with Arpaio, Hendershott told me, "Every time he goes to the tents, it's like a rock concert. Everybody wants his autograph. They'll have him sign toilet paper, anything."

The key question about the federal investigation, Hendershott said, was "Is it an organized conspiracy to muzzle Sheriff Joe Arpaio by using the Justice Department?" He had been doing some Internet research on the chief of the civil-rights division, he said, and decided that she must be unpopular with at least some of her staff. He brandished a thick set of printouts, and said, "D.O.J. is going to be surprised that we find the truth to be a very strong ally." Hendershott pointed at a conference table at one end of his office. "I got seven D.O.J. lawyers coming in here tomorrow. And I'm going to shove it up their ass."

He wasn't more specific about his strategy than that, but the bravado itself seemed to be the point. "You think I don't know how the feds operate?" Arpaio had asked the journalism students at Arizona State. "I don't bow down to the federal government."

Guadalupe is one of the small Maricopa communities that have a contract for police protection with the sheriff's office. Its population is almost entirely Latino and Native American, and one day last year Arpaio launched a major raid there, with a helicopter, paddy wagons, and scores of deputies, including helmeted officers on horseback. They stopped and demanded I.D. from pedestrians, motorists—basically every dark-skinned person they saw. (The sheriff's office calls these raids "crime suppression" sweeps, and insists that the raiders stop only people who are violating the law.) It was standard practice, Arpaio style, complete with a press release and news crews. Indeed, it was the third such operation in less than a month. But dusty little Guadalupe is not a standard Maricopa community. It is an old town, a throwback, not given to the transience of urban sprawl. Many of its residents live in the houses they were born in; very few are foreign-born. And few appreciated the invasion by Sheriff Joe and his team.

Protesters materialized, many waving homemade placards urging Arpaio to leave. Motorists honked in support. Guadalupe's young mayor, Rebecca Jiménez, confronted Arpaio in a parking lot where he had established his mobile command center. Why, she wanted to know, did his press release say that Guadalupe town officials were alarmed about illegal aliens in their midst? They were not. Arpaio went ballistic. "He was waving his arms like a crazy man," Jiménez told me. "I had to wipe the spit off my face. He said, 'You're the one that caused all these riots!' He said he was going to come back the next day. I said we didn't want him. They did come back. But he didn't."

Arpaio chose to direct the next day's Guadalupe operation, which was more modest, from a remote command post, and Jiménez was hailed, at least in some circles, for her courage. The two-day raid netted only nine suspected illegal immigrants, but reportedly produced a high volume of traffic tickets, including charges for "improper use of horn." Jiménez noted that the raid came in the middle of an election campaign. "He used our community to get media attention," she said. "You know, Brown Town. But he got more than he bargained for."

The Guadalupe raid did have a chilling effect. It began the day before a Catholic-church confirmation ceremony—a big deal in Guadalupe—was scheduled to take place in the village plaza, and although the children had prepared for months, a number of them were afraid to come out, and missed their own confirmations.

America's toughest sheriff is, as ever, unapologetic. Over lunch in New York, he told me that he doesn't mind the effect he has. "If they're afraid to go to church, that's good." ♦

Ruling Against Arizona Is a Warning for Other States
By JULIA PRESTON, New York Times, July 28, 2010

A federal judge in Arizona on Wednesday broadly vindicated the Obama administration's high-stakes move to challenge that state's tough immigration law and to assert the primary authority of the federal government over state lawmakers in immigration matters.

The ruling by Judge Susan R. Bolton, in a lawsuit against Arizona brought on July 6 by the Justice Department, blocked central provisions of the law from taking effect while she finishes hearing the case.

But in taking the forceful step of holding up a statute even before it was put into practice, Judge Bolton previewed her opinions on the case, indicating that the federal government was likely to win in the end on the main points.

The decision by Attorney General Eric H. Holder Jr. to throw the federal government's weight against Arizona, on an issue that has aroused passions among state residents, has irritated many state governors, and nine states filed papers supporting Arizona in the court case.

But Judge Bolton found that the law was on the side of the Justice Department in its argument that many provisions of the Arizona statute would interfere with federal law and policy.

Gov. Jan Brewer said the state would appeal the decision.

Although Judge Bolton's ruling is not final, it seems likely to halt, at least temporarily, an expanding movement by states to combat illegal immigration by making it a state crime to be an immigrant without legal documents and by imposing new requirements on state and local police officers to enforce immigration law.

"This is a warning to any other jurisdiction" considering a similar law, said Thomas A. Saenz, president of the Mexican American Legal Defense and Educational Fund , which brought a separate suit against the law that is also before Judge Bolton.

The Arizona law stood out from hundreds of statutes adopted by states in recent years to discourage illegal immigrants. The statute makes it a state crime for immigrants to fail to carry documents proving their legal status, and it requires state police officers to determine the immigration status of anyone they detain for another reason, if there is a "reasonable suspicion" the person is an illegal immigrant.

The mere fact of being present without legal immigration status is a civil violation under federal law, but not a crime.

Arizona's lawyers contended that the statute was written to complement federal laws. Judge Bolton rejected that argument, finding that four of its major provisions interfered or directly conflicted with federal laws.

The Arizona police, she wrote, would have to question every person they detained about immigration status, generating a flood of requests to the federal immigration authorities for confirmations. The number of requests "is likely to impermissibly burden federal resources and redirect federal agencies away from priorities they have established," she wrote.

While opponents of the Arizona law had said it would lead to racial profiling, the Justice Department did not dwell on those issues in its court filings. But Judge Bolton brought them forward, finding significant risks for legal immigrants and perhaps American citizens. There is a "substantial likelihood that officers will wrongfully arrest legal resident aliens," she wrote, warning that foreign tourists could also be wrongly detained.

The law, she found, would increase "the intrusion of police presence into the lives of legally present aliens (and even United States citizens), who will necessarily be swept up" by it. Judge Bolton was appointed by President Bill Clinton in 2000.

Hannah August, a spokeswoman for the Justice Department, said, "While we understand the frustration of Arizonans with the broken immigration system, a patchwork of state and local policies would seriously disrupt federal immigration enforcement."

Some critics said Judge Bolton had decided too quickly. Peter Schuck, a professor of immigration law at Yale, said Judge Bolton should have allowed the law to go into effect, which it was scheduled to do on Thursday, before issuing an order that curbed the power of a state legislature.

"She rushed to judgment in a way I can only assume reflects a lot of pressure from the federal government to get this case resolved quickly," he said.

Now Judge Bolton's ruling has shifted the political pressure back onto President Obama to show that he can effectively enforce the border, and to move forward with an overhaul of the immigration laws, so that states will not seek to step in as Arizona did.

The Incarceration of Drug Offenders: An Overview

The Beckley Foundation Drug Policy Programme
King's College London – International Centre for Prison Studies
Dave Bewley-Taylor, Chris Hallam, Rob Allen
March 2009

The International Picture – A Snapshot of the Incarceration of Drug Offenders.

The terms 'drug offences' or 'drug related offences' cover a variety of activities. The data presented in the table below uses the term to include both offences related on the one hand to the possession, use or consumption of drugs and, on the other, to offences related to the supply, trafficking or production of drugs. This approach is driven by national approaches to the classification of drug offenders, with most countries grouping the two categories together within official statistics. In addition to these groups, most prison systems contain often-large numbers of offenders remanded or sentenced for acquisitive or violent offences arising from drug addiction or trafficking, but reliable data about this is also not available. Nor is it known how many prisoners have committed offences while under the influence of drugs. According to the Corrections Minister in New Zealand, up to 60 per cent of prisoners in that country were affected by alcohol or other drugs at the time of offending but systematic data is not available and therefore this group is not included in the table below.[2]

The table contains information about countries where reliable data is collected and published. Information about the prison population and incarceration rate is available for over 200 countries and dependent territories, but identifying the proportion of the prison population made up of drug offenders, even when combining both 'user' and 'trafficker' figures, is possible only for a much smaller range of countries. It is particularly hard to find information about the situation in Africa, Central and South Asia and parts of Latin America and this is reflected in the nations mentioned below.

Country	Total Prison Population[3]	Incarceration Rate (per 100,000 of national population)[4]	Drug Offenders[5] as proportion of total prison population[6]
EUROPE - EUROPEAN UNION (EU)			
Belgium	10,002	93	14.3%
Bulgaria	10,271	134	5.6%
Cyprus	671	83	27.5%
Czech Republic	18,901	182	8.0%
Denmark	3,448	63	23.9%
Estonia	3,467	259	9.6%

2 Speech by Minister of Corrections to APCCA conference 2006

3 All figures in this column from ICPS World Prison Brief www.prisonstudies.org. Statistics are not necessarily from the same year but represent the most recent figures available.

4 ibid

5 The term drug offender here refers to both trafficking/dealing and possession/use.

6 All figures for European countries in this column are taken from the Council of Europe SPACE statistics 2006 unless otherwise stated. http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/Statistics_SPACE_I/List_Space_I.asp

Finland	3,370	64	15.2%
France	59,655	96	13.6% of those serving sentences at January 2008[7]
Germany	73,203	89	14.9%
Ireland	3,653	81	14.4%
Italy	55,057	92	29.4%
Latvia	6,548	288	9.2%
Lithuania	7,866	234	4.6%
Luxembourg	745	155	42.1%
Malta	387	95	28.1%
Netherlands	16,416	100	18.9%
Portugal	10,830	102	27.3%
Romania	26,350	123	3.3%
Slovenia	1,317	65	10.9%
Spain	73,787	160	27.4%
Sweden	6,770	74	23% of those entering prison[8]
UK: England and Wales	82,240	151	15.5%[9]
UK: Northern Ireland	1,459	82	6.1%
UK: Scotland	7,602	146	14.4%

EUROPE - NON EU

Albania	5,041	159	9.9%
Azerbaijan	19559	229	24.9%
Croatia	4,127	93	17.5%
Georgia	18,170	415	3.8%
Iceland	140	44	26.7%
Moldova	8,130	227	3.4%
Monaco	36	105	6.7%
Norway	3,276	69	29.1%
Russian Federation	887,723	626	9.3%
Serbia	8,978	122	10.7%
FYRO Macedonia	2,200	107	13.4%
Turkey	101,100	142	5.5%
Ukraine	149,690	323	14.7%

7 Pénitentiaire en Chiffres. Direction de l'administration pénitentiaire au 1er janvier 2008 http://www.justice.gouv.fr/index.php?rubrique=10036&ssrubrique=10041&article=15623

8 Information and statistics about The Swedish Prison and Probation Service 2008 http://www.kriminalvarden.se/templates/KVV_InfoMaterialListing____4022.aspx

9 Population in custody monthly tables December 2008 England and Wales

AMERICAS

Argentina	60,621	154	23% of federal [10]prisoners
Bolivia	7,682	82	35% drug trafficking[11]
Canada	38,348	116	4.5% of those receiving prison sentences[12]
Chile	51,428	306	14.6%[13]
Colombia	70,451	151	19%[14]
Ecuador	17,065	126	34%[15]
Mexico	222,671	207	51% of sentenced federal prisoners[16]
Peru	41,745	146	25.2% drug trafficking[17]
USA	2,293,000	756	19.5 % sentenced state prisoners (2005) 53% federal sentenced prisoners in (2007)[18]

AFRICA

South Africa	163,676	334	2.1% [19]
Asia and Oceania			
Australia	27,615	129	10%[20]
Japan	81,255	63	20.6% of those entering prison in 2006[21]
Malaysia	50,303	192	24%[22]
New Zealand	7,887	185	10% [23]
Singapore	11,768	267	20% [24]
Thailand	166,388	257	58%[25]
Vietnam	92,153	107	32%[26]

10 Ministry of Justice Statistics bulletin http://www.justice.gov.uk/docs/population-in-custody-december08.pdf

11 Dirección Nacional de Política Criminal, *Sistema Nacional de Estadísticas sobre Ejecución de la Pena – SNEEP – 2004* www.ine.gov.bo/indice/visualizador.aspx?ah=PC3090405.HTM

12 Cases in adult criminal court by type of sentence; total convicted cases, prison, conditional sentence, probation, by province and territory 2005/6 Statistics Canada http://www40.statcan.gc.ca/l01/cst01/legal22a-eng.htm

13 Gendarmeria de Chile in Table 12 in Dammert and Zuniga Prisons : problems and challenges for the Americas OAS/FLACSO 2008 http://www.flacso.cl/flacso/documentos/rss2008_4_ingles.pdf

14 Augusto Perez Gomez et al**,** Fracciones atribuibles en las relaciones entre crimen y drogas en Colombia: Informe final del proyecto financiado por el Ministerio del Interior y de Justicia de Colombia, la Dirección Nacional de Estupefacientes y la CICAD/OEA; y la cooperación del Inpec, Bogotá, February 2008

15 Official release from the Ministry of Justice and Human Rights: www.minjusticia-ddhh.gov.ec/index.php?option=com_content&task=view&id=89&Itemid=1

16 Instituto Nacional de Estadística y Geografía, *Estadísticas judiciales en materia penal*: www.inegi.org.mx

17 Quoted in Dammert and Zuniga Prisons: problems and challenges for the Americas OAS/FLACSO 2008 p66 http://www.flacso.cl/flacso/documentos/rss2008_4_ingles.pdf

18 Prisoners in 2007 By Heather C. West and William J. Sabol, Ph.D. Bureau of Justice Statistics Bulletin

19 Inmates per crime category 31/12/08 Department of Correctional Services http://www.dcs.gov.za/WebStatistics/

20 Australian Bureau of Statistics Prisoners in Australia 2008 http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4517.0Main%20Features22008?opendocument&tabname=Summary&prodno=4517.0&issue=2008&num=&view

21 http://www.moj.go.jp/ENGLISH/CB/cb-01.html

22 Situational analysis of illicit drug issues and responses in the Asia-Pacific region
Madonna Devaney, Gary Reid and Simon Baldwin / Australian National Council on Drugs

23 Provoost D The Cumulative Effect Uncovering the contributing factors behind the rising prison population Justice Strategic Policy Unity July 2008 http://www.police.govt.nz/events/2008/research-symposium/papers-posters/Provoost%20D,%20The%20Cumulative%20Effect%20-%20Uncovering%20the%20contributing%20factors%20behind%20the%20increasing%20prison%20pop.ppt#313,1,The Cumulative Effect: Uncovering the contributing factors behind the increasing prison population

24 http://www.apcca.org/Pubs/26th/26th%20APCCA%20Conference%20Report.pdf

25 http://www.correct.go.th/eng/Stat/statistic.htm#_Prison_Population_breakdown_by%20Type_1

26 http://www.apcca.org/Pubs/26th/26th%20APCCA%20Conference%20Report.pdf

From *The Collected Works of Billy The Kid* (1970)
Michael Ondaatje

It is the order of the court that you
be taken to Lincoln and confined to
jail until May 13th and that on that
day between the hours of sunrise and
noon you be hanged on the gallows
until you are dead dead dead
And may God have mercy on your
soul

said Judge Warren H. Bristol

THE KID TELLS ALL

'EXCLUSIVE JAIL INTERVIEW'

INTERVIEWER: Billy. . .
BONNEY: Mr. Bonney please.
I: Mr. Bonney, I am from the *Texas Star*. You are now how old?
B: 21.
I: When is your birthday?
B: November 23rd. On that lap I'll be 22.
I: You were reported as saying, as adding, to that phrase — 'If I make it' when asked that question before.
B: Well, sometimes I feel more confident than at others.
I: And you feel alright now. . .
B: Yes, I'm ok now.
I: Mr. Bonney, when you rejected Governor Wallace 's offer of an amnesty, were you aware of the possibility that your life would continue the way it has?
B: Well, I don't know; Charlie, Charlie Bowdre that is, said then that I was a fool not to grab what I could out of old Wallace. But what the hell. It didn't mean too much then anyway. All Wallace was offering me was protection from the law, and at that time the law had no quarrels with me, so it seemed rather silly.
I: But you were wanted for cattle rustling weren't you?
B: Yes, but, well let me put it this way. I could only be arrested if they had proof, definite proof, not just stories. They had to practically catch me with stolen cattle in my bed. And when you rustle, you can see law coming a good two miles away. All I had to do was ride off in the opposite direction and that would have been that.
I: But couldn't they catch you with them when you sold them?
B: Well I don't do, I didn't do the selling — I sold them off before they reached the market.

I: How were, or with whom were you able to do that?
B: I'd rather not mention names if you don't mind.
(Here Mr. Bonney withdrew a black cigarette, lit it, and grinned charmingly, then retreated behind his enigmatic half smile, a smile which was on the verge of one. These smiles of 'Billy the Kid' are well known and have become legendary among his friends in this area. Sheriff Garrett has an explanation for this:
"Billy has a denture system which is prominent, buck teeth you at the paper would call it. So that even when he has no intention of smiling his teeth force his mouth into a half grin. Because of this, people are always amazed at his high spirits in a time of stress." **Mrs. Celsa Guitterrez adds to this:**
"When Billy was 18, a man named John Rapsey ('. . . .head' as he was **affectionately called afterwards) broke his (Billy's) nose with a bottle.** Billy was knocked unconscious and Rapsey escaped. Bowdre who was with him, to ease the pain when he came to, fed him some tequila, made him drunk. Billy didn't get his nose fixed for three days as Bowdre accompanying him on the tequila also got drunk and forgot all about the broken nose. As a result, when Billy finally got to Sumner to get it fixed his breathing channels, or whatever. were clogged. After that he rarely breathed through his nose again, and breathed by sucking the air in through his mouth, or through his teeth as it seemed. If you were near him when he was breathing heavily — when excited or running, you could hear this hissing noise which was quite loud.")

B: Anyway, Wallace offered me protection from the law, and the only law I knew in Fort Sumner was the Murphy faction which would certainly not uphold Wallace if they found me in a dark street without guns. (Laugh)
I: Did you get on well with Wallace?
B: He was ok.
I: What do you mean by that?
B: Just that he was straight about it all. I mean he was disappointed of course that I couldn't agree, but I think he saw my point. I don't think he thought much of Murphy's men, or trusted them either.
I: But right now you've threatened to kill him if you escape this hanging?
B: WHEN I escape, yes.
I: Why?
B: Well, I've been through all this before. I've already made a statement. But anyway, again. In my trial three weeks ago, the charge that was brought against me was for shooting Sheriff Clark, etc. Now Wallace offered me parole, or amnesty or whatever *after* this shooting. As you know there were no real witnesses of any murder on my part after that incident. But the fact is that the Clark shooting took place during the Lincoln County war — when EVERYBODY was shooting. I mean no one brought charges against those who shot McSween or Tunstall. Now Wallace when he spoke to me admitted that, while he couldn't condone what was done during those three days, he understood that both sides were guilty, and like a state of war there was no criminal punishment that could be genuinely brought against me without bringing it against everyone connected with that war. Two wrongs make a right, right? Now they find that because they cannot charge me with anything else that'll stick they charge me for something that happened during a war. A fact that your Governor Wallace realises and I'm sure privately admits and still won't do anything about.
I: Why do you suppose he doesn't do anything to pardon you now?
B: (Giggling) Well I suppose he's been wished into thinking that I've been pretty nasty since. But the point is that there is no legal proof to all this later stuff. The evidence used was unconstitutional.
I: Do you have a lawyer, I mean working on an appeal now?
B: Slip me a gun and I will have — don't print that.
I: Mr. Bonney, or may I call you Billy. . .
B: No.
I: Mr. Bonney, do you believe in God?
B: No.
I: Why not, and for how long haven't you?
B: Well I did for a long time, I mean in a superstitious way, same way I believe in luck for instance. I couldn't take the risk you see. Like never wearing anything yellow. So before big fights, or even the most minor as well as the really easy ones. I used to cross myself and say, "God please don't let me die today." I did this fast though so no one would see me, see what I was doing. I did this pretty well every day from the age of 12 till I was 18. When I was 18, I had a shooting match with Tom O'Folliard, the prize was a horse. Now it was with rifles and Tom is excellent with them and I wanted that horse very much. I prayed every day. Then I lost the bet with Tom.
I: Do you worry about what will happen after death now you don't believe in God?
B: Well I try to avoid it. Though I suppose not. I guess they'll just put you in a box and you will stay there forever. There'll be nothing else. The only thing I wish is that I could hear what people say afterwards. I'd really like that. You know, I'd like to be invisible watching what happens to people when I am not around. I suppose you thing that's simple minded.
I: Are you happy, or at least were you happy? Did you have any reason for going on living, or were you just experimenting?
B: I don't know whether I'm happy or not. But in the end that is all that's important — that you keep testing yourself, as you say — experimenting on how good you are, and you can't do that when you want to lose.
I: Is that all you looked forward to?
B: Yes I suppose so. And my friends. I enjoy people and being with friends.
I: Is it true that you were going to get married and move east when you were arrested?
B: As I say I don't want to cause trouble, and though I'm not saying about the first part of the question, I *had* intended to leave the area cos people kept coming up to me and saying I was going to get it for what I had done to their friends. Bob Ollinger who's worked his way into being my jailer. He had a close friend who was killed in the Lincoln County war.
I: Who do you consider your friends now, now that Bowdre and O'Folliard are dead?
B: Well I have some. Dave Rudabaugh wherever he is. I guess he's locked up too somewhere. They won't tell me. A couple of guys here and there. A couple of ladies.
I: Garrett?
B: Well Pat's right now a . . . .head. We used to be friends as you probably know. He's got senile. He's getting a lot of money for cleaning the

area up — of us supposedly. No I don't think much of him now.
I: He's said that he gave you all plenty of opportunity to get out of New Mexico before he began hunting you.
B: Yeahhhh but one) you don't go around using mutual friends to trap an old friend and two) I love the country around here and Fort Sumner. . .all my friends are here. I'd go now, cos some I thought were friends were really pretty hypocritical.
I: What about pastimes? Did you have many when you were free? Did you like books, music, dancing?
B: Dancing I like, I'm a pretty good dancer. Fond of music too. There's a Canadian group, a sort of orchestra, that is the best. Great. Heard them often when I was up there trying to get hold of a man who went by the name of Captain P———.* Never found him. But that group will be remembered a long time.
I: How about you, do you think you will last in people's memories?
B: I'll be with the world till she dies.
I: But what do you think you'll be remembered as? I mean don't you think that already several feel you are morally vulgar? I mean all these editorials about you. . . .
B: Well. . .editorials. A friend of Garrett's, Mr. Cassavates or something, said something bout editorials. He said editorials don't do anything they just make people feel guilty.
I: That's rather good.
B: Yes. It is.

Am the dartboard
for your midnight blood
the bones' moment
of perfect movement
that waits to be thrown
magnetic into combat

a pencil
harnessing my face
goes stumbling into dots

(Garrett had stuffed birds. Not just the stringy Mexican vultures but huge exotic things. We would sometimes be with him when they arrived. He would have them sent to him frozen in boxes. The box was wooden, a crate really, and with great care after bringing it back from the station, he would remove the nails. He first took out the 8" of small crushed ice and said look. And it would be a white seagull. It was beautifully spread in the ice, not a feather out of place, its claws extended and brittle from the freezing. Garrett melted it and split it with a narrow knife, parting the feathers first, and with a rubber glove in his right hand removed the body. He then washed the rotted blood from the wings, the outside, and then took it out onto the verandah to dry.)

MISS SALLIE CHISUM : PAT GARRETT

A tremendously tall man.

Despite his crooked mouth
and crooked smile which
made his whole face seem crooked

he was a remarkably handsome man.

BILLY THE KID & PAT GARRETT ; SOME FINAL THOUGHTS :

I knew both these men intimately.
There was good mixed in with the bad
in Billy the Kid
and bad mixed in with the good
in Pat Garrett.

No matter what they did in the world
or what the world thought of them
they were my friends.
Both were worth knowing.

BEST AMERICAN FRONT SECTION

FROM POLICE BLOTTER ITEMS to champion dog names to dozens of end-of-the-world lamentations, the Best American Front Section is the best of the front sections that exist in books like this that you know of. There was a movie named *Tron* released in 1982; it starred Bruce Boxleitner and changed everything.

Best American Police Blotter Items from Kensington, California

FROM *www.aboutkensington.com*

Kensington is an unincorporated community in the San Francisco Bay Area. It is 81.77 percent white and 10.58 percent Asian. Kensington features a median income of $71,278, a poverty rate of 1.7 percent, no post office, and a notoriously bored police force.

A man of "foreign appearance" was reported as being suspicious. He was from Africa visiting a friend.

An Oberlin Ave. couple argued over her purchase of a new kitchen table. He complained to police they always agreed on purchases before making them, but she said she knew he would disapprove so she bought it without telling him. The police listened patiently.

A woman living on Purdue Ave. complained to the police that her neighbor's tree was obstructing her view. Apparently the owner of the view had been topping the tree for years, but the owner of the house had given the house and tree to her daughter, who refused to let the neighbor cut the tree. Civil law suits are being threatened.

A woman who works on Arlington Ave. reported her car was stolen. Seems that her husband had parked it in the BART parking lot and had forgotten about it. They remembered the next day.

A Lake Dr. resident was concerned when they were approached by two teenagers asking for directions to Trinity Ave. They pointed them in the wrong direction, toward Grizzly Peak, and then called the police.

A driver on Highland Blvd. found that someone had placed two tampons on their car. The police recorded it as a suspicious event.

Two people on Columbia Ave. got into an argument about the quality of a language translation of a children's book, which one had done for the other. Police informed them that this was a civil dispute and advised them to settle it amicably or to seek legal counsel.

Neighbors reported a noisy party at 11:30 at night. Police found a couple of families sitting around a fire pit in the backyard of a house on Ardmore. Sometimes people talking in their gardens can be disturbing to neighbors.

A woman on Highgate Rd. called police because she thought that her neighbor had deposited dog poop in her driveway. She claimed to have seen the neighbor looking at her car. A police officer described this ongoing neighborhood situation as a "maturity issue." It is uncertain if he meant that the complainer has not yet grown up or is too old to know what she is doing.

An argument between two brothers escalated until police were called to intervene. It seems one was refusing to clean his room.

A deer cornered a man walking his dog one evening near the Carmelite Nuns Monastery just off Rincon. The deer had man and dog trapped up against the monastery door and would not let them escape. Hoping for a response from the front door, there was nun [*sic*]. The man called police on his cell phone; they found the deer to be continually aggressive. By flashing the police car lights and sounding the siren, police were able to distract the deer and escort the man and dog to the safety of the road, keeping the police car between the wild beast and its quarry.

Ten African American men, wearing suits and ties, on Coventry Rd., were reported to police, who discovered they were Jehovah's Witnesses, spreading the word of God. As they were not selling anything or asking for money, they were allowed to go on their way.

School staff noticed a stranger in the bathrooms at Hilltop School. Police found the lady somewhat confused; at first she thought she was a member of a police SWAT team, but then she decided she wasn't. Police gave her a ride to BART, so she could get home.

A person was reported as being suspicious because he was seen sitting on a step on Ardmore Path and eating a sandwich.

A person on Coventry Rd. reported a suspicious person, after a passerby looked at their home for a few seconds when walking past.

A dispute was reported on Grandview Dr. because a mother wouldn't give her sixteen-year-old daughter the cell phone charger.

Someone going for an interview parked their large BMW in the Sunset View Cemetery parking lot. They returned to find that thieves had made off with a $2,100 Gucci purse, $600 in cash, an $800 camera, $50 lip gloss, a $50 stereo, debit cards, and a junky $10 pair of sunglasses. The keys had been left in the car.

A truck was reported stolen from a Clarence residence. Officers determined it actually had been repossessed.

A suspect was arrested for shoplifting from Tops on Orchard Park Rd. after he pushed a cart filled with $160.17 of assorted merchandise into the parking lot without paying for anything. Eggs, juice, cake mix, frosting, and pork chops were among the goods which the suspect allegedly attempted to steal.

A man took a set of car keys from his ex-wife and left. He said he was upset the vehicle was being sold and just wanted to drive it.

An officer noticed a vehicle pull into an auto service facility on Seneca St. and drive around the back of the building although the business was closed. The driver said he was looking for a place to fix his girlfriend's son's dump truck.

A check was requested on Island Park on Main St. for a middle-aged man that was on the ground moaning. He was practicing yoga.

Parents Involved in Community Schools v. Seattle, 551 U.S. 701 (2007)

Case summary adapted from oyez.com:

The Seattle School District allowed students to apply to any high school in the District. Since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 40% white and 60% non-white), the racial tiebreaker went into effect. At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal.

A non-profit group, Parents Involved in Community Schools (Parents), sued the District, arguing that the racial tiebreaker violated the Equal Protection Clause of the Fourteenth Amendment as well as the Civil Rights Act of 1964 and Washington state law. A federal District Court dismissed the suit, upholding the tiebreaker. On appeal, a three-judge panel the U.S. Court of Appeals for the Ninth Circuit reversed.

Under the Supreme Court's precedents on racial classification in higher education, *Grutter v. Bollinger* and *Gratz v. Bollinger*, race-based classifications must be directed toward a "compelling government interest" and must be "narrowly tailored" to that interest. Applying these precedents to K-12 education, the Circuit Court found that the tiebreaker scheme was not narrowly tailored. The District then petitioned for an "en banc" ruling by a panel of 11 Ninth Circuit judges. The en banc panel came to the opposite conclusion and upheld the tiebreaker. The majority ruled that the District had a compelling interest in maintaining racial diversity. Applying a test from *Grutter*, the Circuit Court also ruled that the tiebreaker plan was narrowly tailored, because 1) the District did not employ quotas, 2) the District had considered race-neutral alternatives, 3) the plan caused no undue harm to races, and 4) the plan had an ending point. But by a 5-4 vote, the Supreme Court applied found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court acknowledged that it had previously held that racial diversity can be a compelling government interest in university admissions, but it ruled that "[t]he present cases are not governed by *Grutter*." Unlike the cases pertaining to higher education, the District's plan involved no individualized consideration of students, and it employed a very limited notion of diversity ("white" and "non-white"). The District's goal of preventing racial imbalance did not meet the Court's standards for a constitutionally legitimate use of race: The Court held that the District's tiebreaker plan was actually targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. The District also failed to show that its objectives could not have been met with non-race-conscious means. In a separate opinion concurring in the judgment, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity.

From the plurality opinion by Chief Justice Roberts:

The parties and their amici debate which side is more faithful to the heritage of Brown [v. Board of Education (1954)], but the position of the plaintiffs in Brown was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before thais court for the plaintiffs in Brown put it: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no state has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”

There is no ambiguity in that statement. And it was that position that prevailed in this court, which emphasized in its remedial opinion that what was “[a]t stake is the personal interest of the plaintiffs in

admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again — even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

From the dissenting opinion by Justice Breyer:

Finally, what of the hope and promise of Brown? For much of this nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses and studied in separate schools. In this court's finest hour, Brown v. Board of Education challenged this history and helped to change it. For Brown held out a promise. It was a promise embodied in three amendments designed to make citizens of slaves. It was the promise of true racial equality — not as a matter of fine words on paper, but as a matter of everyday life in the nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this court's decision in Brown. Three years after that decision was handed down, the governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The president of the United States dispatched the 101st Airborne Division to Little Rock, Ark., and federal troops were needed to enforce a desegregation decree.

Today, almost 50 years later, attitudes toward race in this nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten the promise of Brown. The plurality's position, I fear, would break that promise. This is a decision that the court and the nation will come to regret.

Grutter v. Bollinger, 539 U.S. 306 (2003)

Case summary adapted from oyez.com:

In 1997, Barbara Grutter, a white resident of Michigan, applied for admission to the University of Michigan Law School. Grutter applied with a 3.8 undergraduate GPA and an LSAT score of 161 [out of 180]. She was denied admission. The Law School admits that it uses race as a factor in making admissions decisions because it serves a "compelling interest in achieving diversity among its student body." In a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause of the 14th Amendment does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. The Court reasoned that, because the Law School conducts highly individualized review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Justice O'Connor wrote, "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."

From the majority opinion by Justice O'Connor:

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. In announcing the principle of student body diversity as a compelling state interest, Justice Powell [in *Regents v. Bakke,* 1979] invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." Our conclusion that the law school has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the law school's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the law school seeks to "enroll a 'critical mass' of minority students." The law school's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the law school's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the district court emphasized, the law school's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The law school's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the nation's officer corps are the service academies and the Reserve Officers Training Corps (R.O.T.C.), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the R.O.T.C. used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be

selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." . . .

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

The law school does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the law school's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The law school has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

From a dissenting opinion by Justice Thomas:

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

"[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! [Y]our doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury."

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School. The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the law school, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The law school, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the law school's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti....