# THE JOURNAL OF ATTENUATED SUBTLETIES

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WITH AN

INTRODUCTION BY THE EDITORS (2019)

# THE JOURNAL OF ATTENUATED SUBTLETIES



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# PREFACE

# UNATTENUATED ENTHUSIASM

*Ross E. Davies*[†]

The *Green Bag* has been yearning for this moment — or one like it — for more than 20 years. Rob James introduced us to the *Journal of Attenuated Subtleties* in 1998 (see the letter with the lovely logo on the next page), and we have been pestering him ever since to give us more of the similar. He has delivered ten little treasures to us over the years, including several updates to *The Supreme Court and the Westward Movement*, his transcontinental collaboration with Ben Zuraw that first appeared in the first issue of the *Journal of Attenuated Subtleties* and is reproduced in all its formidable originality — along with the rest of the original *JAS* — below.

For a long time, the wishful thinking at *Green Bag* World Headquarters was that Rob and his colleagues would continue to dole out bits and pieces of the *JAS* to us for publication in the *Bag*. Then, a few months ago, a grand old pillar of the modern bar mentioned the *JAS* fondly on Twitter:

> Moving my office, I came across one of my treasures: a ratty old photocopy of the first issue of the Journal of Attenuated Subtleties, kind of a proto-@GB2d. The first issue began, "The law may not care about trifles, but lawyers certainly do."[1]

And we went from wishfully thinking of the *JAS* in our cubicles to cheerfully riding a groundswell of enthusiasm for the *JAS* in our email in-boxes.

The surge of good feeling for their old journal overwhelmed the natural, admirable, unfeigned reticence and modesty of the *JAS* editors. In response to the *Green Bag*'s renewed appeals, they agreed not only to permit full republication of the *JAS* here in the *Journal of Law*, but also to reflect on their great, late-20th-century work from a 21st-century perspective. As you will soon learn (if you don't know it already), they were quick in youth, and they haven't lost a step.

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[†] Ross Davies is a *Green Bag* editor.

[1] @johnpelwood (June 28, 2019).

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March 20, 1998

Mr. Ross E. Davies
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Dear Ross:

I enclose photocopies of the entire run, two issues, of *The Journal of Attenuated Subtleties.* In re-reading our adolescent rag and comparing it with your tony review, I was struck that ours is a kind of Bizarro, parallel-universe version of yours. Where you "prefer[] substance over form" ("A Short Profile"), I noted that "[a] 'case is not to be decided by attenuated subtleties,' but the fancy of the lawyer is surely to be struck by them" and raised a toast "to form over substance." But as your predecessor Horace Fuller warned that lawyers would "seek in vain" for practical information in the *Green Bag,* I opined that colleagues who do not appreciate entertainments in a legal vein "must find their recreation outside the law, in alcohol or bowling."

Please let me know which, if any, of these pieces would merit further consideration. (No hard feelings if they don't, by the way; these are so tongue-in-cheek as to be damn-near serious in parts.) I and my classmates would greatly appreciate the opportunity to polish and update our pieces before they are published.

I enclose my subscription. Since you sent me the first two issues, I'd like it to begin with the third issue of Volume 1 unless that blows an accounting fuse. Best of luck with a great publication!

Very truly yours,

Rob James

Robert A. James

Encs.

# INTRODUCTION

# *ATTENUATED* MEMORIES

*Robert A. James, Benjamin C. Zuraw,*
*Manley W. Roberts & John J. Little*[†]

In meetings held at Yale Law School in 1982, an organization was launched that has had a distinctive impact. No, no, we speak not of *that* society, but of the *Journal of Attenuated Subtleties*. This short-lived experiment by five twenty-four-year-old 2Ls addressed legal trivia in a mock-serious fashion, a practice that has been taken to ever greater heights with the second series of the *Green Bag*.

The *Attenuated Subtleties* standard is that while the articles may be funny, they are not jokes. In piece after piece, we described a subject of unlikely but not impossible relevance to daily practice and applied to it the powerful (but pretentious) tools of research and analysis employed in the law review literature. If the questions ever did come up, in a case or a more substantial publication, our articles would be good authority. They have in fact been cited on some of those rare subsequent occasions.

We editors thank the *Journal of Law* for reproducing the entire run, uncut, in its original dot-matrix glory. Here, we recall the founding era.

## PART ONE
### *Foreword: Form Over Substance*

Robert A. James (RAJ): The *Foreword* has been appraised in the pages of the *Green Bag* itself by our classmate Dave Douglas, now Dean of the William &

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[†] Rob James is a partner in the San Francisco and Houston offices of Pillsbury Winthrop Shaw Pittman LLP. Ben Zuraw is a retired Pillsbury partner, high-school teacher, and owner of minor league baseball clubs. Manley Roberts is a partner in the Charlotte office of McGuireWoods LLP. John Little is a founding partner of Little Pedersen Fankhauser LLP in Dallas. The other founder and the managing editor of the *Journal of Attenuated Subtleties*, J. David Kirkland, Jr., passed away in 2018. He was a longtime partner in the Houston office of Baker Botts L.L.P.

Mary Law School.[1] We of course encountered *Lucas v. Earl* and "attenuated subtleties" in our income tax course. I may have written "Our colleagues of this ilk must find their recreation outside the law, in alcohol or bowling" under the influence of one or the other.

The exact date when time formerly became out of memory, September 23, 1189, was stated without explanation in the edition of *Black's Law Dictionary* I was then using. The back story is supplied in Lewis Hyde's new book on what might be called the passive virtues of forgetting things.[2]

### *Instructions in Supreme Court Jury Trials*

RAJ: Again, Dave Douglas covered the genesis of this piece. Every law student who reads *Marbury v. Madison* is exposed to the Judiciary Act of 1789, and some have glanced at its section 13 confirming the right to a jury trial on issues of fact in original jurisdiction actions at common law. I dug in, and found Charles Alan Wright's casual mention of one such jury trial, but no other treatment. I learned of two more trials (from an ABA piece on courthouse history!) and discussed them all in the law school dining hall with David Kirkland, Manley Roberts, and Ben Zuraw. We laughed at the thought of an article that would simultaneously identify and solve a problem that had never arisen. Soon, the *Journal* was born.

The principal trial, *Georgia v. Brailsford*, has turned out to be an important precedent on a related topic, jury nullification; we had no idea at the time. The citation of Kenneth Arrow was a thinly veiled jab at the law review practice of dropping highfalutin names to support rather ordinary points. Jacques Derrida, Jürgen Habermas, Friedrich Nietzsche and Susan Sontag might agree that this was rather clever.[3]

### *The Supreme Court and the Westward Movement*

Benjamin C. Zuraw (BCZ): My memories of the *Journal*'s creation are somewhat hazy because by my second year, I had fully committed to enjoy-

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[1] Davison M. Douglas, Attenuated Subtleties *Revisited,* 1 GREEN BAG 2D 375 (1998).

[2] *See* Lewis Hyde, A PRIMER FOR FORGETTING: GETTING PAST THE PAST 286-87 (2019); *cf.* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues,* 75 HARV. L. REV. 40 (1961).

[3] *Cf.* Jacques Derrida, OF GRAMMATOLOGY (1967); Jürgen Habermas, LEGITIMATION CRISIS (1973); Friedrich Nietzsche, ALSO SPRACH ZARATHUSTRA (1883); Susan Sontag, AGAINST INTERPRETATION (1966).

ing what might be called the academic freedom of the law school student. I was spending most weekends in New York City with my girlfriend, who luckily is still married to me today. For this purpose the term "weekend" often embraced Thursday through, uh, Tuesday.

I was usually in New Haven on Wednesdays, though — to hang out with friends, play some pickup basketball on the fifth floor of Payne Whitney Gymnasium, and enjoy the underrated cuisine of the law school cafeteria. It was on one of those Wednesdays that my good friend Rob James told me about the idea to create the *Journal* along with David Kirkland and Manley Roberts.

My concept, an article comparing the geographic center of the Supreme Court over time to the geographic center of the overall United States population, was enthusiastically received. The idea sprang from my personal interest in geography. I had spent parts of seven summers, starting my junior year of high school, driving across the country. I developed an in-depth knowledge of the Interstate Highway System and dazzled friends by rattling off the highway numbers connecting any two given U.S. cities.

I cited the frontier theories of Frederick Jackson Turner, and my data showed a rough symmetry between the nation's westward movement and the geographic center of the Court. There were some interesting outlying data points like the birthplaces of Justice Frankfurter in Vienna, Austria and Justice Brewer in Smyrna, Ottoman Empire. Rob suggested that we include data for the location of Justices upon appointment to the Court in addition to birthplace data, to account for geographic influences in their professional lives. David added the citation to *Shapiro v. Thompson* and the constitutional right to interstate travel. Since my original article, regular updates have been published to reflect changes on the Court thanks to Rob's efforts.[4]

While my article was intended to be largely whimsical, our nation's increasing polarization makes the subject of geographic diversity increasingly important. After all, is the Court reflective of our nation's diversity when in the last ten years, four of the Justices hailed from four boroughs of New York City?

The complication of course is that it is no longer clear that degrees longitude are helpful in understanding much about the backgrounds of our

[4] *See* Robert A. James, *The Roberts(dale) Court*, 22 GREEN BAG 2D 137 (2019) (citing prior updates).

Justices. San Francisco is west of Lubbock, Texas, but that directional relationship does not tell us anything useful about the influences of growing up in these distinct locations. Neither does the fact that Hickory, North Carolina is west of Chapel Hill, North Carolina furnish insight into living in those locales.

Today much of our polarization is reflected in the urban/rural divide. This separation is clearly illustrated in the now familiar colored county-level election maps showing a wide sea of red Republican party voting in the nation's sparser heartland, broad swaths of blue Democratic party voting in coastal America, and blue dots across the country representing large urban city centers and smaller college and university towns. This polarization is quite real when analyzing voting patterns, but hard to characterize with a center point.

While I still think that it is important to analyze whether our Supreme Court reflects the diversity of our country, we need a different tool. Perhaps we should generate a number rather than a map — say, the average distance in miles of each Justice's data point from the nearest office location of Alphabet Inc., or U.S. college or university with a "top 100" ranking. I bequeath this exercise to a new generation of scholars who enjoy the academic freedom that I found in school.

### *Rethinking Detroit Timber*

RAJ: David Kirkland was the genius behind this piece. He also made the *Journal* possible with his homebrew computer (built from parts years before the Macintosh or IBM PC, mind you) and a program he personally wrote to integrate texts and footnotes.

David read *U.S. Law Week* regularly as a law student, and was struck by the *Detroit Timber* "shrink-wrap" warning on every Supreme Court syllabus. Professor Paul Gewirtz called our attention to a case where the opinion cited dual standards for equal protection review, but the syllabus only mentioned the less restrictive of the two.[5]

David's grandfather Robert Wales clerked for Justice Oliver Wendell Holmes, Jr. and provided the recollection that only the Reporter wrote or edited the syllabi in years past. We marveled that a relative he personally

[5] *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

knew had served a Civil War veteran and American icon. David was surprised but delighted to report on the split in authority and the logic for "the Ohio rule." The topic has since been addressed in depth by others, including "Gil Grantmore" (Daniel Farber) in "The Headnote," published in the *Green Bag*.[6]

### *The Titles of Nobility Clauses: Rediscovering the Cornerstone*

Manley W. Roberts (MWR): In my case, work on the *Journal of Attenuated Subtleties* was an exercise in stress reduction. Even at Yale (a famously philosophical institution), the level of competitiveness was high. The halls were full of self-motivated, driven individuals, striving for the best jobs, the best judicial clerkships, and the intellectual respect of their classmates.

To a large extent, the articles in the *Journal* were a parody of legal scholarship, and self-parody was the tool I (and I think the other editors) used to cope with the currents around us and inside us. (It is no surprise that several of us also performed in the law school's parody musical comedy show, the Yale Law Revue, and Rob James and I co-directed that Revue for two years.)

Nor did those extracurriculars end at graduation. I have been involved in similar outlets during most of my professional life, including performing in the Charlotte, North Carolina bar's musical parody group (the Mecklenburg Bar Revue), singing with a number of vocal groups (including the Charlotte Symphony chorus), and playing keyboards with various bands and choirs around the South (including a church choir that sings African-American gospel; last month, we loaded the choir and my keyboard on a float and rocked the crowd at the Charlotte Pride Parade). Both the study and the practice of law have been more humane and enjoyable as a result of these outside passions.

I was interested in writing about the twin "titles of nobility" clauses of the U.S. Constitution, precisely because at first glance the topic seemed virtually irrelevant to the modern American scene. Much to my surprise, my research revealed a few modern cases that in fact cited those provisions.

The case holdings were often strange and sometimes sad. One decision prevented a man from changing his name from "Jama" to "von Jama," be-

[6] 5 GREEN BAG 2D 157 (2002).

cause the prefix "von" often occurred in the names of German and Austrian nobles. But I found other authorities, especially dissents by Justice John Paul Stevens, that championed what I called a "radical equality principle" underlying the clauses.

We mined those few cases and our own imaginations to create a "multi-factored" balancing test. This output was itself a parody of a common approach to legal analysis: tossing up a laundry list of "factors," and allowing the decision-maker to decide whether the factors in a particular case supported ruling for the plaintiff or the defendant.

Somewhere along the way, I had read that the children of Congressional Medal of Honor winners receive special treatment when they apply to military academies. Naturally, we applied our factors to those facts and concluded that the Medal of Honor and its ancillary benefits (festooned with "ribbons and appurtenances," as the statute says) violated the federal nobility clause.

I am pleased to report that a later (2007) article by a professor at U.C. Davis Law School reached the same conclusion: the special treatment of the children of Medal of Honor winners "is a clear violation of the federal Nobility Clause."[7] The equality principle for which the nobility clauses have been cited turns out to be relevant to the college admissions practices featured in today's news headlines. We live in a time when titles of nobility may no longer be a laughing matter.

## PART TWO

The *Journal* was produced in small, photocopied production runs. The first issue sold out quickly to students and faculty, and we made a second printing correcting some errors (attention, collectors). The second issue sold out in one printing, and that was all she wrote.

### *Suing Satan: A Jurisdictional Enigma*

John J. Little (JJL): I was the last of the five to join the *Journal* effort. The precise memories are beyond faded, but I am relatively sure I came on board while the first issue was still in the works. I was immediately in-

[7] *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1435.

trigued by the mission and resolved to come up with something worth exploring.

I came upon *U.S. ex rel. Mayo v. Satan and his Staff*,[8] which became the launch point for this article. It was then (and may still be) the only reported federal decision in which the Devil is a named defendant.[9] While the court expressed grave doubts concerning the exercise of personal jurisdiction and mused about the possibility of the case proceeding as a class action, it ultimately issued the most narrow of rulings, denying leave to proceed *in forma pauperis* and assigning the case a miscellaneous docket number.

Courts continue to cite *Mayo* primarily to cast doubt on jurisdiction over other kinds of defendants: parties who are dead or may not ever have existed.[10]

What about Satan, though? The specifically diabolical issues addressed in this article and alluded to in *Mayo* have received some attention in the legal literature. The most well-known treatment is Charles Yablon, *Suing the Devil: A Guide for Practitioners*.[11] Other authors have touched ever so lightly upon the topic.[12]

Recently, *Mayo* has been routinely, and erroneously, cited in a series of decisions out of the Eastern District of Texas, which lies both east and north[13] of my adopted city of Dallas. These decisions incorrectly reference

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[8] 54 F.R.D. 282 (W.D. Pa. 1971).

[9] In researching my contribution to this piece, I came upon *Harris v. Attorney General of Philadelphia*, 2011 WL 3653504 (W.D. Pa. July 22, 2011), in which a *pro se* plaintiff had named God as a party defendant. The Court, citing *Mayo*, expressed doubt that it could serve process upon or exercise jurisdiction over God. *See also Collins v. Henman*, 676 F.Supp. 175, 176 (S.D. Ill. 1987) (*Mayo* cited in action where plaintiff "claimed to be the prophet Muhammed").

[10] See, for example, *Ely v. Cabot Oil & Gas Corp.*, 2016 WL 4169197 at *1, n. 1 (M.D. Pa., Feb. 17, 2016) (presumably beyond the court's power to compel deceased witness to testify); *Driskell v. Homosexuals*, 533 B.R. 281, 282 (D. Neb. 2015) (no defendant "has been identified with sufficient specificity for service of process"); *Krawec v. Allegany Co-op Ins. Co.*, 2009 WL 1974413 at *1, n.1 (N.D. Ohio, July 7, 2009) (assuming court had jurisdiction to transfer case against a defendant "who may or may not exist"); *Water Energizers Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 211 (S.D.N.Y. 1992) (defendant's existence is a necessary prerequisite for personal jurisdiction).

[11] 86 VA. L. REV. 103 (2000).

[12] *See* Christine Alice Corcos, *"Who Ya Gonna C(S)ite?"* Ghostbusters *and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231, 262 & n. 147 (1997) (arguing that Gozer the Destructor is not subject to personal jurisdiction); James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1687-88 (1991) (supposing plaintiff in *Mayo* proceeded *pro se* "because suing the devil would present lawyers with an obvious conflict of interest").

[13] Oddly enough, the Eastern District of Texas contains four counties (Denton, Collin, Cooke, and Grayson) that lie *due north* of Dallas County, which is in the Northern District. 28 U.S.C § 124(c)(3).

*Mayo* as having concluded that the plaintiff's pleading was "frivolous";[14] as noted above, the *Mayo* court declined to go that far.

Without doubt, the crowning achievement for this piece (and likely for any other writing I have ever attempted) was its citation by none other than Guido Calabresi[15] in his 1985 book, *Ideals, Beliefs, Attitudes and the Law*. At page 158, he wrote, "The pains of hell surely are costly, but it is not clear that they are cognizable in a court of law." To this passage he added endnote 193: "*Cf.* Little, *Suing Satan: A Jurisdictional Enigma*, 1 JOURNAL OF ATTENUATED SUBTLETIES 27 (1982)."[16] For that, and for the opportunity to participate in the *Journal*, I am forever grateful.

### *Are Footnotes in Opinions Given Full Precedential Effect?*

RAJ: I learned about the *Melancon* case in David Mellinkoff's lucid book *The Language of the Law*. If an opinion footnote could cite a footnote as authority on the Footnote Argument, I reasoned, why couldn't a law review footnote do the same with the entire caselaw?

The word "indeed" was in common use by one of our professors at the time, when he wanted to endorse a student's comment mildly before moving to another topic. Note the obligatory citation to Immanuel Kant (supposedly in the original German, no less).

At the time, I thought it would be funny for a footnote to have an Appendix. It was not. The humor was sophomoric, and my only defense is that I was a sophomore. I am thankful the *Green Bag* gave me a chance in 1999 to elevate the *Melancon* quotation to the "body" of the footnote, where it belongs. That version has been cited in judicial decisions concerning cocaine

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The Northern District also includes three counties (Kaufman, Rockwall and Hunt) that lie *due east* of Dallas County. 28 U.S.C § 124(a)(1).

[14] *Grohoske v. Fontner*, 2019 WL 2463222 at *1 (E.D. Tex. March 11, 2019); *Lynn v. Summers*, 2018 WL 3431996 at *7 (E.D. Tex. April 30, 2018); *Brown v. U.S. Government*, 2013 WL 4417679 (E.D. Tex. Aug. 13, 2013).

[15] Guido Calabresi is a 1957 graduate of Yale Law School and joined its faculty in 1959. He served as Dean of the Law School from 1985 through 1994. He currently serves as Sterling Professor of Law Emeritus. In 1994, he was appointed to the U.S. Court of Appeals for the Second Circuit, where he continues to serve as a Senior Judge.

[16] Dean Calabresi was certainly aware that the five of us preferred to have the *Journal* cited as J. ATTEN. SUBT. That citation form appears throughout both issues, including my article (1 J. ATTEN. SUBT. 27, 28 n.5). One can only surmise that his editors at Syracuse University Press would accept only those abbreviations that had been blessed by the *Bluebook*.

and eminent domain,[17] and in articles addressing internet gambling, tribal jurisdiction, the World Trade Organization, the Australian constitution, and international arbitration. It is handy for anyone who wishes to bolster the authority of a helpful footnote.

### *On the Spelling of Daniel M'Naghten's Name*

RAJ: This again is the work of David Kirkland, who saw the *Ohio State Law Journal* article cited in a draft criminal law casebook authored by visiting professor John C. Jeffries, Jr., later dean of the University of Virginia Law School. David secured consents from the then-regnant law-journal editor and from Dr. Diamond himself.

### *A System of Citation for Phonograph Records*

RAJ: This article was our joint effort. It stems from the footnote crediting Bruce Springsteen in Mark J. Tushnet's "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory," published in the *Yale Law Journal*. At the time, the *Bluebook* had no provision for citing music.

Proposing "*hear*" as a signal equivalent to "*see*" was facetious, and references to "phonograph records" and "phonorecords" are downright quaint. However, we also made a serious point: in any setting where a shibboleth is overly valued, worthy voices that lack that shibboleth are silenced. That shibboleth could be an approved citation form. But it could likewise be an elite-law-school degree, membership in a privileged group, or articles written exclusively in a mainstream style.

Nowadays, the *Bluebook* has elaborate forms in Rule 18 for citing music as well as other electronic media. A Canadian law review article opined: "The editors of *The Journal of Attenuated Subtleties* were the real pathbreakers in the field of musical legal citation."[18]

The article notes that the *Yale Law Journal* of the time observed a "harmless error" standard on matters of citation. David and I spotted some typos

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[17] *Are Footnotes in Opinions Given Full Precedential Effect?,* 2 GREEN BAG 2D 267 (1999); *State v. Hansen,* 627 N.W.2d 195, 243 Wis. 2d 328 (2001); *In re Condemnation by Mercer County Area School Dist.,* No. 2269 C.D. 2012 (Pa. Commonwealth Ct. Mar. 17, 2014). See also Ira Brad Matetsky's elegant extension, *The Footnote Argument — Sustained At Last?,* 6 GREEN BAG 2D 33 (2002).

[18] Vaughan Black & David Fraser, *Cites for Sore Ears (A Paper Moon),* 16 DALHOUSIE L.J. 217 (1993).

in the first issue of Volume 92. I suggested to Managing Editor Bob Cooper (later Attorney General and Reporter of Tennessee) that since we were going to read all the issues sooner or later, we might as well report those errors ahead of publication. Bob agreed, and David and I started final-proofing the articles, notes, and book reviews of that volume. To that end, I created letterhead of a shadowy quasi-military grammar-police organization, ÆSTHETIC CENTRAL COMMAND, and signed my comments S.Æ.C., *Supreme Æsthetic Commander*.

This article featured the appearance of both dot-matrix printed text and exotic laser-printed examples generated by a friend of David in the Yale computer science department. It is a 1982 Rosetta stone.

### *Case Note*

RAJ: Old law reviews ended with short pieces critiquing recent decisions in the manner of Harvard Law School dean C.C. Langdell. During his trusty *U.S. Law Week* reading, David found a case where Justices dissenting from a cert denial wrote in shorthand that a motorcycle had been stolen "along with title," meaning the paper certificate. I intentionally misread this phrase to mean that the dissenters believed a thief takes title to a pilfered object, and proceeded to rail against the opinion in the manner of Miss Emily Letella in an old *Saturday Night Live* routine. Two passages merit mention in despatches: "these forgotten stanzas of the lost Langdellian idyll" and "a new and ugly trend in Anglo-American legal thought."

### *Advertisement*

RAJ: The "trivial pother" Learned Hand quote and most of the pejoratives are from copyright infringement claims dismissals, cited in the Kaplan & Brown casebook. David found the clincher, quoted by Justice Thurgood Marshall and originally penned by Judge Hutcheson of the Fifth Circuit: "a harking back to the formalistic rigorism of an earlier and outmoded time."[19]

[19] Benjamin Kaplan & Ralph S. Brown, CASES ON COPYRIGHT . . . (3d ed. 1978); *Crump v. Hill*, 104 F.2d 36 (5th Cir. 1939).

## PART THREE

We had vague thoughts of publishing more issues after graduating, but they did not materialize. The lack of execution was not for want of imagination, though. First, John Little drafted an article on "Sports Officiating and the Limits of Judicial Review."

JJL: Preparing these reflections reminds me why I got involved in the *Journal*. Simply put, it was a lot more interesting than law school. It was far easier to find time to research "sports officiating" cases than, say, one's third-year paper (even though the latter was required for graduation). Thirty-eight years later, it remains far more interesting than working on discovery responses (which is what I ought to be doing as I write this).

The sports officiating piece was inspired by a then-recent state court decision, *Georgia H.S. Ass'n v. Waddell*.[20] *Waddell* arose out of a football game between Lithia Springs High School and R.L. Osborne High School, the winner of which would advance to the state playoffs. Osborne led 7-6 with 7:01 remaining in the game, had the ball, and faced fourth down with 21 yards to go on its own 47-yard line. Osborne punted, but roughing the kicker was called. The referee assessed a 15-yard penalty and the ball was placed on the Lithia Springs 38-yard line, *but no first down was awarded* (an obvious error by the official). Osborne punted again. Lithia Springs received the punt, drove down the field and kicked a field goal, and later scored again, making the final score 16-7 in its favor.

Osborne protested the erroneous call to the sports association. The protest was denied by the association's Executive Secretary, then by its Hardship Committee, and finally by its Executive Committee, which sounds like an exhausting exhaustion of administrative remedies.

Suit was filed by the parents of Osborne players in the Superior Court of Cobb County. The trial court found that it had jurisdiction, that the plaintiffs had "a property right in the game of football being played according to the rules, and that the referee denied the plaintiffs and their sons this property right and equal protection of the laws by failing to correctly apply the rules."

The trial judge entered an order cancelling a Lithia Springs playoff game scheduled for November 13 and ordered Lithia Springs and Osborne

[20] 285 S.E.2d 7 (Ga. 1981).

to meet on the football field on November 14, resuming the game with 7:01 remaining, with Osborne in possession at the Lithia Springs 38-yard line, still leading 7-6, and this time with *first down and 10*. (Many of us would love the opportunity to turn back the clock to redo something that happened in high school, or something that did not happen in high school.)

The Supreme Court stayed the trial court order. It cited its prior decision in *Smith v. Crim*,[21] holding that a high school football player has no right to participate in interscholastic sports[22] and no protectable property interest which would give rise to a due process claim. The opinion concluded that courts of equity in Georgia "are without authority to review decisions of football referees because those decisions do not present judicial controversies."

Unfortunately, I have no recollection of what I concluded in the sports officiating piece. The article was complete, or nearly so, but prepared in the most analog of fashions — typed on a Smith-Corona portable electric typewriter with neither memory nor back-up (as if any of us, save David, would have known what that meant in 1982). The manuscript has been lost to history.

Having now done a little more current research, I admit the topic would now be neither sufficiently "attenuated" nor "subtle" for inclusion in the *Journal*. Sports officiating decisions have regularly found their way into our courts.[23] There has been an explosion of law journals devoted to sports and entertainment, which routinely carry articles that could all have traced their lineage to this *Journal of Attenuated Subtleties* piece on sports officiating had we published it (in the subjunctive mood of sports lingo, "woulda, coulda, shoulda").[24]

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[21] 240 Ga. 390, 240 S.E.2d 884 (Ga. 1977).

[22] RAJ, interrupting JJL: I cannot resist citing *Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25 (1st Cir. 1984): "There being no fundamental right to education, see *San Antonio Independent School Dist. v. Rodriguez* [citation omitted], there could hardly be thought to be a fundamental right to play intercollegiate ice hockey."

[23] *See, e.g., Bain v. Gillispie*, 357 N.W.2d 47 (Iowa Ct. App. 1989) (affirming summary judgment for college basketball official on claims brought by sports memorabilia vendor that official's erroneous call constituted malpractice and injured vendor to the tune of $175,000). *Cf. McDonald v. John P. Scripps Newspaper*, 257 Cal. Rptr. 473 (Cal. Ct. App. 1989) (citing *Waddell* in dismissing action brought by loser of county spelling bee based upon official's error).

[24] *See* Richard J. Hunter, Jr., *An "Insider's" Guide to the Legal Liability of Sports Contests Officials*, 15 MARQ. SPORTS L. REV. 369 (2005); S. Christopher Szczerban, *Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials*, 6 VA. SPORTS & ENT. L.J. 277 (2007); Russ VerSteeg &

A most provocative piece in this vein is John Cadkin, *Sports Official Liability: Can I Sue If the Ref Missed a Call?*[25] The author concludes (correctly, I would say) that generally, the "decision of the referee should be left on the playing field." But he argues that a cause of action should lie where "only monetary relief is requested and where the allegedly negligent call is an: (1) on-the-spot judgment, (2) made in good faith, (3) absent instant replay, and (4) is outcome determinative."

The author argues the official's conduct should be judged against an ordinary negligence standard. While I do not recall what I concluded in 1982, I am relatively certain that I would have disagreed with this cause of action and liability standard (and I still respectfully disagree).

RAJ: I wrote a draft of "The Jurisprudence of Paper Clips," an essay on the affixation of allonges to negotiable instruments by various fastening devices, which appeared in the *Green Bag* recently and which has been enriched by correspondence from Paul Kiernan and Shale Stiller.[26]

I looked into "Admiralty Jurisdiction Over Collisions Between Ships and Trains," but it turned out that such accidents have happened with alarming frequency.

In a fragment of "The Mess of Dillegrout," which is still in existence and has been delivered to the editors of the *Green Bag*,[*] I described unusual English serjeanty tenures in which land rights were issued on condition of the holder's serving chicken soup at a coronation or making a "passing of wind" before the monarch.

David Kirkland whimsically suggested "Time Travel: It's Not Just Impossible, It's Illegal," pointing out the problems that journeys into the past could cause for the first-to-file system under Article 9 of the Uniform Commercial Code. Sadly, we do not know his solution. Perhaps he envisioned a Turing Test to determine whether someone who files a UCC-1 today is an interloper from the future.

Years later, I contributed to *The Copyright Infringement Quarterly*, a compendium of legal humor edited by my friends John Morris and Adam Sachs. In that context, I mentioned one of my favorite appellate cases, *Lyon County*

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Kimberley Maruncic, *Instant Replay: A Contemporary Legal Analysis*, 4 MISS. SPORTS L. REV. 153 (2015).

[25] 5 U. DENV. SPORTS & ENT. L. J. 51 (2008).

[26] 19 GREEN BAG 2D 249 (2016).

[*] *General Editor's note:* And it may well appear in print here or there, someday.

*Bank v. Lyon County Bank*.[27] In 1998, John Morris introduced me to Professor Ross Davies, and the connection of the *Journal of Attenuated Subtleties* to the *Green Bag* was established.

• • •

ALL: We are grateful that our works will live online for another day, now complete and in their native format. In the realm of publication, we may have peaked a bit early with our student output of nearly forty years ago. We look forward to the useful and entertaining contributions of those who, like us, appreciate the world of legal scholarship enough to go to *so, so much trouble* parodying it.

[27] 58 P.2d 803 (Nev. 1936), spotted in Fleming James, Jr. & Geoffrey C. Hazard, Jr., CIVIL PROCEDURE (2d ed. 1977).

# THE JOURNAL OF ATTENUATED SUBTLETIES

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# The Journal of Attenuated Subtleties

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# The Journal of Attenuated Subtleties

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# Foreword: Form Over Substance

De minimis non curat lex.[1]

The law may not care about trifles, but lawyers certainly do. From time out of memory,[2] members of the bar have delighted in advancing the arcane argument, in drawing the strained analogy, and in resuscitating the outmoded doctrine; even today, when "exalt[ing] form over substance" is reversible error,[3] the fascination with long dead and unimportant detail continues to pervade the legal mind. A "case is not to be decided by attenuated subtleties,"[4] but the fancy of the lawyer is surely to be struck by them.

It is to this fascination with the defunct, trivial, recherché, and inconsequential that this Journal is dedicated. In this and forthcoming issues, we propose to present short scholarly essays, gracefully written, cogently argued, and copiously referenced, which treat subjects long and justifiably neglected in the "substantial" legal literature[5]--legal topics made obsolete by time or logic.

1. Taverner v. Cromwell, 1 Cro. Eliz. 353, 353, 78 Eng. Rep. 601, 602 (C.P. 1594).
2. That is, since before Sept. 23, 1189. See 2 W. BLACKSTONE, COMMENTARIES *31.
3. Parker v. Flook, 437 U.S. 584, 598 (1978), rev'g In re Flook, 559 F.2d 21 (C.C.P.A. 1977).
4. Lucas v. Earl, 281 U.S. 111, 114 (1930) (Holmes, J.).
5. It must be acknowledged that there is a small body of legal writing which deals in the humorous. See, e.g., Review, 79 YALE L.J. 1198 (1970) (review of the "With the Editors" section of The Harvard Law Review); Note, Crossing the Bar, 78 YALE L.J. 484 (1969) (analysis of ceremonials in the Federal Reporter and the Federal Supplement honoring or in memory of federal judges). Legal trivia, on the other hand, have been heretofore ignored by "serious" scholars.

This Journal, however, is not for every lawyer. The attorney who has never stopped to wonder about the odd footnote affixed to Supreme Court syllabi, for example, will find nothing of interest in these pages. The practitioner who dismisses thoughts of Supreme Court jury trials or claims based on the Titles of Nobility Clauses because of their extreme infrequency and improbability will take no delight in our forays; nor will the lawyer who looks to the Court only for holdings and not for historical richness appreciate an analysis of its geographical center. Our colleagues of this ilk must find their recreation outside the law, in alcohol or bowling.

The Journal is for those steeped in the law who love the subtle and the attenuated. To them we extend our invitation to read our works and to submit their own efforts for publication. Here, then, is to form over substance; here is to trifles.

**– The Editorial Board**

# Instructions in Supreme Court Jury Trials

Robert A. James*

The United States Supreme Court has, by virtue of Constitutional grant, original jurisdiction over all controversies in which a State or foreign emissary is a party.[1] Although the number of categories of cases in which the Court has exclusive jurisdiction is extensively limited by statute, the Court is still the court of first resort for all controversies between two or more States;[2] the Court also occasionally exercises its nonexclusive original jurisdiction.[3] The Seventh Amendment to the United States Constitution[4]

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1. U.S. CONST. art. III, § 2: "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."

The intent of the framers on this provision is thoroughly unascertainable. Professor Farrand has concluded that "surprisingly little [is] found in the records of the convention" regarding jurisdiction and the judicial branch in general. M. FARRAND, THE FRAMING OF THE CONSTITUTION 154 (1913). See, however, the speculation in Note, The Original Jurisdiction of the United States Supreme Court, 11 STAN. L. REV. 665, 665 & n.3 (1959) (purpose of clause to insure prestige of tribunal hearing claims involving sovereign or quasi-sovereign entities).

2. 28 U.S.C. § 1251(a) (Supp. IV 1980): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Formerly, the exclusive original jurisdiction extended to suits brought against foreign emissaries, but jurisdiction with respect to these actions was made nonexclusive by the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 809, 810, sec. 8(b)(1).

3. For a recent instance, see United States v. California, 449 U.S. 408 (1981).

Relatively few original cases have been heard in the Supreme Court's reported history. See Note, supra note 1, at 701-719 (123 reported original jurisdiction cases counted as of 1959); 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 107 n.1 (1978) (hereinafter cited as WRIGHT & MILLER) (eight cases docketed in 1974, 1975, and 1976 Terms combined).

4. U.S. CONST. amend. VII: "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."

and a statutory enactment[5] guarantee the right to trial by jury in the resolution of cases at common law before the Court.[6] There have been very few jury trials in the Court's history,[7] but the assertion in an original jurisdiction action of a party's Seventh Amendment right "remains a theoretical possibility."[8] Once the possibility is acknowledged, a procedural problem becomes apparent: how is a multimember Court to deliver jury instructions where the Justices are not in agreement?

5. Judiciary Act of 1789, c. 20, 1 Stat. 73, 80-81, § 13, codified at 28 U.S.C. § 1872 (1976): "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

6. The right to trial by jury was addressed most recently in United States v. Louisiana, 339 U.S. 699 (1950). Mr. Justice Douglas for the Court held that the State of Louisiana was not entitled to a jury trial where it sought the equitable remedies of injunction and accounting: "The Seventh Amendment and the statute [28 U.S.C. § 1872], assuming they extend to cases under our jurisdiction, are applicable only to actions at law." Id. at 706 (footnote omitted).

Commentators have inferred from the conditional nature of Justice Douglas's discussion that the right to a Supreme Court jury trial may be in doubt. See WRIGHT & MILLER, supra note 3, at 197-98 & n.27. This inference gains no support from Justice Douglas's opinion or the relevant provisions. The language of 28 U.S.C. § 1872 is explicit in its assurance of the right in actions against citizens, see note 5 supra; the text of the Seventh Amendment, moreover, contains no limitation of the jury right to actions in district courts. See note 4 supra. It is apparent that governmental bodies, like all other parties, are entitled to assert the right, see United States v. Pfitsch, 256 U.S. 547, 553-54 (1921); Collins v. Gov't of Virgin Islands, 366 F.2d 279, 283 (5th Cir.), cert. denied, 386 U.S. 958 (1966), so the exclusive category of actions between States is not immune from the prospect of a jury demand. Furthermore, it is sound judicial practice to refrain from deciding more issues than the essential elements of the case at bar. See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 568 (1851); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 734 (1838) (where Court found original jurisdiction suit equitable in nature, no discussion of right to jury trial for legal actions).

7. There have apparently been only three such trials, all in the eighteenth century. Only one is officially reported, that in Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794), discussed in the text accompanying notes 9-12 infra. Two others are evidenced by other Court records, and are discussed in 1 H. CARSON, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 169 n.1 (rev. ed. 1902), and in The Supreme Court--Its Homes Past and Present, 27 A.B.A. J. 283, 286 & n.3 (1941). In Oswald v. New York (U.S. Feb. 6, 1795), a jury verdict for $5,315.06 was entered; in Cutting v. South Carolina (U.S. Aug. 8, 1797), the jury found $5,502.84 in damages. See also Casey v. Galli, 94 U.S. 673, 681 (1876) (parties waived "intervention of a jury").

8. WRIGHT & MILLER, supra note 3, at 197. Of course, the Supreme Court may avoid such a jury trial in nonexclusive cases by redirecting proceedings to the appropriate district court. Even in exclusive cases, the Court typically encourages parties to pursue factual disputes before a special master. See, e.g., Maryland v. Louisiana, 451 U.S. 725, 734 (1981).

In Georgia v. Brailsford,[9] the only reported Supreme Court jury trial, the Justices were able to agree on the charge. Mr. Chief Justice Jay for the Court remarked: "It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous . . . ."[10] When the jurors returned to ask additional questions, the Court was also unanimous in its responses;[11] the jury then rendered its decision.[12] In the future, however, the Court may not be fortunate enough to agree on the form and content of jury instructions.

Jury charges, unlike other judicial actions, require more than an affirmative or negative response to a motion; the body vested with interpretive authority must present a single algorithm, a single formulation of logical argument, to guide the jury in rendering a decision on factual issues. Where the Justices cannot come to agreement upon a single jury instruction, a decision rule must be adopted to determine which of alternative charges is to be delivered.[13] Several potential decision rules may be summarily dismissed. A "pure race" rule, under which the first instruction presented by a Justice would be adopted,[14] is clearly unjust and unworkable in this context. A rule under which the Chief Justice's proposal wins is also unacceptable, as it would appear to place more power in that position than is contemplated by the judicial system.

A plurality rule, one which recognizes the jury instruction endorsed by the largest number of Justices, appears to represent the sound and just resolution of the problem. Although opportunities for negotiation and strategy may be present,[15] and the

9. 3 U.S. (3 Dall.) 1 (1794). The case involved the postwar effect on various creditors of a State's wartime sequestration of debts.
10. Id. at 4.
11. Id. at 5.
12. Id.; the jury found that property in the debts revested in the creditors after the wartime sequestration was nullified by the treaty of peace.
13. The jury instruction issue is therefore inextricably intertwined with the problems addressed by modern social choice theory. See K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).
14. Cf. UNIFORM COMMERCIAL CODE § 9-312(5)(a) (1978) ("pure race" rule for priorities among secured creditors).
15. Cf. J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953).

possibility of a tie would have to be addressed,16 incentives would be placed on the Justices to subscribe to the charge which most closely approximates their own views of the legal issue. The result under the plurality rule test would be the adoption of a single jury instruction which commands the widest support among the members of the Court and which is consistent with the unarticulated yet powerful principle of equality among Justices of the Supreme Court.17

16. Perhaps the Chief Justice Rule could here be profitably used; this situation requires a thorough analysis. Indeed, the problem of the equally divided court is one long neglected by commentators and courts alike. Cf. United States v. Barnett, 330 F.2d 369 (5th Cir. 1963) (en banc), certified question answered, 376 U.S. 681 (1964) (Court of Appeals equally divided in contempt proceeding against state governor).

17. It is not incomprehensible to imagine the guarantee of "one person, one vote" applied generally to the entire federal judiciary. Cf. Reynolds v. Sims, 377 U.S. 533 (1964) (principle of one person, one vote in state legislature apportionment); Bolling v. Sharpe, 347 U.S. 97 (1954) (Fifth Amendment Due Process Clause contains equal protection component).

# The Supreme Court and the Westward Movement: A Demographic Study

**Benjamin C. Zuraw***

Ever since the first days of the Republic, America's population steadily has been moving west.[1] This westward migration has had important effects on America's political, economic, and social history.[2] To the present day, the cry "Go West, young man!"[3] has left its indelible mark on American institutions. This study examines whether the United States Supreme Court has moved westward along with the American public. It is important to know whether the Court has kept pace with America'a westward migration, for a correlation between the two migrations could influence the way scholars analyze decisions of our highest tribunal.[4]

The geographical locations of Supreme Court Justices at various times in their careers were compiled and analyzed (see Table 1). Figure 2 plots the population shift of the Court based on its mean birthplace as of each decennial census year. As can be seen, the results are quite erratic, with the mean birthplace shifting back and forth from the Atlantic Ocean to the mainland. One problem with this approach is its inclusion of several Justices who were born overseas.[5] Figure 3, therefore, displays the adjusted

* B.A., Dartmouth College, 1980; J.D. candidate, Yale Law School, 1983. I am grateful to David Kirkland for invaluable assistance in technical aspects of this article. Any errors, however, are mine.

1. WORLD ALMANAC AND BOOK OF FACTS FOR 1982 at 199 (1981); see also Table 1 infra.

2. See Turner, The Significance of the Frontier in American History, REP. AM. HIST. A. 190 (1893).

3. Soule, Terre Haute (Ind.) Express (1851); cf. J. PARTON, LIFE OF HORACE GREELEY (1855). Contra W.O. DOUGLAS, GO EAST, YOUNG MAN (1974).

4. Decisions of a particular Court, for example, could be explained by the predominance on that Court of an eastern or frontier perspective. Indeed, a fuller theory of "Demographic Determinism" might be articulated.

5. Justice Brewer, for example, was born in Smyrna, Asia Minor (now part of Turkey) (lat. 38 25' N, long. 27 10' E), but moved to Leavenworth, Kansas (lat. 39 19' N, long. 95 55' W). Justice Frankfurter was born in Vienna,

mean birthplace of the Supreme Court, with all Justices born overseas removed from the data. This analysis yields results which are certainly more consistent than those of Figure 2; however, because a study based on birthplace neglects movements of people after their birth, it inadequately examines the mobile American society.[6]

Figure 1, instead of being based on the birthplaces of the Justices, as were Figures 2 and 3, displays the population shift of the Court as measured by the place of residence of each Justice at the time of his or her appointment to the Court. In this way, the study can take into account the large number of Justices who migrated to the West after being born on the eastern seaboard.[7] Figure 1 displays both the mean appointment location of the Court and the geographical center of the United States population, and demonstrates that the Supreme Court's geographical shift has been suprisingly consistent with America's westward migration.

Until 1860, the Court moved steadily westward, although lagging slightly behind the American population. From 1860 to 1870, however, the Court's population center shifted dramatically from near White Sulphur Springs, West Virginia, to Portland, Indiana; from this decade through the 1920's, the Court's westward movement was slightly in front of that of the American people. Since the 1920's, the Court's westward migration has been more inconsistent, but still remarkably similar to America's steady westward shift. The 1982 Supreme Court's population center (near Stoutsville, Missouri) is quite close to the current United States population center (near De Soto, Missouri). Indeed, in a demographic sense, the Supreme Court has come home to the American people.

Austria (lat. 48 13' N, long. 16 22' E).

6. Cf. Dunn v. Blumstein, 405 U.S. 330 (1972) (fundamental right of interstate travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (same).

7. For example, Justice Field was born in Haddam, Connecticut (lat. 41 28' N, long. 72 30' W), but left for the Marysville, California gold field (lat. 39 10' N, long. 121 34' W). Justice Rehnquist was born in Milwaukee, Wisconsin (lat. 43 03' N, long. 87 56' W), but headed for the sunnier climes of Phoenix, Arizona (lat. 33 30' N, long. 112 03' W).

10

TABLE 1

Arithmetic Mean Location of
American Population and Supreme Court, 1790-1982

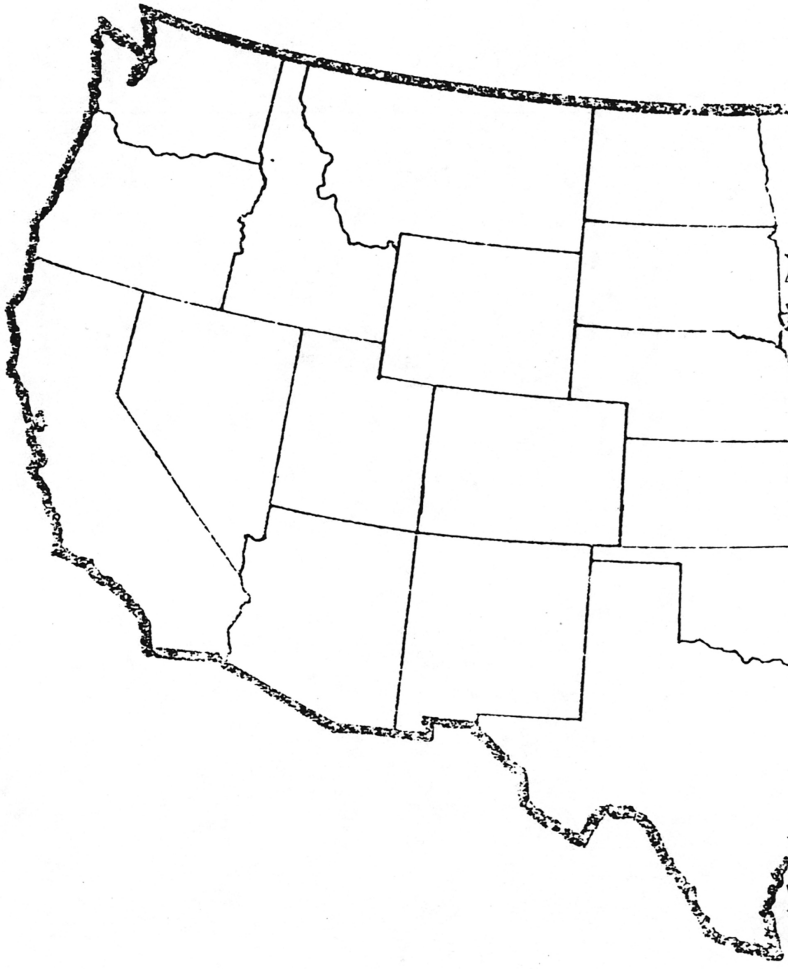
| Year | American Population§ | Supreme Court* Birthplace | | Supreme Court* Adjusted Birthplace¶ | | Supreme Court* At Time of Appointment | |
|---|---|---|---|---|---|---|---|
| | N Lat. W Long. | N Lat. | W Long. | N Lat. | W Long. | N Lat. | W Long. |
| 1790 | 39 16' 76 11' | 43 18' | 50 42' | 38 14' | 75 18' | 38 12' | 75 50' |
| 1800 | 39 16' 76 56' | 41 17' | 64 1' | 38 38' | 75 34' | 39 27' | 75 23' |
| 1810 | 39 11' 77 37' | 38 11' | 76 8' | 38 11' | 76 8' | 38 17' | 77 20' |
| 1820 | 39 5' 78 33' | 38 16' | 76 13' | 38 16' | 76 13' | 38 22' | 77 25' |
| 1830 | 38 57' 79 16' | 39 30' | 75 3' | 39 30' | 75 3' | 38 58' | 77 40' |
| 1840 | 39 2' 80 18' | 39 6' | 75 53' | 39 6' | 75 53' | 38 22' | 79 38' |
| 1850 | 38 59' 81 19' | 39 10' | 76 59' | 39 10' | 76 59' | 38 32' | 79 56' |
| 1860 | 39 0' 82 48' | 38 40' | 77 26' | 38 40' | 77 26' | 37 46' | 80 4' |
| 1870 | 39 12' 83 35' | 41 12' | 75 19' | 41 12' | 75 19' | 40 37' | 85 17' |
| 1880 | 39 4' 84 39' | 40 34' | 77 25' | 40 34' | 77 25' | 40 32' | 85 21' |
| 1890 | 39 11' 85 32' | 40 15' | 64 8' | 40 29' | 75 33' | 39 32' | 86 18' |
| 1900 | 39 9' 85 48' | 39 43' | 65 53' | 39 52' | 77 31' | 39 23' | 87 47' |
| 1910 | 39 10' 86 32' | 38 32' | 81 8' | 38 32' | 81 8' | 37 49' | 88 46' |
| 1920 | 39 10' 86 43' | 38 57' | 81 29' | 38 57' | 81 29' | 39 17' | 87 12' |
| 1930 | 39 3' 87 8' | 41 50' | 72 40' | 40 34' | 81 37' | 40 30' | 85 36' |
| 1940 | 38 56' 87 22' | 40 50' | 71 15' | 39 55' | 82 12' | 39 41' | 84 13' |
| 1950 | 38 48' 88 22' | 39 39' | 74 2' | 38 35' | 85 21' | 39 0' | 88 4' |
| 1960 | 38 35' 89 12' | 39 30' | 80 14' | 38 25' | 92 19' | 38 49' | 91 58' |
| 1970 | 38 27' 89 42' | 40 27' | 88 4' | 40 27' | 88 4' | 41 4' | 89 29' |
| 1980 | 38 8' 90 34' | 40 52' | 86 8' | 40 52' | 86 8' | 40 15' | 88 56' |
| 1982 | -- -- -- -- | 39 53' | 89 12' | 39 53' | 89 12' | 39 38' | 92 0' |

* CONGRESSIONAL QUARTERLY, GUIDE TO THE SUPREME COURT 793-866 (1979).

§ WORLD ALMANAC AND BOOK OF FACTS FOR 1982 at 199 (1981).

¶ Justices born outside the United States were removed from computation.

11



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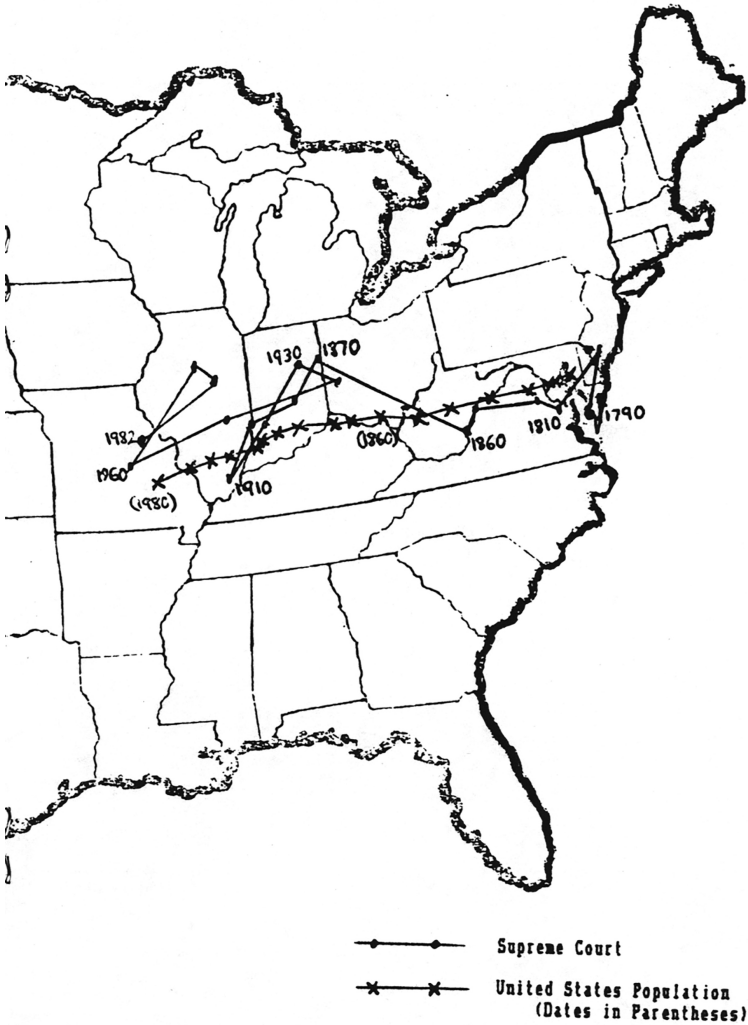
Westward Movement

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pulation Centers, 1790-1982

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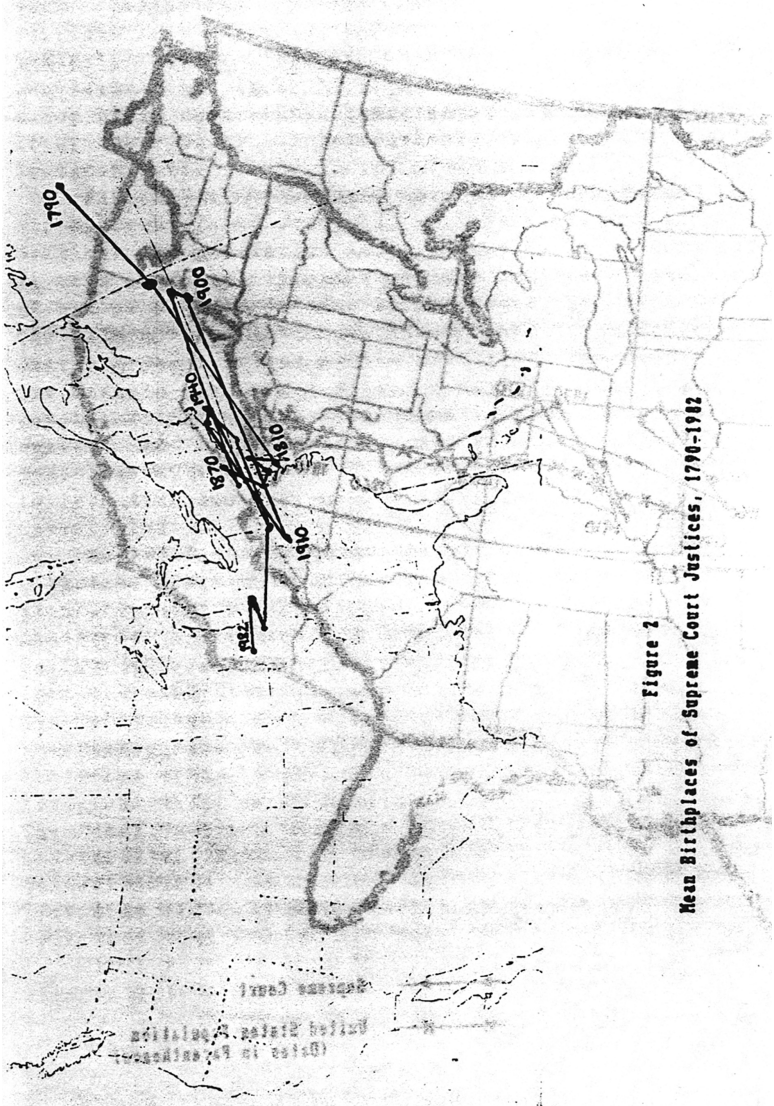


Figure 2
Mean Birthplaces of Supreme Court Justices, 1790-1982

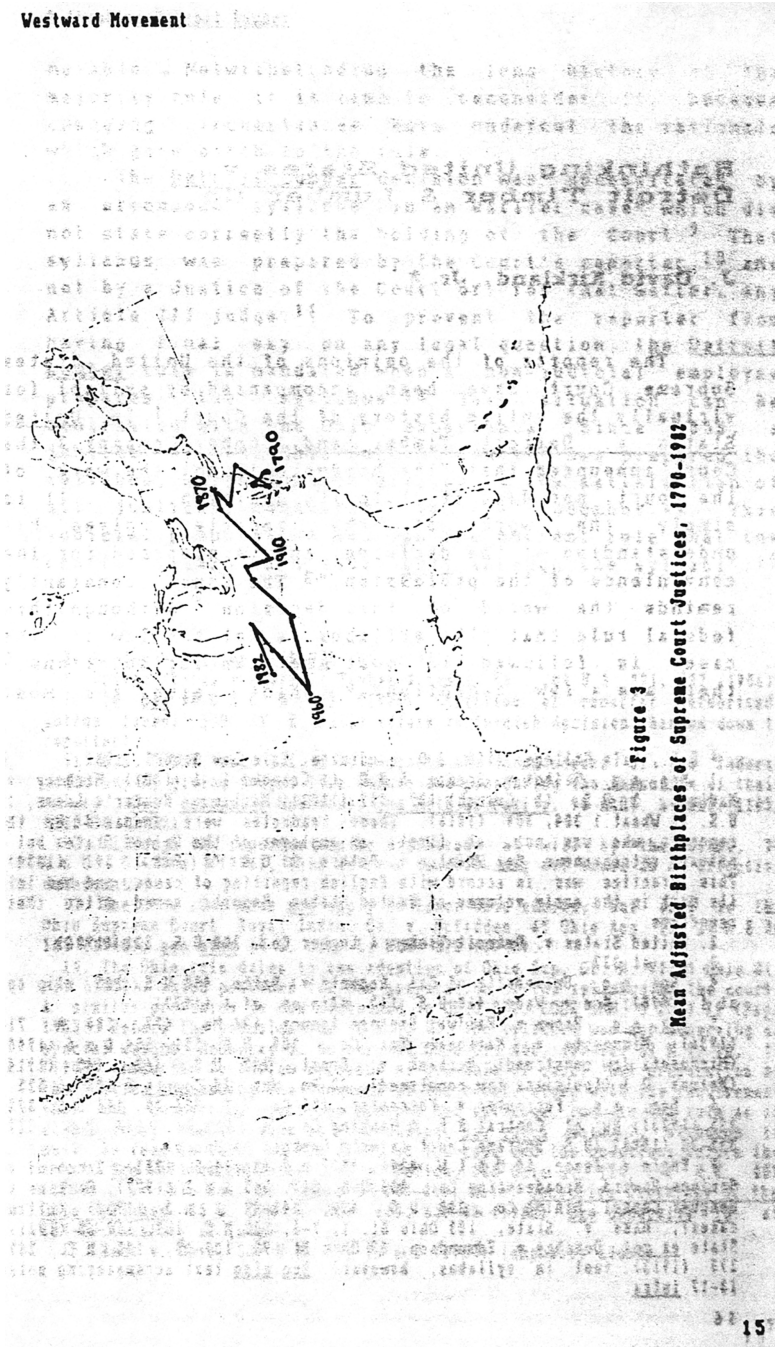


Figure 3
Mean Adjusted Birthplaces of Supreme Court Justices, 1770-1902

# Rethinking United States v. Detroit Timber & Lumber Co.

J. David Kirkland, Jr.*

The reports of the opinions of the United States Supreme Court have been accompanied by syllabi for virtually the entire history of the Court.[1] In United States v. Detroit Timber and Lumber Company,[2] the Court announced that "the headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession."[3] The Court constantly reminds the world of this decision.[4] Although this federal rule that "the syllabus is not the law of the case" is followed in most American jurisdictions,[5] there are a few exceptions,[6] Ohio[7] being the most

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1. See, e.g., Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 1 (1801); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803); Martin v. Hunter's Lesee, 14 U.S. (1 Wheat.) 304, 304 (1816). These headnotes were prepared by the reporter, who was not, at first, an employee of the United States but a private entrepreneur. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). This practice was in accord with English reporting of cases, and has left its mark in the early volumes of United States Reports named after their reporters.

2. United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906).

3. Id. at 337.

4. See, e.g., University of Cal. Regents v. Bakke, 438 U.S. 265, slip op. at 1 (1978); Roe v. Wade, 410 U.S. 115, slip op. at 1 (1973).

5. See, e.g., Brown v. Railway Express Agency, 134 Me. 477, 188 A. 716 (1936); Minnesota v. National Tea Co., 309 U.S. 551, 554 & n.6 (1940) (Minnesota law construed); Burbank v. Ernst, 232 U.S. 162, 165 (1914) (Holmes, J.) (Louisiana law construed); 20 Am. Jur. 2d Courts § 189 at 525.

6. See, e.g., Forrester v. Forrester, 155 Ga. 722, 726-27, 118 S.E. 373, 375 (1923); Buf cf. Central R.R. & Banking Co. v. Wright, 164 U.S. 327, 332-33 (1896) (U.S. Supreme Court rejects Georgia headnote).

7. Engle v. Isaac, 50 U.S.L.W. 4376, 4377 n.7 (April 5, 1982); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 & n.2 (1977); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 441-42 & n.3 (1952) (citing cases); Hass v. State, 103 Ohio St. 1, 7-8, 132 N.E. 158, 159-60 (1921); State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913) (not in syllabus, however). See also text accompanying notes 13-17 infra.

notable. Notwithstanding the long history of the majority rule, it is time to reconsider it, because changing circumstances have undercut the rationale which gave birth to the rule.

The Detroit Lumber decision was necessitated by an erroneous syllabus in an earlier case[8] which did not state correctly the holding of the Court.[9] That syllabus was prepared by the Court's reporter,[10] and not by a Justice of the Court or, for that matter, any Article III judge.[11] To prevent the reporter from having final say on any legal question, the Detroit Lumber rule is mandated when a non-judicial employee prepares the syllabus.[12] This situation can be contrasted with the Ohio experience. Since 1858, a justice of the Ohio Supreme Court[13] has prepared the syllabus, which must be drafted to the satisfaction of all justices concurring in the judgment.[14] This judicial preparation led to the current rule that the court "speaks as a court only through the syllabi";[15]

8. Hawley v. Diller, 178 U.S. 476 (1900).

9. United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906).

10. Id. See 28 U.S.C. § 673 (1976) (position of reporter authorized, duties fixed); SUP. CT. R. 55(1) (clerk to furnish decisions handed down to reporter).

11. U.S. CONST. art. III, § 1, protects the independence of the federal judiciary by giving judges life tenure and preventing the reduction of their salary. See generally Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1120-30 (1977).

12. Although the reporter can be discharged at will by the Court, 28 U.S.C. § 673(a) (1976), this extreme sanction may not serve as an effective deterrent.

13. The Ohio rule does not apply to lower Ohio courts, but only to the Ohio Supreme Court. Royal Indem. Co. v. McFadden, 65 Ohio App. 15, 29 N.E.2d 181 (1940); see also 14 U. CIN. L. REV. 573 (1940).

14. The Ohio rule dates to the adoption of Ohio Sup. Ct. R. VI, 5 Ohio St. vii (1858), which provided for the preparation of the syllabus by the court. A similar provision is now contained in OHIO REV. CODE ANN. § 2503.20 (Page 1953). Before the promulgation of Rule VI, the syllabus was not deserving of special weight. McCorray v. Sutter, 80 Ohio St. 400, 409-10, 89 N.E. 10, 11 (1909) (refusing to follow syllabus of pre-Rule VI case). But preparation by the justice announcing the judgment of the court, along with the requirement that the concurring justices approve the syllabus, led to the rule as it stands today: the syllabus is controlling, see supra note 7, although it must be read in light of the facts of the case and the questions before the court. See Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934); 14 Ohio Jur. 2d Courts §§ 246-249; Note, Deceptive Certainty of the Ohio Syllabus, 35 U. CIN. L. REV. 630, 637-43 (1966). See generally id. at 634-37 (history of rule).

15. Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964) (emphasis added).

the written opinion is mere dictum.[16] Because the syllabus is written and approved by the court, it is fitting that it be given special status.[17]

In the recent[18] past it has become common for the Justices of the United States Supreme Court substantially to revise and redraft the syllabi in conjunction with writing the opinion of the Court.[19] The changes made by the Justices to the reporter's draft often reflect a change in emphasis given various parts of the Court's opinion; but on some occasions a Justice may insert into the syllabus matter which he is unable to place in the opinion because the concurring Justices refuse to accept the language at issue.[20]

While the extent of this editing is not publicly known,[21] it is clear that the rationale for the Detroit Lumber rule is no longer valid. This compels a rejection of the rule and a rethinking of possible alternatives. The Ohio rule seems appealing; it would greatly reduce the reading required of members of the bar, which has increased dramatically as the number of clerks assigned to each Justice has grown. However, the appeal of the Ohio rule is deceptive, because the rule is based on a syllabus which a majority of the court must approve. Because at present only the Justice who drafts a United States Supreme Court opinion revises the syllabus, a rule which made the

16. State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913).

17. But cf. Note, supra note 14, 35 U. CIN. L. REV. at 634-37 (recounting history of Ohio rule; concludes that point taken too far).

18. The reporter prepared the syllabus during October Term, 1930. Telephone interview with Robert W. Wales, Esq., Law Clerk to Justice O.W. Holmes, October Term, 1930 (April 27, 1982) (notes on file with Journal of Attenuated Subtleties).

19. Interview with Prof. Paul Gewirtz, Law Clerk to Justice T. Marshall, October Term, 1971 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties); Interview with Prof. John C. Jeffries, Jr., Law Clerk to Justice L. Powell, October Term, 1973 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties).

20. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (Rehnquist, J.). In this case, which involved an equal protection challenge to a California statutory rape law only applied to male defendants, the opinion cites both Reed v. Reed, 404 U.S. 71 (1971) ("fair and substantial relationship" test) and Craig v. Boren, 429 U.S. 190 (1977) (acknowledging a "sharper focus" when gender-based classifications are challenged). 450 U.S. at 468. The syllabus, however, cites only the less restrictive Reed standard. Id. at 464.

21. The Supreme Court is very secretive about almost all of its internal activities. See generally R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

syllabus controlling is unacceptable.22 However, a compromise between the current federal rule and the Ohio rule is obviously appropriate: the syllabus should be treated as one part of the Court's decision, not controlling but certainly not irrelevant.

22. Cf. James, Instructions in Supreme Court Jury Trials, 1 J. ATTEN. SUBT. 5, 8 & n.17 (1982) (discussing "unarticulated yet powerful principle of equality among Justices").

# The Nobility Clauses: Rediscovering the Cornerstone

**Manley W. Roberts***

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.
>
> Alexander Hamilton[1]

The framers of the United States Constitution recognized that the prohibition on titles of nobility was the fundamental source of a republican government. The prohibition appeared in the Articles of Confederation,[2] and the framers, making few comments but implying great reverence,[3] included the prohibition in two clauses of the new Constitution (one applicable to the federal government[4] and one applicable to the states[5]).

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1. THE FEDERALIST No. 84, at 512 (A. Hamilton) (C. Rossiter ed. 1961).
2. U.S. ARTICLES OF CONFEDERATION art. VI, cl. 3.
3. "The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment." THE FEDERALIST No. 44, at 283 (J. Madison) (C. Rossiter ed. 1961).
4. U.S. CONST. art. I, § 9, cl. 8: "No Title of Nobility shall be granted by the United States."
5. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . grant any Title of Nobility." The division of the prohibition into two clauses located in different parts of the Constitution has proven to be a blunder. The state version is located in the same clause as the frequently cited prohibition of impairment of contracts, making it difficult for researchers to locate headnotes pertaining to the Nobility Clause. See U.S.C.A. Const. art. I, § 10, cl. 1 (West 1981 Supp.). In this respect, at least, the Articles of Confederation were more intelligently constructed. See note 2 supra (federal and state prohibitions in same clause).

For two centuries the courts followed Hamilton's lead and said nothing about the Nobility Clauses.[6] In the last two decades, however, the clauses have experienced a major renaissance, as courts have come to recognize a radical equality principle inherent in the clauses. Judges have invoked the Nobility Clauses to prevent a citizen from changing his name,[7] to halt discriminations against illegitimates,[8] and to cast doubt upon the constitutionality of Indian laws.[9] Justice Stevens has championed the Nobility Clauses in the Supreme Court, authoring ringing dissents in Fullilove v. Klutznick[10] and Mathews v. Lucas.[11]

Yet the cases reveal ad hoc application of the clauses, and no scholar has developed a systematic framework for identifying violations. This Article proposes a multi-factored balancing test. The factors include: (i) whether the government has granted or recognized an actual title; (ii) whether that title

6. The only prominent cases call on the wording of the clauses to support broad generalities concerning the structure of the Constitution. See Downes v. Bidwell, 182 U.S. 244, 277 (1901) (Nobility Clause exemplifies a per se restriction on Congressional power); Legal Tender Case, 110 U.S. 421, 447 (1884) (Congress and states both prohibited from granting titles, unlike other prohibitions applying only to states).

7. In re Jama, 272 N.Y.S.2d 677 (Sup. Ct. 1966). Judge Maurice Wohl denied Robert Paul Jama's petition to change his surname to "von Jama." The court declared that for the state to authorize such a change would violate the Nobility Clause, since "von" is a prefix "occurring in many German and Austrian names, especially in the nobility." Id. at 678. However, Judge Wohl's reasoning was based on a xenophobic aversion to the German people, whom he described as morally reprehensible followers of "the philosophies of a monstrosity and his cohorts." Id. He continued: "An American should measure himself by the American standard, and paraphrasing the bold Romans of old, proudly proclaim himself Civis Americanus Sum." Id. See also Roberts, The Sorry State of New York Name Change Law, 2 J. ATTEN. SUBT. (1983) (forthcoming).

8. Eskra v. Morton, 524 F.2d 9, 13 n.8 (7th Cir. 1975) (opinion of then-Circuit Judge Stevens); see also note 11 infra.

9. Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 687 (1968) (en banc) (asking "whether the law has not conferred upon tribal Indians and their descendants what amounts [sic] to titles of nobility").

10. 100 S. Ct. 2758, 2803 & n.1 (1980) (Stevens, J., dissenting) (affirmative action plan violates equality principle of Nobility Clause).

11. 427 U.S. 495, 522 n.3 (1976) (Stevens, J., dissenting) (discriminating against illegitimate children attaches "badge of ignobility"). Justice Stevens's argument is textually and historically unsound. The framers of the Constitution permitted certain badges of ignobility. See, e.g., U.S. CONST. art. IV, § 2, cl. 3 (states required to deliver up fugitive slaves). Bastardy, moreover, was certainly known to the founding fathers. See, e.g., F. BRODIE, THOMAS JEFFERSON: AN INTIMATE BIOGRAPHY (1976).

bears a relation to the noble orders of Europe;[12] (iii) whether the "noble" individual also receives the traditional trappings and perquisites of nobility; (iv) whether the noble receives a tenurial interest in such trappings and perquisites which clearly distinguish the noble and his progeny from the common man; and (v) whether the perquisites include civil or military power. This test would apply equally to a grant of nobility by a state or by the federal government.[13]

The effect of the test is demonstrated by application to two governmental actions which might be challenged as grants of titles of nobility. One is the policy of certain state universities to recognize an elite cadre of undergraduates. For example, the University of North Carolina officially recognizes and provides facilities for the Order of the Golden Fleece.[14] The title derives directly from an order of eighteenth-century Austrian nobles, and membership insures unofficial but extraordinary influence in the University hierarchy.[15] However, the University does not itself select the members; more importantly, it grants none of the trappings of nobility. Finally, the benefits of membership are not tenurial. Weighing all of these factors leads to the conclusion that official recognition of the order does not rise to the level of a constitutional violation.

By contrast, the federal government's grant of a Congressional Medal of Honor together with all its ancillary benefits does violate the Nobility Clause.

12. The framers were particularly concerned about titles bearing a relation to noble orders of Germany and England. See 4 M.FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 32-36 (rev. ed. 1937) (statement of Charles Pinckney).

13. One might speculate that the use of the passive voice in the federal clause, see note 4 supra, distinguishes it from the state clause, which uses the active voice, see note 5 supra. However, the Supreme Court has stated that "Congress and the States equally are expressly prohibited from . . . granting any title of nobility." Legal Tender Case, 110 U.S. 421, 447 (1884).

14. The University provides meeting rooms for the order, and all members are automatically invited to the annual banquet given by the Chancellor. Interview with B. Steven Toben, former head of the Order of the Golden Fleece (April 24, 1982) (notes on file with Journal of Attenuated Subtleties).

15. Order members have easy access to the Chancellor's office to express their views on university policy. Interview with Steven W. DeVine, member of the Order of the Golden Fleece (April 28, 1982) (notes on file with Journal of Attenuated Subtleties).

Although the medal does not derive explicitly from an Old World title, it does bear a resemblance to an elite military order. The medal itself is an elaborate trapping of nobility.[16] Furthermore, legislation prevents both the medal and its concomitant pension from falling into the hands of common creditors.[17] Most significantly, the medal brings with it a tenurial right of special access to the corridors of power: the children of medal winners may bypass the ordinary admission process and apply directly to the President for admission to the service academies.[18] In sum, it is the exalting of military heroes and their families that currently poses the gravest threat to the republican form of government envisioned by the framers.

16. See 10 U.S.C. §§ 3741 (Army), 6241 (Navy), 8741 (Air Force) (1976) (medals authorized with "ribbons and appurtenances").

17. See, e.g., N.Y. CIV. PRAC. LAW § 5205(e) (medal exempt from bankrupt's estate); 38 U.S.C. § 562(c) (1976) (pension not subject to attachment, levy, or seizure).

18. 10 U.S.C. §§ 4342(c) (Military Academy); 6954(c) (Naval Academy); 9342(c) (Air Force Academy) (1976).

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ROBERT JAMES

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# Suing Satan: A Jurisdictional Enigma

John J. Little*

American legal systems have witnessed a remarkable growth in the use of litigation as a means of redress for personal grievances and injuries.[1] This expansion has been fueled in part by the adoption of increasingly liberalized rules of procedure[2] and jurisdiction[3] and by the emergence of innovative theories whereunder liability is imposed.[4] Despite

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1. The increase in the quantity of litigation over the past few decades has been widely documented, particularly as it has greatly increased the workload of the judiciary and led to a need for more judicial clerks. See, e.g., Betten, Institutional Reforms in the Federal Courts, 52 IND. L.J. 63, 63 (1976) (discussing "law explosion" and "overloaded dockets found at all levels of our federal and state judiciaries").

2. For example, the federal rules governing class actions, joinder of claims and parties, and third-party practice have been greatly liberalized to allow all potentially interested parties to resolve common disputes in one proceeding. See FED. R. CIV. P. 1, 13, 14, 18-20, 23; BULL. YALE U., Aug. 20, 1982, at 46 (Yale Law School) (Procedure II course description characterizing "simple bipolar disputes" as "pretty much the stuff of history"). Expanded concepts of standing have also contributed to the boom in litigation. See, e.g., United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

3. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Cf. UNIF. INTERSTATE & INT'L PROCEDURE ACT, 13 U.L.A. 459 (1962). But see Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

4. See, e.g., Langan v. Valicopters, 88 Wash. 2d 855, 567 P.2d 218 (1977) (strict liability extended to action against cropduster and hiring farmer for spraying insecticides on organic crops of adjacent landowner); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981) (department store employee forced to submit to strip search stated cause of action against manager and customer for tort of outrageous conduct); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813 (1980) (plaintiff may recover for negligently inflicted psychic injuries without physical injury); Robak v. United States, 658 F.2d 471 (7th Cir. 1981)

this expansion, there remain many well-recognized injuries for which the law provides the injured party with no relief.[5] In a glaring example of this failure to provide a means of redress, no workable theories have been advanced to allow plaintiffs to assert claims against Satan and other netherworld entities, despite the historic and widespread recognition of the injurious activities in which they regularly engage.[6]

In the only reported decision of netherworld litigation, United States ex rel. Mayo v. Satan and His Staff,[7] a plaintiff was denied leave to proceed in forma pauperis on claims arising under 18 U.S.C. § 241 and 42 U.S.C. § 1983.[8] The court, without reaching

(doctors liable to parents for wrongful birth of child with pre-natally diagnosable defects); Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 351, 643 P.2d 954 (1982) (doctors liable to child for wrongful life).

5. For example, no claim for damages can be brought against a media defendant for an incorrect weather forecast despite the well-recognized and foreseeable injuries which may result from reliance upon an erroneous prediction. Nor does a cause of action lie for the injuries resulting from an erroneous decision by a sports offical. See Georgia High School Ass'n v. Waddell, 248 Ga. 542, 285 S.E.2d 7 (1981); Little, Sports Officiating Decisions and the Limits of Judicial Review, 2 J. ATTEN. SUBT. (1983) (forthcoming).

6. The ability of Satan, evil spirits, poltergeists, and other assorted netherworlders to work havoc on man has long been recounted. See, e.g., Genesis 3:1-15; Matthew 4:1-11; D.P. WALKER, UNCLEAN SPIRITS: POSSESSION AND EXORCISM IN FRANCE AND ENGLAND IN THE LATE SIXTEENTH AND EARLY SEVENTEENTH CENTURIES (1981); M. STARKEY, THE DEVIL IN MASSACHUSETTS (1949). See generally A. GAULD & A. CORNELL, POLTERGEISTS (1979); L. COULANGE, THE LIFE OF THE DEVIL (1930); J. ASHTON, THE DEVIL IN BRITAIN AND AMERICA (1896).

7. 54 F.R.D. 282 (E.D. Pa. 1971). By naming Satan and an unspecified "staff" in his complaint, plaintiff's pleadings were probably sufficient to subject any subordinate fallen angels to his claims, at least until discovery revealed the names of any subordinates. An alternative approach would have been to name as defendants "Satan and unknown devils." Another alternative would be an action against a class of defendants. See Note, Defendant Class Actions, 91 HARV. L. REV. 630 (1978).

8. Plaintiff's claims that defendants on "numerous occasions caused misery and unwarranted threats," had "placed deliberate obstacles" in plaintiff's path, and had "caused his downfall," were of little merit. 18 U.S.C. § 241 (1976) is a criminal statute and of no use to plaintiff in a civil action. See, e.g., Agnew v. Compton, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957). Similarly, plaintiff's claim under 42 U.S.C. § 1983 (1976) was insufficient as it did not allege that defendants acted under color of state law.

The court also noted, while not basing its decision on these factors, that it might be difficult to manage plaintiff's suit if it were later urged as a class action in favor of all those with similar claims against Satan, and that no instructions for service of process were included. In discussing a class action, the court was overreaching; no such action was

the merits of these claims, rested its decision upon the unlikelihood of establishing personal jurisdiction in the district. Such procedural problems, together with the limited jurisdiction of federal courts to hear non-federal causes of action,[9] make it unlikely that many civil claims could be asserted against Satan or similar defendants in a federal district court.[10] Since most injured plaintiffs must thus look to state courts for relief, this Article proposes an analysis under which a state court can hear claims against Satan.[11]

before it. Some writers have placed undue emphasis on the court's remarks regarding service of process. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 176 (1981) (characterizing failure to include instructions for service as partial basis for dismissal).

9. Absent a statutory or constitutional cause of action, federal jusridiction over Satan would have to rest upon diversity. However, use of diversity presents several problems. First, it is unclear whether Satan is a citizen of any state or a "citizen or subject of a foreign state." 28 U.S.C. § 1332 (1976). If he does not fit one of these categories, diversity is not available; if he does fit either category, plaintiff has further problems, for he must specifically plead defendant's place of residence in a diversity action. FED. R. CIV. P. 8(a)(1); see Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829). Finally, an unusually large number of problems arise in trying to determine whether the amount in controversy satisfies the $10,000 requirement of 28 U.S.C. § 1332 (1976). This is particularly true in disputes arising out of contracts to sell a soul.

10. Because of the difficulty of obtaining federal jurisdiction for these actions, this Article is based on the assumption that actions against Satan will be brought in state courts. However, to the extent that federal subject matter jurisdiction can be obtained, similar questions of personal jurisdiction will arise.

11. The variety of possible claims which could be brought against such defendants is vast. Tort claims, similar to those pressed in Mayo, are obvious examples. A variety of contract claims could arise from attempts to enforce or to rescind a "sale-of-soul" contract. See, e.g., C. MARLOWE, THE TRAGICAL HISTORY OF THE LIFE AND DEATH OF DOCTOR FAUSTUS (1592) (contract between Lucifer and Faustus exchanging soul for unlimited knowledge and services of one Mephistophilis); Scratch v. Stone, described in S. BENET, The Devil and Daniel Webster, in 2 SELECTED WORKS OF STEPHEN VINCENT BENET 32 (1942) (alluded to in Mayo, 54 F.R.D. at 283); G. ABBOTT & D. WALLOP, DAMN YANKEES (1955) (contract between Devil and Washington Senators fan exchanging soul for American League pennant). Similarly, Satan might be subject to suit for property damage. See J. ANSON, THE AMITYVILLE HORROR (1977) (spirits in home damaged property and lowered property value). Finally, third-party complaints might be brought against netherworlders for contribution or indemnification, based upon the "the Devil made me do it" theory. See F. WILSON, THE DEVIL MADE ME BUY THIS DRESS (n.d.) (phonorecord).

There are, however, some Satanic contracts that would be unenforceable as contrary to public policy. One example is the wager for a soul. See, e.g., Daniels, The Devil Went Down to Georgia, in CHARLIE DANIELS BAND,

The primary obstacle to hearing such claims is the need of the forum state court to establish personal jurisdiction over the defendant.[12] The International Shoe decision[13] and its progeny,[14] governing the reach of a forum state's jurisdiction, mandate that the defendant have sufficient "minimum contacts" with the forum state so that "traditional notions of fair play and substantial justice" are not offended by requiring the defendant to defend a suit in that state.[15] Applying this test to Satan and similar defendants, a court should exercise jurisdiction if the plaintiff can show that the defendants maintained certain "minimum evil contacts" with that state.[16]

MILLION MILE REFLECTIONS 2, track 1 (1979) (phonorecord). While the courts will not enforce such gambling contracts, evidence of such activity could be offered to show that Satan had contacts in a given state. See infra notes 15 & 16 and accompanying text.

12. Prior to Shaffer v. Heitner, 433 U.S. 186 (1977), quasi-in-rem jurisdiction could be obtained over Satan by attaching souls owed to him under contracts of sale. See Harris v. Balk, 198 U.S. 215 (1905). However, Shaffer requires that "contacts" with the forum exist before any form of jurisdiction can be exercised; the presence of assets belonging to a potential defendant is not enough to subject him to jurisdiction to decide an unrelated cause of action. See Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1982 SUP. CT. REV. 77, 96-105; see generally R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 585-93 (1981).

13. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

14. See, e.g., Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

15. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In applying this test, the courts have held that sufficient "minimum contacts" exist where a non-resident executes a contract in the forum state, Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974), or where a plaintiff is injured in the forum state by a product produced by a non-resident, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (defendant could reasonably anticipate product's use in forum).

16. Cf. UNIF. INTERSTATE & INT'L PROCEDURE ACT § 1.03(b), 13 U.L.A. 459 (1962). Jurisdiction could be exercised over a claim arising from a contract between Satan and plaintiff if execution occurred in the forum, or if delivery of the soul was to occur there. For tort claims, plaintiff might show that defendant performed acts or caused results within the forum state, and that the injuries arose from these activities. The form of personal jurisdiction that would result in such cases is "specific" jurisdiction; the jurisdiction would extend only to causes of action which were related in some manner to the contacts which allow the exercise of personal jurisdiction. See Brilmayer, supra note 12.

To some extent, all states should be able to exercise jurisdiction over

Having established jurisdiction under the "minimum evil contacts" analysis, a plaintiff need only satisfy the forum state's requirements for service of process before proceeding. Personal service would of course present great difficulties; however, most jurisdictions authorize some alternatives,[17] such as substituted service[18] or service by publication.[19] In some cases, service may only require service upon the forum state's secretary of state;[20] however, states often require that service by publication or substituted service occur in the county or district in which the defendant resides or in which the action arose.[21] Plaintiffs bringing suit against Satan could satisfy these requirements by publishing notice in the county or district in which Satan maintains "maximum evil contacts."[22] For these

some claims against Satan and other netherworlders. It may be necessary for plaintiffs to rest jurisdiction on defendant's temptation centered activities rather than acts of a patently immoral character which can be attributed to defendants. Such acts--prostitution, gambling, drug abuse, political corruption--are potentially rare in some jurisdictions. For example, jurisdiction over Satan in Utah may be mainly based on temptation.

17. Personal service is not always constitutionally required. See Jacob v. Roberts, 223 U.S. 261 (1912) (when authorized by statute, substituted service constitutionally permissible when impractical or impossible to use actual personal service); 62 AM. JUR. 2D Process § 65. But cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (due process requires individual, mailed notice of action to settle accounting to known beneficiaries of trust).

18. See, e.g., S.D. COMP. LAWS ANN. § 15-6-4(e) (1967); see generally 62 AM. JUR. 2D Process § 66 (1972).

19. See, e.g., S.D. COMP. LAWS ANN. § 15-9-7 (1967) (authorizing service by publication in various circumstances in which defendant not within state); see generally 62 AM. JUR. 2D Process § 109 (1972).

20. This is often the case for actions against non-resident motorists and foreign corporations. See 8 AM. JUR. 2D Automobiles and Highway Traffic § 935 et seq. (1980); 26 AM. JUR. 2D Foreign Corporations § 516 et seq. (1968); cf. Burgess v. Ancillary Acceptance Corp., 543 S.W.2d 738 (Tex. Civ. App. 1976) (suit dismissed for failure to allege corporation non-resident).

21. Because service by publication is designed to provide actual notice, the requirement that publication occur in the locality in which defendant resides or has maximum contacts is sound. See, e.g., S.D. COMP. LAWS ANN. § 15-9-17 (1967) (publication in newspaper in county in which action pending).

22. It would be difficult to pinpoint the residence of Satan. This doubtless was part of relator's problem in Mayo. 54 F.R.D. at 283. However, one can replace the inquiry into "residence" with inquiry into where defendant has "maximum contacts" with the state. By providing for service in this location, defendants will be most likely to receive actual notice.

purposes, the courts should adopt a presumption that maximum evil contacts are maintained in the county or district that contains the forum state's capital city.[23]

The jurisdictional problems referred to in Mayo, then, are easily resolvable. Courts that use the approach suggested in this Article need not hide behind procedural technicalities; rather, they bravely can press on to reach the merits of claims against netherworlders.[24]

23. The county in which the state capital is located will often be the place of "maximum evil contacts." The potential for political corruption, graft, prostitution, bribery, and drug use in such areas and the corresponding temptation to engage in such activities is high. However, plaintiffs should be free to adduce evidence that other areas of the state are in fact the centers of "maximum evil contact." States in which such a showing is likely to be made include California (both San Francisco and Los Angeles are potentially more evil than Sacramento), New York (New York City clearly more evil than Albany), and New Jersey (almost any part of the state--Atlantic City, Newark, Jersey City, or Camden--more evil than Trenton).

24. This Article does not deal with the difficult problems of executing any judgment obtained against Satan. It is unlikely that any tangible assets can be found to have sold at an execution sale. However, it should be possible to garnishee ~~debts~~ souls owed to Satan, compelling payment to the judgment creditor instead of the contract creditor. Cf. supra note 12.

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# Are Footnotes in Opinions Given Full Precedential Effect?

**Robert A. James***

Indeed.[1]

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1. Approximately once a decade, a litigator who has run out of colorable arguments has asserted that particularly damning language in an opinion does not control the case at bar because the language appears in a footnote (this argument is herein referred to as the "Footnote Argument"). The federal and California courts have been the victims of such arguments five times since 1939, and have uniformly and vigorously defended a per se rule that the size of typeface does not bear in any way upon the weight accorded the ideas expressed therein. This Article seeks to sound the death knell of the Footnote Argument by providing a comprehensive review of the entire question and by demonstrating the futility of the argument in the face of the judicial declaration that note and text are of equal precedential value.

The earliest Footnote Argument was made in Gray v. Union Joint Stock Land Bank, 105 F.2d 275 (6th Cir.), rev'd on other grounds, 308 U.S. 523 (1939), in which counsel for farmers-appellants were dismayed by the Supreme Court's opinion in Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440 (1937). In Wright, the Court had noted that a court may halt proceedings at any time under the second Frazier-Lemke Act, a farmers' relief provision in the bankruptcy laws, if rehabilitation of the debtor appeared improbable. Id. at 462 n.6. The Circuit Court flatly rejected the contention of appellants that this footnote was not binding, holding that "while a footnote may sometimes make [an opinion] chaotic and bewildering, it is as much a part of it as that in the body." Gray, supra, 105 F.2d at 279. From the first appearance of the Footnote Argument, then, the courts have taken a per se approach that refuses to inquire into the level of chaos and bewilderment engendered by a footnote in an opinion.

The California District Court of Appeal took an identical stand in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 273 P.2d 560 (1954), a stockholder's derivative action. The California Supreme Court had ruled, in Melancon v. Superior Court, 42 Cal. 2d 698, 703 n.4, 268 P.2d 1050, 1053 n.4 (1954), that a third-party defendant may move to require the plaintiff to furnish security for costs. The lower court on remand dismissed the Footnote Argument with a footnote of its own, obliquely citing Gray; the note has been praised as a fine piece of judicial prose, D. MELLINKOFF, THE LANGUAGE OF THE LAW 443-44 (1963), and is reproduced in toto in the Appendix hereto. The Gray and Melancon cases have been cited approvingly by judges in both the federal and California court systems. See United States v. Egelak, 173 F. Supp. 206, 210 (D. Alaska 1959); People v. Jackson, 95 Cal. App. 3d 397, 402, 157 Cal. Rptr. 154, 157 (1979); see

generally 21 C.J.S. Courts § 221 at 407 & n.3 (1940); 20 AM. JUR. 2D Courts § 189 at 525 & n.20 (1965). But cf. Kirkland, Rethinking United States v. Detroit Timber & Lumber Co., 1 J. ATTEN. SUBT. 16 (1982) (per se rule may not apply where matter in footnote is not represented in the syllabus in jurisdictions adhering to the Ohio rule).

An independent and perhaps more satisfying defense of the per se rule, however, is found in Phillips v. Osborne, 444 F.2d 778 (9th Cir. 1971), in which the Court of Appeals held itself bound by the language of its own decision, Phillips v. Osborne, 403 F.2d 826, 828 n.2 (9th Cir. 1968), on the applicability of the abstention doctrine. The court rejected the Footnote Argument thus:

> The appellees would down-grade the significance of that language because it appears in a footnote. We think that the location, whether in the text or in a footnote, of something which the writer of an opinion thinks should be said, is a matter of style which must be left to the writer. A notable example of a footnote of great significance is footnote No. 4 in the opinion of Mr. Justice Stone (later Chief Justice Stone) in United States v. Carolene Products Co., 304 U.S. 144, [152 n.4 (1938)]. See, among the many comments which that footnote has excited, that of Judge [Billings] Learned Hand, "Chief Justice Stone's Concept of the Judicial Function" in "The Spirit of Liberty" (Dillard Ed. 1952) 201, 205.

Phillips v. Osborne, 444 F.2d 778, 782-83 (9th Cir. 1971). The per se rule is therefore founded upon considerations of the writer's individual autonomy, cf. I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785) (L. Beck trans. 1969), and upon the possibility of greatness to which all footnotes, like all texts, may aspire.

## APPENDIX

The full text of the relevant note in Melancon v. Walt Disney Productions, 127 Cal. App. 2d 213, 214 n.*, 273 P.2d 560, 561 n.* (1954), is as follows:

> There is no merit in plaintiff's contention made at the oral argument that the ruling of the Supreme Court was not binding since it appeared in the footnote in the opinion. A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect. See cases cited 21 C.J.S. (1940) p. 407, Courts, footnote 3.

The rhetorical flourish of identifying the "cases" cited in a Corpus Juris Secundum footnote as authority for the per se rule is appealing in its symmetry. Its luster is tarnished, however, by the fact that only one case is actually cited in 21 C.J.S. Courts § 221 at 407 n.3, or in the 1954 Supplement thereto--the Gray case, discussed supra. The logic and style of the note, of course, outweigh the slight inflation of supporting authority.

*Journal of Law* editors' note: For Bernard L. Diamond's article *On the Spelling of Daniel M'Naghten's Name* — which the *Journal of Attenuated Subtleties* had permission to reprint in its entirety back in 1982, but which we do not have permission to reprint today — please see pages 84 to 88 of volume 25 of THE *Ohio State Law Journal* (1964).

# Special Project: A System of Citation for Phonograph Records*

Music has long exerted a powerful influence over Man's cognitive and emotive faculties, and many of the humanities and social sciences have been enriched by recognition of this influence. Scholars in fields such as religion, anthropology, art, and computer science have examined musical forms and expressions in attempts to gain deeper understanding of their respective disciplines.[1] Law, apart from its specialties concerning the public and private regulation of music,[2] has not followed suit. Although music is undoubtedly capable of lending support and giving insight in the examination of many legal doctrines and social problems, only one citation of a musical work on its modern embodiment, the phonograph record or phonorecord,[3] has been discovered.[4]

* The editors thank Douglas L. Baldwin for his assistance in preparing for print the examples used in this Article.

1. See, e.g., J. FRAZER, THE GOLDEN BOUGH (1890-1915) (religion); C. LEVI-STRAUSS, LE CRU ET LE CUIT (1964) (anthropology); K. CLARK, CIVILISATION (1969) (art); D. HOFSTADTER, GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (1979) (computer science).

2. Writers in fields such as copyright have long found it necessary to refer to music. See, e.g., Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F. Supp. 177 (S.D.N.Y. 1977); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924); see generally R. BROWN, KAPLAN AND BROWN'S CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 219-247 (3d ed. 1978).

3. The term "phonorecord" has been adopted by Congress in the Copyright Act of 1976. 17 U.S.C. § 101 (Supp. IV 1980). It is accordingly used in this system of citation.

4. Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1037 n.* (1980) ("Cf. B. SPRINGSTEEN, DARKNESS ON THE EDGE OF TOWN (Columbia Records, Inc. 1978)."). This citation form is mystifying. Why is the name of the publisher given, when this information is omitted from most other types of citations? For the citation under the system proposed by this Article, see infra.

The reason for this apparent absence of musical inspiration and explanation may be the absence in the otherwise comprehensive structure of law review citation[5] of any system of citation of phonograph records. The obsession in legal scholarship with proper form of citation[6] may well have inhibited such references in the past. This situation must not be allowed to continue, especially in the wake of the outburst in this half-century of music addressing social issues.[7] Accordingly, the editors of this Journal set forth a reasonably complete system of citation of musical material on phonograph records, together with related written material, for the consideration and use of the profession.

5. See A UNIFORM SYSTEM OF CITATION (13th ed. 1981).

6. See, e.g., 95 HARV. L. REV. (strict scrutiny standard). But cf. 91 YALE L.J. (harmless error standard); 49 U. CHI. L. REV. ("common sense dictates otherwise" standard).

7. Although music embodying theories of political philosophy has existed for some time, see, e.g., R. STRAUSS, ALSO SPRACH ZARATHUSTRA (H. von Karajan cond. 1974) (phonorecord) (first performed in 1896), and ancient folk music often has dealt with problems of social justice, see, e.g., Good King Wenceslas, in EDWARD BARRINGTON CHORALE, SPIRIT OF CHRISTMAS 1, track 3 (n.d.) (phonorecord), the emergence of rock and folk-rock music since the 1950's has represented a qualitative leap in the applicability of phonograph records to legal discourse.

## 17A Phonograph Records

Cite phonograph records according to rule 17A.1; cite liner and cover material according to rule 17A.2.

The citation forms for authors, titles, editions, and dates specified for books (rules 15.1, 15.2, 15.4, and 15.5), should be followed to the extent applicable when citing records.

### 17A.1 Phonograph Records

Cite phonograph albums by disc number, if more than one (cf. rule 3.2); performer or composer (either an individual, multiple individuals, who are cited similarly to joint authors, or a group); title of album or album set; side and track number, if only part of a disc is cited (rule 17A.3); a parenthetical identifying (i) the transcriber (transc.), conductor (cond.), performer (perf.), or soloist (solo.), if needed, and (ii) the date of the release; and the parenthetical "(phonorecord)".

Most "serious" music (e.g., works for orchestra, classical music) should be cited by composer, while most "popular" music should be cited by performer. When in doubt as to which name to use, refer to the record itself and its jacket and spine; follow the designation used by the publisher.

SIMON & GARFUNKEL, BOOKENDS (1968) (phonorecord).

But:

P. SIMON & A. GARFUNKEL, CONCERT IN CENTRAL PARK (1981) (phonorecord).

L. VAN BEETHOVEN, SYMPHONY NO. 3 (K. Böhm cond. 1962) ("Eroica") (phonorecord).

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M. MUSSOURGSKY, PICTURES AT AN EXHIBITION (M. Ravel transc., H. von Karajan cond. n.d.) (phonorecord).

Only the name performer need be cited, unless a reference to a backing performer is desired.

B. SPRINGSTEEN, DARKNESS ON THE EDGE OF TOWN (1978) (phonorecord).

N. YOUNG, RUST NEVER SLEEPS (1979) (phonorecord).

Or:

N. YOUNG & CRAZY HORSE, RUST NEVER SLEEPS (1979) (phonorecord).

Use the title given in J. OSBORNE, RECORD ALBUMS 1948-1978 (2d ed. 1978), the Schwann Record and Tape catalog, or a similar publication to cite an album that does not have a title provided by the publisher. If a popular name is commonly used, provide the name parenthetically:

THE BEATLES, THE BEATLES (1968) (phonorecord) ("White Album").

LED ZEPPELIN, LED ZEPPELIN IV (1971) (phonorecord).

If citing a particular work within an album, a rule analogous to rule 15.5.1 is used. If all the works in the album are by the same composer or performer, the name, including an initial, of the composer or performer is given, in large and small capitals. If the works are not all by the same composer or performer, or if it is relevant to cite the particular work to an individual or group that is not being cited as the composer or performer for the entire album, then only the last name of the composer or performer is given, in regular roman type. In this case, it is necessary to provide the performer or composer for the entire album before the album name. In either case,

the individual work title is printed in italics and the album title is printed in large and small capitals.

SIMON & GARFUNKEL, *I am a Rock,* in SOUNDS OF SILENCE 2, track 5 (1965) (phonorecord).

J.S. BACH, *Six-Part Ricercare,* in THE MUSICAL OFFERING 1, track 9 (Claves Bach Soloists perfs. 1970) (phonorecord).

Springsteen, *Talk to Me,* in SOUTHSIDE JOHNNY AND THE ASHBURY JUKES, HEARTS OF STONE 2, track 1 (1978) (phonorecord).

When referring to specific material within such a source, include both the side and track on which the source begins and the side and track on which the specific material appears, separated by a comma:

W. MOZART, *Symphony No. 41,* in SYMPHONIEN NR. 40 & NR. 41 (H. von Karajan cond. 1978) 2, track 1, 2, track 2 ("Jupiter" symphony) (2d movement, *Andante cantabile*) (phonorecord).

When possible, cite to omnibus collections by a composer or performer rather than to "greatest hits" collections. Thus:

J.S. BACH, MASS IN B MINOR (K. Münchinger cond. 1971) (phonorecord).

Not:

J.S. BACH, EXCERPTS FROM MASS IN B MINOR (H. Achenbach cond. 1970) (phonorecord).

Bach, *Mass in B Minor,* in BAROQUE TUNES THE WHOLE WORLD LIKES TO HUM 1, track 3 (Anon. cond. 1967) (phonorecord) (not available in stores).

### 17A.2 Liner and Jacket Material

Cite liner and jacket (cover) material according to the form for prefaces and forewords (rule 15.2).

Springsteen, *Jacket Notes* to SOUTHSIDE JOHNNY AND THE ASBURY JUKES, I DON'T WANT TO GO HOME (1976) (phonorecord).

*Liner Notes* to BLONDIE, PARALLEL LINES (1978) (phonorecord).

Ohlsson, *Jacket Notes* to F. CHOPIN, THE TWENTY-FOUR PRELUDES, OP. 28 (G. Ohlsson perf. 1974) (phonorecord).

### 17A.3 Subdivisions: Sides and Tracks

Give the side number after the album title, but before the parenthetical phrases, without any introductory abbreviation. Give the track number, if needed, after the side number, with the notation "track".

C. BOLLING, SUITE FOR FLUTE AND JAZZ PIANO 2, track 3 (J.-P. Rampal & C. Bolling perfs. 1975) (phonorecord).

L. VAN BEETHOVEN, *Sonata No. 21,* in VLADIMIR ASHKENAZY PLAYS BEETHOVEN SONATAS 1, track 4, 2, track 1 (1975) ("Waldstein") (2d movement, *Molto adagio*) (phonorecord).

Never use "side"; use "at", preceeded by a comma, if the side number may be confused with another part of the citation:

Fassert, *Barbara Ann,* in THE BEACH BOYS, BEACH BOYS '69, at 2, track 5 (1976) (phonorecord).

Do not give a disc number in a multi-disc set in which the sides of all discs are numbered in one sequence:

> Mendelssohn, *Trio No. 1,* in FOUR FAVORITE TRIOS 6 (Istomin-Rose-Stern Trio perfs. 1968) (phonorecord).
>
> Page, *Bron-Yr-Aur,* in LED ZEPPELIN, PHYSICAL GRAFFITI 3, track 2 (n.d.) (phonorecord).

But:

> Wonder & Wright, *If You Really Love Me,* in 3 THE GREATEST 64 MOTOWN ORIGINAL HITS 2, track 4 (n.d.) (phonorecord).

### 17A.4 The Hear Signal

In citing phonograph records, replace the signal "see" with "hear", "see also" with "hear also", "but see" with "but hear", and "see generally" with "hear generally" (rule 2.3). When more than one signal is used in a string citation, signals containing the word "hear" should appear immediately after the corresponding "see" signal. Thus:

> *See* T. WOLFE, YOU CAN'T GO HOME AGAIN (1940). *But hear* SIMON & GARFUNKEL, *Homeward Bound,* in PARSLEY, SAGE, ROSEMARY & THYME 1, track 4 (1966) (phonorecord); *hear generally* Ten Years After, *Goin' Home,* in WOODSTOCK (1971) (phonorecord).

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## Case Note

American legal scholarship suffered a devastating blow in the mid-1930's with the abolition of the Case Notes from the major law reviews. These Notes distilled into two (or on rare occasions three) tightly packed paragraphs the facts and holding of a contemporary decision, together with a terse evaluation of its "correctness" as examined against the immutable fabric of the common law. The Note of the pre-Realist days is more like the comments of a professor on a court's examination blue-book than the lengthy rationalizations, predictions, and exhortations of the modern legal observer. The dogmatism and confidence of the Case Note, encountered in an age of relativism and nihilism, are nothing short of refreshing; wherefore we include as an occasional feature of the Journal specimens of these judicial report cards, these forgotten stanzas of the lost Langdellian idyll.

--The Editorial Board

PERSONALTY--LARCENY--TITLE--TWO JUSTICES INTIMATE THAT A THIEF BECOMES OWNER OF STOLEN CHATTEL.--Robert Rivera was indicted and convicted of receiving stolen property. Two weeks after his conviction, a second indictment was returned, charging Rivera with, inter alia, aggravated robbery; both indictments were "based upon the same theft" on August 13, 1980 of money and a motorcycle owned by Francis J. Kelly. Rivera moved to dismiss the second bill on the basis of the double jeopardy clause, U.S. CONST. amend. V, as applied to the states. The Ohio trial and appellate courts refused to dismiss the indictment, whereupon Rivera petitioned the United States Supreme Court for a writ of certiorari. Held, the petition is denied. Mr. Justice Brennan's dissent to the denial, which Mr. Justice Marshall joined, is nonetheless of great interest to students of the law of personal

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property. The bulk of the dissent concerns Justice Brennan's interpretation of the "same offense" requirement in double jeopardy jurisprudence, compare North Carolina v. Pearce, 395 U.S. 711, 717 (1969) with Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring), and is here irrelevant. The critical language occurs in Justice Brennan's statement of the facts: "Petitioner was arrested on August 13, 1980, after one Francis J. Kelly reported that petitioner had taken his motorcycle from him at knife point earlier that day, along with title to the motorcycle and some cash." Rivera v. Ohio, 103 S. Ct. 271, 272 (1982) (Brennan, J., dissenting from denial of certiorari) (emphasis supplied).

The interpretation of the consequences of theft upon title embodied in this statement of facts is clearly contrary to venerated and established principles of the law of personalty. Few tenets of the law are cherished more dearly than the proposition that a thief takes, and in general may pass, no title in the stolen property. See R.A. BROWN, LAW OF PERSONAL PROPERTY § 67 (2d ed. 1955); see also 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 354 (1923); 2 W. BLACKSTONE, COMMENTARIES *449 (English common law heritage). The state courts consistently so hold, see 63 AM. JUR. 2D Property § 46; cf. U.C.C. § 2-403; the federal courts honor this position, see, e.g., Dennis v. United States, 372 F. Supp. 563, 567 (E.D. Va. 1974) (construing Virginia law). Most important, the Supreme Court itself has expressly held that title may not be taken from the owner of personal property except voluntarily and according to law. See The Idaho, 93 U.S. 575, 583 (1876) (general common law) ("the title of the true owner of personalty cannot be impaired by the unauthorized acts of one not the owner"); cf. Stoddard v. Chambers, 43 U.S. (2 How.) 284, 318 (1844) (real property context) ("[n]o title can be held valid which has been acquired against law"). The revelation that two Justices of the Supreme Court apparently think otherwise may indicate a new and ugly trend in Anglo-American legal thought, a trend with unconscionable implications for the incentives for thievery and profound consequences for the future of private property.

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11. Crump v. Hill, 104 F.2d 36, 38 (5th Cir. 1939), quoted in Griggs v. Provident Consumer Discount Co., 51 U.S.L.W. 3413, 3415 (U.S. Nov. 29, 1982) (Marshall, J., dissenting).
12. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 152 (S.D.N.Y. 1924) (B.L. Hand, J.) (quoting "Hough, J., dissentiente" in Jewelers' Circular Publihing Co. v. Keystone Publishing Co., 281 F. 83, 95 (2d Cir. 1922).