The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future from The Roberts Court to Learned Hand -- Segmentation, Audience, and the Opportunity of Justice Sotomayor

Jeffrey A. Van Detta
Sister Linda Bevilacqua, OP, Ph.D., President

SCHOOL OF LAW

FACULTY

Leticia M. Diaz, B.S., M.S., J.D., Ph.D.

Frank Louis Schiavo, B.S., J.D., LL.M.

Helia Garrido Hull, B.A., J.D.

Glen-Peter Ahlers, B.U.S., M.L.S., J.D.

Leonard E. Birdsong, B.A., J.D.

Kate Aschenbrenner, B.A., J.D., LL.M.

Susan Bendlin, B.A., J.D.

Megan Bittakis, B.A., J.D.

Linda E. Coco, B.A., J.D., Ph.D.

Terri R. Day, B.A., M.S.S.A., J.D., LL.M.

Barry Hart Dubner, B.A., J.D., LL.M., LL.M., J.S.D.

Joseph W. DuRocher, B.S., J.D.

Marc Edelman, B.S., M.A., J.D.

Mitchell J. Frank, B.A., J.D.

Marsha B. Freeman, B.A., M.S.L.S., J.D.

Gerard F. Glynn, B.A., M.S., J.D., LL.M.

Enrique Guerra-Pujol, B.A., J.D.

Frederick B. Jonassen, B.A., J.D., Ph.D.

Lisa Kirscht, B.S., J.D.

Heather McDonald Kolinsky, B.A., J.D.

Judith E. Koons, B.A., M.T.S., J.D.


Joanna Sochia Markman, B.S., J.D.

Elizabeth B. Megale, B.B.A., J.D.

Eang Ngov, B.A., J.D.

Daniel O'Gorman, B.A., J.D.

Carlo A. Pedrioli, B.A., M.A., J.D., Ph.D.

Marvin Rooks, B.A., J.D.

Lee Dexter Schinasi, B.S., J.D.

Sister Patricia Siemen, OP, B.A., Masters in Public Affairs, M.A., J.D.

Taylor Simpson-Wood, B.F.A., J.D., LL.M.

Mark A. Summers, B.A., J.D., LL.M.

Stanley M. Talcott, B.S., J.D.

Patrick E. Tolan, Jr., B.S.E.E., J.D., LL.M.

Robert H. Whorf, B.A., J.D.

Ruth A. Witherspoon, B.A., J.D., LL.M.

Jeanne Zokovitch Paben, B.A., M.S., J.D.
# BARRY LAW REVIEW

## TABLE OF CONTENTS

### ARTICLES

The Fair Labor Standards Act
   Exemptions and the Pharmaceuticals Industry:
   Are Sales Representatives Entitled to Overtime? ....................... Steven I. Locke 1

The Decline and Fall of the American Judicial Opinion,
   Part II: Back to the Future from the Roberts Court to Learned Hand –
   Segmentation, Audience, and the
   Opportunity of Justice Sotomayor............................................ Jeffrey A. Van Detta 29

When the School Bully Attacks in the Living Room:
   Using Tinker to Regulate Off-Campus
   Student Cyberbullying.............................................................. Karly Zande 103

Goodbye Forfeiture, Hello Waiver:
   The Effect of Giles v. California................................................. Monica J. Smith 137

Solutions for Disputes over Intellectual Property
   Between Taiwan and China –
   Analyzing Arbitration......................................................... Szu-Chou Peng and Fu-Jung Wu 155

On the Evolution of the Law of International Sea Piracy:
   How Property Trumped Human Rights, the Environment
   and the Sovereign Rights of States in the Areas of the
   Creation and Enforcement of Jurisdiction .. Leticia M. Diaz and Barry Hart Dubner 175
FOREWORD

In this day and age of instant information, tweeting, and instant communication, it seems people believe the answer to any problem is a few clicks away. This increased freedom of information can lead people to believe the answer to complex legal questions is simply a Google search. To whatever extent this may be true, I nevertheless believe that now more than ever it is important to celebrate the acts of scholarship that allow the world to function at its breakneck speed. To paraphrase Henry David Thoreau, “The law will never make people free, it is people that must make the law free.” As attorneys it is vitally important to remember that we do not simply observe and declare the law, we model and shape it, hopefully into something that is better than what we initially encountered.

With these thoughts in mind, I proudly present this general volume of the Barry Law Review. The articles we have gathered truly demonstrate the underlying spirit of scholarship. By analyzing and questioning the current state of the law, our authors are attempting to ensure that we continue to keep the law free.

Steven Locke leads this volume off with a look an issue currently being debated at the highest level of our society, the nature and extent of employee compensation. Mr. Locke’s article focuses on the nature of compensation for sale representatives in the pharmaceutical industry and recent court opinions regarding whether these highly compensated individuals should be granted overtime. The next article is part two of Professor Van Detta’s thorough analysis of judicial opinion writing that first appeared in volume twelve of the Barry Law Review. Professor Van Detta concludes his analysis on the nature of judicial opinion writing by discussing the possible influence Justice Sotomayor may have on the Court. Changing gears to an emerging field of law, Karly Zande writes about an issue facing our children today; the use of the internet to bully one another outside of school. In her article, Karly Zande outlines a possible judicial solution to compensate for this new wave of “cyberbullying.” We then move onto more practical matters in Monica Smith’s analysis of Giles v. California and the effect intent has on forfeiture by wrongdoing and the right to confront witnesses. Then we leave the bounds of our jurisprudence for two excellent articles on international issues. Our first is an analysis of the arbitration law of China by our two international authors, Szu-Chou Peng and Fu-Jung Wu. Finally, we close with an article authored by Dean Leticia Diaz and Professor Barry Dubner of the Barry University School of Law exploring one of the most pressing issues in international jurisprudence, the evolution and escalation of piracy in international waters.

As always, this volume of the Law Review would not be possible without the support of our entire Barry faculty and community. Our Barry Law professors continue to inspire academic excellence in our students both inside and outside of the classroom. The administration and extended Barry community continue to
remind us of the importance of a strong, positive legal education in helping to keep
the law free. Finally, my personal thanks go to the entire staff of the Law Review.

Dean Leticia M. Diaz, J.D., Ph.D
Barry University
Dwayne O. Andreas School of Law
THE FAIR LABOR STANDARDS ACT EXEMPTIONS AND THE PHARMACEUTICALS INDUSTRY: ARE SALES REPRESENTATIVES ENTITLED TO OVERTIME?

Steven I. Locke

INTRODUCTION

The pharmaceuticals industry is enormous. More than three billion prescriptions are written each year for approximately 8,000 products. According to 2004 statistics, these prescriptions were filled by 54,000 retail pharmacies, and sales totaled $168 billion. Some more recent estimates put global sales totals in excess of $820 billion. Although drug companies engage in direct advertising, the bulk of promotions are aimed directly at doctors and other medical prescribers. Reported amounts on this type of promotional spending vary, with the yearly range being between four and fourteen billion dollars. This type of activity is done through face-to-face advocacy by sales representatives who visit doctors’ offices and hospitals in order to meet with prescribing health care professionals. The average primary care physician interacts with no less than twenty-eight sales representatives each week, and the average specialist interacts with fourteen.

According to the Bureau of Labor Statistics, in 2006, the pharmaceutical industry employed 292,000 workers across the country. Of this number, it has been

1. Steven I. Locke is a founding partner of Carabba Locke LLP and practices extensively in the areas of labor and employment law.
3. Id.
5. IMS Health, 550 F.3d at 46.
6. Id.
7. See, e.g., IMS Health, 550 F.3d at 70 n.17 (concurring and dissenting opinion) (collecting references Susan Okie, AMA Criticized for Letting Drug Firms Pay for Ethics Campaign, WASH. POST, Aug. 30, 2001 at A3 (the industry spent about $4 billion in 2000); Memorandum from Rep. Harry Waxman, to the Democratic Members of the Committee on Government Reform, The Marketing of Vioxx to Physicians, at 6 n.15 (May 5, 2005) (the $5.7 billion in 2003); Trends and Indicators, supra note 2, at 22 ($7.8 billion in 2004); Sheryl Gay Stolberg & Jeff Gerth, High-Tech Stealth Being Used to Sway Doctors Prescriptions, N.Y. TIMES, Nov. 16, 2000 at A1 ($13.9 billion in 1999).
8. Id. at 47; Consumers Union, Prescription for Change, http://www.consumersunion.org/pdf/drugreps.pdf.
estimated that as many as 100,000 serve as sales representatives. Employers prefer to give these sales representative positions and other related jobs to college graduates, particularly those with science backgrounds, and most new sales representatives must complete “rigorous formal training programs” involving their employer’s products. Recent yearly salary estimates for sales representatives vary with some surveys indicating a range between $85,000 and $110,000. Overall compensation, however, can increase dramatically depending on whether sales quotas for the sales representatives are met or exceeded.

Presently, and as explained in detail below, a battle is raging in the courts as to whether these highly compensated sales representatives are entitled to overtime pay under the Fair Labor Standards Act (“FLSA” or the “Act”), or whether they are excluded from such an entitlement under one or more of the Act’s “exemptions.” As these cases are winding their way through the United States District Courts and appeals are starting to be taken, this article conducts a review of the courts’ various conflicting positions and charts a course for addressing the issue before the Courts of Appeals and ultimately the Supreme Court.

THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act was enacted by Congress in 1938 to correct and eliminate labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” The cornerstone of the Act was to provide minimum wages and overtime pay for covered workers. According to these requirements, covered employees


11. See, e.g., Trends and Indicators, supra note 2.


13. See, e.g., Clint Cora, Starting Salary and Income Ranges for Pharmaceutical Drug Sales Representatives (June 6, 2007), http://www.yoursdaily.com/layout/set/print/money/starting_salary_and_income_ranges_for_pharmaceutical_drug_sales_representatives. Accord Mack, supra note 10 (average total compensation in 2007 for pharmaceutical sales representatives was $94,200 which would be higher than the average salary).


are entitled to a minimum hourly wage for each hour worked and at least one and one-half times an employee’s regular wage rate for hours worked over forty in a given workweek. According to the Department of Labor, the minimum wage and overtime pay requirements are “among the nation’s most important worker protections.”

The FLSA also contains various exemptions from the overtime requirement for, among others, executive, professional, and administrative workers, and outside salespersons. These “exemptions” cover millions of workers. As a matter of law, these exemptions are to be narrowly construed against the employer seeking to assert them and will be limited to those workers “plainly and unmistakably” within the exemptions’ “terms and spirit.” The burden of invoking these exemptions rests with the employer. According to the Department of Labor:

The legislative history [of the Fair Labor Standards Act] indicates that [the Act’s] exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not easily be spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.

Of particular relevance to overtime claims brought by pharmaceutical sales representatives are the exemptions for outside salespersons and administrative employees.

---

17. See 29 U.S.C. § 206 (providing that presently the minimum hourly wage is $7.25 under the FLSA).
18. 29 U.S.C. § 207.
23. Bilyou, 300 F.3d at 222.
25. Compare Ruggeri v. Boehringer Ingelheim Pharms., Inc., 585 F. Supp. 2d 254 (D. Conn. 2008) (finding sales representatives to be non-exempt and therefore covered by the FLSA’s overtime provisions) with In re Novartis Wage & Hour Litig., 593 F. Supp. 2d 637 (S.D.N.Y. 2009) (concluding that sales representatives are exempt from the FLSA’s overtime provisions both as outside salesmen and administrative employees).
OUTSIDE SALESMAN EXEMPTION

Employers are granted an exemption from the FLSA’s overtime requirements for outside salespersons as that term is defined by the Department of Labor’s regulations.\textsuperscript{26} Because the FLSA grants the Secretary of Labor the broad authority to define and delimit the exemptions to the statute’s overtime requirements, the regulations have the force of law and will be controlling unless found to be arbitrary, capricious, or manifestly contrary to the statute.\textsuperscript{27} The Department of Labor also promulgates regulations setting forth the Secretary’s position on how the regulations should be applied. These interpretations, although lacking the force of law, may be relied upon for guidance by courts and litigants.\textsuperscript{28}

The purpose of the outside sales exemption was explained by the United States Court of Appeals for the Tenth Circuit sixty years ago in \textit{Jewel Tea Co. v. Williams}:

[The] salesman, to a great extent, work[s] individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer’s place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.\textsuperscript{29}

The standard for whether an employee is exempt as an outside salesman is whether an employee’s:

(1) primary duty is:

(i) making sales as that term is defined in section 3(k) of the Act or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and


\textsuperscript{27} Freeman v. NBC, Inc., 80 F.3d 78, 82 (2d Cir. 1996).

\textsuperscript{28} Skidmore v. Swift & Co., 323 U.S. 134 (1944). \textit{See also} Roth v. Perseus, LLC, 522 F.3d 242, 247-48 (2d Cir. 2008) (stating that interpretations of regulations are given deference unless plainly erroneous or inconsistent with statutes or regulations).

\textsuperscript{29} Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941).
(2) who is customarily and regularly engaged away from the employer’s place of business in performing the primary duty.\(^{30}\)

The Act defines a “sale” to include “any sale, exchange, contract to sell, consignment for sale, or other disposition.”\(^{31}\) The related regulations include in this definition the “transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.”\(^{32}\)

The regulations also distinguish between promotional and sales work.\(^{33}\) Promotional work actually performed incidental to, and in conjunction with, an employee’s own outside sales or solicitations is exempt.\(^{34}\) Promotional work that is incidental to sales made, or to be made, by someone else, however, is not exempt.\(^{35}\) Examples of promotional work incidental to sales include a manufacturer’s representative who visits a customer’s shop for the purpose of putting up displays and posters, removing damaged or spoiled stock from the merchant’s shelves, or rearranging the merchandise.\(^{36}\) By way of illustration, in 1999 the Department of Labor issued an opinion letter concluding that college recruitment counselors are not exempt as outside salespersons because they do not make sales of a college’s services, or obtain contracts for those services.\(^{37}\) This is because such work involves identifying customers, which in this scenario refers to students, which may lead to an application. This is because such work involves identifying customers, which in this scenario may lead to an application.\(^{38}\)

If the employee at issue makes at least some sales or obtains some orders or contracts, then the outside sales exemption may apply, provided that such work constitutes the employee’s primary duty.\(^{39}\) The primary duty is the “principal, main, major or most important duty that the employee performs.”\(^{40}\) The determination is made based on all the facts of a case with emphasis on the character of the job as a whole,\(^{41}\) although the time spent performing exempt work is a relevant guide.\(^{42}\) Relevant factors include whether the job was advertised as a sales job, whether the employees were referred to as salespeople, whether they were provided with sales training, whether the employees received commissions, and whether

\(^{30}\) 29 C.F.R. § 541.500(a) (2004).


\(^{32}\) 29 C.F.R. § 541.501(b) (2004).

\(^{33}\) 29 C.F.R. § 541.503(a) (2004).

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) 29 C.F.R. § 541.503(b).


\(^{38}\) Id.

\(^{39}\) The Department of Labor has stated that it would be improper to extend the outside sales exemption to someone who does not “in some sense make a sale.” Dep’t of Labor, Wage & Hour Public Contracts Div., Report and Recommendation of the Presiding Officer on Proposed Revisions of Regulations (Oct. 10, 1940) at 46. See also Final Rule, supra note 19, at 22162 (the exemption should apply only where the employee “in some sense, has made sales”).

\(^{40}\) 29 C.F.R. § 541.700(a).

\(^{41}\) Id.

\(^{42}\) 29 C.F.R. § 541.700(b).
they operated independently. All work that is “incidental to and in conjunction with the employee’s own outside sales or solicitations” and all work that furthers the employee’s sales efforts must also be considered exempt outside sales. Initially, the inquiry focuses on whether the employee’s primary duty is to make actual sales.

**ADMINISTRATIVE EMPLOYEES**

Also relevant to the pharmaceutical sales representatives’ claims for overtime is whether these employees qualify as administrative employees and are therefore exempt. The FLSA exempts from coverage “any employee employed in a bona fide . . . administrative . . . capacity.” To qualify, the employee must earn more than $455 per week and his or her primary duties must include: (1) non-manual work directly related to the management or general business operations of the employer or the employer’s customers, and (2) the exercise of “discretion and independent judgment” with respect to “matters of significance.” With respect to the first prong of the test, the work must be “directly” related to management or general business operations. Work that is only indirectly or tangentially related to administrative functions will not be considered exempt. The inquiry has two parts which consider both the type of work at issue and the level or nature of that work.

In order to satisfy the first prong of the test, the employee has to “perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail service establishment.” Advisory language from the Department of Labor in 2004 recognizes:

As explained in the 1949 Weiss Report, the administrative operations of the business include the work of employees “servicing” the business, such as, for example, “advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” As the current regulations state at section 541.205(c), exempt administrative work

---

44. 29 C.F.R. § 541.500(b).
45. Ackerman v. Coca-Cola Enters., Inc., 179 F.3d 1260, 1265 (10th Cir. 1999).
47. 29 C.F.R. § 541.200(a).
49. Id.
50. Final Rule, supra note 19, at 22144.
51. 29 C.F.R. § 541.201(a).
includes not only those who participate in the formulation of management policies or in the operation of the business as a whole, but it “also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though those assignments are tasks related to the operation of a particular segment of the business.”

The exemption covers a wide variety of workers who carry out major assignments in operating the business or those whose work affects operations to a substantial degree. The Department of Labor has characterized such work as including:

- but not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The administrative/production distinction, however, is only one tool for determining the applicability of the exemption and will be dispositive only where the work involved “falls squarely on the production side of the line.” The inquiry is fact specific and requires analysis of statutory and regulatory frameworks as a whole.

With respect to the second prong of the test, the Department of Labor defines the exercise of discretion and independent judgment as the “comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” Here, the term “matters of significance” addresses the level of importance of the work at issue or the consequence of

---

52. Final Rule, supra note 19, at 22138.
53. Id.
54. 29 C.F.R. § 541.201(b).
55. Final Rule, supra note 19, at 22141 (“We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption”). See Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1127 (9th Cir. 2002) (quoted in Department of Labor position). That being said, some courts have nevertheless used the administrative/production dichotomy as a determinative factor in their analysis. See, e.g., Reich v. John Alden Life Ins. Co., 126 F.3d 1, 9 (1st Cir. 1997) (insurance marketers employed by company producing and marketing insurance policies were engaged in administrative work because they “are no way involved in the design or generation of insurance policies, the very product that the enterprise exists to produce and market”); Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 903 (3d Cir. 1991) (sales employees working for electrical parts wholesaler were engaged in production work because employer’s business purpose was to produce sales of electrical products, the work that the employees did).
56. Phase Metrics, 299 F.3d at 1127; Webster v. Pub. Sch. Employees of Wash., Inc., 247 F.3d 910, 916 (9th Cir. 2001).
57. 29 C.F.R. § 541.202(a).
The Department of Labor’s non-exclusive list of factors to consider includes whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects the business operations to a substantial degree, even if the employee’s assignments are related to the operation of a particular segment of the business;
- has authority to commit the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management; and/or
- represents the company in handling complaints, arbitrating disputes or resolving grievances.

The list includes those activities “clearly related to servicing the business itself” and without which the employer “could not function.” This list does not include activities centering on what the business at issue specifically sells or provides. Rather, these are tasks that every business must engage in to function. This requirement is met when the employee engages in running the business itself or determining its overall course or policies as opposed to the day-to-day carrying out of affairs.

When two or three of these factors are met, the courts will generally find that the employee at issue is exercising discretion and independent judgment sufficient

---

58. *Id.*  
59. 29 C.F.R. § 541.202(b).  
61. *Id.*  
62. *Phase Metrics*, 299 F.3d at 1125.
to invoke the exemption. When considering this test, it is important to note that use of well-established techniques, procedures, and specific standards in manuals or other sources will not qualify to satisfy the second prong of the test. The employee must have the authority to make an independent choice without immediate direction or supervision.

This requirement may be satisfied even if there is review at a higher level. Accordingly, the exercise of independent judgment does not require that the decisions the employee makes have the type of finality that goes with unlimited authority and absence of review. The authority may consist of making recommendations for action rather than actually taking action.

The Department of Labor also recognizes that many employees in the same business may qualify for this exemption. It is up to the employer to establish that this test has been satisfied in order for the exemption to apply.

It should be noted that in 1945, the Department of Labor issued an Opinion Letter concluding that “medical detailists” employed by pharmaceutical companies are exempt from overtime coverage as administrative employees. The work involved increasing the “use of subject’s product in hospitals and through physicians’ recommendations.” According to the Department, this work required a “high degree of technical knowledge.” The detailists’ duties were to:

- train personnel, make special surveys and reports, and in general maintain the company’s relations with the medical and associated professions. They are consulted with respect to individual nutri-

---

63. Final Rule, supra note 19, at 22143 (citing Bondy v. City of Dallas, 77 Fed. Appx. 731 (5th Cir. 2003)) (making recommendations to management on policies and procedures); McAllister v. Transamerica Occidental Life Ins. Co., 325 F.3d 997, 1000-02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval and authority to waive or deviate from established policies and procedures without approval); Cowart v. Ingalls Shipbuilding, Inc., 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer’s customers); Haywood v. N. Am. Van Lines, Inc., 121 F.3d 1066, 1071-73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority and independent investigation and resolution of issues without prior approval); O’Neill-Marino v. Omni Hotels Mgmt. Corp., 2001 WL 210360 *8-9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority and developing guidebooks, manuals, and other policies and procedures for employer or the employer’s customers); Haywood v. N. Am. Van Lines, Inc., 121 F.3d 1066, 1071-73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority and independent investigation and resolution of issues without prior approval); O’Neill-Marino v. Omni Hotels Mgmt. Corp., 2001 WL 210360 *8-9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority and developing guidebooks, manuals, and other policies and procedures for employer or the employer’s customers); Stricker v. E. Off-Rd. Equip., Inc., 935 F. Supp. 650, 656-59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); Reich v. Haemonetics Corp., 907 F. Supp. 512, 517-18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority and authority to commit employer in matters that have financial impact); Hippen v. First Nat’l Bank, 1992 WL 73554

64. 29 C.F.R. § 541.202(c).
65. 29 C.F.R. § 541.202(e).
66. Id.
67. Id.
68. Id. For a summary of these requirements, see Employment Standards Administration, Wage and Hour Division, U.S. Dep’t of Labor, Fact Sheet #17F: Exempt Outside Sales Employees Under Fair Labor Standards Act (FLSA) (Rev. July 2008).
69. 29 C.F.R. § 541.202(d).
70. Final Rule, supra note 19, at 22144.
71. See Applicability of Exemption for Administrative Employees to Medical Detailists, 1943-48 WAGES-HOURS LAB. L. REP. (CCH) ¶ 33,993 (May 19, 1945).
72. Id.
73. Id.
tional problems encountered by hospitals and physicians, such as determining whether the use of subject’s product in a hospital was related to the occurrence of an epidemic. When necessary, they arrange for added deliveries of subject’s product to take care of emergencies. They instruct the firm’s salesmen in such technical matters as disease prevention, the chemical components of their product and nutritional research. They work virtually without supervision. . . .

Based on these responsibilities, the Department of Labor concluded that the medical detailists were involved in matters related to general business operations requiring the use of discretion and independent judgment informed by special training and experience. Accordingly, medical detailists were exempt from the Act’s overtime requirements.

**THE OVERTIME ANALYSIS AND PHARMACEUTICAL SALES REPRESENTATIVES**

Court analysis of whether pharmaceutical sales representatives are entitled to overtime pay under the FLSA begins with a cluster of court decisions issued by the federal district court in the Central District of California addressing whether the sales representatives are exempt from overtime requirements under the California Labor Law’s exemption for outside sales representatives. The facts underlying the cases are similar.

In *Barnick v. Wyeth*, the plaintiff was hired into Wyeth’s sales staff. His essential job function was to “effect sales by educating and guiding health care professionals in their purchase and prescription of Wyeth products and by promoting treatment practices that are consistent with approved indications.” This central job duty is consistent across the industry.

---

74. *Id.*
76. *Id.*
79. *Id.*
80. *See, e.g.*, Menes, 2008 U.S. Dist. LEXIS 4230, at *3 (The Sales Representative’s job is “to inform medical personnel about Defendant’s drugs in the hope that they will prescribe Roche products to their patients.”); *D’Este*, 2007 U.S. Dist. LEXIS 87229, at *1 (“[P]harmaceutical representatives. . . are responsible for promoting and selling Bayer’s prescription pharmaceutical products to medical care providers, including primary care physicians, specialists, and hospitals.”). *See also* Amendola, 558 F. Supp. 2d at 463-64 (“PRs are required to be in the field visiting medical providers from 8 a.m. to 5 p.m., and spend time in the evenings preparing for these visits. The goal of the visits is to influence the prescription practices of the providers.”); *In re Novartis*, 593 F. Supp. 2d at 641 (“The primary function of the Reps is calling on physicians and giving them information about NPC’s drugs.”); *Ruggeri*, 585 F. Supp. 2d at 258 (“Plaintiffs’ job duty was, centrally, to visit physicians and pharmacies
Barnick’s responsibilities included calling physicians pre-assigned to a specific list to discuss Wyeth’s pharmaceutical products, in this case two vaccines, Prevnar and FluMist, and two drugs, Altace and Protonix.\(^{81}\) He spent, on average, between forty-five and forty-eight hours each week in the field and had a specific number of doctors he needed to see within a specified time period and a daily quota of calls to make.\(^{82}\) Although his hours were not controlled, and he was rarely subject to direct supervision, the plaintiff was expected to work from 8:30 am to 5:00 pm and to log physician calls daily, file various reports, check his voicemail three times each day, and synchronize his computer once each day.\(^{83}\)

Barnick did not, however, sell products directly to physicians.\(^{84}\) Occasionally, he provided order forms for vaccines, and sometimes he filled them out.\(^{85}\) The doctors would then order the vaccines from Wyeth and prescribe and administer the vaccines to patients, or prescribe drugs which would then be ordered through a pharmacy.\(^{86}\)

The plaintiff referred to himself as a “salesperson” and was trained in sales techniques at numerous conferences throughout his employment where managers discussed sales data and sales strategies.\(^{87}\) He was paid a yearly salary and received additional compensation tied into the sales he assisted in generating.\(^{88}\) Further, half of Barnick’s evaluation was based on meeting sales objectives for Wyeth’s products.\(^{89}\) The facts in this case are similar to those in \textit{D’Este v. Bayer Corporation}\(^{90}\) and \textit{Menes v. Roche Laboratories}, both of which, as set forth above, were decided in the same judicial district.\(^{91}\)

The plaintiffs in each case filed suit claiming, among other things, that they were never paid overtime under California’s Labor Code.\(^{92}\) Like the FLSA, the California Labor Code and the state Industrial Welfare Commission (“IWC”) provide that outside salespersons are exempt from the state’s overtime requirements.\(^{93}\) According to the IWC, an outside salesperson is “any person, 18 years or over, who customarily and regularly works more than half the working time away from the employer’s place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.”\(^{94}\) The California

\(^{81}\) Barnick, 522 F. Supp. 2d at 1258.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Id.; \textit{In re Novartis}, 593 F. Supp. 2d at 642 (In fact, the sales representatives are prohibited from selling drugs directly to physicians.).
\(^{85}\) Barnick, 522 F. Supp. 2d at 1258-59.
\(^{86}\) Id. at 1259.
\(^{87}\) Id.
\(^{88}\) Id.
\(^{89}\) Id.
\(^{90}\) \textit{D’Este}, 2007 U.S. Dist. LEXIS 87229, at *1-3 (setting forth allegations).
\(^{93}\) CAL. LAB. CODE \S 1171; IWC Wage Order No. 4-2001(1)(C), CAL. CODE REGS. tit. 8, \S 11070 (2009).
analysis is quantitative and focuses on whether the employee spends more than fifty percent of his or her time in sales activities. In Barnick, the court reasoned that the California exemption is similar to the FLSA exemption in that exempt outside salespersons under both statutes are those generally able to set their own schedules and are generally on the road, without the employer knowing what they are doing on an hourly basis. As a result, it is difficult to control their hours or working conditions.

Recognizing case law under the FLSA as persuasive authority, and applying the factors collected from other FLSA cases, the court concluded that the plaintiff-pharmaceutical sales representative was exempt from California state overtime requirements as an outside salesperson because he was hired on the basis of his sales experience, to a position which both sides referred to as a sales position, he received specialized sales training at sales conferences, his pay was determined in part by the sales he generated, he had virtually no direct or constant supervision, and he occasionally solicited business. Further, the plaintiff, although subject to quotas and assigned to a pre-determined list of physicians, was free to decide which physician to see and when. Accordingly, the court determined summary judgment for the defendant was appropriate.

In reaching this conclusion, the court found “unpersuasive” that the sales representative dealt with physicians rather than the end purchasers of the drugs being sold. According to the court, because the doctors “control” the product’s ultimate purchase through their prescriptions, to conclude that the sales representatives are exempt would elevate the form of the salespersons’ work over its substance. The court further concluded that while the Department of Labor’s interpretation of the FLSA distinguishes between promotional and sales work based on whether the employee obtained some type of commitment for sales, this reasoning was unpersuasive, and so the court declined to apply it under the California Labor Law. Moreover, the fact that the employee’s work did not immediately result in some sort of commitment to buy was of no moment, especially where there was no other employee who reached out to confirm the sale. Rather, this distinction better rested on whether the employees’ efforts were addressed to the general public ra-

97. Id.
100. Id. at 1263.
101. Id. at 1265.
102. Id. at 1264.
104. Id.
105. Id. at 1265
ther than an individual. The \textit{D'Este} and \textit{Menes} courts reached the same conclusion applying similar reasoning.

In the \textit{D'Este} case, the litigants also presented the issue as to whether the sales representatives qualified as administrative employees, and were, therefore, exempt from the state overtime requirements under an alternative theory. Because the district court found that the employees were outside salespersons, however, the issue was never decided.

On May 5, 2009, the United States Court of Appeals for the Ninth Circuit in the \textit{D'Este} case, which was consolidated with \textit{Menes} and \textit{Barnick} for the purposes of appeal, certified two questions to the Supreme Court of California:

1. [Under the Industrial Welfare Commission’s Wage Orders] does a pharmaceutical sales representative (PSR) qualify as an “outside salesperson” under [the] definition [above], “if the PSR spends more than half the working time away from the employer’s place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors’ prescriptions of specific drugs?”

2. “In the alternative, Wage Order 4-2001 defines a person employed in an administrative capacity as a person whose duties and responsibilities involve (among other things) ‘[t]he performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer’s customers’ and ‘[w]ho customarily and regularly exercises discretion and independent judgment.’ . . . Is a PSR, as described above, involved in duties and responsibilities that meet these requirements?”

In certifying Question 1, the Court of Appeals expressly noted that while interpretation of the FLSA may be relevant to the analysis of the IWC’s interpretation of the outside sales exemption, any assistance in this regard “may be limited” because the IWC’s exemption language does not closely track the language of the analogous federal regulations. In certifying Question 2, the appellate court recognized that the administrative employee exemption under California law is to be treated in the same manner as the FLSA regulations.

106. \textit{Id.}
107. \textit{D'Este}, 2007 U.S. Dist. LEXIS 87229, at *13-16 (also relying on cases decided under the FLSA as persuasive authority); \textit{Menes}, 2008 U.S. Dist. LEXIS 4230, at *3-7 (adding as a factor that the plaintiff in that case could identify and solicit physicians on her own).
109. \textit{Id.}
110. \textit{D’Este v. Bayer Corp.}, 565 F.3d 1119, 1120-21 (9th Cir. 2009).
111. \textit{Id.} at 1124 (citing \textit{Ramirez}, 978 P.2d at 9-10).
112. \textit{Id.} at 1125 (citing CAL. CODE REGS. tit. 8 § 11040).
In the interim, while these cases are working their way through the appellate process, the California district court decisions have received mixed reviews in subsequent cases. In *In re Novartis Wage and Hour Litigation*, Judge Crotty in the federal district court for the Southern District of New York came to a similar conclusion on summary judgment when considering claims brought under the FLSA, California Labor Law and New York wage and hour law. Initially, the *Novartis* court decided the issue under the FLSA and New York law without reference to the California decisions despite the fact that those decisions relied on an FLSA analysis. Here, the central issue was framed as whether the sales representatives were exempt because they actually executed “sales” within the meaning of the Act, or instead, engaged merely in non-exempt promotional activities. This analysis is different than that applied by the California cases which focused more on other indicia, such as job title, past sales experience necessary to obtain the job, the nature of the job training, and whether compensation was on a commission basis.

In answering this question in the affirmative, the New York district court first acknowledged the policy animating the outside sales exemption as explained by the Tenth Circuit:

*Jewel Tea* teaches that outside salespersons are exempt from the overtime requirement not because they “sell,” as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an-hours based compensation scheme impractical. The *Jewel Tea* rationale is echoed in the DOL’s 2004 Final Rule, which notes that the “white collar” exemptions owe their existence to the fact that the employees they were meant to cover “typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement. . . . The DOL Final Rule also recognizes that the work done by these employees “was difficult to standardize to any time frame . . . making compliance with the overtime provisions difficult.”

Applying this policy, the court then began its inquiry into whether the plaintiffs were actually engaged in sales. In starting its analysis, the court recognized that any review required examination of the industry at issue. In particular, the court

114. Id. at 648, 651.
115. See supra notes 98-101 and accompanying text.
117. Id.
118. Id. (citing *Nielsen*, 302 F. Supp. 2d at 755-56 (addressing the exemption in the context of the college admissions process); *Gregory v. First Title or Amer., Inc.*, No. 06-Civ.-1746, 2008 WL 150487 (M.D. Fla. Jan. 14, 2008) (addressing the exemption in the context of the title insurance industry where the plaintiff could not sell the insurance herself was nevertheless exempt because she “obtained orders”), aff’d, 555 F.3d 1300 (11th Cir. 2009)).
drew on a footnote from an earlier Minnesota decision that took place in the context of the medical devices industry, Medtronic, Inc. v. Gibbons.\textsuperscript{119} In Medtronic, an employment contract case, the court noted that pacemakers are ultimately consumed by patients, not doctors or hospitals to which they are sold.\textsuperscript{120} Nevertheless, the sale was based on a physician recommendation, and so sales efforts are focused on doctors and medical personnel.\textsuperscript{121} As a result, the court in Medtronic reasoned that the term “customers” must include not only the hospital that pays for the product, but also the doctors who recommend its purchase.\textsuperscript{122}

Similarly, reasoned the Novartis court, the physicians who prescribe pharmaceuticals are, in reality, the ones who control the purchase of the drugs by writing prescriptions.\textsuperscript{123} Without the prescriptions, no sales can take place.\textsuperscript{124}

Plaintiffs argue that “[Novartis] sells drugs to distributors. Distributors sell drugs to pharmacies. Pharmacies sell drugs to individuals.” . . . In other words, Plaintiffs ask this Court to conclude that the only true sales made by [Novartis] are to distributors. The Court cannot ignore reality. Distributors are not the end-users of [Novartis’s] products. If physicians did not prescribe [Novartis’s] products, patients would be unable to buy them and distributors would have no incentive to make purchases from [Novartis]. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps’ sales efforts. When the physician writes a prescription for the [Novartis] product, then a sale can take place. Without prescriptions, patients cannot buy the drugs and there is no sale.\textsuperscript{125}

The fundamental nature of this relationship is highlighted by the fact that Novartis spends in excess of $500 million annually to have its sales representatives meet with physicians to get them to prescribe company products.\textsuperscript{126}

This reasoning was subsequently endorsed and elaborated upon in the federal district court for the Western District of Pennsylvania in Baum v. Astrazeneca LP.\textsuperscript{127} In that case, which was brought under Pennsylvania state wage and hour law, the court noted that the markets for pharmaceuticals and medical services do not function like typical markets.\textsuperscript{128} This is due, at least in part, to the “profession-

\textsuperscript{120} Id. at 1094 n.3.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} In re Novartis, 593 F. Supp. 2d at 650.
\textsuperscript{124} Id. at 650-51.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 650.
\textsuperscript{128} Id. at 675. Pennsylvania state law contains exemptions from coverage for outside salespeople and administrative employees. See 34 PA. CODE § 231.83 (2009) (administrative employees); PA. CONS. STAT. § 333.105(a)(5) (2009) (outside salesman).
al culture of physicians” who operate under what is sometimes referred to as a “professional paradigm."129 In this situation, regulation and professional ethics substitute for the workings of a free market, with physicians acting as substitute decision makers, rather than sources of education or advice for consumers.130 The physicians’ decisions are made based on unbiased science.131 Because the doctors possess knowledge generally inaccessible to lay-people, they control the decision making.132

This role of doctors as substitute decision-makers emerged concomitant to the belief that patients themselves are incapable of understanding sufficient information to make intelligent medical decisions [footnote omitted]. In other words, the information asymmetry between physician and patient is simply a bridge too far: because only physicians have the extensive required scientific knowledge and training to make informed health care choices, they alone, must make medical decisions, as patients simply could not possibly make wise decisions for themselves. This pure professional paradigm empowers physicians and subordinates individual consumer preference and choice.133

In reaching its conclusion, the Novartis court characterized the plaintiffs’ argument that the sales representatives’ work was non-exempt “promotional” work rather than “sales” work as “simply wrong.”134 This is because the Department of Labor’s distinction between exempt sales work and non-exempt promotional work is invoked only where the promotional work is incidental to sales made by other employees as opposed to themselves, the latter being the situation in the pharmaceutical industry where it is clear from the compensation structure that the sales representatives’ work is to generate sales for themselves.135 This is because their work, namely visiting physicians to generate sales, is tantamount to obtaining a commitment to buy, which the Department of Labor considers exempt.136 Further, the sales representatives have the independence typically associated with outside

129 Id. at 679-80 (“[T]he Court believes that the professional paradigm still accurately describes much of the actual practices of the health services industry.”); Clark C. Havighurst, The Professional Paradigm of Medical Care: Obstacle to Decentralization, 30 JURIMETRICS J. 415, 419-21 (1990).
130 Id. at 678 (citing James F. Blumstein, Healthcare Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation, 79 CORNELL L. REV. 1459, 1466 (1994)).
131 Id. at 679.
132 Id.
133 Id. at 680. This type of thinking was echoed in a more recent article addressing in part why medical savings accounts in which consumers of healthcare, namely the public, would be more frugal because they would bargain with their physicians for services. The article compared this notion in the context of the doctor-patient relationship like relying “in the sheep to negotiate with the wolves.” Atul Gawande, The Cost Conundrum, THE NEW YORKER, June 1, 2009, at 44.
134 In re Novartis, 593 F. Supp. 2d at 651.
135 Id. (citing 29 C.F.R. § 541.503(a)) (“Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sale work.”).
136 Id. at 651-52 (citing Final Rule, supra note 19, at 22162).
salespersons, namely to set the schedule for their work day, to have rare direct supervision, and to work away from the office.\footnote{Id. at 652. There is no doubt that the plaintiffs meet the minimum salary requirement to qualify for the exemption. Id.} For all of these reasons, the Novartis court concluded that the company’s sales representatives were exempt as outside salespersons under the FLSA.\footnote{Id. Interestingly, the Court then turned to the analogous California state overtime claims, and recognized that while the Barnick, Menes, and D’Este decisions may have been erroneous to some degree when considered in light of the California Supreme Court’s decision in Ramirez, 978 P.2d at 5-9, which held that it is inappropriate to rely on the FLSA and interpreting guidance concerning the outside sales exemption when analyzing California state law on the issue because the language used for each exemption is not parallel, Ramirez was distinguishable from the case before the court because there the plaintiff was a deliveryman who also made sales and the inquiry concerned the primary function of his job. Here the issue is whether the plaintiffs were making sales at all. In re Novartis, 593 F. Supp. 2d at 652.}

The inquiry did not end there, however. The court went on to conclude that even in the absence of the outside sales exemption, the plaintiffs were also exempt as administrative employees.\footnote{Id. at 655 (citing Reich v. John Alden Life Ins. Co., 126 F.3d 1 (1st Cir. 1997) (holding that insurance company’s marketing representatives, who were the primary contacts with the agents that sold the policies, were exempt because they were not involved in production work—they did not create the insurance policies being written—rather they were involved in promoting them)).} Initially, if the “administrative/production dichotomy” is applied, the plaintiffs were clearly not production employees because they were not involved in the production of the defendant’s drugs.\footnote{Id. at 657.} Further, because the sales representatives were responsible for disseminating Novartis’ information into the marketplace, meaning to the prescribing physicians, their work went to the heart of the company’s success, and they are involved in the general business operations sufficient to satisfy the first part of the test for the administrative employee exemption.\footnote{Id. at 657.}

The court then concluded that the sales representatives also exercised enough independent judgment and discretion to satisfy the second prong of the test. Specifically, sales representatives were expected to “use initiative” to increase the number of prescriptions written, typically by developing a rapport with the medical staff with whom they had met, presenting information within certain parameters in the most effective way in light of variables including time constraints, patient base, and prescription history.\footnote{Id.} The sales representatives also set their schedules and used their entertainment budgets to host events and thereby increase sales.\footnote{Id.} As a result, the court determined that summary judgment was appropriate on this basis. Similar reasoning was applied by the Pennsylvania district court in Baum v. AstraZeneca LP to grant the employer summary judgment in that case as well.\footnote{Baum, 605 F. Supp. 2d 669.}

On the other side of the spectrum are two cases from the federal district court for the District of Connecticut.\footnote{Kuzinski v. Schering Corp., 604 F. Supp. 2d 385 (D. Conn. 2009) (motion for interlocutory appeal granted Apr. 17, 2009); Ruggeri v. Boehringer Ingelheim Pharm., Inc. (Ruggeri I), 585 F. Supp. 2d 254 (D. Conn. 2008).} In Ruggeri v. Boehringer Ingelheim Pharma-
In reaching this conclusion, the court declined to rely on the California cases for three reasons. Initially, those cases were based on California state law, not the FLSA, and the fact that the federal courts in California applied an FLSA analysis as persuasive authority does not mean that interpretations of California law are persuasive authority for interpretation of the FLSA. Second, the California Supreme Court has concluded that it is inappropriate to rely on federal regulations or interpretations of the FLSA when applying the state’s outside sales exemption because the language of the two exemptions do not track each other, indicating an intent that they are to be interpreted differently. Accordingly, the California decisions interpreting the state’s outside sales exemption based on the FLSA were incorrectly reasoned, even if they might otherwise constitute persuasive authority.

---

146. Ruggeri I, 585 F. Supp. 2d at 266-77.
147. Id. at 266.
149. Id.
150. Id.
151. Id. at 268.
152. Id. at 267.
153. Id. at 269.
154. Id.
155. Id. (citing Ramirez, 978 P.2d 2 (Cal. 1999)). See Sav-On Drug Stores, Inc. v. Superior Court, 96 P.3d 194, 206 (Cal. 2004) (Ramirez “reversed the Court of Appeal’s ruling that the plaintiff was exempt under an IWC wage order defining ‘outside salesperson,’ largely because the court had inappropriately relied on certain federal regulations, which varied from California law, in making that determination.”).
156. Ruggeri I, 585 F. Supp. 2d at 269-70.
Finally, the analysis in the California decisions was faulty because the courts never conducted an initial inquiry as to the appropriate threshold question, namely, whether the plaintiffs in those cases were actually engaged in sales.\textsuperscript{157} Instead, the courts incorrectly focused on an indicia-of-sales analysis, such as whether the jobs at issue were advertised as “sales” positions, whether the employees referred to themselves as sales people, whether they received commissions, whether they received sales training, and whether they operated independently.\textsuperscript{158} For these reasons, those cases should not be followed.\textsuperscript{159}

Similarly, the sales representatives did not qualify as administrative employees as a matter of law. While no one disputes that the job required non-manual work and met the minimum compensation thresholds, it could not be said on the factual record presented whether the primary duties of the job related to the company’s general business operations, or that while the job required the exercise of some discretion, whether or not that discretion was exercised with respect to “matters of significance.”\textsuperscript{160}

Without a full factual record about Boehringer’s operations, it is impossible to say whether the matters over which Plaintiffs had discretion were matters of significance to Boehringer. The record does not reveal, for example, whether demand for Boehringer’s products was ever affected or whether Boehringer’s revenues ever fell when PSRs other than Plaintiffs chose to formulate presentation ideas different from those [Plaintiff] Ms. Ruggeri formulated; or used metrics different from those she used to determine which physicians to entertain over a meal; or took a different route through their geographical areas than did [Plaintiff] Mr. Jaramillo; or stopped into retail pharmacies more or less frequently than he did; or read physicians’ demeanors differently than [Plaintiff] Mr. Naik in choosing when to be pushy, or even read physicians’ demeanors at all. Moreover, the record does not reveal whether Boehringer was even concerned about the effects of PSRs exercising their discretion in different ways. As Plaintiffs point out . . . [t]here is also no evidence of how significant Defendant considers the matters it left to its PSRs’ discretion. The fact that Boehringer so tightly controlled the message Plaintiffs presented to physicians

\begin{flushright}
\textsuperscript{157} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{158} Id. at 266, 270-71 (noting that one of the California cases, D’Este, is “difficult to parse” and that the plaintiff in that case would obtain a commitment from physicians to prescribe Bayer products and did sign a contract with a hospital to use Bayer products, unlike in the other sales representative cases, and which may have supported the conclusion that the representative in that case was engaged in actual sales, unlike here). See also Ruggeri II, 585 F. Supp. 2d at 315-16 (addressing D’Este).
\end{flushright}

\begin{flushright}
\textsuperscript{159} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{160} Id. at 272-75.
\end{flushright}
could be found to mean that Defendant left to its PSRs’ discretion matters it considered insignificant.\footnote{161}{Ruggeri I, 585 F. Supp. 2d at 275-76.}

Accordingly, application of the administrative exemption on summary judgment was inappropriate.\footnote{162}{Id. at 276-77.}

In reaching this conclusion, the court distinguished the 1945 Department of Labor Opinion Letter concluding that “medical detailists” were exempt administrative employees because those employees had different responsibilities, including that they were consulted with respect to nutritional problems encountered by hospitals and determined whether the use of a subject’s product was related to the occurrence of an epidemic—responsibilities that the pharmaceutical sales representatives in this case did not have.\footnote{163}{Id. at 276.}

The court subsequently denied the defendant’s motion for an interlocutory appeal with respect to its decision granting the plaintiffs’ motion for summary judgment concluding that they were not exempt as outside salespersons under FLSA, rejecting the argument that there was a substantial ground for difference of opinion on this issue.\footnote{164}{Ruggeri II, 585 F. Supp. 2d at 311.} At the time of this decision, the Novartis decision on summary judgment had not yet been handed down.

More recently, in \textit{Kuzinski v. Schering Corporation}, the federal district court in Connecticut had an opportunity to revisit the issue, this time after the Novartis decision had been rendered.\footnote{165}{Kuzinski, 604 F. Supp. 2d at 385 (motion for interlocutory appeal granted April 17, 2009) (addressing Novartis).} Similar to the other cases, the plaintiffs were sales representatives whose job was to “introduce[] and make known its prescription drugs to physicians, pharmacists, hospitals, managed care organizations, and buying groups.”\footnote{166}{Id. at 386-87.} Company revenue was dependent upon physician prescriptions.\footnote{167}{Id. at 388.} To increase market share, the employer also relied upon its sales representatives who met with medical professionals in assigned territories and encouraged the prescription of company products.\footnote{168}{Id. at 391.} Nevertheless, the sales representatives did not enter into contracts on the employer’s behalf for company products, obtain orders, or get binding commitments.\footnote{169}{Id. at 388.}

As in other cases, the work required the representatives to be out of the company offices, doing field work, meeting with doctors, entertaining at lunches and dinners, and attending training sessions and conferences.\footnote{170}{Id.} The company chose which physicians the sales representative would “target.”\footnote{171}{Id.} Supervision of field work occurred when a district manager would sometimes “ridealong” with the

\begin{footnotes}
\item[161] Ruggeri I, 585 F. Supp. 2d at 275-76.
\item[162] Id. at 276-77.
\item[163] Id. at 276.
\item[164] Ruggeri II, 585 F. Supp. 2d at 311.
\item[166] Id. at 386-87.
\item[167] Id. at 388.
\item[168] Id.
\item[169] Id. at 391.
\item[170] Id. at 388.
\item[171] Id. at 389.
\end{footnotes}
sales representative.\textsuperscript{172} Sales representatives were paid a base salary plus incentive payments, which in turn were based roughly on the number of company products prescribed in the representatives’ respective geographic territories.\textsuperscript{173} The company characterized the work as “sales,” considered the plaintiffs’ conduct as “selling,” and sought people with “sales skills” to fill the sales representative positions.\textsuperscript{174}

Analyzing these facts, which are similar to those in \textit{Ruggeri}, the court came to the same conclusion that the plaintiff-sales representatives were not exempt from the FLSA as outside salespersons.\textsuperscript{175} In so doing, the court criticized the \textit{Novartis} court’s outside sales analysis on several grounds.\textsuperscript{176} Initially, in order to qualify as an outside salesperson, the employee has to make “sales.”\textsuperscript{177} Applying the FLSA’s definition of that term, the sales representatives clearly did not engage in any sale, exchange, contract to sell, consignment for sale or other disposition, shipment for sale, or transfer of title to tangible property as required under the statute and regulations.\textsuperscript{178} In fact, the sales representatives and physicians lacked the capacity to consummate sales, as the sales representatives are barred by law and by their employers from entering into contracts or binding commitments with doctors for prescriptions.\textsuperscript{179} Accordingly, any argument that the plaintiffs were exempt is based on nothing more than an artificial attempt to “back-fit” the FLSA onto industry practices.\textsuperscript{180} At most, the sales representatives worked to increase overall demand for a product by “laying the groundwork” for another employee to obtain a commitment for a purchase which, by definition, is non-exempt work.\textsuperscript{181}

The court also distinguished \textit{Medtronic, Inc. v. Gibbons} and relied upon in the \textit{Novartis} decision for its description of the work that sales representatives of cardiac pacemaker manufacturers did in promoting the company’s products.\textsuperscript{182} While the \textit{Novartis} court relied upon \textit{Medtronic’s} discussion that the company sold its products to hospitals based on physicians’ recommendations, the decision in that case was unrelated to the FLSA’s outside sales exemption and did not analyze the term “sales” as applied under the Act or the rule requiring narrow interpretation of

\begin{thebibliography}{99}
\bibitem{172} \textit{Id.} at 388.
\bibitem{173} \textit{Kuzinski}, 604 F. Supp. 2d at 389-90.
\bibitem{174} \textit{Id.} at 390.
\bibitem{175} \textit{Id.} at 397-98. However, the court in \textit{Kuzinski} did not engage in an administrative employee exemption.
\bibitem{176} \textit{Id.} at 397 (citing Clements v. Serco, 530 F.3d 1224, 1227 (10th Cir. 2008) (civilian military recruiters for the army are not outside salesmen even though they engaged in sales training and “sold” the idea of joining the army to potential recruits)).
\bibitem{177} \textit{Id.} at 398; 29 U.S.C. § 203(k); 29 C.F.R. § 541.501(b).
\bibitem{178} \textit{Id.} at 398.
\bibitem{179} \textit{Id.} at 399. \textit{See Ruggeri I}, 585 F. Supp. 2d at 272.
\bibitem{180} \textit{Kuzinski}, 604 F. Supp. 2d at 399. The court also distinguished \textit{Gregory v. First Title of Amer., Inc.}, 555 F.3d 1300, 1309 (11th Cir. 2009) on the ground that there the marketing executive did make sales, because once an order for title insurance services was obtained by the plaintiff, the sale was complete. In \textit{Kuzinski}, the marketing executive did all of the work necessary to reach an agreement with a customer. Pharmaceutical sales representatives on the other hand do not even communicate with the entities that do the actual purchasing of their products. \textit{Kuzinski}, 604 F. Supp. 2d at 399-400.
\bibitem{181} \textit{Kuzinski}, 604 F. Supp. 2d at 399.
\end{thebibliography}
the statutory exemptions. Accordingly, Medtronic is inapposite, and the Novartis decision was wrongly decided. That being said, in the wake of the Novartis decision, this time the district court granted the defendant’s motion for an interlocutory appeal.

Still, other courts take a position somewhere in between Novartis, Baum and the California cases on the one hand and Ruggeri and Kuzinski on the other. Amendola v. Bristol-Myers Squibb, another case in the federal district court for the Southern District of New York, involved a motion for discovery of the names and addresses of potential class members, authorization for notice of a collective action to be sent, and equitable tolling of any claims to be filed. As with other pharmaceutical companies, the sales representatives promoted company products to physicians, hospitals, clinics and medical institutions, worked outside the company offices and were paid a salary plus incentive compensation. Their primary responsibility was to be in the field visiting medical providers to influence prescription practices. Each representative was given a list of medical providers to call, guidelines for how many calls should be made on an average day, and a core message to deliver. The sales representatives set their own daily and weekly schedules and could add and subtract from their list of assigned providers subject to supervisor approval.

Like the other cases, the physicians visited did not buy drugs. Rather, they wrote the prescriptions for patients to present to pharmacies to purchase the prescribed medication. The sales representatives also did not sell drugs to providers or take orders for drugs. The representatives in this case did, however, ask for non-binding commitments to prescribe the medications they were promoting.

Again, the court’s inquiry began with whether the plaintiffs were actually engaged in “sales” work. In reviewing the sales representatives’ responsibilities, the court readily determined that influencing physicians to prescribe drugs and obtain non-binding commitments do not constitute a sale, exchange, contract to sell, consignment for sale or a shipment for sale “as these terms are customarily understood” under the FLSA. Indeed, the Amendola court went so far as to cha-

183. Id. at 400-01. Palmieri v. Nynex Long Distance Co., No. Civ. 04-138-PS, 2005 WL 767170 (D. Me. Mar. 28, 2005), aff’d, 437 F.3d 111 (1st Cir. 2006) is also inapplicable because in that case, there was no dispute that the plaintiff made some sales. As a result, an indicia-of-sales review was appropriate. Here, because the sales representatives make no sales, the subsequent indicia-of-sales analysis does not apply.
184. See Kuzinski, 604 F. Supp. 2d at 397, 401.
187. Id. at 463.
188. Id.
189. Id. at 464.
190. Id.
191. Id.
193. Id.
194. Id.
195. Id. at 470.
racterize this conclusion as “unsurprising” given that the medical providers do not purchase the drugs from the sales representatives and, in fact, that federal law prohibits the sales representatives from selling pharmaceutical products.\textsuperscript{197}

In reaching this conclusion, the court, like in \textit{Ruggeri}, rejected the argument that the plaintiffs were exempt because they received specialized training, were given sales titles, their positions as originally advertised were in sales, and they lacked direct supervision.\textsuperscript{198} This is because these factors become relevant only where the employee has “mixed duties” involving sales and non-sales work.\textsuperscript{199} Here, the employees did not do any sales work at all.\textsuperscript{200}

Similarly, the court declined to follow the California cases because those cases, which interpreted state law, failed to acknowledge that the FLSA exemptions are to be narrowly construed against the employers and relied on the various factors applicable in a mixed duty analysis without “grappling” with whether the plaintiffs were actually engaged in sales.\textsuperscript{201} For these reasons, they were erroneously decided.

The \textit{Amendola} court then reached the same conclusion as the other New York federal district court did in \textit{Novartis} with respect to the administrative employee determination.\textsuperscript{202} Bristol-Myers’s sales representatives, who clearly do non-manual work and earn above the mandatory minimum, represent the company in meetings with medical providers to promote company drugs.\textsuperscript{203} Accordingly, reasoned the court, company success depends in part on the sales representatives’ ability to educate physicians about Bristol-Myers’s drugs, and as such, the work is “directly related to . . . management or business operations.”\textsuperscript{204} Considering the administrative/production distinction, the court held that because the company’s products are the drugs it designs, patents, and manufactures, and the sales representatives do not produce these products, they fall on the administrative side of the line.\textsuperscript{205}

Next, the court concluded that the plaintiffs’ work involved exercise of the type of discretion and independent judgment concerning matters of significance sufficient to render the work exempt.\textsuperscript{206} Specifically, each representative tailored the content of his or her presentation to each medical provider based on a variety of factors and independently decided what message would be most effective.\textsuperscript{207} Further, each one strategically managed a call list, exercising judgment in deciding how often to visit a doctor or whether to add new providers to that list.\textsuperscript{208} In this case, the representatives also managed samples, deciding how effectively each provider would use the samples and determining how best to manage promotional

\begin{flushleft}
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 472.
\textsuperscript{200} Id. at 471.
\textsuperscript{201} Id. at 472.
\textsuperscript{202} Id. at 472-77.
\textsuperscript{203} \textit{Amendola}, 558 F. Supp. 2d at 476-77.
\textsuperscript{204} Id. at 477.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\end{flushleft}
Budgets, organizing group lectures or individual meals for providers. These decisions were made free from supervision and drove the company’s business. Based on all of these facts, the court concluded that there was sufficient likelihood that the sales representatives were exempt administrative employees to deny their motion for authorization to send out notice of the lawsuit to other employees with potential claims.

The federal district court in New Jersey came to a conclusion similar to that in *Amendola*. Relying on the rationale applied in *Ruggeri*, the court in *Smith v. Johnson & Johnson* held that the pharmaceutical sales representatives in that case were not exempt from FLSA overtime requirements as outside salespersons. Where the employees had no capacity to make actual sales, they did not qualify for the exemption. While it is true that physicians create a “chokepoint” in the sales of pharmaceuticals, this reality does not change the analysis. Where the plaintiffs’ conduct could not wind up in anything more than a non-binding declaration of intent to prescribe a drug, this is not enough to constitute “sales” under the FLSA and invoke the exemption.

Nevertheless, following the *Amendola* decision, the New Jersey federal district court concluded that the sales representatives were exempt from the FLSA’s overtime requirements as administrative employees. Although the plaintiffs’ work does not dictate corporate marketing policy, it does drive market demand and, therefore, substantially affects the operation of a particular segment of the business as required under the Department of Labor’s interpretation of the exemption. Similarly, under the administrative/production dichotomy, the sales representatives were not production workers because the employer’s business is not about educating physicians about their products, rather it is about manufacturing and distributing those products. In terms of exercising discretion and independent judgment, while the court recognized that the plaintiffs in *Amendola* had more discretion than Smith in this case, the fact that the plaintiff was able to request permission to visit new physicians and update her marketing plan to be more effective in her territory, even though she needed supervisory approval, was sufficient to qualify her as exempt under the FLSA. This conclusion was further supported by Smith’s work driving the market for the drugs she worked with and her involvement with her

---

209. Id.
211. Id.
213. Id. at *7.
214. See id.
215. Id. at *7.
216. Id. at *10.
217. *Id* (citing Final Rule, supra note 19, at 22138).
219. *Id*.
There is another statutory interpretation based on a simple analysis which leads to a more straightforward result than any of the decisions above. The FLSA defines the term “sale” as “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” The phrase “other disposition,” which is not defined in the statute or the regulations, has received little attention from the courts. Accordingly, as the Supreme Court has repeatedly recognized, under standard rules of statutory construction, the term should be given its ordinary meaning.

The American Heritage College Dictionary defines “disposition” in relevant part as an “[a]rrangement, positioning, or distribution;” a “final settlement;” an “act of disposing of; a bestowal or transfer to another;” and “[t]he power or liberty to control, direct, or dispose” and “[m]anagement control.” Webster’s New International Dictionary defines the term similarly as the “[a]ct or power of disposing, or state of being disposed;” and “[t]he administering of anything; management.” The same sources define the term “dispose” as “[t]o place or set in a particular order; arrange;” “[t]o put [(business affairs, for example)] into correct, definitive, or conclusive form;” “[t]o settle or decide a matter;” “[t]o distribute and put in place; to arrange; to set in order;” “[t]o assign to a certain place or condition; appoint;” and “[t]o regulate; adjust; settle; determine.”

Applying these definitions, it is logical to conclude that the term “other disposition,” as it is used to define a “sale” under the Act, includes a physician’s decision to write a prescription for a particular medication. As the district court in Baum recognized, the purchase of pharmaceuticals does not operate in a typical free market. As part of the “professional paradigm,” the specialized knowledge necessary to make decisions concerning the purchase of drugs is beyond the ability of the typical layperson. As a result, the decision-making process is essentially assigned by the end purchaser—the patient—to a middleman—the physician. In fact, this assignment of responsibility is required as the medications at issue cannot be purchased in the absence of a prescription. The doctor then takes this assigned responsibility and executes it, although not by physically making the purchase, a ministerial act. Rather, the physician writes a prescription, the only legal method by which the drugs can be purchased. While it is true that the act of writing the prescription may not constitute a “sale” in the traditional sense, after all a patient

220. Id. at *12 (citing 29 C.F.R. § 541.202(b)).
221. Id.
225. WEBSTER’S NEW INTERNATIONAL DICTIONARY 752 (2d ed. 1950).
226. See supra note 224, at 250; supra note 225, at 117.
may never go to the pharmacy to pick up or pay for the medication, under a dictionary definition it does constitute a “management” of the process and exercise of the “[t]he power or liberty to control” the decision about whether the purchase of a prescribed medication is appropriate in a particular instance and which medication is best suited for that situation. Accordingly, it is appropriate for the courts to conclude that the pharmaceutical sales representatives’ core function—to influence physician prescription practices—constitutes an “other disposition” as that term is used to define a “sale” under the FLSA. As a result, the pharmaceuticals sales representatives’ “primary duty” is clearly to engage in “sales,” and they should be treated as exempt outside salespersons not covered by the Act’s overtime requirements.

Whether the sales representatives’ work qualifies as exempt administrative work is a more nuanced question because it cannot be answered by looking at the job’s central function—namely to influence medical prescription practices, and some of the other job responsibilities vary by employer. Nevertheless, a review of some of the aspects of the job common across the industry reveals that this exemption likely does not apply here, or at least as the court in Ruggeri concluded, not as a matter of law. The Department of Labor has expressly recognized that work “promoting sales” constitutes the type of “servicing,” as opposed to production work that directly relates to the general business operations of a company, such that sales representative work might qualify as the type of administrative responsibilities exempt under the FLSA.

Nevertheless, the work appears to lack the type of exercise of discretion and independent judgment that exempt administrative work requires. While it is true that the sales representatives typically operate without much direct supervision and set their schedules on a daily basis, this alone is not enough to satisfy the test. As set forth above, the applicable regulations issued by the Department of Labor set forth a non-exclusive list which demonstrates the type of discretion required to invoke the exemption. A review of this list indicates that the sales representatives’ work is non-exempt. Generally speaking, pharmaceutical sales representatives do not have the authority to formulate, affect, interpret, or implement management policies or operating practices. They do not carry out major assignments in conducting the operations of the business. While as a group, their work affects business operations, each representative is typically assigned only a small number of products in a narrow territory, limiting the impact of any one or small group of representatives. The sales representatives do not have the authority to commit the employer to matters having a significant financial impact. They are not authorized to waive or deviate from established policies or procedures without approval. They do not have the authority to negotiate or bind the company on significant matters, and they are not involved in planning long-term or short-term business objectives, at least not beyond their own sales objectives, satisfaction of which typically leads

---

228. Final Rule, supra note 19, at 21138.
229. 29 C.F.R. § 541.202(b).
to increased compensation. They also are not authorized to resolve matters of significance on behalf of management, and they do not represent the company in handling complaints or dispute resolution. Rather, the sales representatives are more involved in carrying out the day-to-day operations of the business. All of these factors weigh against invoking the administrative exemption.

While it is true that the sales representatives do decide how to best formulate their presentations to physicians to increase sales, this responsibility is unconvincing as a basis upon which to invoke the exemption. As the Ruggeri court recognized, there is little evidence that the sales representatives’ exercise of discretion was with regard to any matter that the employers considered significant. Indeed, if this type of exercise of discretion were enough, it is hard to imagine an outside sales representative who spends the majority of his or her time in the field that would not qualify as an administrative employee.

In reaching this conclusion, it should be noted that the medical detailists addressed in the Department of Labor’s 1945 Opinion Letter are different than the sales representatives involved in current litigation. Unlike the medical detailists, there is no indication in any of the recent cases that the sales representatives are consulted with respect to individual nutrition problems or whether a product is related to the outbreak of something like an epidemic. There is also no discussion of the sales representatives at issue training other sales personnel. Accordingly, the Opinion Letter is of little value to the analysis here. In short, while there may be exceptions, as a general matter, pharmaceutical sales representatives likely do not qualify as administrative employees under the FLSA.

CONCLUSION

Whether sales representatives in the pharmaceutical industry are entitled to overtime under the Fair Labor Standards Act is unclear from the decisions of the federal district courts across the country. The issue is complicated because, although the function of these employees is to increase sales, they do not address their efforts to the actual purchaser of the products they represent. Yet, a careful review of the Act reveals that although sales representatives generally lack sufficient discretion to qualify them as administrative employees, their work is sufficiently sales-based to invoke the FLSA’s statutory exemption for outside salesperson. Accordingly, as these cases wind their way through the appellate process, the courts should conclude that pharmaceutical sales representatives are not entitled to overtime pay.

230. See, e.g., Amendola, 558 F. Supp. 2d at 472-77 (applying the administrative employee exemption).
231. See supra notes 161-162 and accompanying text.
232. See Applicability of Exemption for Administrative Employees to Medical Detailists, supra notes 71-74 and accompanying text.
THE DECLINE AND FALL OF THE AMERICAN JUDICIAL OPINION,
PART II: BACK TO THE FUTURE FROM THE ROBERTS COURT TO
LEARNED HAND – SEGMENTATION, AUDIENCE, AND THE
OPPORTUNITY OF JUSTICE SOTOMAYOR

Jeffrey A. Van Detta*

I. INTRODUCTION

This is a continuation of the work I undertook in an article that appeared in Volume 12 of this publication. There I made a close and exacting examination of representative opinions written by Judge Learned Hand during the midst of his fifteen-year Federal District Court tenure. That examination germinated from the attention recently garnered by the decline in influence of the opinions of American courts, including the Supreme Court of the United States, in the estimation of courts around the world.¹

I posited a number of influences on this trend. Among them was a surprising² lack of trial court experience among the members of the Roberts Court, as well as a seemingly concomitant lack of appreciation for the process of writing opinions at the Federal District Court level, which I posited was a gap in knowledge and experience that leads to less effective appellate opinion writing. By looking to the strengths and opportunities of Learned Hand’s work as a U.S. District Judge, I believed we would achieve greater insight into improving the cognitive impact of all American judicial opinion writing by looking “back to the future” from the perspective of the decade and a half of trial court opinion writing experience by the jurist who went on to become America’s most famous 20th century federal appellate judge.

* Professor of Law, John Marshall Law School-Atlanta, Georgia. Professor Van Detta served as law clerk to Judge Roger J. Miner, U.S. Second Circuit Court of Appeals, 1987-1988. I wish to thank our Library Director, Professor Michael Lynch, and our Research Librarian and Head of Public Services, the incomparable Mary Wilson, for their extraordinary assistance throughout Parts I and II of this article. I also wish to thank The Barry Law Review’s Editor-in-Chief, Kevin Dilg, for suggesting that there might be two articles in my material, and the student editorial staff, for their tireless efforts and excellent work.


2. But see Lawrence S. Wrightsman, The Psychology Of The Supreme Court 32 (2006) (observing that “[t]oday’s Court is different from the past ones in that, during the period between 1994 until 2005, eight of the nine justices had prior experience as a judge, mostly at the federal circuit court level, or as a state appellate court justices. . . . In contrast, when Earl Warren was named Chief Justice in 1953, only Justices Minton and Black had prior experience on the bench . . . .”)
In short, by understanding the challenges of trial court opinion writing and relating those to the writings of opinions by the courts that review them, we would achieve a more holistic vision of what contributed to the formerly high reputation of American court opinions, and what may have changed on the road to their decline and fall in international reputation.

My stated objectives in that previous undertaking also apply to the present endeavor:

But how does Hand stand up as a writer of trial court opinions? Is a great appellate writer also a great writer of findings of facts, conclusions of law, and judgments? By what standards would we judge Hand as a judicial writer, based on his legacy of published trial court opinions (which number over 1,000)? Would good trial-court writing skills produce better appellate opinions? Would giving more weight to trial-court experience in judicial selection processes improve the insight and quality of appellate opinions?

To solve the riddle of the decline and fall of the American judicial opinion, I have written two articles—this is Part I of II—and I start here not with an exegesis of the politics or opinions of the Roberts Court. Rather, in both articles I seek to go back to the future, by looking to Learned Hand’s trial court writing and what it can teach us, in order to evaluate the current state of American judicial writing. A critical component of this undertaking is the adoption of a methodology well suited for the analytic task. Thus, these articles undertake to answer each of those questions, using the principles and techniques of superior legal writing developed by Armstrong and Terrell in their seminal work: THINKING LIKE A WRITER.

The tools I used in Part I, and continue to employ in Part II, are those which Terrell and Armstrong have adapted from cognitive psychology and tailored to the arts of legal writing and editing. Part I examined Hand’s District Court opinions

---


4. Using Terrell’s and Armstrong’s framework for evaluating the cognitive virtues and vices of judicial opinion writing makes much more sense than some of the recent efforts by professors at national law schools to set up citation frequency as a proxy for the quality of written opinions. See, e.g., Stephen J. Choi and J. Mitu Gulati, Choosing The Next Supreme Court Justice: An Empirical Ranking Of Judge Performance, 78 So. Cal. L. Rev. 23, 48-49 (2004). Such approaches do not survive even the lightest scrutiny by those familiar with how federal courts really work. The fatal flaw of using citation counts as a proxy for quality is evident to anyone taking a moment to consider the many reasons that particular court cases happen to be cited—their status as Circuit precedent, their vintage as an overview or most recent statement of the law of the Circuit, and the mere fact that more senior judges on appellate panels tend to end up with the presiding duties and many more opinions to write—
from the context and the congruence principles, two of the four foundational principles articulated in Terrell and Armstrong’s work. I observed that the results evidenced a mixed bag, moments of strength and superior coherence intermixed with more stretches of a somewhat banal, work-a-day approach, lacking in the merits of establishing context and achieving congruence.

What bringing to bear the segmentation and the audience principles will reveal about Hand as a trial-court opinion writer is the subject of the present article. Here, I will make holistic observations about Hand’s trial-court writing, and will consider the complete picture painted from the perspective of all four foundational principles.

I will also discuss how the recent confirmation of the first U.S. Supreme Court Justice in our lifetimes with extensive experience on the U.S. District Court creates a unique opportunity for the Supreme Court to apply the lessons from Learned Hand’s strengths and opportunities in trial-court opinion writing to reclaim lost leadership among the world’s high courts.

II. “THINKING LIKE A WRITER”: THE PRINCIPLES AND TECHNIQUES OF EFFECTIVE LEGAL PROSE—SEGMENTATION AND AUDIENCE

In Part I, I explained the crucial analogy between legal thought and legal writing upon which Terrell and Armstrong construct a highly effective taxonomy and analytic template for excellence in legal writing and editing. Terrell and Armstrong note that just as legal principles are the overarching guides from which legal rules spring, so too are the “background principles” of effective legal writing that, “establish the framework within which all [written] rules (and what we will call ‘techniques’) apply.” The principles of effective writing, “speak to fundamental purposes” and guide legal writers in, “assess[ing] the relative importance of specific rules (and techniques), to choose among them when they conflict, and to draw them together toward the single end of clear, persuasive prose.” These principles are the product of applied cognitive psychology.

that have nothing whatsoever to do with the “quality” of the written opinion. In fact, the author from long hours of personal experience as a federal appellate judge’s clerk can testify emphatically that federal courts do not base their search for and use of authorities on how “well written” they are, nor do they have a rich palette of degrees of writing excellence from which to choose.

5. ARMSTRONG & TERRELL 1st, supra note 3 at 1-2 to 1-3 (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1976)).

6. ARMSTRONG & TERRELL 1st, supra note 3, at 1-3. Having lived with both texts for a number of years, including as a senior lecturer for LAWriters, www.lawriters.org, Professor Terrell’s platform for instructing judges and practicing lawyers on this conceptualization of effective legal writing, I borrow freely from both works, rather than treating either as urtext, and consider them as, together, providing the overall approach used in my analysis below.

7. Raffaele Caterina, Comparative Law and the Cognitive Revolution, 78 TUL. L. REV. 1501 (2004). Professor Caterina observes that:

[T]he development of cognitive science brings on stage human nature. Models of vision and object recognition, generation and comprehension of language, reasoning and other cognitive processes elaborated by cognitive science are universal models. The linking of the cognitive processes to deep mechanisms characteristic of our species brings with itself the reconstruction of human nature.
As explained in Part I, Terrell and Armstrong have distilled effective legal writing into four principles that apply at the level of the entire document (which they call macro-organization). First, the context principle: readers absorb information best if they understand its significance as soon as they receive it. Second, the congruence principle: the organization of the information should match the logic of the analysis. Third, the segmentation principle: readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader’s span of attention. Fourth, the audience principle: readers are much more attentive and receptive if the writer approaches the material from the readers’, rather than the writer’s, perspective. An effective writer not only applies these principles, but does so with an informed perspective from having determined the identities, knowledge bases, and needs of each audience of the document.

The context and congruence principles were explained, explored, and applied in Part I. Here in part II, we explain the content, and consequences, of the segmentation and audience principles.

A. The Segmentation Principle

The segmentation principle is based on a fundamental observation from cognitive psychology. That observation is that, “[r]eaders absorb information best if they can absorb it in pieces.” The genesis of the segmentation principle however should not be misunderstood as a patronizing view of modern readers’ abilities, nor founded on a defeatist attitude toward the products of our current system of education. As Terrell and Armstrong observe:

\[\text{[P]roperly applied, this principle is more than a sop to your readers’ impatience. It should walk hand in hand with an earlier principle: Make the structure explicit. . . . If you break your prose into chunks, the divisions should help to make the document’s structure}\]

---


Based on a connectionist cognitive architecture, coherence-based reasoning shows that the decision-making process progresses bidirectionally: premises and facts both determine conclusions and are affected by them in return. A natural result of this cognitive process is a skewing of the premises and facts toward inflated support for the chosen decision. . . . [This theory of cognition may be applied] to four important aspects of the trial. . . . [C]urrent doctrine in these areas is based on misconceptions about human cognition, which lead to systematic legal errors. By identifying the cognitive phenomena that lie at the root of these failings, the research makes it possible to devise interventions and introduce procedures that reduce the risk of trial error.

Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511 (2004). Similarly, by identifying the cognitive phenomena that lie at the root of reader incomprehension, Terrell and Armstrong’s work make it possible to devise interventions – the principles of effective writing – and to introduce procedures (the techniques for implementing the principles) that reduce reader incomprehension.

8. ARMSTRONG & TERRELL 2d, supra note 3, at 33; see ARMSTRONG & TERRELL 1st, supra note 3, at 5-21 to 5-23.
visible. And, if you set out to make the structure explicit, a step that requires you to make it clear to yourself, you will find it much easier to ‘chunk’ the writing.9

In practice, this principle applies throughout a document. First, on a macro-organizational level, large blocks of undifferentiated text are quite daunting to readers and generally operate as a metaphorical “keep out sign”. On a more sophisticated level they are writer’s equivalent of the greeting to Hell imagined by Dante: “ABANDON ALL HOPE, YOU WHO ENTER HERE!”10 The writer, however, is not condemned to this outcome. Rather, the writer can take the reader by the hand, as Virgil took Dante, and use segmenting (i.e., “chunking”) of blocks of information to make the information mentally digestible. This is accomplished by breaking up larger blocks of text using subheadings, shorter paragraphs, and “white space” on the page.11

Within the mid-level (or “intermediate”) structure of a document, even shortened paragraphs can be made more comprehensible to readers by employing segmenting devices such as numerical lists or bullet point presentations.12 At the micro-level, segmenting requires crafting sentences to either be shorter, or to be broken into mentally digestible segments, separated by an effective use of punctuation.13

9. ARMSTRONG & TERRELL 2d, supra note 3, at 16, 114; see ARMSTRONG & TERRELL 1st, supra note 3, at 5-21 to 5-23. 10. DANTE ALIGHIERI, THE INFERNO OF DANTE 25 (Robert Pinsky trans., Farrar, Straus & Giroux 1994) (emphasis added). 11. ARMSTRONG & TERRELL 2d, supra note 3, at 16, 33-34, 114. The concept of white space is the idea of using the absence of text itself as a communicative and organizing tool. As a case in point, Armstrong and Terrell quote the following observation from a writing manual published by a federal agency whose regulatory ambit includes the most vexing of reader unfriendly documents—financial disclosure statements:

   The white space signals a break for the reader while lightening the overall look of the document. White space especially strikes readers of disclosure documents because these documents usually feature dense blocks of impenetrable text. Increased white space invites reading and emphasizes important points.

   Id. at 117 (citing U.S. SEC. & EXCH. COMA’N, PLAIN ENGLISH MANUAL: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 50 (1998), available at http://www.sec.gov/pdf/handbook.pdf). 12. Id. at 114, 118–121. 13. Id. at 16, 33–34, 114. This is in sharp contrast to the trite admonition, “write short sentences.” Id. at 117. Two of the greatest American stylists of political language—Abraham Lincoln and Rev. Dr. Martin Luther King, Jr.—showed great adeptness at using very long, yet very readable, sentences to convey complex ideas. Yet it also weighs in at a hefty eighty-four words. The words are punctuated so carefully and naturally that to subtract even one would destroy the sentence’s effectiveness. See, e.g., GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 60–61, 171–75 (Simon & Schuster 1992); see also, e.g., RONALD C. WHITE, JR., LINCOLN’S GREATEST SPEECH: THE SECOND INAUGURAL 18, 153, 154 (2002) (noting that in emphasizing that the scourge of war was divine retribution for the “offence” of slavery, “[i] n a complex sentence of eighty-six words, he worked with imagery that brought the long dark night of slavery under an intense light that allowed his audience both to see and to understand the dimensions of this American ‘offence.’”) (original emphasis); id. at 19 (where the famous last sentence of the Second Inaugural, “With malice toward none; with charity for all” demonstrates a powerful combination of complex ideas that is incredibly forward-moving and easy to read despite being seventy-six words in length). An even more impressive example is the over 300-word sentence in Dr. King’s Letter from a Birmingham Jail, where he lists the grievances of the African-American community in a sentence that flows like a mighty river to a waterfall, with an ever-rising surge of syn-
B. The Audience Principle

Although discussed last, the fourth principle is one that imbues and guides the implementation of the other three principles. “Readers pay more attention if you approach your material from their perspective, not yours,” Terrell and Armstrong observe. The challenge, they say, is ab initio, from the get-go, to “make busy, impatient readers pay attention throughout the document—not grudgingly, not just out of a sense of duty, but because you have shown that they will be richly rewarded.” To use modern business parlance, the first persuasion that must be achieved in any legal writing is to persuade the reader that working through all of your text “adds value” to him or her. Thus, Terrell and Armstrong liken the writer’s preparation for a writing project to “preparing to negotiate” to “know as much as possible about” the reader’s “business environment and background and, most importantly, about” the reader’s “real needs, as distinct from his explicit demands.”

Thus, they advise determining whether you are writing for “more than one audience”—to whom will this writing be important or useful?—to understand what each audience really wants, (besides “a thorough, reliable legal analysis”) and determining what each audience already knows about your subject to avoid “being condescending or wasting time.” Among other techniques for implementing the audience principle, the writer needs to determine “which conventions of style and organization will seem natural” to each audience “and which will seem alien[,]” as well as to “analyze the practical constraints”—i.e., “[h]ow much time do you have, and how much effort is the project worth[.]” Taking the reader-centric approach advocated in this principle will prevent the writer from “becom[ing] a sopilist, creating an audience to suit his needs rather than adapting himself to his audience.”

tactical power producing an incredible rhetorical effect that leaves the reader feeling the depth of outrage created by racist societal institutions. See MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL, in WHY WE CAN’T WAIT 64, 69-70 (2000).

14. ARMSTRONG & TERRELL 2d, supra note 3, at 17 (emphasis added).
15. Id. at 126.
16. ARMSTRONG & TERRELL 1st, supra note 3, at 2-1.
17. Id. at 2-2, 2-4.
18. Id. at 2-3. The result, say Armstrong and Terrell, is the “more you can show your readers that you understand how they think and speak, the more receptive they will be.” ARMSTRONG & TERRELL 2d, supra note 3, at 129. Thus, the writer should keep three reader questions in mind:

[1] “Will you help me? Or will leave . . . [the mental heavy-lifting to me by] just handing me some information and then leave me to figure out how I should use it?”
[2] “Will you use my time efficiently? Or . . . waste it by [repeating] what I already know[,] . . . or by . . . forcing me to wade through pages of tedious detail before I . . . [come upon] anything [in your document that I care about?]”
[3] “Are we even from the same planet?”

Id. at 135–36. Thus, writers are admonished to, “[a]t the start, show (quickly) that you will give your readers practical help without wasting their time” because “[i]n those few seconds, you often win or lose your struggle to capture the reader’s attention and establish your credibility.” Id. at 130. This short window of opportunity with readers is dramatized by J.K. Rowling in the opening of a Harry Potter novel. See J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 1-2 (2005) (describing narrating the internalized, cognitive reaction of a busy politician attempting to wade through a subordinate’s memorandum, until the politician “gave it up as a bad job”).

19. ARMSTRONG & TERRELL 1st, supra note 3, at 2-10.
20. Id.
III. UNITED STATES DISTRICT JUDGE LEARNED HAND: HIS APPROACH TO THE TRIAL COURT WRITING TASK—SEGMENTATION AND AUDIENCE

A. Making the Digestible Indigestible: The Segmentation Principle in District Judge Hand’s Opinions

Many of the observations made already about the context and congruence principles also apply to the way in which Hand approached the segmentation principle. Some of his writing, as in the Masses, does an effective job of presenting information to the reader in segments, or “chunks,” that allow the reader to absorb it most effectively. In other opinions critiqued above, Hand has not assisted his readers as much as he might by scrupulous attention to the cognitive implications of this principle.

The cardinal tenet of segmentation is that readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader’s span of attention. In practice, this principle applies throughout a document on a macro-organizational level, large blocks of undifferentiated text are quite daunting to readers; in many opinions, Hand does not seem to notice this, and he, like many judges of the era, did not take advantage of ways to re-package of blocks of information to make them mentally digestible —e.g., by using subheadings, shorter paragraphs, and white space on the page. As previously noted, even paragraphs can be made more comprehensible to readers by employing these techniques; Hand’s paragraphs work better from a segmentation perspective —although primarily not by intelligent design, but rather by his realization of the segmentation principle at the micro-level, where he more often crafted sentences either to be shorter, or to be broken into mentally digestible segments, separated by effective use of punctuation.

Indeed, Learned Hand’s greatest strength as a judicial writer was his ability to construct strong, clear, and oftentimes, even songful sentences—a—as noted previously, Hand was a balladeer in his heart of hearts, and the rhythm of ballad often seems to permeate his best sentences. If one reads these sentences aloud, for example, the listener’s ear is attuned not only to the segmentation through grammatical units, but also to a beat running through them not unlike the effect of “the fourteener”21 epitomized in George Chapman’s celebrated Elizabethan translations of Homer:

And therefore since my mother-queene (fam’d for her silver feet)

Told me two fates about my death in my direction meet —

The one, that, if I here remaine t’assist our victorie

My safe returne shall never live, my fame shall never die:

If my returne obtaine successe, much of my fame decayes

But death shall linger his approach and I live many dayes.²²

Both intellectually and aesthetically, then, segmentation was for Hand primarily a function of his sentences. These were like unto the bricks from which he assembled his District Court opinions from the ground up. Thus, unlike some judges who appear to start from the “big idea” and work their way down to the sentence-level, Hand’s writing gives the appearance of a master mason at work on the wall of a cathedral, his ultimate objective—deciding a case—clear in his mind’s eye, but his conception of the task emanating from the bricks—the individual quanta of ideas—that lay before him in his carefully crafted sentences. To paraphrase Emily Dickinson, Hand’s “wars were laid away” in sentences.²³

1. Segmentation in Aid of Fairness: In re Denny

In re Denny²⁴ presents a case of contemporary resonance, in which Hand uses cognitive segmentation in aid of a fair outcome. Born in Russia, having resided in the British Empire, and having petitioned to become a naturalized English citizen, Denny sought United States citizenship, but his lawyer erred in guiding his application and created a technical ground for denying his application.²⁵ His filings stated he was foreswearing loyalty to the Russian Czar, when in fact he needed to do that with respect to his most recent sovereign, King George V of England.²⁶ Rather than subject Denny to deportation and other harsh consequences (as he might well be subjected to in our immigration environment of today), Hand sought to do equity. In doing so, he recognized that his opinion was of significance “for future guidance in this circuit.”²⁷ Hand’s organization of the opinion is a bit problematic from both the context and congruence perspectives. He begins the opinion by stating cases with which he disagrees, and their citations, but without explanation as to what issue they are relevant, what they hold, or why he is rejecting them (other than to say “none of these are authoritative” and to suggest they run counter to his “quite positive belief” that Denny “is entitled to” the benefit of his doubt).²⁸ Despite this inauspicious opening, Hand crafts the most important section of the op-

²². GEORGE CHAPMAN, CHAPMAN’S HOMER: THE ILIAD, Bk. 9, lines 396-401, at 191 (Allardyce Nicoll ed. 1998) (This is the famous passage where Achilles explains the choice confronting him of living a short yet glorious life—or living a long yet undistinguished one, as most men do.).


²⁵. Id. at 845.

²⁶. Id.

²⁷. Id. at 846.

²⁸. Id.
nion, the two well-constructed paragraphs setting forth the “reasons” which Hand
determined it was “proper for [him] to give” in support of the ruling. 29

The segmentation skills displayed by Hand in these two paragraphs operate at
both the paragraph and sentence level. Grammatical cores contain the most impor-
tant information and are clearly constructed; he observes the OI/NI sequencing;
and he skillfully uses dependent and parenthetical clauses to make effective transi-
tions, to set up points of emphasis, and to provide a rhythm, variety, and vitality
that makes his writing in these two critical passages of the opinion both lively and
memorable. To roughly paraphrase Cervantes, the proof of the segmenting is in
the reading: 30

The question is whether, when in his declaration and petition an
applicant has honestly mistaken the name of the sovereign whose
allegiance he means to abjure, he may, upon final hearing, abjure
the proper sovereign, and, if necessary, correct the declaration and
petition. At the outset I may observe that, unless there be some
particular jurisdictional reason, every reasonable motive should al-
low the relief, which would be allowed at the present day in every
other form of legal proceeding, so far as I know. No one wants
gratuitously to impose upon naturalization proceedings that tech-
nical spirit which easily follows a literal application of so detailed
a statute, and which results in vexatious disappointment, and in
needless irritation, to a defenseless class of persons necessarily left
to the guidance of officials, except in so far as the courts may miti-
gate the rigors of their interpretation. The decisions in question
have, therefore, all depended upon the supposed jurisdictional na-
ture of the requirement.

The section controlling the case is section 4, which provides the
preliminaries upon which the citizen may apply for admission.
The first formality is the ‘declaration of intention’ to become a citi-
zen and to renounce his allegiance ‘to any foreign prince, poten-
tate, state, or sovereignty, and particularly, by name, to the prince,
potentate, state, or sovereignty of which the alien may be at the
time a citizen or subject.’ This must be at least two years before
his admission, and must be followed by a petition, three months
before his admission, which must repeat the earlier expression of
his intention in the same words. Under our notions of national feal-
ty, accepted in part by other nations, a subject may voluntarily and
with the consent of his new sovereign change his allegiance. His
own consent is to be manifested by his oath of abjuration and his

29. Id. at 846–47.
30. MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE, Pt. I, Book IV, Ch. 10. (Edith Grossman, tr.,
2003) (“the proof of the pudding is in the eating”).
oath of allegiance. Hence the critical fact for the change in allegiance is the oath; that is the definitive act by which the change takes place, and perhaps even an innocent mistake in that is fatal. At least that question may be reserved. However, the applicant’s prior declarations, either in the ‘declaration of intention’ or in the ‘petition,’ are both mere preliminaries, designed to assure the new sovereign of the persistency of the applicant’s purpose, and perhaps in a measure as well to identify him by his existing allegiance.  

The sentences sing, as does Chapman’s Homer, and they build a strong analysis within an opinion that is otherwise rather undistinguished in its structure, despite the importance of its topic.

2. The Ada

In an admiralty case captioned *The Ada*, Hand handles the prose well at the sentence level, which may be why Hand is so often quoted, and why Robert Jackson advised the bar to “quote Learned;” but the macro-structure may have impelled Jackson to admonish the bar to “follow Gus.”

*The Ada* is a classic work product of a very busy judge. Hand’s opinion does not even open with the obligatory lengthy, small-font factual recitation. We simply learn that this is a “suit by the Universal Transportation Company, Incorporated, against the steamship Ada and the Rederiaktiebolaget Annie” and that the case is “in admiralty” and “[o]n exceptions to the commissioner’s report.” We are not given context. For example, what is the nature of the claim? Tort? Contract? Special rules of admiralty law? And what is a commissioner? What is the commissioner’s role in the decision of the case? These, and numerous other matters, are not explained to the reader. We are given no roadmap—only a declaration, clear and

32. The Ada, 239 F. 363 (2d Cir. 1916), rev’d on other grounds, 250 F. 194 (2d Cir.1918).  
33. Richard A. Posner, *The Learned Hand Biography And The Question Of Judicial Greatness*, 104 YALE L.J. 511, 536 (1984). Posner starts from the thesis that “[t]he counting of citations to the work of a [judge] is therefore a possible method of evaluating the quality of the [judge’s] output, and of comparing the output of different [judges].” *Id.* at 534-35. (Employing an empirical analysis of citations by other courts of the Second Circuit opinions of Hand as well as other Second Circuit Judges who served 1925-1961, Posner finds that Hand leads by a wide margin in total citations (nearly 2,300) but also, more significantly, that contemporary judges continued to cite Hand in the last period studied by Posner, 1988-1992. Posner notes that he considers this to be “a measure of the durability of a judge’s opinions” and notes that “here Hand’s lead is the greatest.” *Id.*  
35. Ada, 239 F. at 363–64.
unmistakable, that if we are not a party to this case, Hand is of no mind to helping us fathom it. “The commissioner’s report gives the general facts in the case with enough detail to justify the omission of any preliminary statement, and I may therefore proceed at once to the specific matters in dispute as shown by the exceptions.”

Hand, however, does not make that report part of the opinion, neither as an attachment nor as an appendix. Thus, Hand is in effect telling us that he is in control of what he wants us to know and he has no intention of making it easy for us to know what he knows. On the macro-structural level, the opinion’s structure does not mirror the overall logic of the analysis—the only structure he appears to provide is around default organizations, and even there, he is not consistent. For example, Hand declares that the organizing structure he has chosen is another document to which we are not privy—the “exceptions” that have been filed to the commissioner’s report, although we are not told by whom (i.e., one or both parties) those exceptions are filed. Even if the exceptions themselves suggested some logical structure, it would be easier to navigate this opinion. But they do not appear to, and making matters even more challenging for the reader, he really is not using the exceptions as the organizing structure! Instead, he immediately quotes eight issues—not exceptions to the Commissioner’s findings or conclusions—which appear to be listed in issues that were delegated to the Commissioner to address, rather than organized around the logic of the exceptions. And even this opening listing is a false roadmap; the opinion does not contain a correlative set of headings or subheadings that match the organization of the eight questions he lists. In fact, Hand uses a few “lead sentence fragments” that tersely have as their referent some of the eight issues he listed as “the exceptions.”

For example, his lead sentence fragment, to which the West editors assigned Headnote 1, “The Outward Voyage,” corresponds to the first “exception” he listed up front: “First. What was the primary damage from the loss of the outward voyage from New York to Genoa, about May 1, 1916?” He includes in this discussion, however, an evaluation of profits, which was separately listed as the second issue up front; he provides the reader no separate indication that he is doing so. The discussion of lost profits consumes several pages in which Hand discusses numerous sub-arguments, uncontextualized documentary and testimonial evidence, and calculation issues that fall upon the reader like a surprise rain shower encountered without an umbrella. Only after several pages of reciting this “bushel of facts” does Hand provide any container that gives us a clue as to their legal relevance: “All this evidence should, in my judgment, have some effect upon whether the Ada could have booked more freight than she did, but for the with-

36. Id. at 363.
37. Id. at 363–64.
38. Id. at 364.
39. Id. at 364.
40. Compare id. at 364 with id. at 363.
41. Compare id. at 364–65 with id. at 363–64.
42. Id. at 364–67.
drawal. He discusses arguments, counterarguments, and additional sub-issues for another page and a half.

We then are greeted with lead sentence fragments, “The Future Return Voyage From Genoa,” “The Loss on the Zealandia” (which appears more confusing as it is designated by the West editor as Headnote 2, although it appears to correspond with Hand’s third issue), “The Sarnia and the General Damages” and “The Net Freight Inward,” which appear to correspond to the Fourth and Fifth issues stated by Hand up front but which have no numbering indicating that, “Incidental Items,” “The Payments Of Hire Under Charter,” and “Interest” (once again, made more confusing for the reader trying to deduce the macro-structure as it is designated by the West editor as Headnote 3, although it corresponds to the Eighth issue), which appear to correspond to the Sixth through Eighth issues listed up front. Thus, while a reader can labor to figure out what Hand is doing—and what Hand is doing is logical—it takes several re-readings and cross-referencing across the opinion to do so, and considerable retention of information (the “Eight issues”) in short-term memory to do so. The reader has carried the burden of the mental heavy lifting with little help.

To truly understand what this case is about, one must go to the Second Circuit’s opinion on the appeal from Judge Hand’s decision—in which the appeals court reversed. The Second Circuit sets out at least a comprehensible narrative of how the case arose, what the claims and arguments were of the parties, and the context for Judge Hand’s decision. The appeals court did not address any of the

\footnotesize{44. Ada, 239 F. at 366.}  
\footnotesize{45. Id. at 367–68.}  
\footnotesize{46. Id. at 367.}  
\footnotesize{47. Compare id. at 368 with id. at 363.}  
\footnotesize{48. Compare id. at 369 with id. at 364. The “Net Freight Forward” becomes quite confusing because Hand appears to begin going through a detailed list of accounting credits and disbursements, some of which he identifies by number (e.g., “item 10”), others of which he identifies by a phrase or a sentence (“The Journal of Commerce item is disallowed” or “The coal at Bermuda would have cost $1500. I follow the commissioner” or “I disallow Stapleton’s and allow Hennessey’s charges”). Id. at 369–71. It is almost as if this portion of the opinion is the judge scanning down through a list, scanning the commissioner’s report, and reacting out loud with his words transcribed by the stenographer, although the opinion does not so state. Hand even initiates out of nowhere a discussion of the effect of some mysterious “interlocutory,” collateral proceeding, introduced out of the blue with the opening phrase, “As to Judge Sith’s order, it was irrelevant to the question”, and Hand tells us little more than that “[i]t would be extremely unjust to throw out $9,000 from the account on any such procedural point as the supposed impropriety of cross-examining one’s own witness. After some experience in trials, I think I can say that I have never seen a case where the objection made [sic] for justice, unless a willing witness was being led.” Id. at 371.}  
\footnotesize{49. Compare id. at 371–72 with id. at 364.}  
\footnotesize{50. See Terrell and Armstrong’s discussion of the ineffectiveness of a writing that expects readers to carry excessive amounts of information in “suspension” in order to understand the significance of information provided by the writer later in the document. ARMSTRONG & TERRELL, supra note 3, at 3-2. Judge John Minor Wisdom once waded through Hand’s opinion to encapsulate it in this concise way: “Judge Hand found that the owner had wrongfully withdrawn the vessel and was liable to the charterer for the loss sustained by it as charterer, although the damages for breach of the sale provisions were not recoverable in admiralty.” Jack Neilson, Inc. v. Tug Peggy, 428 F.2d 54, 59 (5th Cir. 1970).}  
\footnotesize{51. The Ada, 250 F. 194 (2d Cir. 1918).
questions taken up by Hand, since it was found that the matters Hand decided were outside of the District Court’s admiralty jurisdiction.52

Then why do I contend this opinion is at all memorable, given its macro-organizational problems and its subsequent reversal, albeit on procedural grounds that Hand did not pass upon? Although it dealt not with a citable subject matter jurisdictional issue and instead dealt with the fine points in dispute between the parties, the opinion enjoys twenty-two citations in Westlaw (in cases, treatises, and briefs), the most recent of which occurred in 1997 by a federal appeals court and in 2006 by a federal district court.53 Why? Because, I maintain, the strength of Hand’s ability to express ideas clearly, concisely, and memorably in his sentences and paragraphs.

For example, in Navieros Inter-Americanos, S.A. v. M/V Vasilia Exp,54 the First Circuit cited to a concise, pithy, and memorable statement of the rule Hand articulated in terms of damages due for breach of a time charter:

The breach of the Navieros time charter occurred when the vessel was diverted to the use of Comet, after performance of the Navieros contract commenced but before Navieros’s cargo was loaded. Without noting the distinction, defendants assert that the measure of damages should be that which is used in cases where the owner breached the charter party by repudiating it before performance began. The general rule for recovery in that situation was stated long ago by Judge Learned Hand: “the withdrawal of the ship entitled [the charterer] prima facie to damages measured by the difference between the hire reserved in the charter and the hire necessary to secure such another bottom.”55

While it may well be Hand’s reputation that otherwise impelled the court to seize upon one of his cases for citation and quotation, I think that it is equally true that the expression of key ideas in this case with Hand’s careful attention to segmentation and syntax make them attractive even beyond the fading memory of his admiralty work. The opinion is replete with sentences, and paragraphs that bear

---

52. Id. at 194 (“We shall dispose of the case on grounds which relieve us from the duty of considering the merits at all. . . . Evidently the whole controversy could have been disposed of in an action at law, but the jurisdiction of a court of admiralty is confined to maritime subjects. It cannot, having obtained jurisdiction, dispose of nonmaritime subjects, for the purpose of doing complete justice, after the manner of courts of equity, nor can it distribute funds in its possession, as do courts of equity and bankruptcy, among all creditors, preferred and general.”). Id. at 194. Interestingly, although the decision was unanimous, each judge of the three-judge panel wrote separately. Id. at 194 (Opinion of Ward, J.), 197-198 (Opinion of Rogers, J.), 198 (Opinion of Hough, J.).


54. Id. at 317 (quoting The Ada, 239 F. 363, 364 (S.D.N.Y.1916), rev’d on other grounds, 250 F. 194 (2d Cir.1918)) (emphasis supplied).
Barry Law Review
Vol. 13

their length by appropriate punctuation and syntax—take for example his assessment of a witness’s testimony on lost profits:

There is no evidence of the inward freights, except F. Frankel’s estimate that it would result in a gross return of $15,000, equal to the first voyage. The witness supposed that $7,500 of freight was due at New York, though the account subsequently disclosed nearly $11,000. It seems, therefore, that the libelants had already collected at Genoa and Leghorn $7,500, and that the gross freight on that voyage was $18,500. I can scarcely make such an inference, however, without more basis, considering the power of the libelants to produce the exact facts. Assuming that the inward voyage netted $11,000, have we any ground for accepting F. Frankel’s estimate that the next would have done so? Taken merely as an estimate, it seems to me clear that we have not. The witness made no attempt to show that he knew the values or conditions at Genoa. Yet the testimony, which might have been justified by adequate information, was not objected to, so far as I can find, and the libelants had good reason to suppose that it would not be challenged. Whether they could have supported it no one can tell, but they should have been advised that the respondents would insist that it was insufficient. That the ship would have earned some freight was practically certain. The amount would in any case necessarily have been an estimate, and there was at least some basis for supposing that the earlier voyage was an indication of what it would have been. When Frankel made that estimate, he testified to an opinion which, being possibly competent, should stand while unchallenged. I allow $11,000 for the inward voyage.56

Similarly, Hand uses a strong segmentation technique of using complex sentences appropriately balanced by placement of subordinate clauses and punctuation to make the following finding that is based more so on an absence of credible evidence rather than its presence:

As I have already indicated, it presses my credulity hard, especially in view of Herrmann’s and Nichols’ testimony, to suppose that, in such dearth of shipping as existed, the mere withdrawal of the Ada without any fault of the charterers should so have affected their power to fill the Zealandia; but the proof stands uncontradicted, with the exception of the witnesses just mentioned, that the cancellations were because of the withdrawal. Moreover, there would apparently have been no trouble on the face of it in calling those shippers who canceled to see whether any effort was made to

secure them for the Zealandia, and why they refused. Upon such a
record, whatever I may suspect, I do not feel at liberty to disregard
proof which the commissioner has accepted. I shall therefore as-
sume that the Zealandia was not filled because of the Ada’s with-
drawal.57

Hand’s greatest strength as a trial court writer may have been his ability to
build from the bottom up, rather than from the top down. At the building-block
level of lawyerly communication—the sentence and the paragraph—he was a mas-
ter of the segmentation principle in action. Given his excellent undergraduate ed-
ucation by luminaries including George Santayana, that comes as no surprise.58

B. For Whom are You Writing? The Problem of Audience in District
Judge Hand’s Opinions

1. A Tale of Two Hands: “Razzle-Dazzle” and “The Importance of Being
Earnest”

The Audience Principle,59 discussed in Section II.D, supra, is implicated
throughout our examination of principles relating to context, congruence, organiz-
ing patterns, and segmentation. The choices the judicial writer makes in these
areas are important components in the sum total of his or her approach to the au-
dience. To that list we add syntax as well.

Syntax—word choice—can often be a determinative factor in assessing the ac-
cessibility and cognitive effectiveness of prose.60 While syntax may not change the
ultimate meaning of a phrase, a sentence, or an opinion, it can change the efficacy
of communicating the message—and in some cases, the message itself.61

Syntax can be inviting and inclusive. Or it can be opaque and exclusive. A
reader’s cognitive reaction to syntactically difficult judicial writing might well be
described in Franz Kafka’s parable:

[O]f a “man from the country” who seeks the Law. A doorkeeper
stands at the entrance to the Law and bars admittance. The man sits
down and waits for days, weeks, months, and years. He examines

57. Id. at 368.
58. GUNTER, supra note 43, at 33-35.
59. ARMSTRONG & TERRILL 2d, supra note 3, at 128. (“Readers pay more attention if you approach your
material from their perspective, not yours.” In addition, the Audience Principle commands us to explicitly deter-
mine who our audience is, whether we have multiple audiences, and what varying content and degree of meta-
information those audiences bring to the reading of our work.) ARMSTRONG & TERRILL 1st, supra note 3, at 2-1–
2-8.
60. See, e.g., Edward J. Eberle, Comparative Law, 13 ANN. SURV. INT’L & COMP. L. 93, 100 (2007) (“Law
and literature teaches us the power and complexity of language in shaping legal data. Words, their syntax, gram-
mar, style and the like convey the particular context in which words sit, and form meaning.”).
61. See, e.g., Parker B. Potter, Jr., Antipodal Invective: A Field Guide To Kangaroos In American Cour-
trooms, 39 AKRON L. REV. 73 (2006) (a fascinating study of how courts and litigants have affected their messages
by including the phrase “kangaroo court” in the syntax).
the doorkeeper with his eyes and cross-examines him with his questions. As the man grows old and death draws near, he asks one final question of the doorkeeper: why, during this long period of time, no one else has come to seek admittance to the Law. The doorkeeper roars into the man’s nearly deaf ear that the gate to the Law “was made only for you. I am now going to shut it.”

Syntax serves as an implicit invitation, or exclusion, of the audience whom the writer wishes to engage. In a revealing remark made towards the end of his judicial career, Learned Hand observed that, “I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment.” Hand’s district court opinions reveal that, in the main, he seemed to be writing for lawyers representing the immediate parties to the case and for himself—occasionally with an eye, too, for an appeals court, but certainly not always.

a. “Razzle-Dazzle”

Hand did not seem to be especially dedicated to an inclusive approach to writing. Like the English attorneys who could not bear to give up their beloved French law even when the language was deader than a doornail, Hand demonstrated an unusual proclivity, at times, to restrict full understanding of his opinions to a smaller circle—a circle who, like himself, would have known the things that a classically educated young man at Harvard in the 1890s would have learned from professors such as the fabled Santayana. In fact, Hand’s greatest weakness in terms of audience was that he sometimes wrote in a cryptic, almost exclusionary sort of way—for the “guild.” Second Circuit Judge Roger Miner, among the finest of our judicial writers, once referred to the writing of judges who like to sound important and make things look harder than they really are—or, as the English would say, are prone to making rather heavy weather of it—as “razzle-dazzle.” At times, that phrase describes Hand’s judicial writing as well.

Hand’s clubby, collegiate mindset is perhaps best exemplified by one of his more curious writing idiosyncrasies. This being his fondness for the relatively obscure Latin phrase, _vade mecum_, which roughly means a handbook or a “bible” for some area of specialty. In an early personal jurisdiction case, that in some ways was a stepping-stone to _International Shoe_, Hand offers us _vade mecum_ in the

---

63. Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate 50 years of service by Hand) (separately paginated section).
64. See GUNThER, supra note 43, at 33-35 (quoting hand as stating that the study of philosophy was his “first love”, and his reverence for George Santayana, a member of Harvard’s faculty during Hand’s student years and one of his teachers, most often remembered today for his aphorism about those not remembering history being condemned to repeat it).
denouement to his opinion. In that case, describing what would later come to be called the lack of a non-resident defendant’s forum contacts for purposes of personal jurisdiction analysis, there occurs a passage that a few courts have quoted (adding to the already small number of times any federal judge since 1796 has used \textit{vade mecum} in a published judicial opinion):

None of this, and not all of it, seems to us a good reason for drawing the defendant into a suit away from its home state. In the end there is nothing more to be said than that all the defendant’s local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no \textit{vade mecum}.\footnote{Hutchinson, 45 F.2d at 142.}

“\textit{Vade mecum},” a 21st century reader might ask, “what does that phrase mean?” \textit{Vade mecum}\footnote{A \textit{vade mecum} is a useful reference, such as a handbook, \textit{Oxford American Dictionary} 1027 (1980).} appears again in numerous Hand opinions and dissents in the Court of Appeals.\footnote{New York Trust Co. v. Commissioner of Internal Revenue, 68 F.2d 19, 20 (2d Cir. 1933); Catalin Corporation of America v. Catalazuli Mfg. Co., 79 F.2d 593, 595 (2d Cir. 1935); Kuhner v. Irving Trust Co., 85 F.2d 35, 38 (2d Cir. 1936); Pink v. U.S., 105 F.2d 183, 188 (2d Cir. 1939) (Hand, J., dissenting); U.S. v. Goldstein, 120 F.2d 485, 491 (2d Cir. 1941); U.S. v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).} One might expect some judges to feel the need to write more learned-sounding prose in an appeals court capacity. Yet \textit{vade mecum} also appeared in at least one of Hand’s district court opinions.\footnote{Van Heusen Products v. Earl & Wilson, 300 F. 922, 929 (S.D.N.Y. 1924) (“The prospect of getting objective tests for invention is tempting, but it is a mirage. How is it possible to say a priori what combination of elements needs an original twist of the mind, and what is within the compass of the ordinary clod? Is it not clear that the quality of a man’s inventiveness must be tested by reconstituting the situation as it was in the light of the preceding history of the art? There is no \textit{vade mecum} for such inquiries.”).}

Among legal phrases, even in 1930, this was not one typically encountered. In fact, a search of the Federal Reporter series through 2007 reveals that the phrase has been used in twenty-three federal judicial opinions from 1796 until its last appearance in 1999, \textit{eight of which} (35\%) Hand authored as noted above.\footnote{Compare Roberts v. Cay’s Ex’rs, 2 U.S. (2 Dall.) 260, 261 (1796) (in which the phrase is part of the title of a treatise listed in a string citation), with Longhi v. Animal & Plant Health Inspection Service, 165 F.3d 1057, 1060 (6th Cir. 1999) (in which Judge Nelson writes, “This prohibition is found in Subchapter A of Title 9 of the Code of Federal Regulations, the Agriculture Department’s \textit{vade mecum} of regulatory provisions related to animal welfare.”).} That kind of syntax seems to be quite uninviting, even among the most narrowly conceived audience of judicial opinions; and it excludes many readers whose educations did not include a substantial amount of Latin instruction. While the education of many who became lawyers included some Latin, given the paucity of the use of \textit{vade mecum} in the federal courts suggests that is not one of the helpful Latin legal
phrases that many 19th and early 20th century lawyers and judges incorporated into their syntax. Further, considering how many attorneys of the day clerked their way into bar admission with a minimum of formal education. The use of such a Latin phrase could leave out many of the audience even in the legal profession. Indeed, when the Military Court of Appeals employed it in a 1954 opinion, the court felt the need to define it immediately: “This Court has, from the first, emphasized that the Manual for Courts-Martial constitutes the military lawyers’ vade mecum, his very Bible.”

b. The Importance of Being Earnest

Perhaps Hand’s greatest strength in terms of audience was his impressive and consistent earnestness in judicial writing. Hand understood, as we have seen, the terrors and tribulations of being a litigant. Hand also held a modest assessment of his own corpus of judicial work that was focused on the parties before him: that “I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment.” This, in any of the opinions known to the author, Hand always treated the rendering of the opinion with the seriousness of purpose and sense of occasion for the litigants befitting the judicial role and the deconstructive suffering endured by all litigants as a result of the process, no matter how “due,” itself. While that may seem obvious to some, expected, de rigeur, it is not so simple.

Complexities abound from judges who become too literary, and use the opinion as an opportunity to impress in a manner usually reserved for creative writing classes. Judge John Brown, for example, whose maritime and admiralty opinions are deservedly celebrated for their clarity, did have a distracting habit of injecting “humor” into his opinions. His clerks reminisce fondly about it:

Judge Brown’s legal opinions are equally legendary. Judge Brown very much believed that the law and its language need not be dull and lifeless. Legal writing was his passion and ultimately, his leg-

71. U.S. v. Drain, 1954 WL 2443 (CMA), 16 C.M.R. 220, 4 USCMA 646, 648 (Ct. Mil. App. 1954). Certainly, of course, Hand might have explained his reference this way—that he did not do so is telling for his view of the audience. One might compare the way that even the antiquarian Cardozo dealt with terms or phrases on which he sought to build his metaphors; thus, while he felt no need to help the reader with the unusual word, “punctilio” in Meinhard v. Salmon, he sometimes took more solicitude for the reader, as when he sought to build a metaphor on a modern medical device, the sphygmograph. See, e.g., People v. Zachowitz, 172 N.E. 466, 467 (N.Y. 1930) (“The sphygmograph records with graphic certainty the fluctuations of the pulse. There is no instrument yet invented that records with equal certainty the fluctuations of the mind.”). Cardozo’s use of the word does not appear, however, entirely accurate. See, e.g., Jennifer Leonard Nevins, Measuring The Mind: A Comparison Of Personality Testing To Polygraph Testing In The Hiring Process, 109 Penn. St. L. Rev. 857, 864 n.56 (2005) (describing the device as one of three used in polygraphing, “to record changes in blood pressure”).

72. See generally GUNTHER, supra note 43.

73. Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate 50 years of service by Hand) (separately paginated section).

74. See, e.g., ANITA MILLER, UNCOLLECTING CHEEVER: THE FAMILY OF JOHN CHEEVER VS. ACADEMY CHICAGO PUBLISHERS (1999) (describing bankrupting effects—emotionally and financially—of protracted litigation between author’s widow and small publishing house).
acy. As a result, he and his clerks made every effort to make his opinions entertaining as well as illuminating. In fact, when I began clerking for the Judge, I was told that the funnier the draft (in appropriate cases, of course) the more likely he was to accept it without changes. That proved to be pretty good advice. As a result, “Pac-Man” starred in one of our opinions, and even Dickens was employed as the voice of garbage to describe its landfill destination as the “far, far better rest I go to than I have ever known.”

Yet, the humorous school of judging takes little account of the sacrifice of emotion, time, expense, resources, and orientation within the context of normal life that attends all litigation, even that involving “soulless corporations,” for individual corporate agents have responsibility for the litigation and are typically among the witnesses; these sufferings Hand always seemed to be keenly aware of. Imagine then, what Hand’s reaction might have been to the following anecdote about Judge Brown:

Judge Brown’s creativity in making his point through humor is shown in *Croft & Scully Co. v. M/V Skulptor Vuchetich*. The issue in the case was whether the $500 package limitation set forth by the Carriage of Goods by Sea Act (COGSA) applied to a 20-foot steel container that held 1,755 cases of a soft drink called Delaware Punch. In the context of a container that capsized during loading operations at Houston, Judge Brown declined to apply the [COGSA package monetary limitation.] He noted that “Pepsi Cola Hits the Spot-On the Pavement”; “during the Refreshing Pause between the arrival of the container and the arrival of the Skulptor”; “42,120 cans of soft drinks crashed to the ground, never a thirst to quench”; “[in the Crush. . . ][the stevedore . . . was in no mood to have a Coke and a smile]; “the winds of judicial change Swepped away the $500 shelter”; and the appellee’s argument held “no water, carbonated or otherwise.”

The litigants—and lawyers—in this case spent considerable time, resources, and efforts arguing these points. To make their dispute the subject of corny humor

---

75. Collyn A. Peddie, *Lessons From The Master-The Legacy Of Judge John R. Brown*, 25 Hous. J. Int’l L. 247, 250 (2003) (footnotes omitted) (Pettie attempted to rationalize Brown’s thinking by asserting that “[t]here was a method to the Judge’s apparent madness. Judge Brown instinctively knew that humor—perhaps more than any other language tool—has the ability to make an idea memorable and concrete and to explain a complex concept in terms that people can understand.”). *Id.* at 250. While that may be true, there are other, countervailing considerations in writing a judicial opinion—lessons of the Audience Principle. See, e.g., Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado, 205 U.S. 454, 465 (Brewer, J., dissenting) (taking Justice Holmes to task gently for treating as “frivolous . . . a distinct claim that [appellant] was denied that which he asserted to be a right guaranteed by the Federal Constitution.”).

that would not pass muster in even the remotest of Catskill Resorts\textsuperscript{77} would seem to trivialize the gravity of the dispute to the parties, let alone the legal system. This is something Hand would never do.\textsuperscript{78}

The Audience Principle is even more poorly served by judicial opinions that actually poke fun at parties. A most egregious example, now included in law-school casebooks on contracts,\textsuperscript{79} is the New York Appellate Division’s opinion in \textit{Stambosvky v. Ackley} \textsuperscript{80} Justice Rubin’s majority opinion is a rollicking exercise in finding as many ways to work in words and phrases relating to the supernatural as possible; however, the jokes not only are demeaning to the parties (however skeptical one is of the world of the supernatural) but also interfere in communicating to a broader audience the nature of the case and the issues that required an appellate opinion to resolve them. In fact, it is only in the dissenting opinion of Justice Smith, who plays it straight, that we clearly learn what the case is about:

Plaintiff seeks to rescind his contract to purchase defendant Ackley’s residential property and recover his down payment. Plaintiff alleges that Ackley and her real estate broker, defendant Ellis Realty, made material misrepresentations of the property in that they failed to disclose that Ackley believed that the house was haunted by poltergeists. Moreover, Ackley shared this belief with her community and the general public through articles published in Reader’s Digest (1977) and the local newspaper (1982). In November 1989, approximately two months after the parties entered into the contract of sale but subsequent to the scheduled October 2,
1989 closing, the house was included in a five-house walking tour and again described in the local newspaper as being haunted.

Prior to closing, plaintiff learned of this reputation and unsuccess-fully sought to rescind the $650,000 contract of sale and obtain re-turn of his $32,500 down payment without resort to litigation. The plaintiff then commenced this action for that relief and alleged that he would not have entered into the contract had he been so advised and that as a result of the alleged poltergeist activity, the market value and resaleability of the property was greatly diminished. Defendant Ackley has counterclaimed for specific performance.\footnote{Id. at 261.}

It is rare that the dissent has to take on the tasks of setting forth the basic facts and claims in the case. But Justice Rubin’s opinion left Judge Smith little choice. Justice Rubin opens the opinion with the first in a string of bad puns, “The majority opinion goes on to observe that ‘no divination is required to conclude that it is defendant’s promotional efforts in publicizing her close encounters with these spirits which fostered the home’s reputation in the community.’\footnote{Id. at 256.} But Justice Rubin was just getting his comedy-club audience warmed up, as we see him “top” himself in the next passage:

While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment.\footnote{Id. at 256 (emphases added).}

But Justice Rubin was not done. As if we were reading the work of a judicial Jim Carey, having lost control of a skit and now far over the top and out of any reasonable bounds of decorum, we are treated to the climatic passage of the opinion, “Pity me not but lend thy serious hearing to what I shall unfold.”\footnote{William Shakespeare, Hamlet the First Act, sc. 5.}

From the perspective of a person in the position of plaintiff herein, a very practical problem arises with respect to the discovery of a paranormal phenomenon: “Who you gonna’ call?” as the title song to the movie “Ghostbusters’ asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an in-
inspection of every home subject to a contract of sale. *It portends* that the prudent attorney will establish an escrow *account lest the subject of the transaction come back to haunt him* and his client—or pray that his malpractice insurance coverage extends to *supernatural disasters*. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a *hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest.*

In their teaching notes on this case, Professors Brian Blum and Amy Bushaw of the Lewis & Clark School of Law posit troubling questions about this opinion, striking at the heart of the Audience Principle:

> We don’t mean to spoil the fun, but think that it is worth raising the issue of whether it is appropriate, and not a lapse of proper judicial conduct, for a judge to write an amusing or facetious opinion. Although the facts may be funny to an outsider, the parties have spent considerable money and time, and have no doubt incurred some emotional cost, in litigating the case. Their perception of the system of justice may be diminished by an opinion that is not serious and judicious, even if the case itself seems silly. (There are more appropriate sanctions for frivolous or vexatious litigation.)

Two of these points especially merit further development and emphasis. First, the diminution of the judicial system from such writing is not just in the eyes of the parties, it has toxicity for the judiciary (abasing general rules of decorum and sensitivity in adjudication), for the legal profession (where professionalism and decorum are already seriously at-risk), for the general public (to see courts having a laugh at the expense of non-lawyers and non-insiders) -and for law students (who read such cases in forming their own values, perceptions, and standards at a very critical time in their professional lives). Second, the suggestion that frivolous and vexatious claims (which this was not, given that the majority reinstated the rescission claim) can be better handled through established means is one that was lost on this court. Another opinion in which a judge—a federal trial judge, no less—losses sight of the line between decorum and toxicity, between appropriate sanctions and inappropriate humiliation, is *Bradshaw v. Unity Marine Corp., Inc.*

The *Bradshaw* court was ruling on a defense summary judgment, but found the briefs and authorities submitted by both parties to be inadequate and inaccurate. Rather than simply holding a hearing on the motion and scolding the attorneys in

---

85. [Stambovsky, 169 A.D.2d at 257 (emphases added).](#)


Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact-complete with hats, handshakes and cryptic words-to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor’s edge sense of exhilaration, the Court begins.88

The court, however, was not satisfied with that lashing. The court continues in the same mocking tone as it begins to evaluate specific arguments:

Defendant begins the descent into Alice’s Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. See Gonzales v. Wyatt, 157 F.3d 1016, 1021 n. 1 (5th Cir.1998). That is all well and good-the Court is quite fond of the Erie doctrine; indeed there is talk of little else around both the Canal and this Court’s water cooler. Defendant, however, does not even cite to Erie, but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of Erie. Finally, Defendant does not even provide a cite to its desired Texas limitation statute. A more bumbling approach is difficult to conceive-but wait folks, There’s More!89

It continues such hyperbolic sarcasm throughout the opinion:

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff

88. Id. at 670.
89. Id.
does at least cite the federal limitations provision applicable to maritime tort claims. See 46 U.S.C. § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff “cites” to a single case from the Fourth Circuit. Plaintiff’s citation, however, points to a nonexistent Volume “1886” of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court’s dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. See Wells v. Liddy, 186 F.3d 505, 524 (4th Cir.1999) (What the ...)! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff’s counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!).

The insults are too numerous to catalog easily; they even penetrate into the lowest of the vernacular in the court’s Wells v. Liddy parenthetical, which (if we are trying to imagine the audience) should appeal to cynical teens, perhaps. The shrillness of tone reaches a pitch at which the reader begins to feel sympathy, if not empathy, for these lawyers, no matter how poor their lawyering, since the public judicial response is so far over the top. For example, at one point, the district court writes:

> Despite the continued shortcomings of Plaintiff’s supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon-Brick Red is much easier on the eyes than Goldernrod, and stands out much better amidst the mustard sploched about Plaintiff’s briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

The court then dismissively transitions back into a legal analysis with the barb, “Now, alas, the Court must return to grownup land.” The *ad hominem* attack on the attorneys continues unabated right into the concluding paragraphs of the opinion, in which the court not only casts more aspersions on the lawyer’s abilities, but allows the venom to spill over into disrespect for the parties and the cause of action:

90. *Id.* at 670–71.
91. *Id.* at 671.
92. *Id.*
After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties’ briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter.

... 

[I]t is well known around these parts that Unity Marine’s lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff’s lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what’s left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.  

Despite exhausting nearly every contumely a court might think of, this court went so far as to finish off the opinion with a final, demeaning footnote, admonishing that, “[i]n either case, the Court cautions Plaintiff’s counsel not to run with a sharpened writing utensil in hand—he could put his eye out.”

We of course do not know how vexing the pleadings were with which the judge dealt. Perhaps they were worthy of the level of scorn and contempt heaped upon them. But the Audience Principle tells us that the manner of the heaping was utterly inappropriate. The judge could have played it straight in the opinion; he might have noted the amateurish nature of the pleadings, and might even have made an appendix of highlights of some of the more embarrassing lowlights. However, in losing the restraint of language and tone that decorum demands, the court, instead, abdicated its judicial role with a public audience of bench, bar, and public—it committed a judicial sin at least as mortal as, if not more so, than the incompetence with which it charges the lawyers. As Professor Steven Lubet has observed of this opinion:

Let’s resist th[e] urge [to delight in misfortune well-earned], at least for the time being, while we think a bit about the use and misuse of judicial opinions. In that regard, [the judge’s] stylings turn out to be a symptom, or perhaps an exemplar, of a more general problem for both the judiciary and the legal profession.

93. Bradshaw, 147 F. Supp. 2d at 671.
94. Id. at 671 n.4.
Federal judges exercise enormous power over lawyers and their clients. Armed with life tenure and broad discretion, a judge can do great damage to an attorney’s reputation and career, while the lawyer has almost no recourse. So when [the judge] decided to torment the hapless counsel in the Bradshaw case—who are identified by name in the published opinion—he was taking aim at people who could not defend themselves. Under prevailing law, they cannot even get their case transferred to a new judge. They just have to grin and bear it, in the hope that ‘His Honor’ doesn’t decide to go after them again.  

Even more significant, however, to our discussion of Learned Hand and the Audience Principle is the impact of a judicial opinion like this on the injured plaintiff:

Furthermore, there are severe costs when courts use published opinions for the purpose of humiliation, even when couched in humorous terms. First, we ought to worry about the impact on the parties. Bradshaw is a Jones Act case, involving serious personal injuries to a seaman. Judge Kent’s decision dismissed an important defendant from the case, causing a definite setback to the plaintiff. Imagine how the injured Mr. Bradshaw would feel upon reading [the opinion] . . .

Put aside the fact that Mr. Bradshaw was injured when climbing from a tugboat to the pier, which Judge Kent chose to use as part of a joke. Until seeing this excerpt, Mr. Bradshaw might once have believed that federal judges decided cases out of an obligation to justice, not out of affection for counsel, and certainly not out of morbid curiosity (another bad joke). He would surely be

95. Steven Lubet, Bullying from the Bench, 5 GREEN BAG 2D 11, 12 (2001) (footnote omitted). This judge’s excess eventually proved not confined merely to his writings. See, e.g., James C. McKinley, Jr., Judge Sentenced To Prison For Lying About Harassment, N.Y. TIMES, May 12, 2009, at A15 (discussing Samuel Kent’s guilty plea to obstruction of justice charges in the wake of his confession that falsely denied in forcing unwanted sexual contact on two of the district court’s personnel). The victims of the judge’s excesses were quoted as follows:

Both women made statements before the sentencing, The Houston Chronicle reported. Ms. McBroom expressed anger that Judge Kent had tried to portray her complaints as those of a spurned lover.

“Being molested and groped by a drunken giant is not my idea of an affair,” she said in court.

Ms. Wilkinson called Judge Kent “the biggest bully of them all.”

Id. Recently, it was reported that “Dick DeGuerin, a lawyer for Judge Kent, said the judge suffered from depression, alcoholism, diabetes and bipolar disease. Rather than resign before he serves his time in prison, Judge Kent, appointed to the lifetime post by President George Bush in 1990, has asked to be allowed to claim that he is disabled so he can continue to collect his salary of $169,300 a year.” Id.
confused, or more likely appalled, by the court’s trivializing reference to the odor of a wet dog. And remember, the plaintiff lost. Although you would not know it from reading the opinion, the case was about Mr. Bradshaw, not about the judge’s relationship to the lawyers. Will Bradshaw be able to read Kent’s opinion and feel that he received a fair hearing?

What would Judge Hand say to such opinion? As Richard Posner reports, Hand didn’t suffer fools gladly and wasn’t afraid to, “[s]wivel his chair 180 degrees, thus presenting his back to the lawyer, and at times he would toss briefs over the bench in disgust.” One can easily see Judge Hand turning his back on such judicial writing and tossing the opinions back over the bench to their authors.

2. Audience and Judicial Motivation

Speaking metaphorically, if syntax is but a key to estimating the audience intended for a judicial opinion, it may also be a surrogate for judicial attitudes and motivations otherwise disclosed. The subject of audience in judicial opinions has recently been tackled by Professor Lawrence Baum.

Professor Baum’s approach to the subject might be fairly deemed a motivational perspective—he examines a range of communications, both judicial and extra-judicial, to decipher motivations for their decisions beyond merely “making good law” or even “making good policy.”

Baum hypothesizes that judges are also driven by the very human desire for popular approval and public respect, and, as a result, these extra-legal factors both shape their decision-making and define the audiences for whom they write. A strong motivator—both conscious and unconscious, for most judges is the perception of them as “elite” groups in American society, “whose values are more similar to those of the mass public than they are different,” but when those views “differ, however, judges’ links with their personal audiences will draw them toward the

96. Id. at 12–13; see David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 GEO. J. LEGAL ETHICS 509, 568, 574 (2001). It is interesting to contrast this judge’s contempt for the status of the injured merchant mariner with the solicitude for injured sailors shown by District Judge Edmund Waddell, Jr., whose admiralty opinion in The Mina, 241 F. 530 (E.D. Va. 1917), was contrasted with one of Hand’s, supra notes 208–09 and accompanying text.


99. Id. at 158–59.

100. Id. at 148. Baum observes that “an audience-based perspective can supply some of the missing motivational bases” for models of judicial behavior and assist in harmonizing disparate models.

101. Id. at 5 (stating that although his study has focused on “higher courts,” especially the U.S. Supreme Court, his “interest extends to lower courts” and that “a perspective based on judges’ relationships with their audiences is one means to study lower courts in the same terms as higher courts”). The phenomenon of lawyering targeted at elites begins even in the fundamentals of legal education, as Professor Lucille Jewel has recently brought to light. See Lucille A. Jewel, Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy, 56 BUFFALO L. REV. 1157 (2008).
views of elites.  

Baum makes other, extensive empirical observations about how judges’ perceptions of audiences drive their decision-making. I do not propose to test those hypotheses here against Hand’s District Court work—the environment in which he did that work is remote and the contextualizing personal and societal sources require more research than resources at hand permit. However, recognizing that Terrell and Armstrong’s approach to cognitive communication is on a parallax with this recent work on audience-versus-outcomes in the field of political science, I turn to a more explicit discussion of audience in Hand’s opinions than the article has explored until this point. The key to understanding Hand’s style goes beyond idiosyncrasies he may have indulged. A broader assessment of his work suggests that Hand was keenly aware of writing for the parties as audiences; and that he was often writing for other judges in the District, as well as for lawyers whose practices were centered there. Of more significance, however, is Richard Posner’s observation that, “no careful reader, making due allowance for differences in linguistic conventions between the nineteenth century and today, will fail to note the personal, direct, and conversational tone of” Learned Hand’s judicial opinions.

The following is an eclectic, yet representative selection of cases that reveal issues of audience arising inferentially from Hand’s District Court opinions; and for the reader who wishes to enrich this with Baum’s exploration of decision-making models, the following are worthy of case study.

a. Isn’t this Important Enough to Lay Out Logically?  *In re Kerner*

Fraud—whether done by commission or omission—is an all-too-familiar phenomenon to bankruptcy practitioners. Hand dealt with such a problem in *In re Kerner*, as he worked to develop the bankruptcy law of the Southern District of New York (an obviously bustling place for bankruptcies). The question in the

---

102. *BAUM, supra* note 98, at 163.
104. See *In re Denny*, 240 F. 845, 847 (S.D.N.Y. 1917).
107. 245 F. 807 (S.D.N.Y. 1917).
108. See *David A. Skeel, supra* note 106, at 40–43 (discussing the history of the Bankruptcy Act of 1898 and its early development); see also *F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 157-162* (William S. Hein & Co., Inc. 2003) (1919); *Charles Warren, Bankruptcy in United States History 128-43* (Harvard U. Press 1935); *Peter J. Coleman, Debtors and Creditors in America: Insolvency, imprisonment for Debt, and Bankruptcy 1607-1900* (State Historical Society of Wisconsin 1974); Charles Jordan Tabb, *A History of the Bankruptcy Laws of the United States, 3 AM. BANKR. INST. L. REV. 5, 23-26* (1995); *David A. Skeel, Jr., The Genius of the Bankruptcy Act of 1898, 15 BANKR. DEV. J. 319* (1999). Bankruptcy cases were a very significant part of Hand’s work from the beginning of his District Court service, yet he was new to the subject. *GUNTHER, supra* note 43, at 137. Bankruptcy “cases produced more than half of his written opinions during his first year on the bench.” *Id.* In a letter to his mother, Hand described the stress that such cases caused him:
case was whether a debtor could obtain a discharge of debts when he omitted in a mid-winter financial statement information about inventory he had purchased for the spring season. The debtor’s excuse (at least according to the Reporter of Decisions) was that “it was customary in the trade to omit from the financial statement such assets and liabilities.” The issue here seems fairly significant—in general, establishing the standard of disclosure in bankruptcy cases; and in particular, establishing whether business practices alleged to be common are relevant to, let alone modify, the disclosure standards that Congress intended to establish through the Bankruptcy Act. Obviously, this would be a ruling of critical importance to individuals, businesses, and lawyers.

One might think that the importance of this issue would have moved Hand to have written a well-organized opinion, explaining the background of the issue and its significance to a broad audience. However, Hand did not take that approach—the opinion is cryptic, and the importance of the issue is not revealed until the very end of what might be fairly described as a somewhat cursory opinion. Indeed, Hand’s opening leaves the reader feeling as if we have walked into a conversation already well under way during our absence:

This case falls directly under my ruling in Re Maaget, 245 Fed. 804, and I shall follow it, unless it appears that it has been overruled in Re Rosenthal, 231 Fed. 449, 145 C.C.A. 443. The opinion in that case does not pass upon the point, and I have no means of determining whether it was raised on the appeal. In any event the opinion below does not diverge from In re Maaget, but quotes it with approval, and the case has the distinguishing point that the bankrupt, who could not read or write, may well have supposed the statement to have been true. I cannot find that any court has decided that, where a bankrupt deliberately chooses to omit a liability for the purchase price of goods still on hand, he has made a true financial statement. Scienter is, of course, a necessary element in the charge, and it would be a defense to show that the bankrupt, however erroneously, supposed that the liability did not in fact exist. 109

There is a lot going on here—a juggling of case precedents the reader has no particular reason to know, facts of those cases contrasted with facts of this case, and the judge’s thinking out loud about the effect of one precedent upon another. It should hardly be the lead in. In fact, the lead in should have been crafted around what Hand left for the end of the opinion—crafted with the syntactical excellence

It is not that the bankruptcy cases are more difficult to decide than others . . . only there are so many of them, and I get mixed up; and besides that, I am constantly interrupted by people who come in asking usually for what they ought not to have.

Id. 109. In re Kerner, 245 F. at 807.
characteristic of Hand’s sequencing skills at the paragraph and sentence level, and leaving therefore an indelible impression:

[W]hile the bankrupt’s error touching the existence of the liability would make the statement honest and excuse a mere mistake, his error as to his obligation to make a true statement is irrelevant. His duty is to speak the truth, so far as he knows it, and no mistake as to the scope of that duty affects the legal consequences of his omission. Like any other duty, the law imposes it upon him at his risk. The test is honesty in the statement, not in the belief that an honest statement is necessary. It would be as intolerable as it is anomalous to allow men to make financial statements which they know to be false, on the plea that they supposed the recipient was not entitled to honest ones.  

Interestingly, Hand invites the parties to appeal; “[i]t would be satisfactory if a ruling upon the point could be obtained from the Circuit Court of Appeals.” The debtor’s attorney took him up on this; and the Second Circuit reversed Hand’s decision. Perhaps “the point” deserved a more cognitively well-crafted opinion. As it was, there was a dissent, but Hand’s view on this important issue of developing clear standards of veracity in bankruptcy did not command either of the remaining two judges on the panel.

It is a bit odd that Hand put little into crafting an opinion that he invited the parties to appeal. The Circuit Court of Appeals is a potential audience to virtually every district court opinion; Hand, who frequently sat by designation on the Appeals Court from 1917 onwards, certainly had that constituency in mind among his audience. Beyond the immediate parties, a future panel of appeals court judges is one of the significant audiences for an opinion of a district judge. While some of Hand’s opinions were not written in a way that would seem to take that audience into account, others were written to engage that audience—who showed their cognitive connectedness not only by affirming Hand’s ruling, but by adopting his opinion as the opinion of the appeals court. A Westlaw search reveals four opi—

110. Id. at 807–08.
111. Id.
112. In re Kerner, 250 F. 993, 995 (2d Cir. 1918). The Reporter helped to make clear the issue and its context better than Hand had in the district court:

Under Bankruptcy Act, § 14b, as amended by Act Feb. 5, 1903, c. 487, § 4, and Act June 25, 1910, c. 412, § 6 (Comp.St.1916, § 9598), prohibiting a discharge where the applicant has obtained credit on a materially false statement in writing, a financial statement, made by the bankrupt as a basis for credit which omitted from the assets certain merchandise and from the liabilities the amount due thereon, held not so materially false as to warrant denial of discharge and furnish ground for objection to a composition offer.

Id. at 993.
113. Id. at 995 (Hough, dissenting) (“[D]issent, on the ground that the financial statement in question was ‘materially false’; i.e., substantially untrue, and made so with intent to deceive.”).
nions in which the Second Circuit rendered an affirmance by incorporating Hand’s district court opinion as its own: *F.I.A.T. v. A. Elliot Ranney Co.*,115 *Owens v. Breit tung*;116 *The Walter Green*;117 and *May v. Hartford Fire Insurance Co.*118 None of these occurred during the 1916-1917 period under examination. Perhaps that suggests that he was still learning how the principles of cognitively effective communication play out in actual application; the evidence principles in application, and only after a decade of seasoning (and increasingly frequent-stints on appellate panels by designation119) was he fully in tune with the judicial craft to the degree that his opinions reflected the style and presentation of the appellate judge.

b. Writing for The Parties, Not Posterity: Contrasting Coronet Phosphate and Pressed Steel

In an admiralty opinion that implicates the Congruence Principle and the use of default organizations as well as the Audience Principle, *Coronet Phosphate Co. v. United States Shipping Co.*,120 neither Hand nor the Reporter of Decisions graces us with a faculty summary. In fact, were it not for the Headnotes inserted by a West Publishing Company Editor, we would have no idea what the opinion is about. That is because Hand begins with a discussion of a pleading we have not seen, which is itself a response to another pleading we have not seen:

The first defense is contained in the forty-eighth article of the answer. It alleges . . .

The rest of the opinion is organized in this same mechanical fashion, based on the order of articles in the answer:

The second defense is set up in the forty-ninth article of the answer. It alleges . . .

. . .

The third defense is contained in the fiftieth article of the answer. It alleges . . .

. . .

The fourth defense, in the fifty-first article, asserts that . . .

---

115. 249 F. 973, 973 (2d Cir. 1918).
116. 270 F. 190 (2d Cir. 1920).
117. 266 F. 269, 271 (2d Cir. 1920).
118. 297 F. 997, 998 (2d Cir. 1923).
119. GUENTHER, supra note 43, at 56.
120. 260 F. 846 (S.D.N.Y. 1917).
121. *Id.* at 846.
... and so on. The organization of the answer, therefore, becomes the organization of the opinion. This default organization works conveniently enough for the parties’ lawyers; out of their numerous case files, they could pull the required pleadings and lay them down alongside Hand’s opinion to, in effect (and with apologies to Mitch Miller), sing along with Learned. As a result, Hand provides no meta-information about the case, about the relative legal importance of the arguments, or about how they might relate to the overall disposition of the case. He simply, and efficiently for the lawyers in the case, ticks off the various exceptions to the answer. He closes the opinion, in effect, to an outside audience as if he were a school board in executive session. There are, however, matters of real interest to other parties. For example, World War I was raging on land and sea. Although the United States had not yet entered the war, United States businesses and foreign businesses with United States presence were being greatly affected by the slings and arrows of belligerence among the European powers. Thus, the defenses to contract performance associated with doctrines such as impossibility of performance and with contract clauses such as *force majeur* came into play. The case raises issues such as the proper pleading (in the pre-Federal Rules of Civil Procedure (“FRCP”) days of stricter pleading rules) of such defenses:

> [T]he charter party under which the carriage was to be made contained the usual provision against restraints of rulers, princes, and people. It then goes on to allege that, in consequence of the Great War, ‘restraints, restrictions, and limitations have been placed on shipping, both under neutral and belligerent governments’ among them being Great Britain and her allies, on shipments destined to Sweden and Holland, and that by reason of these restraints, limitations, and restrictions respondent was prevented and restrained from performing the charters mentioned in the libel and furnishing the tonnage.

This allegation is certainly bad as it stands. I do not mean to pass upon the question whether the British Orders in Council excused the respondent from the voyage; but I do mean to say that in pleading foreign ordinances having the force of law the pleader is bound to allege more than his conclusion of the effects of the ordinance. He is bound to set out its substance, so that the court may judge whether it has the effect which he ascribes. Without passing, therefore, upon the question as to whether shipments to Sweden...
and Holland were excused by the Orders in Council, or any other ordinances promulgated by any of the powers, the exception is sustained.123

But the significance of the legal matters ruled upon is buried under the default organization, which operates as a kind of code that, absent considerable reader effort, can be readily unlocked only by the parties’ counsel.

That is not to say, however, that Hand was unconscious in this case of an audience beyond counsel of record. We find mid-way through the opinion that there are two other sets of exceptions that he is ruling on, “[t]he other exceptions, except the last two, touch the interrogatories”124—but here, Hand sets aside the mechanical run-through to give a commentary on the function of interrogatories in admiralty cases and the limits of (pre-FRCP) discovery:

Interrogatories in the admiralty serve two purposes, to amplify the pleadings of the party interrogated, and to procure evidence in support of the libel or defense of the party interrogating. They should not, however, be used merely to fish into the evidence which the party interrogated may produce in support of his own allegations. This limitation upon discovery has remained even in the most modern rules of procedure. A party is of course entitled to know whether his opponent admits the truth of his own allegations, and how far, so as to avoid unnecessary preparation for trial. He is not entitled to know what evidence his adversary will produce to prove the adversary’s allegations, and what evidence he must himself produce to overcome the case so made. The result will, of course, be, as it has been in the past, that he must go to trial somewhat in the dark as to what he must meet. The pleadings are intended to advise him of that, and interrogatories are proper to reduce those allegations to very specific form. They should be encouraged for that purpose, but so far as they call upon the pleader to go further, and give, not only the details of his allegations, but the evidence by which he means to prove them, they are liable to abuse. If there develop on the trial a case of genuine surprise, the court, especially where there is no jury, has ample power to protect the party surprised.125

This digression is clearly aimed at a larger audience, beyond counsel of record. Hand appears to be speaking to the admiralty bar in New York, if not more broadly. Having recognized the broader audience, even for matters in this opinion, one

123. Coronate Phosphate Co., 260 F. at 847 (citations omitted).
124. Id. at 849.
125. Id.
might have thought that Hand would structure the opinion to be more accessible to
that audience.

While Hand hid the ball in discussing the important discovery issue in Coronet
Phosphate for an audience of fireside intimacy, he certainly showed a greater ap-
preciation for a broader audience in Pressed Steel Car Co. v. Union Pacific Rail
Co., where Hand tackled a subject that is the bane of many trial judges’ exis-
tence—discovery disputes.

Part of the challenge presented by the bill of discovery was that this was an
equitable process being sought in an action-at-law for breach of contract. At the
time, the equity and law jurisdictions of the Federal District Court had not yet been
merged. This was not to occur until 1935. Hand addressed the problem in an ear-
lier opinion in this litigation. In this subsequent opinion, the Reporter of deci-
sions provides an extensive prologue setting forth the details of the pleadings in
what boiled down to a breach of patent licensure agreement. This set the stage
for Hand to discuss, for the benefit of practitioners throughout the country, the
changes from the “old course of equity” and “the abolition of pleas” to new rules
(at that time) “that discovery shall be by interrogatories, to which specific objec-
tions may be taken, . . . and that pleadings shall contain no evidence, but the ‘ulti-
mate facts.’” Then, as if turning to address a gathering of federal court civil
practitioners at an American Bar Association annual meeting, Hand details that
“the proper practice in a bill of discovery is now as follows,” and proceeds to lay
out the steps, and then demonstrate, as a case study, how they apply to the discov-
ery dispute between these parties. While Hand helps us out a bit more here than
in Coronet Phosphate as to the content of the interrogatories being challenged and
their relationship to the lawsuit, it seems to matter less: Hand is holding a master
class in the “new” federal court discovery. This becomes clear as Hand describes
not only how the discovery he’s allowing will proceed here, but also, how he will
not allow discovery to proceed:

If the defendant can be brought to acknowledge the possession of
any documents which appear to be pertinent to the issues, it will be
required to produce them, but not until it does. Any other rule
would enable the plaintiff to fish among all the documents which
the defendant may have for the purpose of picking out those on
which it chooses to sue. Such a course is wholly unauthorized, not
only under the old practice (Langdell, Secs. 204, 205), but equally
under rule 58, which requires a party to produce only those docu-

126. 241 F. 964 (S.D.N.Y. 1917).
127. Pressed Steel Car Co. v. Union Pac. Rail Co., 240 F. 135 (S.D.N.Y. 1917) (justifying exercise of
court’s equitable jurisdiction over bill of discovery petition in a breach-of-contract action at law).
129. Id. at 966.
130. Id. at 966–67.
ments which contain evidence material to the case or defense of his adversary.\textsuperscript{131}

If any doubt could be entertained to how much more broadly Hand acknowledges his audience here, that doubt would be dispelled by the use of this opinion as a platform to preach greater party cooperation in the use of discovery to save the “maximum of expense in time and labor”:

The plaintiff will have leave to frame and keep reframing interrogatories till it has extracted from the defendant all the information which it possesses. Much the most convenient way would be for the parties to agree upon a master and allow the plaintiff an oral examination. This, however, I cannot compel; but the same result may probably be obtained, though it must be confessed with the maximum of expense in time and labor, by allowing interrogatories to be renewed as often as justice requires. If that does not serve, the plaintiff must rely upon such rights as he will have at the trial under Revised Statutes, Sec. 724 (Comp. St. 1916, Sec. 1469).\textsuperscript{132}

c. Deferring To The Special Master: \textit{Page Machine Co. v. Dow, Jones & Co.}

Another question on the Audience Principle is at what point does the audience come to the litigation? Should a judge reprise the facts, at least in summary form, if the opinion is to be published? Or should the judge simply leave it to the reader

\begin{itemize}
  \item \textsuperscript{131} Id. at 967.
  \item \textsuperscript{132} Id. at 967. As Professor Peter Subrin has described pre-FRCP discovery:
    
    In 1935, Edson Sunderland started drafting what became Rules 26 to 37 of the Federal Rules. Up to that time, extremely limited discovery took place in both law and equity cases in the federal courts. For law cases, the sole discovery (except the motion for a bill of particulars, which was considered a pleading device, and an equitable bill for discovery in support of a law case, a cumbersome and infrequently used device) was provided for in two federal statutes dealing with depositions.


    One could use an equitable bill of discovery in aid of a legal action, but “there was a conflict of opinion as to whether a party could obtain discovery only of evidence that was relevant to the claim or defense or whether the party could obtain discovery of evidence which was relevant to any issue in dispute.” \textit{Id.} Moreover, “[t]he bill of discovery was a cumbersome proceeding. The courts were constantly burdened with applications to settle the form, scope, and propriety of interrogatories.” \textit{Id.} (citing a Learned Hand opinion (\textit{Pressed Steel Car Co. v. Union Pac. R. Co.}, 241 F. 964, 967 (S.D.N.Y. 1917)) (stating that “Judge Learned Hand pointed out the wastefulness of this procedure”)).

    \textit{Id.} at 698 n.41 (quoting 6 JAMES WM. MOORE ET AL., \textit{MOORE’S FEDERAL PRACTICE} § 26 App.100 (3d ed. 1997)).
\end{itemize}
either to look up another opinion, or more burdensomely try to obtain from the Clerk of Court’s Office a copy of an unpublished opinion, order, or report?

Learned Hand opted for the latter approach in a factually interesting litigation, *Page Machine Co. v. Dow Jones & Co.* 133 In that case, Hand did not orient his readers in his published opinion; he passed them off to the unpublished report of a special master, “I think there is no gain in repeating the general outline of the litigation, which sufficiently appears in the [special master’s] report.” 134

And just where is this report? What would it tell the reader? The “gain” that Hand could not see is actually apparent—the gain to be had is by a broader audience of readers beyond the attorneys for the respective parties, who would have more ready access to the Special Master’s report in their files. Without it, other readers—lay, attorney, or judicial—are left with little context in which to order Hand’s discussion of the details at issue in that opinion. To gain such context, a reader would have to be highly motivated—willing to spend the time, money, and frustration in trying to obtain a manuscript copy of the Special Master’s report from the clerk’s office—or if the file is checked out to chambers, from the issuing Judge’s chambers. 135

In contrast to Hand’s attitude towards audience in *Page Machine*, Michael Mukasey (the last of President George W. Bush’s Attorneys General), as a United States District Judge in Hand’s former Southern District of New York, certainly saw the value of orienting a broader audience of readers. A good example of this is found in his opinions in a litigation filed by a sports and entertainment promoter against American poet and author Maya Angelou. 136 In issuing an opinion on contract-claim issues remanded to him by a Second Circuit panel, Judge Mukasey made passing reference to the prior opinion (giving readers familiar with it an opportunity to opt out of the fact section and to go directly to the legal discussion), but also oriented all readers not involved with the case by providing a synthesized—but not cursory—presentation of the facts pertinent to the issues addressed in the remand:

---

133. 238 F. 369 (S.D.N.Y. 1916).
134.  Id. at 369.
135. See, e.g., Comment, Discretionary reporting of Trial Court Decisions: A Dialogue, 114 U. PA. L. REV. 249, 255 (1966). Hand’s occasional predilection to dive into legal discussions without context, and sometimes even facts, vexed Professor Grant Gilmore, the reporter for Article 9 of the UCC. In a seminal book of debtor-creditor law, Gilmore quoted at length from a Hand opinion that decried the artificiality and incoherence of the common-law distinction between pledge and chattel mortgage. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY S-9 (1965) (citing In re German Publication Society, 289 F. 509 (S.D.N.Y. 1922), aff’d, 289 F. 510 (2d Cir. 1923)). However, when trying to bring Hand’s legal discussion to life by providing the factual context for that case, Gilmore lamented, “I find it impossible to make out from Judge Hand’s opinion what the facts of the case could have been.” Id. at 9 n. 12.
136. B. Lewis Productions, Inc. v. Angelou, No. 01 Civ. 0530 (MBM), 2003 WL 21709465 (S.D.N.Y. Jul 23, 2003), rev’d Nos. 03-7864(L), 03-7922(XAP), 2004 WL 11470712d Cir. 2004 (unpublished summary order), remanded to No. 01Civ.0530MBM, 2005 WL 1138474 (S.D.N.Y. May 12, 2005) (on remand after the U.S. Court of Appeals reversed the above decision in part to have Judge Mukasey consider “whether the Letter Agreement formed a contract other than a formal joint venture or exclusive agency agreement”—such as a simple bilateral contract).
Although familiarity with the facts in this case can be assumed, as they were set forth in detail in the court’s previous opinion, B. Lewis Prods., 2003 U.S. Dist. LEXIS 12655, at *2-*15, a brief recapitulation is necessary to provide context for this decision.\footnote{B. Lewis Productions, Inc. v. Maya Angelou, Hallmark Cards, Inc., No. 01Civ.0530MBM, 2005 WL 1138474 at *1 (S.D.N.Y. May 12, 2005). Judge Mukasey made good on his promise to the reader, compressing lengthy findings and prior proceedings into three-and-a-half slip opinion pages. See id. at *1-*4.}

Thus, by recognizing the simple teachings of the Audience Principle (not to mention the Context Principle), Judge Mukasey expanded the potential audience for this opinion from the immediate parties to others who might encounter it in researching the litigation, the law involved, or the operation of his court. It is no surprise that lawyers from all sides of the equation have praised Judge Mukasey for the transparency of proceedings in his court.\footnote{E.g., The New Man at the Justice Department, N.Y. Times, Sept. 20, 2007, at A1, 25. Some have attributed Mukasey’s crisp, concise, and clean judicial writing style to his admiration of George Orwell’s and to a stint at United Press International. Adam Liptak, Nuance and Resolve in Rulings by Attorney General Nominee, N.Y. TIMES, Sept. 23, 2007, at A1.}

IV. THE OPPORTUNITY OF SONIA SOTOMAYOR

During the interim in which Part I of this article was in the publication process, President Barack Obama nominated Second Circuit U.S. Court of Appeals Judge Sonia Sotomayor to the first vacancy on the U.S. Supreme Court during his administration. The media coverage and political discourse about her nomination seemed firmly fixed on her Latina heritage and her gender.\footnote{See, e.g., Nico Pitney, Sonia Sotomayor, Supreme Court Nominee: All You Need To Know, THE HUFFINGTON POST (June 1, 2009)(“President Barack Obama has tapped federal appeals judge Sonia Sotomayor for the Supreme Court, making her the first Hispanic in history picked to wear the robes of a justice.”), available at http://www.huffingtonpost.com/2009/05/01/sonia-sotomayor-supreme-court-capital-justice_n_194470.html (last visited Aug. 28, 2009); Peter Hamby, Ed Henry, Suzanne Malveaux and Bill Mear, Obama Nominates Sonia Sotomayor To The Supreme Court, CNN.com (May 26, 2009) (“If confirmed, Sotomayor, 54, would be the first Hispanic U.S. Supreme Court justice and the third woman to serve on the high court.”), available at http://www.cnn.com/2009/POLITICS/05/26/supreme-court/index.html (last visited Aug. 28, 2009); Jeff Zeleny, Obama Chooses Sotomayor for Supreme Court Nominee, N.Y. TIMES, May 26, 2009 (“If confirmed by the Democratic-controlled Senate, Judge Sotomayor, 54, would replace Justice David H. Souter to become the second woman on the court and only the third female justice in the history of the Supreme Court. She also would be the first Hispanic justice to serve on the Supreme Court.”), available at http://thecaucus.blogs.nytimes.com/2009/05/26/obama-makes-decision-on-supreme-court-nominee/?scp=3&sq=Sotomayor%20nominate&st=cse (last visited Aug. 28, 2009).}

What is, however, most remarkable about the nominee is her experience on the District Court bench. While a District Judge for only six years (1992-1998) before her nomination and confirmation to the U.S. Second Circuit Court of Appeals,\footnote{Charlie Savage, A Primer on the Sotomayor Hearings, N.Y. TIMES July 12, 2009, available at http://thecaucus.blogs.nytimes.com/2009/07/12/a-primer-on-the-sotomayor-hearings/?scp=7&sq=Sotomayor%20nominate&st=cse (last visited August 28, 2009).} those six years on the District Court bench are far more than any Supreme Court nominee since the ill-fated nomination of G. Harold Carswell\footnote{Martin Waldron, Supreme Court Choice—George Harrold Carswell, N.Y. TIMES, Jan. 20, 1970 (noting that Carswell was nominated by President Eisenhower to the District Court in 1958, where he served until he was nominated and confirmed to the U.S. Appeals Court in 1969), available at http://thecaucus.blogs.nytimes.com/2009/07/12/a-primer-on-the-sotomayor-hearings/?scp=7&sq=Sotomayor%20nominate&st=cse (last visited August 28, 2009).} in 1969, and the most substantial prior judicial
experience of any nominee since Benjamin Cardozo in 1932.\footnote{Cardozo was elected to the New York State Supreme Court in November 1913, sworn in on January 1, 1914, but in little over a month was detailed as a judge of the Court of Appeals, the New York’s highest court, where he served until sworn in as a U.S. Supreme Court Justice in 1932. See Hornblower Goes On Appeals Bench—Glynn Also Designates Cardozo For That Tribunal And Names Weeks For The Supreme Court, N.Y. Times, Feb. 2, 1914, available at http://query.nytimes.com/mem/archive-free/pdf?res=9B0DEED81F3BE633A25750C0A9649C946596D6CF (last visited Aug. 30, 2009).} Confirmed by the Senate in August 2009, Justice Sotomayor presents the first opportunity in a very long time to forge the hard-earned lessons of trial court judging with the opportunity to bring those lessons to bear on appellate judging at both the Circuit and Supreme Court levels.

As she embarks upon the work of the Court, Justice Sotomayor has an even greater opportunity to affect the practice of writing opinions than she does to impact doctrine (which will be more difficult given established voting blocs awaiting her on the Court). From our examination of what laboring in the Southern District of New York taught Learned Hand about opinion writing, we can anticipate that Justice Sotomayor is likely to bring many of the same lessons to the Supreme Court. But her spin on those lessons may be a bit different than Hand’s after the Senate Judiciary Committee, reflecting political polarization in the media, used her confirmation hearings to debate — albeit on a terribly simplistic and poorly informed level — the very notion of what it means to be a judge both in 21st century America as well as in the Anglo-American legal tradition as perceived 222 years after the judicial power was created in the Constitution of 1787.

Detailed explorations of legal, judicial, or political philosophy are outside of this article’s stated purview. However, Justice Sotomayor’s confirmation hearings raised three specific philosophical issues that bear directly on how the cognitive theories of communication will be applied to opinion writing. A judge’s view of each of these issues defines the milieu within which the principles, particularly the audience principle, operate. These issues do not bear merely on a judge’s jurisprudence or legal philosophy; they are viewed through the critical intellectual scaffolding within which cognitive communication occurs. These issues involve:

1. the dangerous – and fictional – “judges as baseball umpires” metaphor;

\[\text{http://select.nytimes.com/mem/archive/pdf?res=F10E17F83C5D137B93C2AB178AD85F448785F9} (\text{last visited Aug. 28, 2009)}. \] It must be noted, however, that Judge Carswell’s actions and words as a District Judge are what ultimately torpedoed his nomination. \text{See, e.g., Senators Are Told That Carswell Was Insulting To Negro Lawyers, N.Y. Times, Feb. 2, 1970, at 15 (“Louis H. Pollock, Dean of the Yale Law School,” testified before the Senate Judiciary Committee in 1970 “that after a study of Judge Carswell’s opinions, ‘I am compelled to conclude that this nominee presents the most slender credentials of any man put forward in this century’ for the Supreme Court.”), available at http://select.nytimes.com/mem/archive/pdf?res=FB0F15F9355D1B7493C1A91789D85F448785F9 (last visited Aug. 28, 2009). After the Senate Judiciary Committee rejected his nomination, Judge Carswell resigned from the bench to campaign for a seat in the Senate “on a platform based largely on his ridicule of liberal senators who had turned down his nomination to the Supreme Court by President Nixon”; he lost by nearly 90,000 out of slightly over 317,000 votes cast in the election. \text{John Nordheimer, Cramer Beats Ex Judge, N.Y. Times, Sept. 9, 1970, at 36, available at http://select.nytimes.com/mem/archive/pdf?res=F40612F8345E157B93CBA91782D85F448785F9} (last visited Aug. 28, 2009).}
the ahistorical and erroneous notion that in deciding cases judges do not make “policy” or “law”; and

the bizarre denunciation of “empathy” as a quality of judges.

These are important issues in the fabric that connects the District Court opinions of Learned Hand at the turn of the last century to the opinions being written by the Supreme Court in the period of decline at the turn of the present century. We will examine each of these issues in turn. Then we will coalesce the product of that examination into an attempt to read what the tea leaves, in the form of a representative opinion from the many Justice Sotomayor wrote as a District Judge—suggest is an opportunity for Justice Sotomayor to elevate the cognitive integrity of the Court’s opinions from the sophistic to the transformational.

A. Of Umpiring, Legislating, and Empathizing: Three Confirmation Hearing Issues And Their Implications For Justice Sotomayor’s Judicial Opinion Writing

1. The Dangerous – And Fictitious – “Judges As Baseball Umpires” Metaphor

Perhaps the most unfortunate metaphor yet invoked to describe the judicial function is the notion of the judge as an umpire calling balls and strikes. Such a simplistic metaphor would be anathema to any of the eminent judges in Anglo-American legal history, be they labeled “liberal,” or “moderate,” or “conservative.”

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.

***

I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.

Id. 144.

...tive,”145 whatever those labels are supposed to mean. Harlan Fiske Stone, a Dean of Columbia University Law School, a Republican, and an appointee of Republican President Calvin Coolidge,146 would have no truck with such boyish metaphors147 when he observed that:

[O]ne of the evil features, a very evil one, about all this assumption that judges only find the law and don’t make it, often becomes the evil of a lack of candor. By covering up the lawmaking function of judges, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.148

Yet, it is a contemporary, conservatively-identified judge, Richard Posner of the Seventh Circuit, who delivers the most devastating critique of the Roberts “umpire” metaphor. In How Judges Think, Judge Posner takes us, the readers,

145. See Sir Michael Hardie Boys, The Right Honourable the Lord Cooke of Thorndon, 39 VICT. WELLINGTON L. REV. 9, 13 (2007) (Eulogy given at Lord Cooke of Thorndon’s funeral) (“Some have called Robin an activist, but that is a foolish label, indicative of a failure to understand our legal history and the nature of the judicial process. He was in truth liberal, open minded, seeing the law as a living instrument, unafraid to ensure as far as he could that it met the needs of contemporary society; above all, that it achieved fairness.”); Archibald Cox, The Role of the Supreme Court: Judicial Activism or Self-Restraint?, 47 Md. L. REV. 118, 121-123 (1987) (demolishing the typical use of the “liberal”/”conservative” and “activist”/”restrained” judicial labels). As a wise law-student writer has admonished:

Much is expected from the judicial power of the United States. Expected to possess neither force nor will, it must serve as a bulwark for discrete and insular minorities. At the same time, it is expected to give effect to the will of the legislature. The demands on the federal judiciary are far from homogenous, and at times, they are conflicting. A court is expected to do justice yet receives public criticism for engaging in “activism.” Yet, American law finds its roots in a tradition of adjudication that is evolving and flexible: the common law. At the heart of its charge is the obligation*1458 to safeguard the will of the legislature, to ensure the protection of the minority, and resolve particular disputes and redress particular injuries.

It is difficult to imagine a philosophy of law that accommodates such a tension.


The judge-umpire analogy, in the end, is unfair to both judges and umpires, and in the current context it’s worth remembering the 1933 eulogy that F. Scott Fitzgerald delivered for his friend Ring Lardner, whose focus on baseball — “a boy’s game, with no more possibilities in it than a boy could master,” Fitzgerald lamented — kept him from fulfilling his promise as a writer.

Id. The same might be said of the effect of the umpire metaphor on the fulfillment of promise a judge.

aside and speaks plainly to us as persons of intelligence when he writes, “[n]either
[John Roberts] nor any other knowledgeable person actually believed or believes
that the rules that judges in our system apply, particularly appellate judges and
most particularly the Justices of the U.S. Supreme Court, are given to them the way
rules of baseball are given to umpires.” 149  If judges are umpires, Posner writes,
“[w]e must imagine that umpires, in addition to calling balls and strikes, made the
rules of baseball and changed them at will.” 150  As Judge Posner elaborates, Chief
Justice Roberts:

150. Id. at 78-79.  Judge Posner also notes another flaw in the Roberts umpire metaphor:

There is a less obvious mistake in Roberts’s baseball analogy. Until recently, different um-
pires defined the strike zone differently, so that pitchers had to adjust their tactics to the par-
ticular umpire. The analogy is to the way in which different judges interpret the Constitution
differently.

. . . . As is usually true of “reasoning by analogy,” what is interesting about the comparison
between umpires and judges in not the similarities but the differences.

Id. at 79 (emphasis supplied).  Judge Posner highlights those differences by offering “the story of the three ump-
ires asked to explain the epistemology of balls and strikes”:

The first umpire explains that he calls them as they are, the second that he calls them as he
sees them, and the third that there are no balls and strikes until he calls them. The first um-
pire is the legalist. The second umpire is the pragmatic trial judge . . . . The third is the ap-
pellate judge deciding cases in the open area. His activity is creation rather than discovery.

Id. at 81.  The popular press is largely in accord with Judge Posner’s critique. See, e.g., Dahlia Lithwick, The
http://www.newsweek.com/id/208123; Edward Lazarus, The Supreme Court as Umpire?: How the Global Warm-
ing Decision Illuminates the Role We Ask the Justices to Play, Findlaw, April 13, 2007 (“no matter the Chief
Justice might say, judicial decision-making is often, inevitably, about policy judgments. Moreover, the decisions
themselves are, inevitably, political in consequence”), available at http://writ.news.findlaw.com/lazarus/20070412.html;
aptly observed that Justice Sotomayor may have gone too far in conceding deference to this unhistorical notion,
“by staging what was, in effect, a three-day infomercial for judges as mechanical umpires who simply ‘apply the
law’ by ‘calling balls and strikes,’” and in so doing “Sotomayor has proved conclusively that it’s John Roberts’s
world now—we all just rent space there.” Dahlia Lithwick, The Sotomayor Test: Will She Limit Obama’s Next
taken to task both John Roberts and Sonia Sotomayor for seeking confirmation refuge in creating philosophical
constructs so bizarrely off-base that the importance of the very position they sought would be imperiled if reality
mirrored their confirmation persona:

An eavesdropper from Mars listening in on the confirmation hearings of John Roberts and
Sonia Sotomayor might wonder why any attorney of lively intelligence would aspire to
serve on the U.S. Supreme Court. Roberts’s umpire calling balls and strikes and Soto-
mayor’s dispassionate technician doggedly applying law to facts make the process of judi-
cial decision[-]making seem simple and dull. Both know that cases where the law is clear,
the facts are unambiguous, and reasonable minds agree on the right result seldom reach the
Supreme Court, or, for that matter, any appellate court.

Leslie Carothers, Closing Statement—Judging And The “Empire Of Unconscious Loyalties, THE
ENVIRONMENTAL FORUM at 60 (Sept./Oct. 2009), available at http://www.eli.org/pdf/forum/26-5/26-
Sclosingstatement.pdf.  Ruth Marcus has provided an even more amusing way to describe the absurdity of the
metaphor:

Winnie the Pooh, or so he tells us, is a Bear of Very Little Brain. As he struggles to think
his way out of a predicament, you can see him trying to knock the solution out of his fluff-
Knows that when legalist methods of judicial decision-making fall short, judges draw on beliefs and intuitions that may have a political hue . . . [S/]he will draw on these intuitions and believes in the legalistically indeterminate cases because the judicial imperative is to decide cases, with reasonable dispatch . . . . The judge cannot throw up his [or her] hands, or stew indefinitely, just because [s/]he is confronted with a case in which the orthodox materials of judicial decision-making, honestly deployed, will not produce an acceptable result. They may not produce any result, as in a case in which two canons of statutory construction are applicable and they point to different results. 151

Adding to the concerns that Harlan Fiske Stone expressed about the harm to the public’s perception of the bench resulting from such caricatures of judging, Richard Posner finds that such false modesty is just as harmful to the judge who appears to wear it on his sleeve:

Roberts may have made a tactical error. His confirmation did not turn on convincing Senators that a Supreme Court Justice is like a baseball umpire. In the spring of 2007, less than two years after his confirmation, he demonstrated by his judicial votes and opinions that he aspires to re-make significant areas of constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts’s reputation for candor and a further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings. 152

Filled head. By contrast, Chief Justice John G. Roberts and Justice-in-Waiting Samuel Alito are, as Pooh might say, Very Clever Brains indeed. But, listening to their confirmation hearings, they seem to have a Winnie the Pooh theory of judging: a conviction that if they just think, think, think, they will come up with the correct result.


151. Posner, supra note 149, at 79 (original emphasis).
152. Id. at 81. Professor Timothy Terrell has undertaken a deeper, jurisprudential exploration of this territory, in which he finds an integral relationship between the metaphor chosen to express the judicial function and the very notion of an independent judiciary:

[j]udges, properly understood in their most fundamental political sense, are not simply observers of “balls and strikes.” They are instead essential to the existence of balls and strikes in the first place. The key proposition is therefore this: Judges do not exist as a part of modern political life to make the “easy” calls that make the sandlot game a bit more efficient and (perhaps) fun and satisfying; they exist to make the frequent “hard” calls that our circumstances now demand for us to remain a viable civil community. The “players” in this “game” of civil life expect nothing less, for the game itself has been redefined by all of us to include the presence, and authority, of these “official scorers.”
Richard Posner is not the only sitting federal circuit judge to find cause for pause in the face of the Roberts umpire metaphor. Judge McKee of the U.S. Third Circuit Court of Appeals cautioned two years before the Sotomayor confirmation hearings that he:

[R]ealize[d], of course, that the confirmation hearings of both Chief Justice Roberts and Associate Justice Alito were largely theater and that the metaphor was offered in that context. However, the metaphor has become accepted as a kind of shorthand for judicial “best practices,” that obscures a complex dynamic that is far more amorphous, elusive and troublesome than its simplistic appeal suggests.153

Judge McKee helpfully observes that “[r]ather than indulging the pretense that judges are umpires and that umpires merely ‘call’um as they see’um,’ we should accept the fact that the law is flexible enough and strong enough to accommodate a far more honest approach to adjudication.”154

With respect to appellate judges, Richard Posner calls that approach the recognition that “judges are occasional legislators.”155 He emphasizes that judges do not

This observation, I think, gives additional perspective to the concept of “judicial independence” about which we hear from time to time – quite often from the judiciary itself. Judges are indeed not “players” in the drama of real life the way the rest of us are; they are “scorers” who should be able to provide this vital function without being harassed by the players or the fans. The ability of an umpire to end a dispute by throwing a player or manager out of the game is therefore entirely appropriate and easily explained: At some point, to preserve the game itself, interference with the umpire’s function must end, and the umpire is in fact in the best position at that moment to make that determination. By the same token, judges must be able to operate from a vantage of perspective “outside” the fray that produced the dispute that is before them. It is not as if they do not live in our ordinary non-judicial communities – they most certainly do. But those communities should not be able to dictate to a judge – once the issue of a “score” has been brought before him or her – what the judge’s assessment of the situation should be.

Perhaps most daunting of all, however, is the further observation that because judges are essential to the game, they are also essential to the values that constitute and justify the game. An important additional conclusion is therefore unavoidable: Every judicial decision will be relevant in some way to the values that are inherent in civil life, and the only question becomes whether judges acknowledge that fact or attempt to hide from it.

Timothy P. Terrell, Babe Pinelli’s Moment of Truth: An Essay on the Art of Legal Reasoning and the Angst of Judging, at 92-94 (unpublished manuscript 2008, on file with author). Professor Terrell’s essay is expected to become part of a forthcoming book that he is preparing for publication. 153. Theodore A. McKee, Judges As Umpires, 35 Hofstra L. Rev. 1709, 1710 (2007); see Neil Siegel, Umpires at Bat: On Integration and Legitimation, 24 Const. Comment. 701 (2007) (stating that the Court sustains its institutional legitimacy over the long run, not by pursuing the impossible task of simply applying ‘the rules,’ but by articulating a vision of social order that resonates with fundamental public values.). 154. Id. at 1719. 155. POSNER, supra note 149, at 81. Judge Posner notes that “[i]n their legislative capacity they labor under constraints that do not bind official legislators—rules of standing, for example, and limitations on whom the judges may consult and more generally on what methods of inquiry they may employ.” Id. On the other hand, Judge Posner observes, “judges also enjoy leeways that official legislators do not” — such as lower “[t]ransaction costs” (because, as he notes, “there are many fewer judges on a panel . . . than there are members of a legislative body”), that “constituent pressures are usually nonexistent,” and greater liberation than legislators because of “the
consciously divide their deliberative process along a divide of “judging” versus “legislating.” Rather, what occurs is, as Judge McKee’s observations suggest, a phenomenon in which “[m]ost judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence. Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors.”\[156\]

Of course, while both Judge Posner and Judge McKee provide valuable, contemporary discussions of the law-making functions of judges, their thinking owes a great debt to the candor and labors of Benjamin N. Cardozo, whose classic and most insightful statements on the nature of judging come from his Storrs Lectures at Yale in 1921, later published as a book that he called *The Nature of the Judicial Process*\[157\].

In *The Nature of the Judicial Process*, Cardozo made critical points about judging with a clarity and intelligence that makes the current debate appear to be idle. Thus, Cardozo would have been contemptuous, to say the least, of the judges-as-balls-and-strikes-umpires metaphor.\[158\] As he pointedly observed in Lecture I, the “inherited instincts, traditional beliefs, acquired opinions” of those who become judges produce “an outlook on life, a conception of social needs . . . which, when reasons are nicely balanced, must determine where choice shall fall.”\[159\] Betraying his own outlook of decisively artistic and of a literary temperament rather than a

---


fact that they cannot sit in cases in which they have a financial or personal stake enlarges their decisional freedom, just as not being answerable to an electorate does.” *Id.* at 81-82. Judge Posner further elaborates these ideas in the balance of his chapter on “The Judge As Occasional Legislator.” *See id.* at 83-92.

156. *Id.* at 84-85.

157. If the members of the Senate Judiciary Committee have ever encountered this book, nothing said in Justice Sotomayor’s confirmation hearings showed either the temperance or wisdom to betray any familiarity with it whatsoever. Every Senate Judiciary member ought to get a copy. It should be required reading—whether as an inaugural encounter or a refresher—for every member on the Senate Judiciary Committee and their staff before every judicial confirmation hearing. From appearances, they either haven’t read it; or have forgotten they read it; or, for purposes of political posturing, are simply ignoring that they have read it.

158. The only reference to baseball Cardozo made in a published judicial opinion was by way of explaining a precedent in a premises liability case:

> We may say more simply, and perhaps more wisely, rejecting the fiction of invitation, that the nature of the use itself creates the duty, and that an owner is just as much bound to repair a structure that endangers travelers on a highway as he is to repair a structure that endangers travelers on a walk in an amusement park. Whatever the underlying principle that explains the rule, the rule itself is settled. The owner of such a park must use all reasonable care to make its structures safe before he leases it for his profit. In *Lusk v. Peck*, (supra), the defendant had leased a grand stand and bleachers to be used for baseball games; the lease was for a term of years. The plan of the structure was proper. Some of the timbers, however, had decayed before the lease was made. Because inspection would have disclosed the defect, the landlord was held liable.


follower of professional or collegiate sports—Cardozo invoked a painting metaphor to expose the same kind of mechanistic view of both judge and judge’s audience that underlies the umpire metaphor: “Their notion of their duty is to match the colors of the case at hand against the colors of the many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.”160 “But of course,” wrote Cardozo in dismissing such notions out of hand, “no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. . . . It is when the colors do not match, . . . when there is no decisive precedent, that the serious business of the judge begins.”161

If the Senate Judiciary Committee’s complaints of “activist judges” are sincere, then Cardozo—who, along with Hand, considered among America’s greatest common-law judge, and who in 1932 was confirmed by a unanimous voice-vote in the Senate to the U.S. Supreme Court, and even though nominated by a Republican President—should have been rejected as a dangerous, activist, and radical nominee. What an odd fate that would have been for a founding member of the American Law Institute.162 In such a bizarre anti-intellectual climate whose logic would foster such an absurd result, the Sotomayor confirmation hearings became a spectacle of intellectual paucity on the part of her interlocutors—on both sides of the political aisle.163

One must hope that Justice Sotomayor—unlike Nominee Sotomayor—will be willing to renounce the fallacy of the cramped and intellectually vacuous “balls-and-strikes” perspective of the “umpire analogy,” and instead embrace that aspect of judging—unquestionable integrity—that has characterized her seventeen years of federal judicial service. It is the same unquestionable integrity that Justice Robert H. Jackson eloquently and accurately described in a 1951 tribute to Learned Hand and his cousin, Judge Augustus Hand:

These men found their highest satisfaction in judicial work. It fulfilled their every ambition. They put all they had into it—they have not shirked even its drudgery. They wrote their opinions with no appeal for applause and sought only to merit the ultimate approval of their profession. They have not been looking over their shoul-

160. Id. at 19.
161. Id. at 20.

The atmospherics alone were astonishing. A panel of white, mostly Southern men (on the still all-white Judiciary Committee), using tones that were alternately scolding and condescending, sought to school the first Latina Supreme Court nominee on the dangers of racism and the importance of equal opportunity.

Id. Sadly, too, the Sotomayor confirmation hearings suggest yet another audience for judicial opinion writing, another constituency in the mix: the U.S. Senate’s Judiciary Committee.
ders to see whom they please. *They have represented an independent and intellectually honest judiciary at its best. And the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands.*

2. The Heretical Notion That Judges Do Not Make Law In A Common-Law Legal System—Cardozo Redux

During the Roberts confirmation hearings, Dean Chemerinsky felt compelled to write an editorial in the popular press responding to another distortion of the historic Anglo-American judicial role:

Misleading and silly slogans about what judges do are dominating the debate about Supreme Court nominee John Roberts.

[Supporters] repeat, as a mantra, that Roberts is a desirable choice because he won’t “legislate from the bench” and will merely “apply the law, not make it.”

But every lawyer knows that judges make law—it’s their job. In fact, law students learn in the first semester that almost all tort law (governing accidental injuries), contract law and property law are

---


What should go without saying is that the essence of the judicial role, active or passive, is impartiality and detachment, both felt and exhibited. In the quest for truth through the clash of contradictions, which is, of course, the only reason in theory for having trials, the judge does not care where the chips may fall. Concerned only that the right is done, the judge “should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others” as [s/] he presides over the contentious strivings toward that end.

*Id.* Perhaps the real “umpire” metaphor here is that there is, as Benjamin Wittes has recently written, no one playing role of umpire in the sense of functioning as “a trusted source of information about [judicial] nominees and the controversies surrounding them.” Benjamin Wittes, *Judicial Nominations In An Umpireless Game: Trusted Sources, A Complaint, And A Proposal*, 93 MINN. L. REV. 1487, 1488, 1490 (2009) (“My purpose in this Article is both to describe the consequences of our umpireless confirmation game and to suggest the establishment of an institutional umpire for it. That is, I mean to propose the deliberate construction of an intellectual counterweight to the ideological interest groups that now dominate the confirmation process, the creation of a trusted source of information about judicial confirmations.”).
made by judges. Legislatures did not create these rules; judges did, and they continue to do so when they revise the rules over time.\textsuperscript{165}

We find the seed from which such thoughts grew not in the era of David Bazelon and the D.C. Circuit of the 1960s\textsuperscript{166}, nor from the days of the Warren Court. “I take judge-made law as one of the existing realities of life.” So said Cardozo in \textit{The Nature of the Judicial Process}.\textsuperscript{167} Indeed, he candidly titled the third of his seven Storrs Lectures at Yale Law School in 1921, “The Method of Sociology—The Judge as Legislator.”\textsuperscript{168} Having discussed three examples of areas of the law that were, at the time, in the process of development by judicial appreciation of sociological perspectives and application of those perspectives in judicial rule-making for example, the extent of legislative “power to control and regulate a business affected with ‘a public use’”; “modern decisions which have liberalized the common law rule condemning contracts in restraint of trade”; and “a like development in the attitude of the courts toward the activities of labor unions,”\textsuperscript{169} Cardozo expressed the operation of the common-law, judicial law-making process in terms of a horticultural metaphor:

I have chosen these branches of the law merely as conspicuous illustrations of the application by the courts of the method of sociology. But the truth is that there is no branch where the method is not fruitful. Even when it does not seem to dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all. \textit{Few rules in our time are so well es-}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Marilyn Berger, \textit{David Bazelon Dies At 83; Jurist Had Wide Influence}, N.Y. Times, Feb. 21, 1993, at Section 1, p. 38 (“Rather than follow precedent set in a simpler time, he questioned the status quo and sought to apply new findings in the social sciences and psychiatry to issues the court faced. . . . Judge Bazelon . . . believed that the judiciary should reach beyond the bench and speak out on social issues” and “was assailed by conservatives as being soft on crime and by some legal scholars for bringing the judiciary into the regulatory process.”)
\item \textbf{BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture I: Introduction—The Method of Philosophy, 10 (1921); see, e.g., Republican Party of Minnesota v. White, 536 U.S. 765 & n.12 (2002) Writing for the Court, Justice Scalia echoed Cardozo in words that are not likely to be spoken by any nominee before the Senate Judiciary Committee anytime soon:
\begin{quote}
Th[e]complete separation of the judiciary from the enterprise of “representative government” might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to “make” common law, but they have the immense power to shape the States’ constitutions as well.
\end{quote}
\textit{Id.}
\item \textbf{BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture III: The Method Of Sociology The Judge As Legislator 97 (1921).}
\item \textbf{BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture II: The Methods of History, Tradition, & Sociology 85-86, 93-94 (1921).}
\end{enumerate}
\end{footnotesize}
established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.\textsuperscript{170}

Thus, “[c]odes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled.”\textsuperscript{171} Such language, however, should not be misread to import unrestrained judicial law-making. Cardozo squarely speaks to the judge in law-making capacity as he admonishes that “[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants.”\textsuperscript{172} The law-making judge must, as Cardozo wrote:

remembe[r] that the scope of law-making power in the judiciary is circumscribed . . . . [E]ven when he is free, he is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.”\textsuperscript{173}

Cardozo had no hesitancy in drawing a direct, and close, parallel between the law-making function of judges in their common-law sphere, and the law-making function of legislators in the age of statutes:

We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.

***

. . . [L]aw is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the

\textsuperscript{170} CARDozo, supra note 168, at 97-98 (emphasis supplied).
\textsuperscript{171} CARDozo, supra note 159, at 14.
\textsuperscript{172} BENJAMIN N. CARDozo, THE NATURE OF THE JUDICIAL PROCESS, Lecture IV: Adherence To Precedent—The Subconscious Element In The Judicial Process—Conclusion 151 (1921).
\textsuperscript{173} CARDozo, supra note 168, at 139-40.
judge is directed to the attainment of the moral end and its embo-
diment in legal forms. Nothing less than conscious effort will be
adequate if the end in view is to prevail. The standards or patterns
of utility and morals will be found by the judge in the life of the
community. They will be found in the same way by the legislator.
That does not mean, however, that the work of the one any more
than that of the other is a replica of nature’s forms.174

As Cardozo’s contemporary, Hand clearly exhibited the ability to take on ef-
fortlessly the role of restrained law-maker. Hand’s decision in Stohr v. Wallace,175
for example, a Trading-With-The-Enemy Act case in the wake of U.S. entry into
World War I, exhibits this quality, as Hand had to chart a course between Con-
gress’s intentions, the language of the statute, international law, and sound policy:

It is quite true that the right of capture on land depends upon the
action of Congress, and is not a part of our customary law arising
from a state of war. Yet the incidents of sea capture might, in the
absence of contrary legislative expression, be perhaps looked to as a
fair analogy. The reason of the rule which makes the transitu a
test of the validity of a transfer, imminente bello, was considered
by the Privy Council in The Baltica, supra, and it was held to be the
difficulty involved in detecting reserved enemy interests.
Therefore a ship was restored when delivery was made to the
transferee at an intermediate port. The theory was *841 repudiated
that while at sea the belligerent’s rights are already inchoate, and
that the ship has come, as it were, already into the jurisdiction of
the captor.

In spite of The Baltica, it might still be that sales of goods within
enemy territory, imminente bello, and to avoid capture, ought to be
regarded as in fraud of belligerent rights, if the statute said noth-
ing. A serious argument might be made in favor of such a result,
once a policy of land capture be inaugurated; but under this act it
appears to me that section 7b effectively closes any such discus-
sion. A part of the first paragraph of that section reads as follows:

‘No person shall by virtue of any assignment * * * to him of
any * * * chose in action by * * * an enemy * * * have any
right or remedy against the * * * obligor * * * unless said as-
signment * * * was made prior to the beginning of the war.’

174. Id. at 103, 105 (emphasis supplied)(footnotes omitted).
175. 269 F. 827, 841 (S.D.N.Y. 1920) (suit by shareholders in multi-national corporation against the Alien
Property Custodian seeking declaratory and injunetive relief to reclaim their interest in German-held stock shares
that had been seized under color of authorization by the Trading with the Enemy Act of 1917).
It might indeed be open to a good deal of question whether this included an assignment of equitable interests in shares of stock, though shares are analogous to choses in action, and a fortiori equitable interests in shares. But I think that the purpose of the statute is pretty clearly indicated, even if its letter does not cover this precise case. It can scarcely be supposed that an exception would be made in favor of ante bellum transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April 6, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import; therefore the capture must stand upon the ground that the contract conveyed nothing to Stohr & Sons, Incorporated. Upon that ground it finds sufficient support.  

Hand wrote hundreds of district court decisions in which the court was called upon to establish the rule of law, from the relevant available sources, needed to decide the claims in the case. As he once wrote to Justice Brandeis, “[i]t is of course true that any kind of judicial legislation is objectionable on the score of the limited interests which a Court can represent, yet there are wrongs which in fact legislatures cannot be brought to take an interest in, at least not until the Courts have acted.”

3. Empathy As A Corollary Of The Audience Principle In Action

It should chill good people to the bone when one hears judges criticized for having the quality of empathy. It should make us recoil to hear denunciation of a chief executive, or judicial commission, who considers the capacity for empathy as a judicial qualification. For those, however, who do embrace such harsh rhetoric,

176. Stohr, 269 F. at 841.
179. See, e.g., Slate.com, Dahlia Lithwick, Once More, Without Feeling: The GOP’S Misguided And Confused Campaign Against Judicial Empathy, http://www.slate.com/id/2218103/ (last visited S.LATE. Nov. 6, 2009) (discussing criticism of President Barack Obama’s listing of empathy as one of the qualities he seeks in judicial nominees). President Obama has described his view of empathy in the following terms: “It is at the heart of my moral code, and it is how I understand the Golden Rule — not simply as a call to sympathy or charity, but as something more demanding, a call to stand in somebody else’s shoes and see through their eyes.” Sheryl Gay Stolberg, Political Memo: Buzzwords Shape The Debate Over Confirmation, N.Y. TIMES, May 29, 2009, at A15 (quoting Barack Obama, The Audacity of Hope (2006)), available at http://www.nytimes.com/2009/05/29/us/politics/29memo.html. For a psychological view of empathy and the law, see Richard Warner, Empathy and Compassion, 9 Minn. J.L. Sci. & Tech. 813, 824 (2008) (“we often fail to empathize, which can lead to intolerance”); See also, Tibor Varady, Harold Berman—An Empathy For Difference That Made All The Difference, 57 Emyory L.J. 1455 (2008). For a fascinating discussion of empathy, ritual, and
a slipperiest of slopes is presented: Where would we hope to end up with such a qualification standard?  

That the quality of empathy is a most desirable characteristic of a judge is a notion at least as old as Solomon and Sheba. A judge who cannot empathize is a poor judge of character, motivation, and psychology; as Professor Linder has observed, “[e]mpathy, unlike intuition, is an ‘act of great sophistication,’ necessitating imagination of the beginning, middle, and possible end of another human being."

In flushing out the true mother in a custody contest between two women, King Solomon demonstrated a capacity for empathy when he startlingly proposed that the child should be vivisected. At first, this assertion may seem preposterous given the obvious savage cruelty of the royal decree if it had actually been executed—but the statement was the sophisticated product of empathy, delivered in the form of what we commonly call “reverse psychology.” As Solomon correctly understood, the birth mother would rather give up possession of the child than to see him slaughtered. He also knew that the other woman, a maternal pretender, was simply trying to escape a state of semi-servitude for childless widows, and cared naught for sacrificing the child to gain the freedom of the maternal status. Thus, over two thousand years later, we marvel at the wisdom of Solomon. But that wisdom came not from cleverness, or detachment, or logic, or playing the umpire; it came straight from the ability to empathize—King Solomon was able to
place himself in the shoes of both women, and found the correct solution to what at first seemed an intractable swearing contest.  

Solomons are sought today. Despite the tenor of recent political debate, it is well-documented that the general public desires empathy as a quality of any lawyer—practitioner or judge—in the legal system with whom they come into contact. Thus, the Audience Principle cannot be effectively applied to judicial opinion writing unless the quality of empathy is taken into account in determining what a very predominant segment of the audience expects and demands.

Our subject, Learned Hand, struggled with finding the right balance of empathy with other factors—but he nonetheless recognized the value of that struggle and strove to realize its beneficial potential for judicial decision-making. Indeed, Hand has not been alone in that search; as it has been said of another federal judge in one of the few examinations in the law-review literature of empathy as a judicial quality:

Deciding any given case likely requires a judge to rely on a combination of different abilities and knowledge including a firm understanding of rules of law, statutes, and precedent; an appreciation for legal theory and policy; and an incorporation of common sense and judgment informed by an empathic understanding of context. . . . [E]mpathy [may therefore be understood] as an integrated component of the decision making process that may enhance, but does not undermine, other vital judicial considerations.

184. For a modern analog in the tradition of King Solomon, see the rare and hard-to-find IRVING YOUNGER, IMAGINARY JUDICIAL OPINIONS: A CREATIVE VIEW FROM THE BENCH (1989). Professor Younger wielded the wisdom of Solomon in fictional cases such as In the Matter of the Application of Redan, id. at 67-70 (described as “an application for an injunction to prevent the end of the world,” offering a Malthusian analysis circa 1822 predicting a dire future for New York City due to transportation pollution—from horses—and conditionally dismissing the petition that sought the court to enjoin “further enlargement of the population, human or equine” on the condition that “within three years hereof, there has . . . been bred and made available to the public a ‘clean’ horse”); In the Matter of the Application of a Number of Fetuses, id. at 25 (a decision of Solomonic logic upholding a challenge to a “limited abortion law” on the grounds that it “unlawfully distinguishes between permissible and impermissible abortions”).

185. See, e.g., Kristin B. Gerdy, Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering, 87 NEB. L. REV. 1, 12-15 (2008); see also Michael J. Zimmer, Systemic Empathy, 34 COLUM. HUM. RTS. L. REV. 575 (2003) (proposing “that judges ought to adopt an approach to victims of discrimination rooted in . . . systemic empathy” and explore[ing] how the existence of discrimination can be used to educate judges in the hopes that they will develop this sort of empathy”).


187. Catherine Gage O’Grady, Empathy and Perspective in Judging: The Honorable William C. Canby, Jr., 33 ARIZ. ST. L. J. 4, 7 (2001). Professor O’Grady’s observations about the difference between desirable judicial empathy as a quality of judging versus undesirable favoritism are worth recounting here:

In the judicial process, the conscious attempt to employ empathy—to understand a case by imagining the perspectives and situations of others—requires a judge to consider thoughtfully the unique context that surrounds a dispute and to recognize the individual perspective, or “life story,” that each litigant brings to the court. The notion of empathy in judging is intertwined with a widespread “call to context” in judicial decisionmaking. Judges are urged
It is not unprecedented for Supreme Court Justices who are very open and candid about the work of the court, to reveal, at least in intimate circles, how a case made them feel and how they tried to understand the emotions of the parties, particularly those who had not prevailed in the high court. In 1831, for example, the Supreme Court turned back the Cherokee Nation’s effort to use the federal courts to contest Georgia’s encroachment on their native sovereignty, an encroachment that ultimately led to their complete disenfranchisement and their expulsion from the State.\textsuperscript{188} In a divided court, Chief Justice Marshall ruled that the Court had jurisdiction only over disputes between a sovereign state (Georgia) and a sovereign nation, not a sovereign state and an association of people with cultural and familial ties within that nation, which is how he characterized the Indian Nations. Justice Joseph Story, however, joined Justice Thompson’s comprehensive dissent from that ruling, and would have found federal subject matter jurisdiction.\textsuperscript{189} The case deeply affected Justice Story. Story wrote to his wife, at the beginning of the second half of the term of court (January 1832), that:

\begin{quote}
At Philadelphia I was introduced to two of the Chiefs of the Cherokee nation so sadly dealt with by the State of Georgia. I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards
\end{quote}

\textsuperscript{188} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
\textsuperscript{189} Id. at 80 (Thomson, J., dissenting, and noting “I am authorised by my brother Story to say that he concurs with me in this opinion.”).
them. I fear, and greatly fear, that in the course of Providence there will be dealt to us a heavy retributive justice. 190

Story, who died in 1845, did not live to see truth come of his fearsome prophecy.

Like Story, Justice Sotomayor was to encounter a previous litigant in the wake of a decision. However, the retributive aspect of this encounter was immediate and political, not predictive and dispensational. A litigant confronted Justice Sotomayor from a case in which, unlike Story, she did not dissent, but rather, added her vote to rule against the litigant. And unlike the exiled Cherokee Nation, who left Story's East-Coast antebellum world along a "trail of tears," the litigant who returned to haunt Justice Sotomayor was mustered by those most opposed to her advancement to argue that her empathy was selectively effectuated and that this litigant, unlike the Cherokee Nation for Story, had not received the benefit of judicial empathy. In an ironic twist, Justice Sotomayor's confirmation opponents constructed a seemingly intractable conundrum as their assessment of the nominee—criticizing her for being empathetic (and for being the nominee of a President who valued empathy) while at the same time decrying her supposed lack of empathy for this particular litigant. Only "double-think" worthy of Orwell could reconcile the incongruity in these inconsistent positions.

To complicate matters even more, the criticism of empathy drove Justice Sotomayor to seek the same kind of deflecting shelter that John Roberts took refuge in during his confirmation hearings with the simplistic "umpire" metaphor. Put on the defensive by a hostile press and hostile Judiciary Committee members, Justice Sotomayor appeared constrained to distance herself from empathy as a quality of judges. 191 This is unfortunate.

The role of empathy has been distorted so far beyond its meaning and its tradition that it is time for a voice that commands the attention of politicians and of the people to set its role aright. 192 In bringing a clearer acknowledgement of the Audience Principle to the Supreme Court's opinions, Justice Sotomayor has an opportunity to rehabilitate and reinstall empathy in the pantheon of values on which the tradition of American judicial opinion-writing is based.

Her bona fides for doing so were, in fact, enhanced as a result of her confirmation process, and the odd roles that the topic of empathy played in it. The only criticism that could be—and was—levelled at her actual judicial record involved the

190. 2 LIFE AND LETTERS OF JOSEPH STORY 49 (WILLIAM WETMORE STORY, EDITOR 1851)(LETTER OF JOSEPH STORY TO MRS. JOSEPH STORY, JANUARY 13, 1832); SEE JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 299 & n. 115 (1971).
192. See, e.g., Editorial Advisory Board, Commentary: The Empathy Of Judges, THE DAILY REC. (Balt., Md.), July 16, 2009, available at http://mddailyrecord.com/2009/07/16/editorial-advisory-board-the-empathy-of-judges/(distinguishing among empathy, sympathy, and judicial activism; observing that "there is no necessary correlation between having empathy for a litigant and employing empathy to achieve a predetermined policy objective"; and concluding that "the judicial standard must be scrupulous impartiality, informed by empathy").
Second Circuit’s opinion in *Ricci v. DeStefano*, known to most as “the New Haven firefighters’ case.” *Ricci* has become paradigmatic of the perils in short-shrifting the Audience Principle, particularly by choosing a manner and means of communicating a ruling that is perceived by the Audience — rightly or wrongly, fairly or unfairly — to denigrate, rather than promote, empathy. The *Ricci* case is now perhaps better known than any other contemporary federal court decision among the general public (except, of course, for *Roe v. Wade*) — and the aspect of the case that is most well-known is not so much the divisive legal issue it presented on whether promotions in a public fire department could be deferred for those who passed a qualifying examination when the examination results showed a statistically significant disparate impact on non-white examinees. What is most well known is the way in which the Second Circuit chose to issue its affirmation of the U.S. District Court that had found the firefighter’s claims legally insufficient. The Second Circuit elected to dispose of the case by an unpublished summary order and considerations of the way such a disposition would be received by the parties, the public, the press, and the politicians apparently eluded or were downplayed in the panel’s deliberations. It was Justice Sotomayor’s lot to have been a member of that very appellate panel.

The panel’s miscalculation of what the Audience Principle required of them in *Ricci* might have gone unnoticed outside of the parties’ circle, had it not been for the further levels of scrutiny to which the slender opinion was subjected. First, there was a petition for rehearing in banc, and a request by Circuit Judges for a poll of the Circuit to determine whether rehearing would be granted. At that point, the panel thought it better to convert the summary order into a published per curiam opinion without enhancing or adding anything to the text itself. The divisive issue ended up dividing the Circuit quite closely — seven judges to six, in fact, voting by the slenderest of margins to allow the slender summary order (now dressed in per curiam raiments) to stand without a full-Circuit rehearing. But even more than the merits of the case per se, it was the panel’s choice to employ summary disposition that provoked the strongest reaction from the judges who favored in banc rehearing.

---


195. *Ricci*, 530 F.3d at 87. Here is the entirety of the summary order:

> We affirm, substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below. In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs’ expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

196. *Id.* at 88 (order and opinions on petition for rehearing in banc).

197. *Id.* at 87.
The opinion, filed by Circuit Judge Jose Cabranes, dissenting from the seven to six denial of in banc rehearing, has garnered the most attention and it epitomizes how badly a miscalculation under the Audience Principle may redound to the detriment of the judicial authors.

Judge Cabranes’ dissent started in strictly factual and measured tones, but one can sense the disquietude building as he wrote:

The use of per curiam opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straightforward questions that do not require explanation or elaboration by the Court of Appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled. 198

Judge Cabranes’ tone and his pace were marked by both accelerando and crescendo as he contrasted the weight of the filings and argument against the wisp of an opinion issued by the panel:

On appeal, the parties submitted briefs of eighty-six pages each and a six-volume joint appendix of over 1,800 pages; plaintiffs’ reply brief was thirty-two pages long. Two amici briefs were filed and oral argument, on December 10, 2007, lasted over an hour (an unusually long argument in the practice of our Circuit). More than two months after oral argument, on February 15, 2008, the panel affirmed the District Court’s ruling in a summary order containing a single substantive paragraph. 199

Judge Cabranes had harsher words for what, in effect, was the Audience Principle impact of choosing the summary order format to communicate the panel’s decision to affirm:

This per curiam opinion adopted in toto the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. 200 It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case, and a casual reader of the opinion could be ex-

---

198. Id. at 94 (Cabranes, J., dissenting from order denying in banc rehearing).
199. Id. at 95-96 (emphasis supplied).
200. Author’s note: Apparently Arterton’s opinion had not appeared in the official reports at the time Judge Cabranes wrote. Ultimately, she submitted her opinion for publication in the Federal Reporter. See Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006).
cused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.\footnote{Ricci, 530 F.3d at 96.}

Judge Cabranes then proceeded to reel off, in substantial detail with specific legal authorities, all of the major issues raised by the appeal of the District Court’s opinion that had been summarily addressed, overlooked, or not addressed at all in the panel’s summary disposition.\footnote{Id. at 96-101.} This extensive critique culminated in a terse conclusion how far off the mark the panel’s summary disposition was for some very important members of its audience — six of the seven Circuit Judges polled on the in banc rehearing petition:

It is arguable that when an appeal raising novel questions of constitutional and statutory law is resolved by an opinion that tersely adopts the reasoning of a lower court—and does so without further legal analysis or even a full statement of the questions raised on appeal—those questions are insulated from further judicial review. . . . \footnote{Id. at 101.} His Court has failed to grapple with the questions of exceptional importance raised in this appeal.\footnote{Id. at 101.  It should be noted that the Second Circuit’s order denying rehearing in banc was also accompanied by other Judges’ opinions, both for and against in banc rehearing. See, e.g., the separate opinions of Chief Judge Jacobs, Judge Katzmann, Judge Calabresi, and Judge Barrington Parker; \textit{Id.} at 92 (Chief Judge Jacobs dissenting from order denying in banc rehearing); \textit{Id.} at 89 (Judge Katzmann concurring in order denying in banc rehearing); \textit{Id.} at 88 (Judge Calabresi concurring in order denying in banc rehearing); \textit{Id.} at 90 (Judge Barrington Parker concurring in order denying in banc rehearing).}

Never in the author’s experience has a sitting Judge of a Circuit Court of Appeals publicly taken others of his own court to the proverbial woodshed in quite this way.

The sharp reaction to the panel’s opinion did \textit{not}, however, end when Judge Cabranes’ set down his pen. The Supreme Court took up the case (as Judge Cabranes urged them to do). Again, the Audience Principle exacted its toll for those unfortunate enough to transgress it. Not only was the panel reversed, but in a separate concurring and widely quoted opinion, Justice Samuel Alito demonstrated a reaction similar to Judge Cabranes’ dissent in its exasperated tone, but with a more pointed assault. Zeroing in on the panel’s half-hearted sounding statement (as it was echoed substantially in Justice Ginsburg’s dissent) that “[w]e are not unsympathetic to the plaintiffs’ expression of frustration” (and citing, almost gratuitously, that, “Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated”\footnote{Ricci v. DeStefano, 264 Fed. App’x 106, 107 (2d Cir. 2008) \textit{withdrawn}, aff’d on other grounds, 530 F.3d 87 (2d Cir. 2008), \textit{reh’g denied}, 530 F.3d 88 (2d Cir. 2008). Judge Cabranes had not let the panel’s peculiar singling out of this one fact as a sop to the plaintiffs go unnoted: “[T]he opinion contains no reference whatsoever for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.”}), Justice Alito rebuked the confusion of “sympathy” with “empathy”:
The dissent grants that petitioners’ situation is “unfortunate” and that they “understandably attract this Court’s sympathy.” But “sympathy” is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law—of Title VII’s prohibition against discrimination based on race. And that is what, until today’s decision, has been denied them.205

Even this, however, was not the final word to be heard for the panel’s misestimation of their audience. Yet another audience member was yet to be heard from—lead plaintiff Ricci himself. The potential for the most subjective, and thus the most passionate, rebuke—that from lead plaintiff Ricci himself—portended a scenario unseen206 since the Senate rejected President Hoover’s nomination of Circuit Judge John J. Parker for the Supreme Court in 1930.207

to the constitutional claims at the core of this case, and a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination.” 530 F.3d at 96 (Cabranes, J., dissenting from order denying in banc rehearing).


Three judges heard the case, International Organization United Mineworkers of America v. Red Jacket Consolidated Coal & Coke Co. (18 Fed. 2d. 839), and all concurred in the opinion which Parker wrote. The court found precedent for the injunction, which it upheld, in previous Supreme Court decisions which forbade even peaceful union interference with workers’ contracts. The Supreme Court apparently agreed with Parker’s reasoning for it refused to hear the union’s appeal.

Id. at 14. Walter Green, then American Federation of Labor President, appeared, not quite the representative of a party to this case, represented, at the very least, a party whose interests were directly affected by contacts prohibiting workers from engaging in any union-related organizing activity. His testimony was powerful:

Supreme Court Justices, he observed, “should possess a trained mind sympathetic toward the hopes and aspirations of the masses of the people.” Judge Parker, according to Green, did not have such a judicial disposition, and for that reason the A.F. of L. protested his nomination. Green then zeroed in on the Red Jacket case in which Parker’s sustaining of the district court’s injunction had the effect of making “criminals out of law abiding, honest, loyal American citizens if they requested, in the exercise of peaceful, law abiding methods, workingmen to join with them in a labor organization.” Green reminded the Senators that their late colleague, Robert M. LaFollette of Wisconsin, had found the district judge in the Red Jacket case, George McClintic, “to be a petty tyrant and an arrogant despot.” McClintic seems to have been a fairly notorious anti-union judge, and Green must have been trying to pass along some of McClintic’s bad reputation to Parker.

A major obstacle to the success of Green’s argument was the prevailing impression that Parker had been bound by precedent to uphold McClintic’s injunction. In his Red Jacket opinion Parker cited several Supreme Court decisions which he felt supported the injunction. Primarily he relied upon Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229, which was handed down by the Court in 1917. Green knew that his own case would be immeasurably strengthened if he could show that the Hitchman and Red Jacket cases were in some respect different and that Parker was not in fact bound by precedent to decide as he did. Green began by emphasizing that the Hitchman decision was rendered thirteen years ago and that “[s]ince that time many economic, industrial, and social changes have taken
Ricci was called to testify in the Sotomayor confirmation hearings. Having some personal experience with civil litigation, I attest that it is many a party’s dream to get to express their feelings about a judge’s decision (even when that party “won” the case) once they are finally beyond the power of the judge’s pen, especially in a setting, like testimony before a judiciary committee, where the judge is compelled to sit nearby, and listen silently. Ricci might have described all of the emotions that he and his fellow plaintiffs endured when their hard-fought case seemingly came to its final act with a one-paragraph dismissal. He might have galvanized the country with testimony about how poorly, from his perspective, the

place.” Green then claimed that even the late, and conservative, Chief Justice Taft was of

the opinion that “yellow dog” contracts were made under duress and thus unenforceable.

Id. at 25-26. The witness inflicted even greater blows by calling out what he’d divined was the nominee’s vision of the common working person while trying to hide behind Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917)—a intellectually compromised precedent if there ever was one:

The Hitchman decision—I will try to make it plain— was the Dred Scott decision to labor. . . . What I stated in the preceding paragraph was not so much that Judge Parker followed the Hitchman decision as laid down by the Supreme Court, but that he shows himself as in entire sympathy with that decision, and that is our objection to Judge Parker.” Therein Green was stating the kernel of truth in labor’s argument against the Judge. . . . Most of the pro-labor and anti-Parker Senators were simply disturbed that Judge Parker, even if he were bound by precedent when he wrote the Red Jacket decision, failed to make clear that his opinion was dictated by the law and that “yellow dog” contracts violated his personal code of abstract justice. Though he would have ample opportunities to do so during the six weeks that his name was before the Senate, Parker never publicly declared his personal opinion of the hated contract, and indeed it is safe to presume that the “yellow dog” probably did not offend him terribly.

Id. at 27-28 (footnotes omitted). See also William C. Burris, Duty and the Law: Judge John J. Parker and the Constitution, Colonial Press (1987). Interestingly, had Judge Parker been a bit more scholarly in his approach to the application of Hitchman, he might have found, digested, and applied the law-review article written by Professor Cook, which would have supplied a sound intellectual and legal basis for limiting Hitchman and denying enforcement of the “yellow dog” contract in Red Jacket. See Walter Wheeler Cook, Privileges of Labor Unions in the Struggle for Life, 27 Yale L. J. 779 (1918). That he did not do so would seem to suggest that he did not wish to limit Hitchman or to deny enforcement of contracts intended solely to interfere, restrain, and coerce employees in the exercise of personal autonomy to discuss unionization. That apparent choice ended up being quite costly. Current judges of ambition might consider how resort to the calmer reflection found in legal scholarship might assist their opinion writing, despite perennial judicial complaints that judges no longer find legal scholarship to be relevant or helpful. See, e.g., Adam Liptak, Sidebar: When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant, N.Y. Times, March 19, 2007, available at http://select.nytimes.com/2007/03/19/us/19bar.html (quoting, among others, Second Circuit Chief Judge Dennis Jacobs as saying “I haven’t opened up a law review in years. . . No one speaks of them. No one relies on them.”); see also Trends in Federal Judicial Citations and Law Review Articles—Court of Appeals for the Second Circuit Roundtable Discussion, Benjamin N. Cardozo School of Law, March 8, 2007, available at http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf. Of course, the judges’ principle complaint is that so many of the “national” law reviews—such as the Yale Law Journal of 2009 rather than of 1917—publish too much inter-disciplinary scholarship, and not enough doctrinal scholarship to assist courts. See, e.g., Richard A. Posner, Against the Law Reviews: Welcome To a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse, Legal Affairs (Nov./Dec. 2004), available at http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp. The solution to that problem, however, may be to recognize that scholarship useful to judges can be found in the pages of the excellent law reviews and journals published by law schools that do not happen to carry the “branding” of the U.S. News & World Report’s so-called “first tier.” That such a realization has not seemed to have taken hold may be explained by the candid observation of Second Circuit Judge Robert Sack that “[j]udges use them like drunks use lamp posts—more for support than for illumination.” See Adam Liptak, supra note 207 (quoting comments of Hon. Robert D. Sack at the Second Circuit Roundtable Discussion March 8, 2007).
court considered its audience, and how it patronized that audience with its “not unsympathetic” throw-away line. What was portended, however, did not transpire. Ricci’s testimony was short, delivered with seemingly great effort, and did not discuss at any length how the form of the panel’s decision had made the plaintiffs feel about the court system, its transparency, its integrity, its empathy, and its competency.208 He stuck to a script on the merits, denouncing activist judges, and thus this potential blow was greatly softened.209

Yet the mere fact that a litigant from an appeals case seemingly treated by the panel as hum-drum could become a public player in a confirmation hearing is testimony to the power of the Audience Principle—and the 21st century media’s capacity to expose and exploit when a judicial opinion has served it poorly.

It is not fair, however, as many in the press have done, to lay this mishandling of the Audience Principle generally, and of judicial empathy in particular, at the feet of Justice Sotomayor. It is most unlikely, in fact, that she would have written the summary or per curiam opinions.210 Nor is it likely that she directed the form

---


209. See, e.g., Dana Millbank, Fireman Ricci Fails To Extinguish Sotomayor’s Hope, WASHINGTON POST, July 17, 2009, Bus. Section, 2009 WLNR 13624929 (noting that although “Frank Ricci was to be Sonia Sotomayor’s Anita Hill,” he left the witness chair having “reduce[d] to embers the case against Sotomayor. Id. (emphasis supplied); see CEO Wire, July 13, 2009, 2009 WLNR 13318848 (transcript of panel discussion)(comments of James Taranto, of the Wall Street Journal Editorial Board, describing as a “very bad idea having a litigant testify against a judge who ruled against him.”). Of course, if the decision to include litigant testimony in a confirmation hearing is to be perceived as anything other than cheap political grandstanding, the summoning committee needs to have testimony from defendants and other interested parties and amici, not just from plaintiffs.

210. Nor, as Professor Ifill has, among other, pointed out, is it tenable to attack Justice Sotomayor, or her panel of colleagues, for not reaching the same ruling as did the Supreme Court, even if they disagree with the precedents that lay before them at the time they reviewed the District Court’s decision in Ricci:

   Her now-infamous “wise Latina” statement raised legitimate questions about Judge Sotomayor’s approach to judging. But in the context of the full speeches she gave, Judge Sotomayor’s remarks were an honest attempt to talk about how all judges are shaped by their backgrounds and must be conscious enough of this reality to guard against how these influences might skew their judicial view.

   The firefighter case was problematic for the Republicans as well, because although the Supreme Court overturned the decision of the court on which Judge Sotomayor was a part, it had done so by announcing a new legal standard - one that Judge Sotomayor could not fairly have been expected to divine or impose as an appellate court judge when she heard the case. But no matter. The case involved the inflammatory issue of race, and combined with her “wise Latina” remark, the Republican committee members settled on a strategy that could at least arouse their base. And so, ignoring thousands of decisions in which Judge Sotomayor has participated, they undertook to paint the nominee as a dangerous racial partisan.
of the disposition. She sat as the junior member of a three-judge Appeals Court panel. Judge Rosemary Pooler was the Presiding Judge of the panel during that week of oral arguments; and under Circuit tradition, it was Judge Pooler’s chambers that would take the responsibility for proposing cases to be disposed on summary orders and for her law clerks to draft the summary orders in the cases decided that week.211 Then, Judge Sotomayor and Judge Sack agreed with the Presiding Judge that summary disposition was appropriate.

 Ricci cannot be, and should not have been, held up as an example of Judge Sotomayor’s judicial opinion writing, or even as one of “Judge Sotomayor’s opinions.” However, she apparently did not reckon that the risks created by communicating the court’s decision in summary order fashion was worth digging in her heels to bring her colleagues back to political reality. Nor did her empathy appear sufficiently attuned for how important audiences of this opinion would receive its form, apart from its substance. A significant opportunity to save the panel from itself appears to have been missed as a result.212

 Of significance now is what Justice Sotomayor may have gleaned from the Ricci experience. The opportunity, and the hope, is that now given the independence that comes with life tenure, she can put that experience to positive use in re-

Ifill, supra note 163, 2009 WLNR 14255261. That some Senators themselves had not come to terms with their own racial stereotypes was evident, Professor Ifill notes, in two telling statements:

There were moments that were almost too painful to watch . . . [such as] Sen. Tom Coburn’s tortured, historical reading of the history of the passage of the 14th Amendment as a debate about gun rights, and the Oklahoma Republican’s channeling of Ricky Ricardo in another sequence, joking that the Latina judge might have some “‘splainin’ to do.” And Mr. Sessions chided the judge that if she had just voted in the firefighters’ case along with her colleague on the Second Circuit Court of Appeals who “is also of Puerto Rican ancestry,” there wouldn’t be all this trouble.

Id. 211. With her home chambers in Vermont, Judge Pooler would quite likely be pushing to wrap up the presiding judge’s post-argument responsibilities to catch the Amtrak at Penn Station on her way home to Vermont for the weekend. The end of a week of oral arguments for the chambers of the federal appeals judge presiding that week is one of the most hectic periods in the life of the law clerks (who must complete the work) and the judge (who must manage it). This is particularly so when the Judge’s chambers are upstate or out-of-state, as are Judge Pooler’s. In the chambers where I clerked twenty-two years ago, the rule was that all work from the sitting, other than the writing of the more extensive opinions expected to be published, would be completed before judges and clerks departed on Friday evening. This made for many an interesting dash from Foley Square to the immensely crowded rush-hour subway and (in the 1980s) struggle through the throngs of commuters at Grand Central Terminal looking for some distant departure track. By the time one found and awkwardly settled into a seat on the sleek aluminum cars of Amtrak’s The Henry Hudson, utter exhaustion was the only emotion left, thirst the only desire to be quenched, and three hours of restless sleep the only scheduled activity (except for the judge, who, always vigilant and diligent, used this quiet time to read recently issued advance sheets of opinions from our Circuit (and nobody knew them better than did our judge)).

Id. 212. Christopher Caldwell, The Limits Of Empathy For Sonia Sotomayor, TME, June 8, 2009, available at http://www.time.com/time/magazine/article/0,9171,1901478,00.html. Mr. Caldwell observes that the Ricci case puts the quality of Justice Sotomayor’s empathy into a different light:

Whether or not you like racial preferences, they involve a way of looking at the law that is sophisticated rather than commonsensical. If the New Haven opinion is fair, it is the kind of fairness you learn at Yale Law School, not the kind you learn in the South Bronx. Sotomayor may be a child of the barrio, culturally speaking, but the judicial philosophy she represents comes from the mandarin, not the proletarian, wing of the Democratic Party.

Id.
engaging the Supreme Court with the Audience Principle and its empathetic basis. She will have on her side the persuasiveness that comes from being the bearer of such a *stigmata*, the memorable scar inflicted from failing to give the Audience Principle its full due.

**B. Justice Sotomayor’s District Court Opinions As Augurs Of Her Opportunity**

Justice Sotomayor comes to the U.S. Supreme Court with a portfolio of judicial opinions larger than that any other sitting Justice brought with them. She is credited with over 600 federal court opinions in the Federal Cases database on Westlaw, most of those written in the District Court. As might be expected of a talented writer and thinker, her opinions realize a baseline of quality in applying the four critical principles of effective cognitive communication that we have examined in our Part I and Part II articles. Adam Liptak speaks knowingly and well for her canon when he writes:

> Judge Sonia Sotomayor’s judicial opinions are marked by diligence, depth and unflashy competence. If they are not always a pleasure to read, they are usually models of modern judicial craftsmanship, which prizes careful attention to the facts in the record and a methodical application of layers of legal principles.  

This achievement, however, may leave room for further progress. As Liptak observes, her opinions written on the District and Circuit courts:

> [R]eveal no larger vision, seldom appeal to history and consistently avoid quotable language. Judge Sotomayor’s decisions are, instead, almost always technical, incremental and exhaustive, considering all of the relevant precedents and supporting even completely uncontroversial propositions with elaborate footnotes.

Some might argue that the Supreme Court thrusts a judge on a stage with many diverse audiences. The stakes are even higher there than they were on the federal trial and appellate benches on which she has served for seventeen years. To use a theater metaphor, what “plays in the Catskills” may need to be turned up a notch or two “for Broadway.” Here is an opportunity for Judge Sotomayor to glance back from her future to the example of Learned Hand. While her opinions reflect a more consistent application of the context and congruence principles than Hand’s trial-court opinions, Justice Sotomayor may find inspiration in Hand’s impactful use of the sentence in realizing both the segmentation and audience principles, while creating a style of memorable and quotable syntax that marked his writings with

---


214. *Id.*
uniqueness. Hand hewed this achievement out of the bricks he laid at the sentence level. From that vantage point, he created—in his best opinions—a truly literary style of writing that not merely made his points, but made them memorably. Hand never sounded like a bureaucrat; nor should any Supreme Court Justice.

Yet, there is much virtue in judicial writing that eschews using opinions to state “larger vision[s]”; that appeals “not to history”—in the sense of discursive displays of erudition or the evasion of rigorous analysis in favor of questionable reasoning cloaked in the fog of history—but rather deals predominantly with the Constitutional provision, treaty, statute or case that frame the context of the legal analysis; and to emphasize substance over “quotable language,” which, as some of the examples by a variety of judges discussed earlier in this article show, often come at the expense of empathy to the parties and clarity of the ruling. Perhaps Justice Sotomayor best articulated why we may expect that she will consciously seek to avoid such artifices in her judicial opinions. Echoing Learned Hand’s assessment of his own judicial career many years ago, Justice Sotomayor has observed of her own that she was “not going to be able to spend much time on lofty ideals,” “since[th]e cases that shake the world don’t come along every day. But the world of the litigants is shaken by the existence of their case, and I don’t lose sight of that, either.”

Of the more than 400 District Court opinions credited to Justice Sotomayor, her opinion-writing strengths and opportunities are well illustrated by the last district court opinion she appears to have authored—Barlett v. New York Bd. Of State Law Examiners. This was the third of three opinions written by Justice Sotomayor in a case brought by a bar examinee who challenged the New York State Board of Bar Examiners’ denial of requests for accommodation of an alleged dys-

---

215. See, e.g., FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY 3 (1873) (“[W]e need for life and action, not as a convenient way to avoid life and action, or to excuse a selfish life or a cowardly or base action.”). A classic example of the use and abuse “of appeals to history” is Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), in which Justice Brandeis resorted to the flawed pseudo-historical research of Charles Warren (which he described as the “recent research of a competent scholar”) on the legislative history of Section 34 of the Judiciary Act of 1789 (the so-called “Rules of Decision Act”) to severely limit the authority of federal courts to develop the common-law in diversity cases coordinately with, rather than subordinately to, the state courts. See, e.g., LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 399-400, 403-404 & authorities cited in nn. 109, 111, & 112 (2d ed. 2000). Erie is the classic example of the Supreme Court’s “appeal to history,” and the kind of reasoning designed to insulate instrumentalism against its own faulty logic; as Professors Teply and Whitten aptly describe it, “[a]s a criticism of Swift [v. Tyson] and as a justification for a change of course, however, the Erie opinion was an intellectual disaster.” Id. at 402; see generally id. at 402-406. History as buffoonery, rather than the pseudo-scholarship of Erie, afflicted Flood v. Kuhn, 407 U.S. 258 (1972), about which it has been said:

The opinion — for which Blackmun would long be ridiculed — included a juvenile, rhapsodic ode to the glories of the national pastime, sprinkled with comments about legendary ballplayers and references to the doggerel poem “Casey at the Bat.”


216. Supra text & note 73, Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959)(special session to commemorate Hand’s half-century on the federal bench) (separately paginated section).

217. Liptak, supra note 213.

lexia-based cognitive impairment under both the Americans with Disabilities Act and the Rehabilitation Act of 1973. The case garnered national attention. When it started in 1993, Justice Sotomayor was a relatively new District Judge; by the time of its last iteration in 2001, Justice Sotomayor had been promoted to the Circuit for three years, but returned to the trial court to continue hearing a case about which she likely knew more than any other single living person. During her confirmation process, Judge Sotomayor’s handling of this case was recalled with praise for her attention to detail and ability to navigate uncertainties, in both the legal standards under the relatively new Americans with Disabilities Act (“ADA”), as well as in the starkly conflicting expert testimony about both the meaning of standardized reading tests and the significance of the plaintiff’s impairment.

In her original 1997 opinion, Judge Sotomayor gave an excellent introduction to, and synthesis of, the Bartlett case that would serve to guide readers throughout the years of proceedings to come:

This case, tried to the bench in 21 days of testimony accompanied by exhibits and briefs aggregating to more than 5000 pages, principally devolves to the meaning of a single word—substantially—as used in the Americans with Disabilities Act . . . and the Rehabilitation Act . . . . Both Acts define a disability as “a physical or mental


impairment that *substantially limits one or more of* an individual’s “major life activities.”

... The evidence at trial has convinced me that Marilyn Bartlett suffers from a learning deficit that evinces itself as a difficulty in reading with the speed, fluency and automaticity of an individual with her background and level of intellectual ability. Despite this impairment, plaintiff obtained a Ph.D. in Educational Administration and a law degree. By virtue of superior effort and not a small amount of courage, Marilyn Bartlett has been able to succeed academically and professionally despite the limitations her impairment has placed upon her.

But this case asks whether, in light of the confined language of the law, plaintiff is not merely impaired, but disabled.  

Years later, after appeals to the Circuit and the Supreme Court and remands from both courts, Justice Sotomayor was required to hold yet another trial, this one lasting four days and focusing on highly contentious testimony of expert witnesses — and this time focusing on standards of disability in the major life activity of both reading and working, under legal standards that the Supreme Court itself had only just started to evolve during the pendency of the Bartlett case.  

Despite the disruption of being taken away from her Circuit Court duties, Justice Sotomayor treated the remand with the same care and attention to detail as the original trial. Her opinion is 48 pages long, which in and of itself does not necessarily equate with quality — yet the quality is there. The opinion is efficiently written, with focus on the new issues at hand rather than repeating discussions in previous opinions.

After a thorough, yet concise, reprise of the procedural history of the case, Justice Sotomayor specified the questions that were now on remand to her from the Second Circuit, and — unlike Hand in so many of his District Court opinions — proceeded to set forth the result up front, providing critical context for the detailed findings of fact and conclusions of law that followed:

Having witnessed all of this additional testimony and having studied the exhibits and affidavits submitted by the parties on the issues before me on this remand and in the original trial record, I conclude that, when considering both the positive and negative ef-

---


fects of plaintiff’s self-accommodations, plaintiff is substantially limited in the major life activity of reading when compared to the average reader by her slow reading rate and by the fatigue caused by her inability to read with automaticity. I also conclude, in the alternative, that plaintiff is substantially limited in the major life activity of working because the Board’s failure to accommodate her reading impairment is a substantial factor in her failure to pass the bar. For these reasons, I find that plaintiff is entitled to receive reasonable accommodations in taking the New York State Bar Examination.225

Had the opinion also included a roadmap through the detailed factual findings in Sections III and IV of the opinion, the context principle might have been even better served, and the foundation upon which the congruence principle builds laid down. As it is, the opinion’s findings appear to be organized around categories of testimonial evidence, with each category further sub-organized around a summary of each witness’s testimony (although the principle on which that sub-organization is based — e.g., chronological order of presentation at trial, the order of significance to the judge’s ultimate conclusions, the order of ascending or descending credibility, etc. — is not revealed in the opinion). Thus, there are no evident “road signs” beyond the witness’s name, as well as no overall road map, to guide the reader through the lengthy opinion; nor is there a table of contents to help the reader locate specific information quickly.

Rather, the opinion moves immediately from the final paragraph of the introduction, quoted above (and a brief summary of previous findings on plaintiff’s psychometric evaluations and previous bar examination attempts) to a new section headed “Plaintiff’s Expert Witnesses,” in which the testimony of each witness is summarized and separated by subheadings listing only the witness’s name.226 That section is followed by one that does the same thing for the defendant Board of Bar Examiners’ expert witnesses,227 and for the “lay testimony” presented by both parties, including the plaintiff herself.228

The organizational pattern of the factual findings shifts abruptly, and without warning, to “observations about the limitations of using psychometric measures to diagnose learning disabilities generally, particularly with adults.”229 This portion of the findings is sub-organized around the specific kinds of tests upon which the dueling expert testimony was based. The same kind of structure is repeated for a short section on “clinical observations” of the plaintiff, which concludes the factual findings.230 While the macro-organization of this opinion remains obtuse, Justice

226. Id. at *3-4, 4-13.
227. Id. at *13-20.
228. Id. at *20-22.
229. Id. at *22, 23-28.
230. Id. at *29.
Sotomayor’s picks up energy in her discussion of the evidence and her findings therefrom, and shines from the elegance of a rhetorically sophisticated simplicity:

While defendants now try to couch their argument in terms of the entire gestalt of tests administered to plaintiff, this is a distinction without a difference. Dr. Flanagan [defendant’s testing expert] concluded that plaintiff’s performance on “multiple, individually administered” psychometric measures “indicates that she performs within normal limits or better on all indicators of reading performance.” Of the 35 scores from psychometric measures on which Dr. Flanagan relied, however, thirty are from the Woodcock. For the reasons I discussed in my first opinion and order, I am convinced that the Woodcock cannot be used as the principal instrument to diagnose a reading disability.  

This kind of writing that at the micro-organizational level shows an expertise in applying both the segmentation and audience principles.

Like the factual findings, the Conclusions of Law open with no roadmap to explain where the opinion has been, nor where it is going. While each sub-section is introduced effectively and concisely, and tied together at subsection’s end with a concise conclusion, the progress of the section as a whole is not explicit – as

231. Id. at *24.
232. Id. at *29.
233. For example, in the introduction to Section II of the Conclusions of Law, entitled, “Substantial Limitation Under the Law for the Major Life Activity of Working,” Justice Sotomayor orients the reader well as to where that Section is going and why:

The Second Circuit remanded for me “to determine, if necessary, whether plaintiff has shown that it is her impairment, rather than factors such as her education, experience or innate ability, that ‘substantially limits’ her ability to work.” I interpret the Circuit’s use of the phrase “if necessary” to refer to the fact that (at least in the context of Title I of the ADA), a court should only examine whether an individual is substantially limited in the major life activity of working if it finds that the individual is not substantially limited in any other major life activity. (. . . If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.). While ordinarily I would not reach the issue of whether plaintiff has a working disability because I find that she has a reading disability, given the long procedural history of this case, I will exercise an abundance of caution and discuss this issue in the event that the Circuit disagrees with my conclusion that plaintiff is substantially limited in the major life activity of reading.


234. Looking again to the Section whose introduction we examined in the previous footnote, supra, we find a representative example of Justice Sotomayor’s ability to wrap up a discrete sub-section of the opinion with an effective concluding synthesis. Having previously concluded that non-accommodation in the bar examination may exclude plaintiff from a discrete “class of jobs” in the ADA’s sense of that phrase, that she “still must answer the limited question posed to me by the Circuit on remand—whether ‘the denial of accommodations was a substantial factor preventing her from passing the [bar] exam,’” id. at *45, Justice Sotomayor summarized her conclusions on that question, and Section II overall, as follows:

When I view the evidence as a whole, I find that plaintiff has shown that the Board’s denial of accommodations was a significant factor in her failure to pass the bar exam. While on
Terrell and Armstrong’s command would have it, “make the structure explicit on the surface of the prose.”

Thus, while each sub-section works well on a self-contained level, they are as a whole episodic; there is little to no explanation of how one subsection transitions into another, which on the macro-organizational level, misses a chance to produce vertical and horizontal coherence across the opinion as a whole. Outlined in a schematic form, the structure of the Conclusions of Law should appear as thus:

I. Substantial Limitation Under the Law for the Major Life Activity of Reading
   A. Corrective Devices or Mitigating Measures
   B. Measure of Substantial Limitation By Outcomes Alone
   C. The Comparison Group of “Most People”

II. Substantial Limitation Under the Law for the Major Life Activity of Working

III. Injunctive and Declaratory Relief

IV. Compensatory Damages

If one looks back at the opinion’s opening very carefully, we find, on second glance, that the opinion contains a buried roadmap (or perhaps a buried treasure map, since we had to search to find it), in which Justice Sotomayor explains the remand issues in the Second Circuit’s opinion in discussing what she is going to address in her remand opinion. First, she writes, “in this opinion and order, I will first address whether Bartlett is substantially limited in the major life activity of reading’ by her slow reading rate, or by any other ‘conditions, manner, or duration’ that limits her reading ‘in comparison to most people.’” She then discusses two other aspects of the Second Circuit’s opinion:

any single exam there may have been other factors that affected plaintiff’s ability to pass the bar (as I have found to be the case with the July 1993 and 1999 exams), I believe that the Board’s failure to provide her with accommodations on those exams deprived her of a fair opportunity to be tested on her knowledge. Therefore, I find that plaintiff has proven that her impairment of dyslexia “substantially limits” her major life activity of working and, therefore, that she is an individual with a disability under the ADA and Section 504.

Id. at *46.


Bartlett, 2001 WL 930792 at *29-51; ARMSTRONG & TERRELL 1st, supra note 3, at 3-18 – 3-21.

Bartlett, 2001 WL 930792 at *46.

Id. at *2.
The Circuit further held that if I find that plaintiff is not substantially limited in reading, I should make further findings with respect to whether plaintiff is substantially limited in the major life activity of working. Specifically, the Court directed me to determine, if necessary, “whether plaintiff has shown that it is her impairment, rather than factors such as her education, experience, or innate ability, that ‘substantially limits’ her ability to work.”

Finally, the Second Circuit stated that it adhered to its original remand with respect to compensatory damages. It added, however, that if I were to find that plaintiff is disabled, and therefore entitled to compensatory damages, I should limit my damage award to the bar exams, if any, where the Board had before it sufficient information to determine that plaintiff was disabled.239

While this matches up with the earlier quoted context providing conclusions240, it does not sufficiently explain the sub-organization of the Conclusions of Law, nor does it even shed any light on the macro- or sub-organization of the factual findings. That is not to say that along the way anything that Justice Sotomayor wrote in the opinion is unclear; the opinion, in fact, is quite amazing in just how coherently and seamlessly it unfolds within each section and subsection, and how strongly organized her writing is at both sentence and paragraph level. One of many fine examples:

In my first opinion and order, I found that the bar examination functions like an employment examination that prevents plaintiff from working in her chosen profession:

If plaintiff’s disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working because if she is not given a chance to compete fairly on what is essentially an employment test, she is necessarily precluded from potential employment in that field. In this sense, the bar examination clearly implicates the major life activity of working.

While I might have chosen a different word than “implicates” to describe how the bar exam functions like an employment test had I known the confusion its use would cause, I was merely addressing defendants’ argument that the Title I definition with regard to working was not proper in a Title II case because the bar exam is

239. Id. at *2-3 (citations omitted).
not an employment test. I in no way intended to imply that plaintiff had shown only that her reading impairment “implicates” the major life activity of working rather than substantially limits it.241

What is most striking about this opinion is the incredible command of structure and logic Justice Sotomayor maintains at all levels of the opinion. Her writing is cognitively effective, particularly at the sentence and paragraph level. As we have seen, that was Learned Hand’s forte as well. The writing is also well organized, but viewed from the perspective of logic; it would be even more powerful if it made the organizational structure more explicit, and reassured the reader undertaking the long trek through this opinion about where she is, where she has been, and where she is going.

That rather small criticism, however, pales before the earnest struggle Justice Sotomayor undertook — and largely won — in managing the structure of a lengthy opinion while at the same time marshalling the key portions of the voluminous trial record and prior rulings in the case. Her accomplishment reveals itself clearly as the product of a sincere and earnest struggle to attain a reasonable outcome for the parties within a statutory framework whose parameters had not yet been fully limned. All of this goes to show why it has been observed of her handling of the remanded case in 2001: “Her detailed and respectful treatment of the parties and witnesses in a decision on a matter involving less than ten thousand dollars in damages is testament to her commitment to the fair and equal administration of justice to all who come before her.”242

And all of this augurs well for Justice Sotomayor to seize the opportunity afforded by her demonstrated judicial writing talents to take her own—and the court’s, opinion writing to a new level of cognitive effectiveness, responsive to a highly diverse domestic and international audience. To borrow a phrase from novelist Tom Wolfe, Justice Sotomayor has “the right stuff” to elevate her skillful opinion writing to mastery, and in so doing become the apotheosis of the seasoned

241. Id. at *44.
242. Women’s Bar Association of the State of New York, Statement In Support of Judge Sonia Sotomayor, at 5 (June 30, 2009), available at http://www.grawa.org/documents/SotomayorStatement_July2009.pdf. Some have speculated that the evident empathy Justice Sotomayor displayed for the disabled is a result of her long-term diabetic condition. See, e.g., Deborah Kendrick, Commentary: Sotomayor’s Diabetes Surely Helped Shape Her Judicial Career, COLUMBUS DISPATCH, June 28, 2009, available at http://www.dispatch.com/live/content/editorials/stories/2009/06/28/Kendrick28.ART_Art_06-28-09_G5_JKEA8EJ.html. However, a force just as — if not even more — significant may be the struggle that Justice Sotomayor undertook during her Princeton undergraduate days to elevate the level of her writing in English to the excellence expected there, and invaluable to judicial opinion writing. See, e.g., Stewart Taylor, Jr., Grading Sotomayor’s Senior Thesis, The National Law Journal, June 2, 2009, available at http://ninthjustice.nationaljournal.com/2009/06/grading-sotomays-senior-thesis.php. The fruits of these labors—including graduating with the highest Latin honors and election to Phi Beta Kappa—are described in Gabriel Debenedetti, At Princeton, Sotomayor ’76 Excelled At Academics, Extracurriculars, DAILY PRINCETONIAN, May 13, 2009, available at http://www.dailyprincetonian.com/2009/05/13/23695/). In this sense, she may well have had genuine sympathy — indeed, empathy — for Mr. Ricci in Ricci v. DeStefano, supra note 204, whose own Herculean efforts to overcome the effects of dyslexia so that he could pass the promotion test in New Haven were central to the emotional merits of the case. See, e.g., Susan Crile, Frank Ricci: All You Need To Know, THE HUFFINGTON POST, July 9, 2009, available at http://www.huffingtonpost.com/2009/07/09/frank-ricci-all-you-need_n_228898.html.
opinion writer, looking equally at the trial and appellate courts, the parties, and the broader audience to be embraced.

V. SOME CONCLUDING THOUGHTS ON PARTS I AND II

Frank Easterbrook has observed that “[m]uch of judge-centered scholarship in contemporary law schools assumes judges have the leisure to examine subjects deeply and resolve debates wisely. Professors believe that they have this capacity and attribute it to judges. Pfah!”  

Chief Judge Easterbrook’s realism may temper somewhat our assessment of Hand’s District Court work, but it does not change its lessons for whether appellate court writing skill should be a model for trial judges, or for whether skill as an appellate writer implies skill as a writer of trial-court opinions and judgments.

Considering Learned Hand’s work as a District Judge, it is a spotty record from the perspective of the cognitive impact of his opinions. Some, like The Masses, show strokes of brilliance in producing a well-organized, cogitively effective work, calculated to be quite reader-friendly; many show a very workman-like approach that while coherent, leaves the readers to fend for themselves; but a surprising number of others—including significant cases involving Congressional attempts to intimidate the United States Attorney and landmark anti-trust lawsuits seeking to dissolve large corporations, show little care or concern for reaching readers beyond the parties—or slim appreciation for the lessons taught by cognitive psychology. Certainly, the sampling of Hand’s record made here, demonstrates that reputation and skill as an appellate writer may be the product of considerable struggle and hard-won increments of improvement as a trial court writer.

But Hand’s uneven oeuvre on the Southern District of New York calls even more fundamental questions into play. What exactly is the role of a judicial opinion? Some might quarrel with my assumption that to be of the highest quality, judicial writing need speak beyond the parochial concerns of the lawyers for the parties to the case—that it must speak to a broad audience both within and without the legal profession. Yet this notion has a more venerable pedigree than my preferences, or the points of Terrell and Armstrong. In fact, this expectation goes to the very formational period in American history when publishing any judicial opinion

244. Masses Pub Co. v. Patten, 244 F. 535 (S.D.N.Y.1917). I discussed this opinion in Jeffrey A. Van Detta, The Decline And Fall Of The American Judicial Opinion, Part I: Back To The Future From The Roberts Court To Learned Hand--Context And Congruence, 12 BARRY L. REV. 53 (2009), at Section II.A.1.b, text & accompanying notes 114-125.
was the exception, not the norm—a time that few of us, educated in the firmly-rooted case-method of the latter 20th century law school, realize were not dominated by the minds of judges, but rather, by the arguments of advocates. We were not let in on the secret that opinion writing and publication were 19th century developments, hard-fought and slowly adopted. And the battle and reception of these practices came based on an early and intuitive appreciation for the truly American idea that the writing and reporting of court decisions served multiple audiences, not specialists residing at an Inn of Court. “[C]ase reporting,” Denis Duffey has written, “was understood to be directed not only at improving judicial administration and aiding litigants by making the law known, but also at controlling courts by making their decisions subject to public scrutiny.”247 As an early reviewer of Henry Wheaton’s pioneering efforts in case reporting observed, the writing and reporting of decisions and judgments makes their authors “[a]nswerable, not only to parties and the power of the state, but to the tribunals of judicial and professional opinion. They cannot sin in defiance of the opinion or other judges and the profession of the law . . . .”248

Writing and publishing judicial decisions, in the American experience, is therefore transformational. “By making the actions of the court visible and subject to constant analysis and criticism, reports domesticated adjudication.”249 In doing so, the judicial process is transformed from “a matter of lawyers and judges applying alien, abstract, rigid doctrines in courtrooms,” into “part of an ongoing, communal discussion conducted in the light of day.”250

Hand’s struggles to master the facts and to apply the law are evident in our cross-sectional view of a typical year of his trial work. While much of his writing appears to be a continuation of his oral rulings in court, there is a substantial portion of his work that shows real effort of written authorship, to reach audiences beyond the parties in a particular controversy. These efforts vary in effectiveness, and are not consistently made; but Hand struggled to make them, and against rather daunting odds in the low-tech, high-volume District Court of the 1910s. That he struggled at all to do so opened a new vista in American judicial writing that allows us to have the conversation undertaken in this article.

It is now Sonia Sotomayor’s hour to struggle with these questions anew. For the first time in our lifetimes, we have a Supreme Court justice with considerable District Court, not to mention Court of Appeals, experience. This juncture in history, this hour of her dogged professional rise, presents an opportunity for Justice Sotomayor to influence the Roberts Court immediately and the Supreme Court institutionally. The influence of which I speak is not as avatar for so-called (and grossly oversimplified and infelicitously stereotyped) “liberal” or “conservative” political-legal agendas. Far more important than the ephemeral legal squabbles of

---

248. Id. at 266 n.13 (citing Wheaton’s Reports, Vol. iii, 8 N. Am. Rev. 62, 67 (1818) (reviewing 3 Henry Wheaton, Reports of Cases Argued and Adjudged in the Supreme Court of the United States (1818)).
249. Duffey, supra note 247, at 267.
250. Id.
the day is the influence Justice Sotomayor has the opportunity to wield in pursuit of a goal more enduring, to make the Supreme Court a leader, once again, as a judicial communicator, so that its opinions enjoy influence not merely because they are “final,” but rather, because they embody higher principles of cognitive excellence. By focusing on the context, congruence, segmentation, and audience principles in the judicial writing that will emanate from within her chambers, Justice Sotomayor may seize a unique opportunity to steer the Supreme Court out of the backwaters into which observers argue that it has slowly drifted since the death of its last great opinion writer, Justice Robert Jackson. Should Justice Sotomayor decide to focus less on adding yet another paddle to steering the substantive outcomes, and more on how the court can persuasively and clearly speak to a wide circle of readers and explain its rulings, the reputation of the Supreme Court and of courts everywhere in America will be substantially enhanced as those courts follow her lead. Justice Sotomayor would therefore make an indelible contribution to American jurisprudence that, while not easily distilled into a sound bite or highlighted text-box for the practicing bar or for law students, can have an effect on pushing judges at all levels to confront the issues we have confronted in Parts I and II, which are the requisites to writing opinions to persuade, not merely to pronounce.

In this endeavor, it is Learned Hand rather than her preferred ideal of Benjamin Cardozo—that should play Virgil to her Dante. Learned Hand’s history provides a pole star by which Judge Sotomayor may steer her efforts in pursuit of this most worthy of goals.

It was Hand’s very iconic status as an appellate judge that has made our critical—and mixed—review of his District Court opinions so much more useful and educational for the federal courts generally, and for Justice Sotomayor and her Roberts Court colleagues in particular, than any collection of gossamer phrases plucked from Second Circuit opinions with a meaningless exhortation to “write like B” so one might be “quote[d]” like B. The exhortation must be to struggle earnestly like B—and to recognize that the struggle is not with the law, nor with the facts, but rather with our own ability to write for a broad range of “others,” rather than for ourselves.

It is a lesson well learned by those who pass through the refiner’s fire of trial-court judging. It is this lesson; above all others; our Supreme Court and its Chief Justice must consciously embrace and model for all judges to emulate if America’s judicial opinions are to begin a reformative path to their former prominence among the nations of the world. And it is Sonia Sotomayor’s opportunity—and perhaps, destiny—to catalyze this reformation as she takes up her work on the same Su-

---


252. CHARLES E. WYZANSKI, WHEREAS—A JUDGE’S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW 82 (1965) (“it was oft repeated that Gus had better judgment than B—a view shared by Justice Robert H. Jackson, who wittily advised the bench and the bar: ‘Quote B, but follow Gus’ ‘); see also Telford Taylor, Letter to the Editor: The Judge’s Legacy, N.Y. TIMES, June 12, 1994, Section 7, page 51 (explaining that in the Second Circuit, Learned Hand was known by the initial for his given first name—“B” for “Billings”—while his cousin Judge Augustus Hand was known as “Gus”).
prem Court to which Learned Hand’s ambitions turned, but outran his political luck.
WHEN THE SCHOOL BULLY ATTACKS IN THE LIVING ROOM:
USING TINKER TO REGULATE OFF-CAMPUS STUDENT CYBERBULLYING

Karly Zande∗

“It lowers my self esteem. It makes me feel really crappy. It makes me walk around the rest of the day feeling worthless, like no one cares. It makes me very, very depressed.”

– Twelve Year Old Cyberbullying Victim†

INTRODUCTION ................................................................. 104
I. CYBERBULLYING EXPLORED ................................................................. 106
A. Defining Cyberbullying ................................................................. 106
B. Differences Between Cyberbullying and Traditional Bullying .......... 109
II. STUDENT FREE SPEECH ISSUES ...................................................... 113
A. Supreme Court Authority on Free Speech in the Schools ................. 113
B. Fleshing Out the Tinker Test .......................................................... 115
   1. Material and Substantial Disruption under Tinker ..................... 115
   2. Impinging on the Rights of Other Students under Tinker .......... 117
III. THE CYBERBULLYING DILEMMA ...................................................... 119
A. Courts Holding Off-Campus Speech Cannot be Curtailed by the Schools ................................................................. 120
B. Applying a True-Threat Analysis .................................................... 121
C. Courts Using a Tinker Analysis in Off-Campus Student Speech Cases .. 122
D. Courts Applying a Hybrid Approach to Tinker for Off-Campus Student Speech .................................................. 124
   1. Finding a Nexus Before Applying Tinker ......................... 124
   2. Conducting an Intent-Based Analysis ................................ 125
IV. TINKER SHOULD GOVERN OFF-CAMPUS STUDENT CYBERBULLYING .... 126
A. Cyberbullying Should Only Be Used to Describe Incidents Between Two Minors ................................................................. 127
B. Courts Should Employ Tinker to Analyze Whether Schools can Regulate Off-Campus Cyberbullying ........................................ 128

∗ J.D. 2009, (summa cum laude), Michigan State University College of Law; B.A. 2006 (with high honors), Michigan State University. The author would like to thank Professor Kristi Bowman for her help and advice in writing this Article.
INTRODUCTION

Everyone remembers the school bully from their childhood years, even if they were never a victim themselves. He was the one who was unbelievably large for his age and surrounded by myths of flunking several grades, or who picked on the first graders by the monkey bars on the playground, or the popular student who spread rumors about classmates. His victims could only escape him by retreating to the refuge of their home as soon as the final school bell rang.

However, the Columbine shootings led to massive changes to how the law deals with incidents of so-called “traditional bullying.” In the ten years since that tragedy, advancements in technology have changed interactions among students. Instead of rushing to the playground and local restaurants after school, today’s students “meet up” with their peers on social networking websites, such as MySpace.
and Facebook, and instant messaging programs. In response to this constant availability of technology, bullies have adapted their tactics to the times, giving rise to an emerging problem known as cyberbullying.

For example, Ryan Halligan, a seventh grader, was tormented online in the privacy of his own living room by schoolmates who used instant messaging software to mock and ridicule him, causing him to take his own life. Eighth grader Jeff Johnston also committed suicide after a group of hackers destroyed an online game that he had invented and replaced it with a website full of malicious comments about him. Kylie Kenney was forced to change schools after a group of classmates created a website entitled “Kill Kylie Incorporated.” Those students also sent her harassing emails and phone messages, and used instant messaging to spread rumors that she was a lesbian.

The continuous access to other students and the anonymity offered by these technologies has created a constant problem both for school administrators, in trying to prevent cyberbullying and discipline perpetrators, and for victims, who are just as vulnerable at home as they are in school. The law has failed to keep pace with today’s technology, and is currently inadequate to protect victims of cyberbullying. Until a nationwide cyberbullying regime is implemented, courts need to give schools the authority to constitutionally intervene in cyberbullying incidents and punish perpetrators, even when such acts occur off campus in the living rooms of the students.

Accordingly, Part I of this paper will define cyberbullying and discuss its effects on victims. Next, Part II will discuss the free speech rights of students as it stands today. Part III will then examine the current ambiguous state of the law addressing cyberspeech and off-campus student speech. Finally, Part IV will dis-

4. Frontline: Growing Up Online (PBS television broadcast Jan. 22, 2008) (calling social network sites the “hub” of teenagers’ social lives); see also ROBIN M. KOWALSKI ET AL., CYBER BULLYING: BULLYING IN THE DIGITAL AGE, 3 (2008) (referring to the Internet as the “digital communication backbone of teens’ daily lives”).
5. See Growing Up Online, supra note 4 (chronicling how technology has changed the lives of today’s students); see also KOWALSKI, supra note 4, at 3-5 (describing how technology has led to the problem of cyberbullying).
6. See Growing Up Online, supra note 4. Ryan’s father details how Ryan’s online “friends” from school spread rumors about Ryan being gay, how a girl Ryan liked pretended to return his affection so she could later humiliate him, and how when Ryan told a friend he was going to commit suicide, the friend responded, “It’s about [expletive] time.” Id.
9. Id. Kylie noted that she felt “ashamed, humiliated and scared.” Id.
10. See KOWALSKI, supra note 4, at 35-37 (describing what school administrations are attempting to do to prevent cyberbullying); see also Growing Up Online, supra note 4 (interviewing Anne Collier, the author of MySpace Unraveled, who stated that “there are so many devices [students] can use to connect, there are so many hot spots and friends’ houses and libraries and cafes and schools and all these places where they can go on line where we can’t control them”).
11. See supra note 3, noting that only nine states’ anti-bullying statutes include a definition of bullying that would adequately allow schools to intervene in student cyberbullying incidents. See also infra Part III for a discussion on the inconsistency of court decisions regarding cyberbullying.
12. This nationwide regime should be similar to that in place for traditional bullying. See discussion supra note 3 on the different state anti-bullying statutes.
cuss how courts can empower schools to prevent and stop student cyberbullying using the *Tinker* test.\textsuperscript{13} Utilization of the *Tinker* analysis will give school administrators and courts a workable and well-developed test for determining whether or not schools can curtail student cyberbullying, even when such speech occurs off campus.

**I. CYBERBULLYING EXPLORED**

**A. Defining Cyberbullying**

Cyberbullying is such a newly recognized phenomenon that there is no current consensus on whether it is one word or two words, let alone what it entails.\textsuperscript{14} Despite an absence of widespread knowledge on the subject, cyberbullying is extremely prevalent among today’s school children, with several studies reporting that approximately eighteen percent of students are cyberbullied during a twomonth period.\textsuperscript{15}

But before one can understand the trouble courts are having in deciding how to regulate cyberbullying, it is important to understand what it entails, and how it differs from traditional bullying. Most courts and commentators agree that it is a very narrow part of cyberspeech, which is yet another developing area.\textsuperscript{16} In general, cyberbullying can be described as the use of technology to humiliate, embarrass, or otherwise bully another.\textsuperscript{17} Today’s child has numerous technologies at their dis-

---

\textsuperscript{13} *Tinker v. Des Moines Independent Community School District* was the first decision by the U.S. Supreme Court discussing student free speech rights, and held that schools could discipline students for speech that was materially and substantially disruptive or impinged on the rights of other students. 393 U.S. 503, 504 (1969). See also infra Part II-A.

\textsuperscript{14} Many variations in spelling are seen across articles on this topic, including cyber bullying, cyberbullying (as used in this Article), and cyber-bullying.

\textsuperscript{15} Robin M. Kowalski & Susan P. Limber, *Electronic Bullying Among Middle School Students*, Vol. 41, Iss. 6, Supp. 1 J. ADOLESCENT HEALTH S22, S28S26 (2007). Of those, 52% were cyberbullied by a known schoolmate, and another 36% reported that the cyberbully was a friend. *Id.* This data reinforced the results of another study conducted in 2000, where 19% of the school-age children reported being the victims of cyberbullying within the prior year. Michelle L. Ybarra & Kimberley J. Mitchell, *Online aggressor/targets, aggressors, and targets: A comparison of associated youth characteristics*, 45 J. CHILD PSYCHOLOGY & PSYCHIATRY 1308, 1311-12 (2004). However, another survey, albeit less scientific and controlled than the others cited in this footnote, reports currently 52% of those polled have been cyberbullied. *Wired Safety Cyberbullying Poll*, http://www.wiredsafety.org/cgi-bin/survey/survey.cgi?survey_name=site (last visited Mar. 11, 2009). This increase may be due to its location on a website devoted to stopping cyberbullying, which would likely attract more cyberbullying victims.


\textsuperscript{17} Darby Dickerson, *What is Cyberbullying?,* 29 NAPSA LEADERSHIP EXCHANGE 28, 28 (2009), available at http://www.leadershipexchange-digital.com/leadershipexchange/2009spring/?pg=31. All the definitions have similar elements in common to the definition provided in this Comment. *See, e.g.*, Stopcyberbullying.org, http://www.stopcyberbullying.org/what_is_cyberbullying_exact.html (last visited Mar. 6, 2009) (defining cyberbullying as “when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones?”); KOWALSKI, supra note 4, at 1 (defining it as “bullying through e-mail, instant messaging (IM), in a chat room, on a Web site (sic), or through digital messages or images sent to a cellular phone”).
posals that they can employ to perpetrate acts of cyberbullying. Among others, these include text messages, emails, chat rooms, instant messages, social networking sites, other websites, and cell phones. These technologies give cyberbullies perpetual access to their victims, and the ability to hide their true identities.

One notable difference between many cyberbullying definitions is an age element. While some definitions and scholars specify that cyberbullying describes behavior between two adolescents, others use the term to describe incidents between two adults, or between an adult and adolescent. Indeed, what is perhaps the most notorious case of cyberbullying involved the suicide of thirteen-year-old Megan Meier, after she was tormented on MySpace by forty-nine-year-old Lori Drew.

Cyberbullies, like traditional bullies, use multiple methods to accomplish their ends, some more violent than others. Flaming is one such technique, involving a short online argument between two or more persons trading insults while using offensive language. It often occurs in chat rooms, on discussion boards, or on virtual game websites. Harassment involves the one-sided sending of offensive
messages to a targeted individual over a period of time. It usually occurs over email, instant messaging, and text messaging. Denigration is the dissemination of cruel, harmful information about a target, where the target is generally not the recipient of the information. This information is usually spread over email, instant messaging software, or posted online at a website. Impersonation occurs when a cyberbully gains access to the victim’s password, logs on to one of the victim’s accounts, and sends out hurtful messages or posts hateful comments purporting to be the victim. Another method, outing and trickery, involves the cyberbully pretending to befriend the victim in order to learn personal, and often embarrassing, information which the victim believes will be kept private, and then spreading that information to others. Finally, exclusion/ostracism is when the cyberbullying victim is purposefully excluded from groups, chat rooms, or websites, due to a change in password, omission from a buddy list, or from being ganged up on by other members.

A related concept is that of cyberbullying by proxy, which occurs when the cyberbully gets a third party to do the bullying for him or her. Often, the third party is unaware that he or she is being used to cyberbully a victim. Unsurprisingly, some forms of cyberbullying by proxy overlap with the cyberbullying methods of denigration and impersonation. For instance, the cyberbully can enlist the third party to send harassing emails or instant messages from the victim’s personal accounts, or the cyberbully can hack into the third party’s accounts and use those accounts to transmit attacks. More commonly, however, the cyberbully will get others to engage the victim in “Notify Wars,” where the accomplices press a “notify” or “warning” button in the software, which will wrongly alert the victim’s instant messaging service, chat room, or email server that the victim is writing objectionable content. Once the service or chat room administrator receives a certain number of warnings, the victim’s account is terminated. Cyberbullying by proxy can also occur when the cyberbully urges the others to send harassing messages to the victim. The cyberbully provokes the victim until the victim responds, either in an emotional or harassing message, email, or some other form. The cyberbully

27. See WILLARD, supra note 1919, at 6-7. Note that harassment involves one or many protagonists, but a victim who does not send offensive messages back. Id. This distinguishes harassment from flaming, where both sides send offensive messages. Id.
28. Id.
29. Id. at 7. Examples include sending digitally altered photographs or websites targeting a specific student. KOWALSKI, supra note 4, at 48. Kylie, from the Introduction, was the victim of denigation. See supra note 9 and accompanying discussion.
30. See WILLARD, supra note 19, at 7-8.
31. See id. at 8. Willard points out that the cyberbully does not necessarily steal the password, noting that it is common practice among teen girls to exchange passwords as a pledge of friendship. Id.
32. Id. at 9. It is this method by which Ryan Halligan from the Introduction was tormented by numerous cyberbullies, including a girl he liked. See supra note 6 and accompanying text.
33. See KOWALSKI, supra note 4, at 49-50.
35. KOWALSKI, supra note 4, at 44.
36. Id. at 45.
37. Id. at 44.
38. Id.
39. Dickerson, supra note 34, at 59.
then forwards the victim’s response on to either friends, to embarrass the victim, or to an authority figure, in an attempt to get the victim in trouble.  

B. Differences Between Cyberbullying and Traditional Bullying

In the aftermath of the Columbine tragedy, the mindset of the public towards bullying changed from being begrudgingly tolerant to actively preventing bullying from occurring.  

Ironically this same earlier tolerance of traditional bullying is prevalent again today in incidents of cyberbullying.  

Cyberbullying shares three common characteristics with traditional bullying: it is aggressive, it involves an imbalance of power between the players, and the bullying is repeated over a period of time.  

However, differences in how these characteristics play out in a cyberbullying event makes cyberbullying more difficult to regulate than traditional bullying.  

Traditional bullying usually involves a physically stronger bully and a weaker victim.  

However, technology enables an otherwise powerless child to subject a physically stronger or older child to fear and abuse that the cyberbully would be unable to assert in a face-to-face confrontation.  

Technology can also obstruct a victim’s ability to trace the comments back to the bully.  

Thus, a cyberbully, unlike a traditional bully, can use technology to hide behind anonymity and inspire additional fear.  

Cloaked by this anonymity, the cyberbully is enabled to say harsher, more destructive things than a traditional bully due to his physical removal from the situation.  

---

40. Id.

41. See Erb, supra note 22, at 259 (averring that “[t]he viewpoint that harassment and bullying by one’s peers is relatively harmless and a rite of passage for school children changed drastically” after the Columbine shootings). Horrified viewers were glued to their television for days after the Columbine shooting, and outraged that the two teen shooters supposedly committed this horrendous act in response to being victims of bullies at school. See id.; see also Stephanie Chen, Debunking the Myths of Columbine, 10 Years Later, CNN, Apr. 20, 2009, available at http://www.cnn.com/2009/CRIME/04/20/columbine.myths/. In response to this outrage, schools have enacted numerous measures to make students safer, and have petitioned for stronger bullying statutes to allow schools to intervene in bullying incidents. Kathy Bushouse & Marc Freeman, Columbine made schools take notice on 10-year anniversary, Safety now paramount, S. Fla. SUN-SENTINEL, Apr. 20, 2009, at B1.

42. See, e.g., Jonathan Stayton, Cyber bully drove schoolboy to attempt suicide, THE ARGUS, Feb. 18, 2008, available at http://www.theargus.co.uk/news/2053716.cyber_bully_drove_schoolboy_to_attempt_suicide (stating that the cyberbully told all of his friends and teachers of his attacks about a fellow student yet no one intervened). Similarly, Ryan Halligan’s classmates were aware he was being cyberbullied, but did nothing to stop it. See Growing Up Online, supra note 4.

43. KOWALSKI, supra note 4, at 61-62.

44. Id.

45. Id. at 62.

46. Id. (noting that “a child who might wield little power over a victim face-to-face may wield a great deal of power . . . in cyber space”). 

47. Id. at 65.

48. Id.

49. See Glenn Stutzky, Stutzky’s Cyberbullying Information, http://www.ippsr.msu.edu/Documents/Forums/2006_Mar CYBER_BULLYING_INFORMATION_2006%20-%20Provided%20by%20Mr.%20Glenn%20Stutzky.pdf http://glennstutzky.com/id14.html (last visited Mar. 11, 2009) (stating that “[i]f I’m bullying you face to face I can see the impact it’s having on you . . . and I might back off and end it seeing that I’ve got you good. This technology removes me from being able to see the impact of my
online conversations, a cyberbully might not even be aware of the harm he or she is unintentionally causing the victim.50

Additionally, while traditional bullying involves multiple, separate acts between the players, one act of cyberbullying can be spread over and over again to thousands of people, and cause far more damage.51 Degrading comments posted online are accessible to people across the globe, including relatives, friends, and future employers, who may mistake the cyberbullying comments as truth.52 While acts of traditional bullying are instantaneous, and can be easily forgotten by observers over time, cyberbullying acts posted on the Internet spread rapidly and are left up for a potentially infinite length of time, increasing the duration of the acts, and causing an extended period of embarrassment and shame.53

It is not uncommon for victims of cyberbullying to also be victims of traditional bullying during school hours.54 But, unlike the victims of traditional bullying, cyberbullying victims have no safe haven to run home to after school.55 Because students are constantly accessible to each other via the Internet and cell phones, a cyberbully can reach into the victim’s own living room to torment him or her.56 Further, where a bully at school must operate under the watchful eyes of teachers, lunchroom monitors, and other faculty, there is no one supervising his or her actions in cyberspace.57 There is no one to punish the cyberbully, except for his or her parents, who may be blissfully unaware of their child’s online activities.58

actions and so lends itself to greater cruelty”). See also KOWALSKI, supra note 4, at 65 (referring to this as “the phenomenon of disinhibition”).

50. See, e.g., id. at 65 (including the comments of one child who describes how you can become an accidental cyberbully by thinking you are making a joke and inadvertently hurting someone’s feelings due to the lack of tone and expression). Likewise, it is almost certain that no cyberbully, or traditional bully, would intend to cause death, or suicidal ideations, such as those experienced by many victims. See supra notes 6-9 and accompanying text.

51. See KOWALSKI, supra note 4 at 62 (stating that although “there may have been only one initial [cyberbullying] act, it may have been perpetrated through many people and over time”).

52. See, e.g., CBC News In Depth: Cyberbullying, http://www.cbc.ca/news/background/bullying/cyber_bullying.html (last visited Mar. 31, 2009) One victim described the humiliation from having such an increased audience: Rather than just some people, say 30 in a cafeteria, hearing them all yell insults at you, it’s up there for 6 billion people to see. Anyone with a computer can see it . . . . And you can’t get away from it. It doesn’t go away when you come home from school. It made me feel even more trapped. Id.

53. See, e.g., Stutzky, supra note 49 (noting that cyberbullying “lengthens the duration of . . . torment” compared to traditional bullying).

54. See, e.g., Carroll, infra note 77 (describing the plight of a high school girl who was the victim of cyberbullying at home, and “berated . . . in person during school hours”).

55. See Bob Meadows, The Web: the Bully’s New Playground, PEOPLE, Mar. 14, 2005, at 153 (emphasizing the difficulty cyberbullying victims have in escaping the perpetrator). The mother of a cyberbullying victim aptly described that “[w]hen [the bullying] is on the computer at home, you have nowhere to go.” Id.

56. See Mike Wendland, Cyber-bullies make it tough for kids to leave playground, DET. FREE PRESS, Nov. 17, 2003, at 1A (describing the accessibility of today’s teens due to the technology available to them).


58. See id. (noting that the lack of supervision renders many incidents of cyberbullying "outside of regulatory reach"). According to one survey, although ninety-three percent of parents think they know what their child is doing online, approximately forty-one percent of children reported that their parents didn’t know what activities they did online. KOWALSKI, supra note 4, at 91. Kowalski points out that parents are often not members of social
While some may argue that the victim could escape merely by turning off her cell phone or signing offline, this is not the reality for today’s students. Technology has become so entwined with teenage lives, as a vehicle for both completing schoolwork and hanging out with friends, that logging off is simply not a viable option. Thus, cyberbullies effectively “have their victims on an electronic tether.”

Perhaps surprisingly, while boys are generally the perpetrators and victims of traditional bullying, it is girls who are more likely to be on both ends of cyberbullying. However, it appears that the boys who cyberbully others do so more frequently than their female counterparts. Cyberbullying also peaks during the middle school years, while most traditional bullying occurs during elementary school years.

An intriguing difference between cyberbullying and traditional bullying is the role that bystanders play. Traditional bullying is witnessed by a number of bystanders who play a variety of different roles. While some bystanders might become accomplices and assist in the bullying, others may try to help the victim get out of the situation. Another group may indirectly engage in the bullying by laughing, egging the bully on, or otherwise reinforcing the bully’s behavior. The largest group of bystanders will likely witness the event silently without assisting either side or reporting the bullying to a teacher.

Comparatively, cyberbullying bystanders can be either more or less of a presence depending on how the cyberbully chooses to operate. It is possible that a bystander to a cyberbullying act could participate in the bullying, defend the victim, or choose to ignore it, just as with traditional bullying. Unlike traditional bullying, the bystander could unwittingly become part of the bullying, such as in a cyberbullying by proxy scenario, if the cyberbully utilizes the bystander’s screen name or email account to harass the victim. Troublingly, research also suggests networking websites, and are unfamiliar with the technologies that their children are using, making it more difficult to monitor their child’s online activities. Id.

59. See supra note 4 and accompanying text, describing how pivotal technology is in the lives of teens today. See also Melissa McNamara, Teens Are Wired . . . And, Yes, It’s Okay, CBS NEWS, June 13, 2006, available at http://www.cbsnews.com/stories/2006/06/09/gentech/main1698246.shtml (reporting that “[t]echnology is so integrated into teens’ lives that it’s difficult to measure where their offline life begins and their online life ends”).

60. Wendland, supra note 56 (quoting Glenn Stutzky, a clinical professor at Michigan State University’s School of Social Work and school-violence specialist).

61. See KOWALSKI, supra note 4, at 78-79 (noting that “cyber bullying overall seems to occur more frequently among girls than among boys”) (citation omitted).

62. Id. (describing survey results that showed more boys acknowledging that they cyberbullied someone at least once a week, and several times a week, than the girls surveyed who admitted to cyberbullying).

63. Id. at 80 (discussing the results of a scientific survey that authors conducted).

64. WILLARD, supra note 19, at 44 (noting that bystanders play varying roles “within the bullying dynamic”).

65. Id.

66. Id.

67. KOWALSKI, supra note 4, at 63. However, even the silence by these bystanders can be taken as passive support by the bully, or cause the victim to feel even more humiliated. Id. at 63-64.

68. See WILLARD, supra note 19, at 44 (suggesting that more research should be done on the role of bystanders in cyberbullying).

69. KOWALSKI, supra note 4, at 44.

70. Id.
that bystanders to cyberbullying are more likely to become cyberbullies themselves in the future, due to the lack of physical requirements associated with traditional bullies and anonymity offered by the internet.\textsuperscript{71} Thus, it is imperative that schools make preventing cyberbullying a priority.

Although cyberbullying attacks may sound insignificant to an outside observer, these acts can have permanent, serious effects on victims that cannot, and should not, be ignored.\textsuperscript{72} These effects are often more devastating than those experienced by victims of traditional bullying.\textsuperscript{73} In addition to feeling lonely, humiliated, and insecure, like victims of traditional bullying, cyberbullying victims also experience heightened feelings of anger, frustration, and depression.\textsuperscript{74} In some cases, these emotions can be so strong as to lead to suicidal ideations and even suicide attempts.\textsuperscript{75} Victims also experience trouble concentrating, exhibit lower self-esteem, and demonstrate physical symptoms, such as headaches and abdominal discomfort.\textsuperscript{76} Furthermore, cyberbullying victims who know that the cyberbully is another student at school often fear and avoid attending school in an effort to evade face to face contact with the bully.\textsuperscript{77} Victims may be in constant fear for their safety at school and become preoccupied with both avoiding the perpetrator and ensuring that their surroundings are safe.\textsuperscript{78}

All of these effects culminate in the victims’ inability to form positive relationships with others and to function normally in their academic and familial responsibilities.\textsuperscript{79} Stories shared by cyberbullying victims attest to the fact that cyberbullying can decrease students’ grades and performance in school.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{71} Id. Kowalski believes that all of these factors coupled together will make it easier for bystanders of cyberbullying to become desensitized to cyberbullying, and to become one themselves. Id.
\item \textsuperscript{72} Wendland, supra note 56 (quoting Professor Glenn Stutzky as saying that “while these comments may seem silly to people who have matured, they are very devastating to the young people on the receiving end.”). See also Hinduja & Patchin, infra note 77, at 2 (stating that the effects of cyberbullying are not limited to hurt feelings that can be easily disregarded and can permanently damage the psyche of many adolescents).
\item \textsuperscript{73} See, e.g., Meadows, supra note 55; see also Wendland, supra note 56.
\item \textsuperscript{74} See Hinduja & Patchin, infra note 77, at 1-2; WILLARD, supra note 19 at 33-34 (listing the emotional problems experienced by cyberbullying victims).
\item \textsuperscript{75} See WILLARD, supra note 19, at 34. Unfortunately, this is what happened to Jeff Johnston and Ryan Halligan when they could no longer stand being cyberbullied. See supra notes 7 and 8 and accompanying text.
\item \textsuperscript{76} See KOWALSKI, supra note 4, at 85 (stating that the effects of cyberbullying are similar to traditional bullying, and can include “depression, low self-esteem, helplessness, social anxiety, reduced concentration,” and other negative emotions); see also WILLARD, supra note 19, at 34 (listing psychosomatic symptoms a cyberbullying victim may experience).
\item \textsuperscript{77} See, e.g., Sameer Hinduja, Ph.D. & Justin W. Patchin, Ph.D., Cyberbullying Research Summary: Emotional and Psychological Consequences (2008), available at http://www.cyberbullying.us/cyberbullying_emotional_consequences.pdf. Another report found that 400,000 adolescents nationwide try to avoid attending school because they are being bullied, and approximately one out of three of those children are being cyberbullied. Kathleen Carroll, Schools step up efforts to stop cyber bullying, Jan. 4, 2009, available at http://www.northjersey.com/education/bigpicture/57055169.html (quoting J. Frank Vespa-Papaleo, the director of the New Jersey Division on Civil Rights).
\item \textsuperscript{78} See Hinduja & Patchin, supra note 77, at 2 (noting that victims are constantly surveilling the landscape of cyberspace or real space to guard against problematic personal encounters).
\item \textsuperscript{79} See id. (stating that a victim’s ability to focus on academics, family matters and responsibilities, and prosocial choices is compromised to some extent).
\item \textsuperscript{80} See, e.g., Meadows, supra note 55 (sharing several teen accounts of cyberbullying, and noting that more common than suicide, which one cyberbullying victim committed, cyberbullying “caused victims’ grades to plummet and kids to seek psychiatric help and change schools”); see also Amanda Burgess-Proctor, Ph.D., et al., Cyberbullying Research Summary: Victimization of Adolescent Girls 1, 1-2, available at
cyberbullying acts occur off campus, in the privacy of the perpetrator and victim’s respective homes, it can have long-lasting and destructive effects on the victim inside the school.81

In sum, cyberbullying is a growing problem in schools, just like traditional bullying before the tragic Columbine shootings. Because of its severe effects on students, schools should be allowed to intervene in student cyberbullying cases and prevent further harm to victims of cyberbullying. However, unlike incidents of traditional bullying, cyberbullying remains essentially unregulated in most states.82

II. STUDENT FREE SPEECH ISSUES

Although a school may wish to intervene in cyberbullying incidents between students, its authority to do so under the First Amendment is currently unclear. While most states have adopted anti-bullying statutes, only a few of those clearly give schools jurisdiction to act in cyberbullying situations.83 Thus, the school must look to court decisions to ensure that it is not violating the free speech rights of cyberbullies by disciplining them. This section details the current state of the law governing the free speech rights of students.

A. Supreme Court Authority on Free Speech in the Schools

Student rights to free speech in a public school are governed by a quartet of Supreme Court cases spanning the last four decades. The first, Tinker v. Des Moines Independent Community School District, involved a group of students who were suspended for wearing black armbands to voice their opposition to the Vietnam War.84 The Supreme Court remarked on the need to balance the First Amendment rights of students with the ability of school administrators to make and enforce rules governing appropriate student conduct.85 Thus, it held that the school could quash student speech when it was materially or substantially disruptive, or when it violated the rights of other students.86 Since the armbands in Tinker were passive, and neither disrupted the classroom nor impinged on the rights of other

81. See, e.g., Hinduja & Patchin, supra note 77, at 2 (describing the difficulties cyberbullying victims have in going to school after being cyberbullied).
82. See supra note 3 and accompanying text.
83. Id.
84. 393 U.S. 503, 504 (1969).
85. Id. at 506-07 (stating that while “[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” schools must be able “to prescribe and control conduct in the schools” under the First Amendment).
86. Id. at 512-13 (citing Blackwell v. Issaquena Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (discussing past decisions in lower courts, and noting that student speech which “materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech”).

http://www.cyberbullying.us/cyberbullying_girls_victimization.pdf (22.7% of female victims in this study reported feeling affected at school, even though the cyberbullying took place off-campus). Depriving victims of their educational opportunities in this way is also one of the harms recognized in Title IX sexual harassment lawsuits. See, e.g., Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) (noting that Title IX requires that “students must not be denied access to educational benefits and opportunities on the basis of gender”).
students, the Court ruled that the school violated the students’ right to free speech. Commentators suggest that Tinker is the most important case regarding student free speech rights, and that the later decisions are merely exceptions to the Tinker standard.

The second case in the student speech quartet, Bethel School District Number 403 v. Fraser, involved a high school student who described a fellow student’s candidacy for student body vice president using a series of sexual metaphors during a school assembly. The Court noted that Fraser’s speech was lewd and offensive, and upheld the school district’s suspension. In so ruling, the Court limited the scope of Tinker, and gave schools the authority to curtail student speech when its expression was lewd, offensive, and contrary to the school’s mission, even when not disruptive.

Hazelwood School District v. Kuhlmeier, the third school speech case, further chipped away at Tinker. The school administration in that case deleted two articles from the school newspaper concerning student pregnancy and the effect of divorce on students. Administrators were concerned that the topics were not appropriate for younger students and that some of the anonymous students in the article could be identified. The Court reiterated that a school could curtail otherwise uncensorable speech that conflicted with the school’s educational mission and values. This decision was partly because the student speech could be perceived as “school-sponsored.” Thus, school-sponsored speech became another exception to Tinker.

The most recent case, Morse v. Frederick, further expanded the rights of school administration to curtail student speech. The school planned an event during the school day, allowing students to leave class to observe the Olympic torch passing

---

87. See Tinker, 393 U.S. at 508-09. The Court noted that the district court had found no evidence of disruption caused by the armbands, or that the armbands had interfered with the rights of other students at the school. Id. at 509. It further observed that a school-issued memo on the suspension of the students had made no mention of any actual or potential disruption. Id.

88. See, e.g., Kellie A. Cairns, Morse v. Frederick: Evaluating a Supreme Hit to Students’ First Amendment Rights, 29 Pace L. Rev. 151, 151 (2008) (stating that “the Court has steadily continued to carve out exceptions to [Tinker]”).

89. Bethel Sch. Dist. Number 403 v. Fraser, 478 U.S. 675, 684-90 (1986). Fraser depicted the other student as “firm in his pants,” and a person who goes to the “climax” for his peers. Id. at 687 (Brennan, J., concurring) (citation omitted).

90. Id. at 683 (stating that the “pervasive sexual innuendo ... was plainly offensive ... to any mature person”).

91. Id. at 684-90.


93. Id. at 263.

94. Id.

95. Id. at 260 (holding that “[a] school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school”).

96. Id. at 261 (maintaining that “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

97. 127 S. Ct. 2618, 2622 (2008); see also Cairns, supra note 88, at 151 (arguing that the Supreme Court made a mistake in carving an exception out of Tinker with Morse v. Frederick).
through the town.\footnote{Morse, 127 S. Ct. at 2622. The school arranged for students to be dismissed from class for a specified period of time, under the supervision of teachers and administrators, to view the event. Id.} Frederick, a student at the school, did not show up for classes that morning, but came to see the torch pass.\footnote{Id.} He stood off campus with classmates and held up a fourteen-foot wide, homemade banner with the phrase “BONG HiTS 4 JESUS.”\footnote{Id.} When Frederick refused to take down his banner, the school principal suspended him.\footnote{Id. at 2624 (stating that Frederick could not “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.”) (citations omitted).} The Court rejected Frederick’s argument that the school could not punish his actions, as he had not been in attendance at school that day.\footnote{Id.} However, the Court did note that there was no established boundary for when the school speech rules apply.\footnote{Id.} It also found that the school principal did not violate Frederick’s First Amendment rights by prohibiting him from displaying the banner because it could reasonably be seen as promoting drug use, and the school could curtail such speech.\footnote{Id. at 2625.}

All of the cases in the Supreme Court quartet reiterate the original standard set forth in \textit{Tinker}: schools are allowed to discipline students for speech that causes a substantial disruption in the classroom or interferes with the rights of other students.\footnote{See supra Part II.A.} However, the quartet leaves many questions unanswered, including whether off-campus student speech that reaches onto the school campus can be curtailed by school administrators. This makes application of the Supreme Court precedent to cyberbullying cases difficult and unpredictable.

\section*{B. Fleshing Out the \textit{Tinker} Test}

\textit{Tinker} gave the lower courts an adaptable test to use when analyzing student speech cases. Since then, it has been largely up to the lower courts to flesh out the nuances of the \textit{Tinker} test and to determine what constitutes substantial disruption and what speech impinges on the rights of others.\footnote{Id. at 2625.} This section discusses cases interpreting \textit{Tinker} that are relevant to cyberbullying.

\subsection*{1. Material and Substantial Disruption under \textit{Tinker}}

The first prong of the test laid out in \textit{Tinker} allows schools to curtail student speech consistent with the First Amendment when the speech causes a substantial and material disruption inside the school.\footnote{Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).} Since this prong has been well devel-
oped by courts interpreting it, school administrators can find a wealth of information on which they can draw to determine if they can constitutionally prohibit certain student speech, including cyberbullying.

Even before Tinker, several courts found that a school could prohibit student speech that caused an actual disruption inside the classroom. Both Burnside v. Byars and Blackwell v. Issaquena County Board of Education involved students wearing freedom buttons at school to show support for African American voting rights. Both lower courts that considered the matter rejected the students’ arguments that the prohibition violated the students’ free speech rights. However, because the freedom buttons in Blackwell caused actual disruption in the school, the Fifth Circuit upheld the prohibition against wearing the freedom buttons in that case on appeal, where in Burnside it did not.

However, neither Tinker nor the First Amendment requires schools to wait until actual disruption occurs within the school. Instead, administrators have a duty to prevent any such disruption from taking place. In order to constitutionally curtail speech by forecasting disruption, the Tinker Court examined whether the school could point to specific facts which made it reasonable to believe that material and substantial disruption could occur on campus.

Since then, other courts have expanded on what criteria schools can use to forecast material and substantial disruption. Schools cannot, for instance, forecast material and substantial disruption due to students refusing to stand for the Pledge of Allegiance, but may base it on speech with sexual connotations. It is well established that schools can reasonably forecast disruption based on prior incidents outside the school. However, the prior events must have occurred relatively recently in time.

108. See Kristi L. Bowman, The Civil Rights Roots of Tinker’s Disruption Tests, 58 AM. U. L. REV. 1129 (2009) (describing the Fifth Circuit cases Burnside and Blackwell which were decided just prior to Tinker, and cited in its opinion). The Tinker Court cited these cases only in the final draft of its opinion, lending the ultimate test that it announced greater clarity than it had articulated in previous drafts. Id. at 1160.


110. Burnside, 363 F.2d at 744; Blackwell, 363 F.2d at 752.

111. Burnside; 363 F.2d at 749; Blackwell, 363 F.2d at 753-54. The court compared the two in its Blackwell opinion, noting that in Blackwell, the facts were much different than in Burnside which involved “no disruption of classes or school routine.” 363 F.2d at 753.

112. Tinker, 393 U.S. at 514. See also Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973) (stating that, under Tinker, school administrators “have a duty to prevent the occurrence of disturbances” which could result from student speech).

113. Tinker, 393 U.S. at 514.


115. See, e.g., Guzick v. Drebus, 431 F.2d 594, 600 (6th Cir. 1970) (school did not violate the First Amendment by prohibiting anti-war buttons because of a history of violence at the school regarding other buttons); Melton v. Young, 465 F.2d 1332, 1337 (6th Cir. 1972) (school could prohibit student from wearing a Confederate flag jacket to school because there was a tense, racial situation at the high school, and it could reasonably anticipate disruption based on past racial violence); Karp, 477 F.2d at 176 (school was justified in forecasting substantial and material disruption when a student organized a walkout during an awards presentation and invited the media); Phillips v. Anderson County Sch. Dist. Five, 987 F. Supp. 488 (D.S.C. 1997) (school could reasonably
Additionally, some courts hold that the school must be able to demonstrate a close nexus between those events and the speech in question.\textsuperscript{117} For instance, in \textit{Sypniewski v Warren Hills Regional Board of Education}, the court found that the school could not use prior incidents involving a gang called the “Hicks” to forecast disruption from a Jeff Foxworthy “You Might Be A Redneck If . . .” T-shirt that a student wore to school.\textsuperscript{118} Similarly, in \textit{Chambers v. Babbitt}, the court found that there was not a sufficient nexus between a prior racial incident and a student’s “Straight Pride” T-shirt by which the school could reasonably forecast disruption.\textsuperscript{119}

2. Impinging on the Rights of Other Students under \textit{Tinker}

The second prong of \textit{Tinker} allows schools to curtail student speech when it impinges on the rights of other students.\textsuperscript{120} Particularly for incidents of cyberbullying, this test could assist school administrators in showing that prohibition of the cyberbully’s speech was constitutional.\textsuperscript{121} Many court cases have expanded on the \textit{Tinker} standard governing actual disruption and forecasting material and substantial disruption.\textsuperscript{122} Curiously, though, very few courts have addressed the \textit{Tinker} Court’s statement that a school can regulate speech that impinges on the rights of other students, leaving this standard regrettably ambiguous.\textsuperscript{123}

In \textit{Nixon v. Northern Local School Board of Education}, the Southern District Court of Ohio grasped the opportunity to develop this test in ruling that a school forecast material and substantial disruption from a Confederate flag jacket based on racial tensions and prior disruptive incidents. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1362 (10th Cir. 2000) (school could reasonably forecast disruption when a student drew a Confederate flag on a paper in class because there was a history of racial violence at the school).\textsuperscript{116} See Barber ex rel. Barber v. Dearborn Pub. Sch., 286 F. Supp. 2d 847, 857 (E.D. Mich. 2003) (holding that a school could not reasonably forecast that a T-shirt stating George W. Bush was an “International Terrorist” would cause disruption based on events that occurred in response to Operation Desert Storm ten years earlier).

\textsuperscript{116} See supra Part II.B.1.

\textsuperscript{117} \textit{Sypniewski v. Warren Hills Reg’l Bd. of Educ.}, 307 F.3d 243, 254-55 (3d Cir. 2002) (noting that there needed to be some identifiable relationship linking the past disruption and the present speech in order for the school to be able to forecast disruption).

\textsuperscript{118} \textsuperscript{Id}. at 274-75. The court noted that a mere “association” between the prior events and the speech was not enough, because such a limited standard could lead to an almost unfettered authority to the school district to curtail student speech on a weakly premised connection. \textit{Id}. at 257. Although the words “Hick” and “Redneck” had similar meanings, there was no evidence here that “Redneck” had ever been used to refer to the Hick gang before, or that the student’s shirt was intended to promote bigotry inside the school. \textit{Id}.

\textsuperscript{119} 145 F. Supp. 2d 1068, 1072 (D. Minn. 2001). In the preceding school year, a series of racially-charged fights broke out in the school when a student wore a Confederate flag bandana. \textit{Id}. at 1070. The court noted that the only factor in common between that incident and curtailment of the “Straight Pride” T-shirt was that the shirt and bandana were both articles of clothing. \textit{Id}. at 1072. This, it held, was not a sufficient nexus to forecast violence based on sexual orientation from violence based on race. \textit{Id}.

\textsuperscript{120} \textit{Tinker}, 393 U.S. 503, 512-13 (1969).

\textsuperscript{121} See infra Part IV.C.2.

\textsuperscript{122} See supra Part II.B.1.

\textsuperscript{123} See, e.g., Andrew Canter & Gabriel Pardo, Comment, \textit{The Court’s Missed Opportunity in Harper v. Poway}, 2008 B.Y.U. Educ. & L.J. 125, 126 (2008) (stating that when the court denied certiorari to \textit{Harper v. Poway}, it lost the chance to answer the question of whether it is “possible for a student’s words and writings alone to ‘invade the rights of others!’”). See also Harvard Law Rev. Ass’n, \textit{Ninth Circuit Upholds Public School’s Prohibition of Anti-Gay T-Shirts}, 120 Harv. L. Rev. 1691, 1694 (2007) (noting that there is not universal recognition that this is a separate prong of the \textit{Tinker} test, and most courts “treat the likelihood of ‘material disruption’ as dispositive when considering bans on political speech and symbols”).
could constitutionally prohibit a student from wearing a T-shirt reading “Homo-
sexuality is a sin! Islam is a lie! Abortion is murder!” The court expressly rec-
ognized that schools could, under Tinker, restrict student speech that interfered
with the rights of other students. Noting the dearth of case law developing this
test, the court interpreted Tinker to mean that students in the school maintain both
the right to security and the freedom to be left alone. Since the court concluded
that this T-shirt did not violate those rights, it held that the actions of the school
were unconstitutional.

Another case addressing this prong of Tinker, however, found that a similar T-
shirt did impinge on the rights of other students. A student attended school
wearing a shirt reading “HOMOSEXUALITY IS SHAMEFUL.” In holding that
the school could constitutionally prohibit the student from wearing the shirt, the
Ninth Circuit noted that it relied solely on the provision of Tinker, which allows
schools to prevent speech that interferes with the rights of others. The court ob-
served that this shirt collided with the rights of other students in the “most funda-
mental way,” which includes the right to be secure from both physical and psycho-
logical attacks. The court determined that speech against groups which have been
“made to feel inferior[] serves to injure and intimidate them, as well as to . . .
interfere with their opportunity to learn.” This case, however, is not controlling
because the Supreme Court subsequently vacated it as moot. Additional courts
have also recognized the right of students to feel psychologically secure under
Tinker.

In sum, these cases, and others interpreting Tinker, give schools fairly wide la-
titude to curtail student speech under the First Amendment. Tinker has with-
stood many scenarios and interpretations, and has prevailed as a superior test ba-

125. Id. at 974 (“It is true that, according to Tinker, schools can regulate speech that invades on the rights of
others.”). However, the court noted that it could find no cases allowing the schools to curtail student speech based
solely on this prong of Tinker. Id.
126. Id. (stating that “invading on the rights of other students entails invading on other students’ rights to be
secure and to be let alone”).
127. Id.
128. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177-84 (9th Cir. 2006), vacated as moot, 549
129. Id. at 1171.
130. Id. at 1175. Lack of sole reliance on this prong of Tinker in other cases was pointed out in Nixon barely
over a year prior. See supra note 125.
131. Poway, 445 F.3d at 1178 (stating that “[b]eing secure involves not only freedom from physical assaults
but from psychological attacks that cause young people to question their self-worth and their rightful place in
society”).
132. Id.
certiorari, the case could still be used as controlling case law.
134. For example, the Tenth Circuit held that, despite any evidence of potential physical violence, exhibiting
the Confederate flag could reasonably be seen as interfering with the rights of students to be let alone. West v.
Darby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000). The Ninth Circuit also previously held that
vulgar terms may impinge on those same rights of students without any instance of physical attacks. Chandler v.
McMillinville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).
135. See, e.g., Denning & Taylor, supra note 22, at 865-66 (commenting that after Morse v. Frederick,
school administrators have many ways in which they can constitutionally curtail student speech).
lancing both the free speech rights of students and the interest of the schools in educating and protecting their students. It has also proven to be an adaptable test, and, if adopted by the courts, should provide schools additional guidance on how to analyze the murky and complicated scenario of the free-speech rights of student cyberbullies.

III. THE CYBERBULLYING DILEMMA

A review of relevant case law uncovers little precedent on cyberbullying cases, and, indeed, cyberspeech cases in general. As with traditional bullying cases, this scarcity is likely due to most cases settling out of court, coupled with the fact that cyberbullying is only recently attracting the public’s attention. More troublesome is that what little precedent exists regarding both off-campus student speech and cyberspeech is riddled with contradictions. This makes predicting how courts will treat cyberbullying, and thus advising clients, especially difficult. Cyberbullying cases are further complicated by the fact that most cyberbullying acts occur off campus, arguably beyond the school’s authority. Even the lower courts have bemoaned the paucity of direction given to them in deciding off-campus student speech cases. School officials are left uncertain as to which speech they can and cannot curtail without exposing themselves to liability, making them more likely to settle cases instead of litigate.

Because of the lack of guidance from the Supreme Court on how to treat off-campus student speech and cyberspeech, courts in different jurisdictions have applied inconsistent tests to the cases that have come before them. These tests employ approaches ranging from holding that schools cannot curtail off-campus student speech that arrives on campus, to utilizing a completely different constitutional approach under a “true threat” analysis, to applying several variations of Tinker. This variety of approaches among the courts illustrates the need for a standardized,

136. See infra Part III.
137. See, e.g., KOWALSKI, supra note 4, at 165 (noting that court decisions regarding cyberbullying are “scant”).
138. Id. at 164-65.
139. See infra Part III.A-C.
140. See Tracy L. Adamovich, Return to Sender: Off-Campus Student Speech Brought On-Campus By Another Student, 82 ST. JOHN’S L. REV. 1087, 1088 (2008) (stating that the courts have given “little guidance” on this issue despite an “abundance of cases” regarding free speech rights of students with off-campus speech). Because of the increasing availability and accessibility of technology, it is likely that these cases will increase in frequency. Id. at 1113.
141. See Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619-20 (5th Cir. 2004) (discussing the various standards applied to off-campus student speech, and stating how commentators are “[f]rustrated by these inconsistencies” and are “calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation”).
142. See, e.g., Kara D. Williams, Note, Public Schools vs. MySpace & Facebook: The Newest Challenge to Student Speech Rights, 76 U. CN. L. REV. 707, 730-31 (2008) (stating that “[s]chool officials have admitted to not knowing what students’ speech rights are,” especially when applying to social networking sites and other cyberspeech) (citation omitted); see also Tresa Baldas, As ‘Cyber-Bullying’ Grows, and So Do Lawsuits, NAT’L L.J. (Dec. 10, 2007), available at http://www.law.com/jsp/article.jsp?id=1197281074941 (noting that school districts are fearful that if they curtail student cyberbullying they will be sued for violating student free speech rights, and if they do not stop that speech that they will be sued for failure to act).
adaptable test for courts to apply in cyberbullying cases, such as *Tinker*, that reflects the shrinking distinction between on- and off-campus speech due to today’s technology. This section details the Circuit Courts’ split regarding the free-speech rights of students in off-campus student speech and cyberspeech cases under these varied approaches.

A. Courts Holding Off-Campus Speech Cannot be Curtailed by the Schools

Some scholars argue that off-campus student speech should not be subjected to analysis under *Tinker*, even if the speech is brought on campus by another student or a third party. Several courts have adopted this approach. For instance, in *Thomas v. Board of Education, Granville Central School District* the New York Supreme Court refused to apply *Tinker* to an offensive student newspaper article because it was written and distributed off campus, holding the article was beyond the reach of school administrators.

In *Porter v. Ascension Parish School Board*, the Fifth Circuit also had to rule on off-campus student speech that was brought on campus by a third party. In reaching its decision, the court summarized a series of cases both following and refusing to apply *Tinker* in off-campus student speech cases. The court noted that the line between on-campus speech, subject to school curtailment, and off-campus speech, receiving full constitutional protection, was unclear. However, it declined to apply *Tinker* to this set of facts, finding that the drawing in question was off-campus speech that only accidentally made its way on campus.

---

143. Some may argue that it does not matter whether students in different jurisdictions have different rights, and thus there is no need for a standardized test. However, since free speech is a First Amendment right under the Constitution of the United States, students in all jurisdictions should have uniform rights regarding what speech is and is not allowed in school.

144. See, e.g., Denning & Taylor, supra note 22, at 882 (stating that students should not be accountable for off-campus speech which is brought on-campus by another student). This reflects the analysis under the intent test. See Justin P. Markey, *Enough Tinkering with Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 C. U. L. REV. 129, 143-44 (2007) (arguing that courts should not be able to use a pure *Tinker* analysis to curtail off-campus student speech, and advocating the adoption of an intent test).

145. 607 F.2d 1043, 1051 (2d. Cir. 1979) (holding that the “First Amendment will not abide the additional chill on protected expression that would inevitably emanate from” school administrator’s regulation of off-campus speech).

146. 393 F.3d at 608. Fourteen-year-old Adam Porter drew a violent sketch at home of his high school exploding, accompanied by racial slurs and other offensive language. *Id.* at 611. Adam showed the drawing only to his mother and younger brother. *Id.* Two years later, Adam’s younger brother brought the picture to school and showed it to a bus driver. *Id.* School officials, alarmed over the graphic content of the drawing, suspended both Adam, for making the picture, and his younger brother, for possessing it on campus. *Id.* at 612.

147. *Id.* at 619-20.

148. *Id.* at 618 (“The line dividing fully protected ‘off-campus’ speech from less protected ‘on-campus’ speech is unclear, however, in cases such as this involving off-campus speech brought on-campus without the knowledge or permission of the speaker.”).

149. *Id.* at 620 (holding that since the drawing was “composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him . . . or publicized in a way certain to result in its appearance at EAHS” the drawing was entitled to full constitutional protection).
al district court in Washington held similarly in a case analyzing a student’s website in *Emmett v. Kent School District No. 415*. These cases illustrate the very real possibility that a court may hold that schools cannot discipline student cyberbullies for speech that originates off campus. The cases also demonstrate the current uncertainty as to the school’s jurisdiction over off-campus student speech, and exemplify the need for courts to adopt clear standards to govern future cases.

**B. Applying a True-Threat Analysis**

The Eighth Circuit, seemingly believing that off-campus speech should be censored by the schools but unsure under what standard, applied a different constitutional approach in *Doe v. Pulaski County Special School District*. The majority opinion omitted any discussion of *Tinker*, and analyzed the letters at issue, authored by a student at home, under a “true threat” analysis. The “true threat” analysis looks at whether the speech in question involves a threat of violence such that it loses constitutional protection. The court ultimately found for the school because of the brutal nature of the letter, deciding that the letter constituted a true threat with no protection under the First Amendment. The dissenting opinion in *Pulaski*, however, pointed out that the majority failed to consider the effects stemming from the speech arriving on a school campus.

While the “true threat” analysis may be a possible tool in the school’s arsenal, it is unlikely to meet the needs of a school hoping to stop student cyberbullying, as most cyberbullying acts will not rise to this level of threat of violence. Indeed, most student speech in general would fail to satisfy the heightened threshold of a “true threat” analysis. Perhaps that is why most courts, other than *Pulaski*, have failed to adopt this standard. Instead, it would be better for the courts to adopt a.
more flexible test, such as *Tinker*, which gives schools a lower-threshold level on which they can act.

C. Courts Using a *Tinker* Analysis in Off-Campus Student Speech Cases

Since *Tinker* is well established, many courts and scholars believe that both off-campus and student cyberspeech cases should be analyzed under *Tinker*. The first inkling that off-campus student speech is subject to the same standards as that occurring on-campus can be found in *Tinker* itself. In the majority opinion, Justice Fortas states that out-of-class speech that causes substantial disruption in the classroom, or impinges the rights of others, does not receive protection under the First Amendment.\(^{158}\)

The majority of courts ruling on whether schools can censor off-campus student speech have applied some form of the *Tinker* analysis.\(^{159}\) In particular, *Tinker* has been used to analyze student newspapers created off campus\(^ {160}\) and student websites.\(^ {161}\) This seems consistent with the trend of giving escalating authority to schools to curtail student speech under the First Amendment across the Supreme Court student speech quartet.\(^ {162}\) However, when the Supreme Court was presented with the recent opportunity in *Morse v. Frederick* to delineate the school’s jurisdiction over off-campus speech (or lack thereof) and eliminate inconsistencies in the various tests used, it instead only further complicated the analysis.\(^ {163}\)

Although student Joseph Frederick’s banner was displayed off campus, the Court both identified and quickly dismissed the issue of the boundaries of off-campus student speech by simply stating that Frederick was at school.\(^ {164}\) Frederick, however, was not in attendance during morning classes that day and was

---

157. *See*, e.g., Williams, *supra* note 142, at 724 (arguing that adopting a new test for cyberspeech would be problematic, overboard, and not applied by the courts); Renee L. Servance, *Cyberbullying: Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 Wisc. L. Rev. 1213, 1238 (2003) (noting that *Tinker* should apply to off-campus cyberspeech because of a lack of physical borders on the Internet).

158. *Tinker*, 393 U.S. at 513. Justice Fortas opined that:

"[C]onduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* (emphasis added). However, this statement, as used in the courts thus far, has been largely interpreted as referring to incidents on the playground, school bus, or other places connected to the school. Indeed, four of the states with electronic provisions in their anti-bullying statutes have limited it to a similar school setting. *See supra* note 3.

159. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 619 (5th Cir. 2004) ("Many courts have applied the *Tinker* standard in evaluating off-campus student speech later brought on-campus by persons other than the speaker."); *see also* Killion v. Franklin Reg’l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (noting that it used *Tinker* because “[t]he overwhelming weight of authority has analyzed student speech [whether on or off campus] in accordance with *Tinker*."


161. *See infra* Part IV.B.

162. *See*, e.g., Adamovich, *supra* note 140, at 1090-95 (tracing the Supreme Court student speech decisions and commenting on the increasing power of the school board apparent in each decision).

163. *See* Roberts, *supra* note 16 at 1180 (noting that in allowing Principal Morse to discipline Frederick for his off-campus banner, the Court is laying “a framework for school officials to restrict more student speech than ever before,” especially cyberspeech).

164. *See supra* note 103 and accompanying text. In so deciding, the Court missed the opportunity to provide guidance on off-campus student speech to the lower courts which were hoping for it. *See supra* note 141.
standing off of school property among both students and non-students. What could have potentially been ruled an off-campus speech case was brought within the jurisdiction of the school as on-campus speech, further eradicating the difference between on- and off-campus student speech.

Similarly, students’ constant access to technology is also making it more difficult to judge which speech occurs on- and off-campus. Students using the Internet as a forum for their speech are facing increasing difficulty keeping that speech off school grounds, even if they intend to do so. For instance, in J.S. v Bethlehem Area School District, this issue was especially apparent when the Pennsylvania Supreme Court held that a school could not discipline a student for a webpage he created at home. Analyzing the student’s First Amendment claim under Tinker, the court determined that because the student accessed the website at school, the website was on-campus speech, despite being developed in the student’s bedroom. The problem of technological boundaries was similarly prevalent in Coy v. Board of Education of North Canton City Schools over another student’s website. The federal district court in North Dakota reached the opposite result from J.S. over whether a website was on- or off-campus speech and ruled that the Tinker standard applied to the website despite the fact that it was off-campus speech.

Another student webpage was the subject of analysis in Beussink v. Woodland R-IV

165. Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006), rev’d Morse v. Frederick, 551 U.S. 393 (2007). The court acknowledges Frederick’s uncontradicted account that he had not attended school on that day, that he was across the street from the school campus, that the Olympic Torch relay was attended by many non-students in the community as well as students from his high school, that schools were released from classes and did not have to attend, did not have to stay near a designated area of students or with their teachers (with the exception of one gym class), and that school officials made no attempt to keep students from leaving the area to go home. Id.

166. See, e.g., Roberts, supra note 16, at 1178 (hypothesizing that Morse extends the schools’ jurisdiction off campus).

167. See supra Part III.B.

168. See, e.g., Denning & Taylor, supra note 22, at 868 (noting that “no one knows quite where the limits to the school’s authority lie” in off-campus cyberspeech cases).

169. 807 A.2d 847, 851 (Pa. 2002). J.S., a middle school student, created a series of linked web pages disparaging his teachers and principal. Id. In addition to offensive language, the website encouraged students to contribute money to hire a hitman to kill his algebra teacher. Id. The court first applied a true threat analysis, and determined that the website did not constitute a true threat. Id. at 859-60 (noting that while in poor taste, the website did not indicate a real intention to inflict harm on the teacher).

170. Id. at 864-65 (“We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”). Because of the impact on the targeted teacher, and the fact that the website was a “hot topic” at school, the court held that the website materially and substantially disrupted the school, and the school’s expulsion was upheld. Id. at 868-69. The targeted teacher reported being afraid someone would actually kill her, and feeling anxious and stressed. Id. at 852. She suffered headaches, became depressed, lost sleep and weight, and exhibited memory problems. Id. These symptoms prevented her from both interacting socially with others and forced her to take a medical leave of absence from school. Id.

171. 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002). A student created a website at home, containing pictures of three classmates and a series of insults under a section labeled “Losers.” Id. The court observed that while objectionable, none of the material on the website could be considered obscene under Fraser. Id.

172. Id. at 799-800. It then noted that the defendants could point to no evidence that the website created disruption within the school, and thus denied the school’s motion for summary judgment. Id.
School District.173 A federal district court in Missouri again analyzed the case under Tinker’s material and substantial disruption standard.174

In sum, courts have widely accepted the Tinker disruption test for on-campus student speech and used to analyze many instances of off-campus student speech. Thus, it is definitely one of the tests a court will consider adopting for instances of off-campus cyberbullying.

D. Courts Applying a Hybrid Approach to Tinker for Off-Campus Student Speech

Even in applying the Tinker test, many courts and scholars suggest the need for something besides material and substantial disruption, or an infringement on other students’ rights in off-campus speech cases.175 Particularly, one line of precedent examines whether there is a sufficient nexus between the speech and the forecast of disruption such that the school can constitutionally curtail the speech. A complementary set of cases considers the intent of the speaker, asking whether it was reasonably foreseeable that the speech would end up on campus.

1. Finding a Nexus Before Applying Tinker

The first of these hybrid approaches searches for a nexus between the off-campus student speech and the forecast of disruption, just as in Sypniewski and Chambers.176 This test was utilized by the court in Layshock v. Hermitage School District.177 The federal district court in Pennsylvania looked for a nexus between a mock MySpace page created by the student and the forecasted disruption before it applied the Tinker standard.178 Another MySpace page was analyzed by a different federal district court in Pennsylvania in J.S. ex rel. Snyder v. Blue Mountain School District.179 Reflecting on the enormous role technology is playing in students’ lives, which is causing student speech to arrive on campus with increasing frequency, the court concluded that schools have the right to censor off-campus student

173. 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998). A high school junior created a homepage containing vulgar language about his school, teachers, and administrators. Id.
174. Id. at 1180. Because the website had only been accessed by one student at school, and because Brandon did not share the website with any students except for that one, the court held the Tinker’s material and substantial disruption standard was not satisfied. Id. In fact, the only reason that the other student accessed the website at school was to show it to a teacher to get back at the defendant after they got in a fight. Id. at 1177-78.
175. See infra Part III.D.1-2. See also Markey, supra note 144, at 143-44 (advocating an intent test)
176. See supra Part II.B.1.
177. 496 F. Supp. 2d 587, 590 (W.D. Pa. 2007). A student created a mock MySpace page for his school’s principal, filling in “silly” and “crude juvenile language” for answers to questions on the profile. Id.
178. Id. at 595-96. Since it found that no such nexus between the speech and alleged disruption existed, especially considering the presence of several other MySpace profiles mocking the principal, the court found the school’s discipline unconstitutional. Id. at 600-01.
179. No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685, at *2-3 (M.D. Pa. Sept. 11, 2008). Like in Layshock, this MySpace page also scorned the student’s principal. Id. This page, however, repeatedly referred to the principal as a pedophile and a sex addict. Id. at *1.
speech under Tinker. However, it believed that a satisfactory nexus must exist between the off-campus speech and the Tinker factors before the school could punish the student for his or her speech.

2. Conducting an Intent-Based Analysis

Many scholars suggest that the intent of the student speaker should be an important consideration in the analysis of whether a school has the authority to discipline students for their off-campus speech. The Second Circuit adopted this reasoning in several cases.

In Wisniewski v. Board of Education of Weedsport Central School District, the Second Circuit overturned its previous precedent in Thomas, holding that, under Tinker, schools could censor off-campus student speech that arrived on campus. The court, however, struggled over whether the intent of the student speaker should be important in determining whether the school could curtail the speech. The Second Circuit then had the opportunity to revisit this question in 2008, when it decided Doninger v. Niehoff. The court began its analysis by recognizing that technology is clouding the lines between on- and off-campus speech, and then stated that Tinker was the appropriate standard to apply in both circumstances. However, it then definitively stated that schools could censor off-campus student speech.

---

180. Id. at *7 n.5 (stating that technology has blurred the line between on- and off-campus student speech, and that since “technology allows such access, it requires school administrators to be more concerned about speech created off campus–which almost inevitably leaks on campus–than they would have been in years past.”).
181. Id. at *7. Here, the court found a satisfactory nexus between the MySpace page and the school, noting that the student used the principal’s photograph from the school website, and created the page for the entertainment of other students at the school. Id. at *6-7. Then, despite finding that there was no material or substantial disruption under Tinker, the court found that the school could still censor the student’s speech due to the serious language that the student used, which, in this instance, could warrant criminal charges. Id.
182. See, e.g., Roberts, supra note 16, at 1183-85 (suggesting that the intent of the student should be an important factor in any analysis of off-campus speech, as otherwise you are giving too much deference to the school board and other students); Markey, supra note 144, at 143-44 (advocating for the intent test); Dickerson, supra note 17, at 28-29 (discussing why the intent test is the best test for cyberbullying analyses).
183. 494 F.3d 34, 38 (2d Cir. 2007). See also supra Part III.A. In Wisniewski, a school suspended a student upon discovering a Buddy Icon he created on AOL’s Instant Messaging program depicting a person being shot, and the text “Kill Mr. VanderMolen,” the student’s English teacher. 494 F.3d at 36. A Buddy Icon is a small picture each AOL Instant Messaging user selects to be displayed on every conversation window that the user has with other users.
184. Wisniewski, 494 F.3d at 39 (noting its conflicting views over whether it must be “reasonably foreseeable that Aaron’s IM icon would reach the school property or whether the undisputed fact that it did reach the school preterminits any inquiry as to this aspect of reasonable foreseeability”). Here, however, the court found this discussion was irrelevant, since it was reasonably foreseeable to the student that the Buddy Icon would make its way in to the school. Id. at 39-40. This gave school administrators authority to discipline the student for his off-campus speech consistent with Tinker. Id.
185. 527 F.3d 41, 45 (2d Cir. 2008). A disgruntled student wrote a blog entry referring to school administrators as “douchebags.” Id. The blog also contained misinformation claiming the principal had cancelled a school event, and urged students to call or email the principal to “piss her off more.” Id.
186. Id. at 48-49 (stating that the school’s ability to censor off-campus speech is more appropriate today “when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication”).

---
speech only “when it was . . . foreseeable that the off-campus expression might also reach campus.”\textsuperscript{187}

Thus, the Second Circuit embraced the intent test for dealing with off-campus student speech. It is likely that the intent analysis will be one of the tests considered by a court deciding whether a school has the authority to stop cyberbullying, since it gives additional emphasis to the constitutional rights of students while off campus.

Because of the inconsistent application of standards to cases involving off-campus student speech that arrives on campus, the school’s authority to discipline cyberbullies over such speech is unclear. As such, current law is inadequate to protect victims of cyberbullying from its devastating effects.\textsuperscript{188} The courts must adopt a standardized test that gives schools the authority to discipline student cyberbullies and provides schools with a clear idea of when they can and cannot constitutionally intervene in cyberbullying incidents.

\textbf{IV. Tinker Should Govern Off-Campus Student Cyberbullying}

The cases above illustrate several ways in which courts can give schools the authority to punish cyberbullies for their speech. First, as in \textit{Doe v. Pulaski}, the court can find that the student’s speech constitutes a “true threat” and lacks protection under the First Amendment.\textsuperscript{189} Second, if the speech is school-sponsored, such as a blog for a class, the courts can apply the analysis in \textit{Hazelwood} and allow the schools to curtail it consistent with the pedagogical values they are supposed to instill.\textsuperscript{190} If the cyberbully uses a school-issued computer or school Internet, administrators could use the analysis under \textit{Frederick} or \textit{Hazelwood} to stop the speech.\textsuperscript{191} However, it is the most common type of cyberbullying, occurring off campus through personal computers, where the school’s jurisdiction is currently uncertain.

This section will first discuss why the definition of cyberbullying needs to be established, given the lack of consensus in the definition, as addressed earlier.\textsuperscript{192} Specifically, it will argue why cyberbullying should be confined to incidents occurring between two minor children. This section will then analyze why \textit{Tinker} is a superior test, and why the courts should adopt \textit{Tinker} for determining whether a school’s curtailment of off campus cyberbullying is constitutional. Finally, this section will describe how a school can use \textit{Tinker} to intervene in cyberbullying situations.

\textsuperscript{187} \textit{Id.} at 48 (citing \textit{Wisniewski}, 494 F.3d at 40). The court looked at the student’s intent, saying that she created the blog to reach campus, and thus found the school could censor her speech. \textit{Id.} However, this leaves open the question of whether recklessness in making the speech would satisfy this requirement.

\textsuperscript{188} \textit{See supra} Part III.A-D; \textit{see also supra} Part I.B.

\textsuperscript{189} \textit{See supra} Part III.C.

\textsuperscript{190} \textit{Hazelwood}, 484 U.S. at 261; \textit{see also supra} Part II.A.

\textsuperscript{191} \textit{Hazelwood}, 484 U.S. at 261; \textit{Morse v. Frederick}, 127 S. Ct. 2618, 2625 (2008); \textit{see also supra} Part II.A.

\textsuperscript{192} \textit{See supra} Part I.A.
A. Cyberbullying Should Only Be Used to Describe Incidents Between Two Minors

As noted previously, many legal scholars refer to incidents involving a student and adult faculty members, such as that presented in J.S. or Layshock, as cyberbullying.\textsuperscript{193} However, this is inconsistent with the current understanding of traditional bullying and will lead to the formation of a test that is ill-adapted to protect student cyberbullying victims.

from the school may be enough to curb the cyberbully’s behavior.\textsuperscript{194} Traditional bullying is used to describe incidents occurring between school-age children.\textsuperscript{195} The law has developed other terms, such as harassment, abuse, or assault, to describe acts occurring between two adults, or an adult and child.\textsuperscript{196} Following that trend, especially given the similarities between cyberbullying and traditional bullying, it is logical to limit the definition of cyberbullying to the acts of school-age children. Victims of incidents involving a child and adult, or two adults, have other legal claims available to proceed under, including defamation, cyberharassment, and cyberstalking.\textsuperscript{197} These offenses, often more serious than the acts of a cyberbully, can be more appropriately prosecuted in the criminal system or litigated in civil courts.\textsuperscript{198} Comparatively, it would be a waste to utilize court resources in a cyberbullying claim when schools are in a better position to educate the cyberbully as to appropriate online and social behavior, as well as to determine and oversee

\textsuperscript{193.} See supra Part III.B; see also supra notes 22 and 23 demonstrating the current manner cyberbullying is being used to describe actions beyond those involving a minor perpetrator and minor victim.

\textsuperscript{194.} This is especially true given the phenomenon of disinhibition on the Internet, where a cyberbully may not realize the extent of suffering the victim is experiencing because of his or her actions. See supra Part I.B; see also Stayton, supra note 42 (describing the remorse felt by a student cyberbully once he was aware of the effects of his actions on his victim).

\textsuperscript{195.} See, e.g., supra note 23. All state bullying laws regulate incidents between two school children.

\textsuperscript{196.} See generally Black’s Law Dictionary 315 (2d. pocket ed. 2001) (defining harassment as “[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose”); id. at 4 (defining abuse as “[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury”); id. at 45 (defining assault as “[t]he threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact”).

\textsuperscript{197.} See, e.g., Sajai Singh, Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0, 12 No. 6 J. INTERNET L. 3, 6 (2008) (describing cyber-harassment, and cyber-stalking). Indeed, this was pointed out in a recent incident deemed “cyberbullying” by many, when two female students at Yale Law School became victims of a series of vicious posts on an online bulletin board, commenting on their integrity and sexual promiscuity. See Cyber Harassment and the Law (NPR radio broadcast Mar. 3, 2009), available at http://www.onpointradio.org/2009/03/cyber-harassment. One victim claimed that the posts online harmed her reputation and ability to secure employment. Id. The show points out that this sort of behavior is much too serious to be termed “cyberbullying.” It is a more serious defamation or cyber-harassment action. Id.

\textsuperscript{198.} This, for instance, was the fate of Lori Drew, the forty-year-old woman who used MySpace to harass thirteen-year-old Megan Meier. See, supra note 23, and accompanying text.
appropriate punishment. Oftentimes, this decorum lesson from the school may be enough to curb the cyberbully’s behavior.

Giving a concrete age definition to cyberbullying also allows for the formulation of a better test reflecting the differences in maturity between children and adults. Child victims may fear going to school, experience physical symptoms, have low self-esteem, and exhibit decreased performance in school. Adult victims of cyber-crimes are more likely to brush it off, making it unlikely that they will experience the same effects or, if they do, at the same degree of severity as a child victim.

This limitation will also allow for the courts to develop a clearer, narrower test for dealing with instances of cyberbullying consistent with other student speech cases. Further, it will give added protection to the free-speech rights of the student cyberbullies themselves, taking into consideration the maturity level and ages of their targeted victims. Such a definition would allow punishment of the cyberbully for comments which, although seemingly silly, are hurtful and damaging to child victims. However, if a student targets an adult victim, he or she would be allowed a greater range of speech before it could be constitutionally censored. This reflects the different maturity levels of the student and adult involved.

Therefore, “cyberbullying” should be defined with an age limitation, restricting it to behavior between two minors. Any incidents involving two adults, or an adult and a minor, should be more properly categorized as cyber-harassment, cyber-stalking, or more general cyberspeech.

B. Courts Should Employ Tinker to Analyze Whether Schools can Regulate Off-Campus Cyberbullying

The Supreme Court student speech quartet leaves many unanswered questions, notably the authority of the school administrators over off-campus student speech. Already, issues regarding off-campus speech and technological boundaries have divided courts. Indeed, the federal district court in Pennsylvania and

---

199. Teachers and school administrators, more so than children’s parents, can see the interactions between students and are more likely to either observe or hear about incidents of cyberbullying. The importance in school oversight has been recognized in statutes allowing schools to intervene in instances of traditional bullying. See, supra note 24, and accompanying text.

200. This is especially true given the phenomenon of disinhibition on the Internet, where a cyberbully may not realize the extent of suffering the victim is experiencing because of his or her actions. See supra Part I.B; see also Stayton, supra note 42 (describing the remorse felt by a student cyberbully once he was aware of the effects of his actions on his victim).

201. See supra Part I.B (explaining the effects of cyberbullying on victims).

202. Cf. FATIMA GOSS GRAVES, RESTORING EFFECTIVE PROTECTIONS FOR STUDENTS AGAINST SEXUAL HARASSMENT IN SCHOOLS: MOVING BEYOND THE GEBSER AND DAVIS STANDARDS 2 (2008), http://www.acslaw.org/files/Goss%20Graves%20--%20Moving%20Beyond%20and%20Beyond%20Gebser%20and%20Davis%20Final.pdf (stating that student victims of sexual harassment are more likely to suffer serious harms than adult victims, and are more likely to silently tolerate harassment that adults would not). See also Wendland, supra note 56 (quoting school violence expert Glenn Stutzky describing how cyberbullying acts that are devastating to student victims often seem silly and immature to adults).

203. See supra Part II.A.

204. See supra Part III.
the Supreme Court of Pennsylvania, in deciding Layshock and J.S., reached opposite conclusions over whether silently accessing a website at school constituted on-campus speech. Courts in Thomas and Porter ruled that schools could not curtail off-campus speech under any circumstances, while other courts have ruled that schools can, provided the speech meets a variety of differing tests.

The lower court decisions illustrate the main problem persisting after the Supreme Court decisions: the law governing student speech has not caught up with technology. Neither the courts, nor the anti-bullying laws of most states, provide assurance to school administrators that they have the authority to punish student-on-student cyberbullying. The decisions in the courts are inconsistent, and leave schools more confused than ever as to when they can constitutionally intervene in acts of cyberbullying. We should not wait for another Columbine-like tragedy before we recognize the seriousness of the cyberbullying problem and take steps to prevent it from occurring. However, until states enact laws suitable to deter cyberbullying and protect victims, schools should be given leeway to investigate cyberbullying incidents among their students and to punish student cyberbullies.

The ability of school administrators to curtail student speech occurring off-campus can be extracted from the Supreme Court decisions. In Tinker, the Court concerned itself with balancing the rights of students to voice unpopular political opinions with the rights of schools to maintain discipline and the rights other students to feel safe. In Fraser, the Supreme Court granted even more deference to school administrators to provide students with a safe school environment. Subsequently in Hazelwood and, even more clearly in Morse, the Court further expanded the authority of the schools to curtail student speech. This trend suggests that the schools, and not the judicial system, are more aptly suited to determine what student speech is inappropriate, and to prohibit that speech under the First Amendment.

The school is in the unique position to both identify student cyberbullies and educate them as to proper behavior. This is, after all, consistent with schools’ pedagogical mission, as the Supreme Court explicitly recognized in Hazelwood. Since cyberbullying, in both form and effect, is so similar to traditional bullying, where the school’s authority is clearer, it seems logical that schools are the proper party to curtail student cyberbullying as well. Thus, schools should have the authority to constitutionally discipline students for acts of cyberbullying, even when occurring off-campus.

205. In J.S. the court held that merely accessing the website at the school made it on-campus speech, in Layshock the court found it did not. See supra Parts III.B and III.D.

206. See supra Part III. The same circuit that decided Thomas later held that a website created off-campus in Wisniewski could be curtailed under Tinker. See id.

207. See supra note 24; see also supra Part III.

208. See supra Part III.

209. See supra note 85 and accompanying text.

210. See supra Part II.A.

211. Hazelwood, 484 U.S. at 261(maintaining that “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”).

212. See supra Part I.B.
1. A Clear Test for Cyberbullying Cases is Needed

While support for school authority to curtail and discipline students for incidents of cyberbullying can be found amongst commentators, many frequently state that such punishment decisions can and should be left to the school’s discretion. However, without the adoption of a more concrete standard for administrators to follow, this is an unacceptable position. First, it fails to properly balance students’ free speech rights as identified in Tinker. Second, and perhaps more importantly, it does nothing to eliminate the current uncertainty over when a school can and cannot intervene in acts of student cyberbullying without violating the First Amendment.

Further, without the delineation of a useful test, school administrators will be uncomfortable curtailing student speech for fear of lawsuits. Especially given the current uncertainty over the off-campus free speech rights of students and the muddled handling of student cyberspeech cases by the lower courts, it is in the best interests of teachers, students, and courts if a clear test is set forth. Ideally, such a test will give schools guidance as to when they can and cannot discipline students for off-campus cyberbullying.

Some advocate for the formulation of an entirely new test by the courts to deal with cyberbullying, citing the problems created by technological student speech, notably its common occurrence off campus. However, implementation of a new standard unique to cyberbullying would bog down school administrators and cause additional burdens on courts forced to interpret its provisions. Instead, the Tinker test, which is already widely accepted and utilized by courts and educators alike, is the best test for courts to apply in cyberbullying cases. Indeed, many courts have already adopted and applied Tinker in a variety of cyberspeech cases. Given Tinker’s acceptance and ease of application, there is no need for development of a separate test for a small subset of student speech cases.

Because of the balancing test in Tinker, it can adequately protect the rights of student speakers and schools, even given the additional complications associated with cyberbullying cases such as the off-campus nature of many cyberbullying attacks. For instance, acts of off-campus cyberbullying that fail to meet the material and substantial disruption test cannot be punished by the school, thus protecting the free speech rights of the student cyberbully. However, the school can inter-
vene in incidents that do satisfy the *Tinker* test, allowing the school to fulfill its obligation to protect its students. Additionally, adoption of the *Tinker* test also adequately reflects the age limitation proposed in this Article to the definition of cyberbullying. Since schools applying the *Tinker* standard generally lack authority over adults, limiting cyberbullying to acts between minors allows *Tinker* to be used in all cyberbullying situations instead of formulating separate tests.

Further, adoption of *Tinker* in cyberbullying cases provides educators with a wealth of information from scholars and courts alike, which they can utilize to make their decisions regarding punishing student cyberbullies. Specifically, the line of precedent regarding forecasting material and substantial disruption within the school has been fleshed-out extensively by the lower courts. This will give the schools ample guidance on when they can intervene under *Tinker*, even when the cyberbullying occurs off-campus. This information gives schools freedom to discipline student cyberbullies consistently with prior cases without fearing student lawsuits. Further, the prong of *Tinker* allowing schools to curtail student speech that infringes on the rights of others seems especially suited to cyberbullying cases. Although sparsely litigated, the psychological harm and fearfulness for safety experienced by cyberbullying victims seems to be the exact type of harm identified in the few cases to address the prong. Thus, cyberbullying cases are the perfect student speech cases for the widespread acceptance of this prong of *Tinker*, further supporting the adoption of *Tinker* in cyberbullying cases.

*Tinker* is already familiar to both the schools and the courts, and will provide the workable test that is desperately needed. Indeed, *Tinker* has been widely utilized even in cases involving cyberspeech and off-campus student speech, which are uncertain areas that complicate the cyberbullying analysis. Thus, *Tinker* is the best test the courts can adopt to govern student cyberbullying decisions.

### 2. *Tinker* Should Be Used for Both On- and Off-Campus Cyberbullying

The unique and controversial legal aspects surrounding cyberbullying, namely the use of technology and the off-campus nature of the speech, are also easily adaptable to the *Tinker* test. While the courts are certainly not unanimous in their decisions, quite a few courts have already adopted *Tinker* analysis in off-campus student speech and cyberspeech cases. The latest Supreme Court decision in *Morse* also explicitly recognizes that the line between on- and off-campus speech is becoming increasingly unclear.

---

220. See supra Part IV.1.
221. See supra Part II.B.
222. See supra II.B.
223. See supra note 214 and accompanying text.
224. See supra Part II.B.2.
225. See infra Part IV.C.2.
226. See supra Part III.
227. See id.
228. See supra Part III.B; see also supra note 103 and accompanying text.
By deciding *Morse* as an on-campus speech case, despite Frederick’s physical presence off campus, the Court further added to the confusion between which speech is on-campus, and which speech is not.\(^{229}\) It seemingly expands the jurisdiction of schools over speech that occurs outside of the confines of the school grounds, consistent with what was perhaps the original intent of *Tinker*.

With today’s tech-savvy students and the constant accessibility of cell phones and the Internet, the distinction between on- and off-campus speech only continues to blur, making this a very different world indeed than that in which *Thomas* was litigated thirty years ago.\(^{230}\) When Frederick displayed his banner, he knew that it would be seen by other students and adults, all standing off of, albeit around, school property. A cyberbully, however, has no way of knowing where or when his or her victim will be when the hurtful act is viewed. The constant accessibility of victims to the cyberbully, given the availability of technology, means the cyberbully has no real way of predicting whether the victim will receive the taunts while at home, at school, or somewhere else. This makes it increasingly difficult for courts already puzzled over whether accessing a website on school grounds is on-campus speech to decipher whether cyberbullying is more akin to on- or off-campus speech. Like Frederick’s banner, it is hard to determine whether these acts occur on- or off-campus. This is especially true considering teachers and administrators are often less adept with today’s technologies than their students and may be unable to determine whether the student cyberspeech was actually sent or accessed on campus.\(^{231}\)

Further, unlike the websites in *Beussnik* and *Snyder*, which may have inspired laughs from classmates, cyberbullying victims carry the off-campus speech back with them into the school. Besides constantly fearing that they will run into their tormentor, their academic performance in school is reduced.\(^{232}\) Thus, even if the cyberbully knows his or her victim will view the acts while at home, victims are still bringing effects with them back into the school, where the acts may be amplified by the physical presence of the cyberbully.\(^{233}\)

These same arguments also illustrate why using an intent test, such as that proposed by the Second Circuit in *Wisniewski* and *Niehoff*, is illogical for cyberbullying given today’s technology.\(^{234}\) Regardless of the cyberbully’s intent, because the cyberbully does not know the physical location of his or her victim may be either at

---

\(^{229}\) In addition, while the Court noted a distinction between on-and off-campus speech, it gave no hints as to whether the categorization of the speech made a difference as to which analysis applied. See *Morse*, 127 S. Ct. at 2618.


\(^{231}\) See, e.g., *Growing Up Online*, supra note 4 (interviewing a teacher who admits to feeling like a “dinosaur” because her students know how to use technology in ways she does not).

\(^{232}\) See supra Part I.B.

\(^{233}\) See id. (describing the effects of cyberbullying on victims). Particularly, cyberbullying victims are constantly on edge during the school day, trying to locate and avoid their cyberbully, leading to a greater decline in academic performance. *Id.*

\(^{234}\) See supra Part III.D.2 for a discussion of the intent test.
home or at school when he or she views the cyberbullying act. Further, while the cyberbully may not intend it, victims bring the effects of the cyberbullying into the school with them. The cyberbully should not be able to escape punishment by claiming that he did not intend the victim feel afraid of him, or intend the victim’s grades to suffer. Instead, the cyberbully should have to be responsible for the consequences of his or her actions.

Although an intent test approach has been championed in legal scholarship, it has not been adopted by other courts. This can, perhaps, also be partially explained by the Supreme Court’s decision in Morse. Frederick’s speech occurred off campus, among students and non-students, on a day Frederick had not been in attendance at school. By allowing the school to curtail Frederick’s speech, the Court insinuates that the intent of the student is not an essential consideration of which speech the school can censor.

Due to the increasingly hazy line between on- and off-campus student cyberbullying, the distinction in location should not matter for purposes of any test or analysis. So long as the school can show that, pursuant to Tinker, the cyberbullying caused a material and substantial disruption inside the school or infringed on the rights of another student, the school should be able to punish the cyberbully regardless of the physical location where it occurred. Thus, Tinker is the best test the courts can adopt to protect student cyberbullying victims, while balancing the free speech rights of cyberbullies.

C. Using the Tinker Test in Off-Campus Cyberbullying

If courts adopt a Tinker analysis to determine whether schools can discipline students for off-campus cyberbullying, the school still needs to satisfy one of the prongs to avoid violating the free speech rights of the cyberbully. Under both prongs of the Tinker test, provided the victims experience the requisite effects, the school will be able to regulate and punish student cyberbullies. This section will provide guidance as to how schools can proceed under each prong of Tinker.

---

235. Thus, even if the court system did widely adopt the intent test, it is likely that cyberbullying would meet that test. Because the perpetrator committed the cyberbullying acts via technology, it was reasonably foreseeable that the acts would reach campus. It is similarly foreseeable that the cyberbullying victim will carry the effects of the cyberbullying acts into the school. The court’s interpretation, though, seems to be less stringent than that advocated by legal scholars. See, e.g., Roberts, supra note 16, at 1183-85.

236. See supra Part I.B.

237. This position finds additional support when examining tort and criminal law, on the basis that the perpetrator takes his victim as he finds them, known as the eggshell skull doctrine. This doctrine was first enunciated in the English case Dulieu v. White & Sons [1901] 2 KB 669, 679, and has since been fairly universally accepted in the United States. Jacob A. Stein, Stein on Personal Injury Damages § 11:1 (1998). Thus, if a cyberbully chooses a victim who takes the effects of cyberbullying with him into the school, the cyberbully should be responsible for that even if another victim would find the acts less harmful. Criminal law standards further lend themselves to this position, in that recklessness is often a substitute for willfulness or intent.

238. See supra Part III.D.2.

1. School Officials Can Forecast a Material and Substantial Disruption from Off-Campus Cyberbullying

Under *Tinker*, the school can curtail student cyberbullying if it causes actual disruption within the school. For instance, as in *Blackwell*, if the cyberbully physically bullies the victim during school, or if people are using classroom time to discuss the cyberbullying instead of doing schoolwork, the school will be able to step in and curtail the cyberbullying.240

But of course schools are not required to wait for actual disruption according to *Tinker*. This is especially important in our post-Columbine world. Waiting for the actual disruption to occur may have catastrophic detrimental effects for the cyberbullying victim.241 Thus, it is in the best interests of the school to forecast reasonable disruption and curtail student cyberbullying as quickly as possible.

*Layshock* and *Snyder* seem to spin the test created in *Chambers* and *Sypniewski*, looking for a nexus between the off-campus speech and the forecasted disruption and the off-campus speech and the school.242 With cyberbullying, showing this nexus should be easy for the school. The off-campus cyberbullying can be reasonably forecasted to cause substantial disruption within the school if the victim demonstrates effects such as insecurity at the school, fearfulness, or depression.243 Since empirical evidence shows that this will negatively impact the victim’s ability to perform at school, administrators can point to academic harm as disruption.244

Further, there is a connection between the speech and the school, because the students likely initially met in the schoolyard, see each other at school, and are forced to interact within the confines of the classroom environment. It is possible that there are confrontations between the two parties on school grounds as well as in cyberspace. The cyberbully also likely gains insight into what he can use to bully his victims inside the classroom, even if he chooses to wait until after hours to perpetrate his acts.

Therefore, if the victim experiences some of the severe effects associated with cyberbullying, such as severe depression or fearfulness for safety among others, it is likely that the school will be able to step in. Because the school will be able to reasonably forecast disruption under *Tinker*, and show a nexus between the speech and school, if required, they will not violate the First Amendment rights of the cyberbully by stopping his or her speech.

2. Off-Campus Cyberbullying Impinges on the Rights of Other Students to Learn in a Safe Environment Within the School

As with *Tinker*’s disruption test, school administrators may try to use the impinging on the rights of others test to curtail student cyberbullying. The case for

241. *See supra* Part I.B.
244. *Id.*
school authority to discipline cyberbullies is actually stronger under this prong of Tinker than disruption. In actuality, because of its unique effects on victims and the holdings of prior cases, cyberbullying seems to be the perfect vehicle for widespread acceptance of this prong of Tinker.

The T-shirts worn in Harper and Nixon were passive speech directed at a school-wide audience, stating a general opinion on a controversial topic. Comparatively, cyberbullying statements are directed specifically at a victim, inflicting various effects that are natural outgrowths of the bully’s act. The effects from the targeted statements are much more harmful than any effects experienced by observers of the T-shirts’ blanket statements.

Harper provides educators with additional support, in holding that students have a right to be “secure from both physical and psychological attacks” which interfere with their opportunity to learn. Cyberbullying is just such a psychological attack as was contemplated under Harper, affecting the victim’s very self-esteem, security, and ability to continue existing relationships. Regardless of whether the cyberbullying acts occur on- or off-campus, many students clearly carry those effects with them into school. School administrators can point to dropping grades as an interference with the victim’s ability to learn while at school.

Nixon noted that this impingement claim rested on the rights of other students to be “secure and let alone.” Cyberbullying victims both attempt to avoid school and become preoccupied with avoiding their harasser because they feel as vulnerable to additional attacks at school as they do at home, and fear for their safety. Furthermore, unlike Harper and Nixon schools do not wish to curtail student cyberbullying because of any controversial content in the speech. Rather, the schools’ curtailment is to ensure the well-being of other students, and is based on empirical evidence showing that victims of cyberbullying feel unsafe at school.

However, both Harper and Nixon involved speech occurring inside the school, unlike instances of cyberbullying, which generally occur off-campus. Thus, the school must utilize the Supreme Court’s decision in Morse, which demonstrated the unclear boundary between on- and off-campus speech, along with technology, which only further blurs that line. Under such an analysis, schools can argue that

---

245. Id.
246. While the statements on the student T-shirts in these cases are offensive, particularly to students belonging in the group to which the message applies, targeted statements will cause students much more embarrassment and humiliation. Instead of being passive speech, the directed statements involved in cyberbullying make victims feel specifically victimized and inferior, which leads to more severe consequences than the offense taken to derogatory blanket statements.
248. See supra Part I.B.
250. See supra Part I.B.
251. See supra Part II.B.2. Plaintiffs in both cases alleged that the defendant schools curtailed their speech because of the political and social controversy surrounding homosexuality and abortion.
252. See id.
253. See supra Parts II.A and IV.B.2.
this distinction between on- and off-campus speech is irrelevant to the cyberbullying analysis, strengthening their use of Harper and Nixon.\textsuperscript{254}

If the school can show that these effects interfere with the rights of students to feel safe at school or perform academically, then it should be able to discipline a cyberbully for off-campus acts under the second prong of the Tinker test. However, since the disruption test is more universally accepted than Tinker’s impingement on the rights of others analysis, schools would be advised to justify curtailment first under the disruption prong if they are so able.

\textbf{CONCLUSION}

Problems with cyberbullying are growing exponentially with the increased availability of technology throughout the day, along with the constant accessibility to others that such technology brings.\textsuperscript{255} It is in the best interests of all parties for the courts to adopt a test that schools can use to curtail student cyberbullying, even when such acts occur off-campus. Tinker, because of its widespread acceptance and adaptability to both cyberspeech and off-campus student speech, will provide educators with a well-established line of precedence which they can use in determining whether they can constitutionally curtail student speech.\textsuperscript{256} It is time for the courts to recognize that the law has failed to keep pace with technology and adopt measures to protect today’s students.

\textsuperscript{254} See supra Part IV.B.2.
\textsuperscript{255} See supra Introduction and Part I.
\textsuperscript{256} See supra Part IV.B.
GOODBYE FORFEITURE, HELLO WAIVER:
THE EFFECT OF GILES V. CALIFORNIA

Monica J. Smith*

I. INTRODUCTION

Dwayne killed Brenda;¹ as a result, Brenda could not testify at the subsequent trial. It had become common practice for courts to apply the doctrine of forfeiture by wrongdoing as an equitable principle in cases such as this, in which a defendant's actions caused a victim to be unavailable to testify.² In 2008, the Supreme Court decided Giles v. California³ and altered that exercise of the forfeiture doc-

---

¹ See infra notes 11, 16 and accompanying text.
² See infra notes 34-37, 41-42, 126-29 and accompanying text.
trine. The Court added a requirement that a defendant must actually intend to prevent a witness from testifying in order for forfeiture by wrongdoing to apply.\(^4\)

This article begins with a presentation of the \textit{Giles} case in Part II. Part III provides an historical understanding of the confrontation right and forfeiture by wrongdoing under the Constitution, common law, and Federal Rules of Evidence. Finally, through an examination of waiver requirements for other confrontation rights, Part IV demonstrates that the Court’s addition of an intent element has turned the forfeiture doctrine into a waiver of the confrontation right by misconduct.

\section*{II. \textit{Giles v. California}}

\subsection*{A. Facts}

“If I catch you fucking around I’ll kill you,” Dwayne Giles said to Brenda Avie while pointing a knife at her.\(^5\) This was the end of an argument between the couple, which began when Giles accused Avie of having an affair.\(^6\) Giles grabbed Avie, lifted her up, and started to choke her.\(^7\) Avie was able to break free, but fell to the floor, and Giles began punching her before pulling out the knife.\(^8\) The police responded to the domestic disturbance, and Officer Stephen Kotsinadelis took Avie’s statement.\(^9\)

Three weeks later,\(^10\) Avie lay bleeding and dying on the ground with Giles standing over her holding a gun.\(^11\) She had been shot six times.\(^12\)

There were no witnesses to the shooting, but Giles’ niece was inside the house and heard what happened.\(^13\) She heard the couple engaged in a normal conversa-
tion, but then heard Avie yell “Granny” repeatedly and a series of gunshots.\footnote{14} Giles left the scene of the crime and was apprehended two weeks later.\footnote{15} 

B. Procedural History

1. Trial

At trial, Giles testified to shooting Avie, but claimed his actions were in self-defense.\footnote{16} He said that Avie shot another man before their relationship, that she threatened others with a knife, and that she previously vandalized his property.\footnote{17} According to Giles, prior to the shooting, Avie called him and threatened to kill his new girlfriend.\footnote{18} She then showed up at the house and told Giles she was going to kill both him and his new girlfriend, so Giles retrieved his gun.\footnote{19} He then claimed Avie “charged” him, and he shot her in response because he feared that she had a weapon in her hand.\footnote{20} However, Avie did not have a weapon.\footnote{21}

During trial, in order to establish a propensity for domestic violence by Giles,\footnote{22} the prosecution offered evidence of the earlier domestic disturbance between Giles and Avie.\footnote{23} Officer Kotsinadelis testified about his response to the call, including statements made by Avie.\footnote{24} The defense objected to the statements, based on hearsay.\footnote{25} The trial court ruled Avie’s statements were admissible under a hearsay exception allowing trustworthy out-of-court statements about the infliction of physical injury on an unavailable declarant.\footnote{26} The jury found Giles guilty of first degree murder,\footnote{27} and “[h]e was sentenced to prison for a term of 50 years to life.”\footnote{28}

\begin{enumerate}
\item \textit{Id.} (19 Cal. Rptr. 3d at 845. The shooting took place at Giles’ grandmother’s house. \textit{Id.})
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 845-46.
\item \textit{Id.}
\item \textit{Id.} at 845.
\item \textit{See CAL. EVID. CODE § 1109 (West Supp. 2009) (amended 2004 and 2005).}
\item \textit{Giles 1,} 19 Cal. Rptr. 3d at 846. This was done in order “[t]o rebut [Giles’] claim of self-defense and impeach his testimony . . . .” \textit{Giles 3,} 128 S. Ct. at 2695.
\item \textit{Id.} (19 Cal. Rptr. 3d at 846).
\item \textit{Id.}
\item \textit{Id.} (See CAL. EVID. CODE § 1370(a) (West Supp. 2009), which provides in pertinent part:

Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. (2) The declarant is unavailable as a witness pursuant to Section 240. (3) The statement was made at or near the time of the infliction or threat of physical injury . . . . (4) The statement was made under circumstances that would indicate its trustworthiness. (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

\textit{CAL. EVID. CODE § 1370(a).}
\item \textit{Giles 2,} 152 P.3d at 437. \textit{See CAL. PENAL CODE § 187(a) (West 2008); CAL. PENAL CODE § 189 (West 2008) (amended 2002) (California’s first degree murder statutes). The jury also found Giles “personally dis-
2. California Court of Appeals

On appeal, Giles contended that the admission of Avie’s statements to Officer Kotsinadelis violated his Sixth Amendment right to confront witnesses.29 He claimed that the statements were testimonial under Crawford v. Washington30 and should have been excluded.31 Giles argued “that a defendant forfeits a Confrontation Clause objection through wrongdoing only when he is charged with or is under investigation for a crime, and wrongfully procures the witness’s absence from trial with the intent of preventing testimony about that crime.”32 Giles further argued that applying the forfeiture doctrine in cases where the defendant is on trial for homicide of the victim witness, such as his own, would require the trial court to determine that the defendant is guilty before admitting victim hearsay evidence.33

The appellate court held that Giles forfeited his Confrontation Clause objection to Avie’s statements by killing her.34 It classified the doctrine of forfeiture by wrongdoing as an historical, equitable principle disallowing a defendant to benefit from wrongfully procuring a witness’s absence.35 The court refused to limit the doctrine only to defendants with intent, at the time of the crime, to prevent a witness from testifying against him.36 In sum, “forfeiture by wrongdoing is both amply supported by the record and equitable under the circumstances. [Giles] cannot be heard to complain that he was unable to cross-examine Avie about her prior, charged a firearm causing great bodily injury or death.” Giles 2, 152 P.3d at 437. See CAL. PENAL CODE § 12022.53(d) (West 2000) (amended 2001, 2002, 2003, and 2006).

28. Giles 1, 19 Cal. Rptr. 3d at 844.

29. Id. at 845. Giles’ secondary appellate argument was that the evidence did not establish the premeditation and deliberation necessary for first degree murder, and his conviction should be reduced to second degree murder. Id. The court of appeals found that the evidence “was more than adequate” for his first degree murder conviction. Id. at 852.


31. Id. at 846-47. It was accepted by all of the reviewing courts that Avie’s statements to Officer Kotsinadelis during the domestic disturbance were testimonial in nature, without any court undergoing such an analysis. See Giles 3, 128 S. Ct. at 2682; Giles 2, 152 P.3d at 438; Giles 1, 19 Cal. Rptr. 3d at 847. On remand, the appellate court determined that “Avie’s statements were testimonial because they were made in response to a focused police interview aimed at establishing the circumstances of a crime.” People v. Giles, No. B166937, 2009 WL 457832, at *1 (Cal. Ct. App. Feb. 25, 2009) [hereinafter Giles 4].

32. Giles 1, 19 Cal. Rptr. 3d at 848.

33. Id. at 849. The appellate court found that making a determination on the admissibility of homicide hearsay evidence does not present procedural problems for trial courts. Id. “A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case.” Id. As with other hearsay evidence, the court would make a decision based on preliminary facts. Id. “This ruling will not infringe in any way upon the ultimate question for the jury’s resolution—whether the defendant is guilty beyond a reasonable doubt of the homicide as charged.” Id.

34. Id. at 850. The appellate court explicitly stated it was a narrow holding with four limitations: 1) hearsay statements by unavailable witnesses are not automatically admissible, but must fit under an exception; 2) the criminal act making the witness unavailable must have been intentional rather than incidental; 3) forfeiture by wrongdoing can only apply if equitable, and not if it would be unjust; and 4) victim homicide hearsay evidence is to be admitted without informing the jury of any particular findings by the court. Id. at 850-51.

35. Id. at 847-48.

36. Id. at 848 (citing United States v. Emergy, 186 F.3d 921, 926 (8th Cir. 1999); United States v. Miller, 116 F.3d 641, 667-68 (2d Cir. 1997); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004); People v. Moore, 117 P.3d 1, 2-3 (Colo. Ct. App. 2004)).
trustworthy statements to law enforcement when it was his own criminal violence that made her unavailable for cross-examination.”37

3. California Supreme Court

The Supreme Court of California granted review regarding application of the forfeiture by wrongdoing doctrine38 and affirmed the court of appeals.39 The court found that it was proper for post-Crawford courts to apply the forfeiture by wrongdoing doctrine as an equitable principle, “allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony.”40 Regarding Giles, the court opined that he “should not be able to take advantage of his own wrong by using the victim’s statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements.”41 The court determined that Giles forfeited his right to confront Avie’s statements by wrongdoing when he caused her unavailability to testify through an unlawful homicide.42

C. Majority Opinion

The Supreme Court of the United States granted certiorari43 in order to determine “whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.”44 Although this was the initial framing, the Court then narrowed the issue to whether such an understanding of the forfeiture by wrongdoing doctrine is an exception to the confrontation right established at the founding, as required by Crawford.45 The Supreme Court held that at the founding, and historically thereafter, forfeiture by wrongdoing was only applied when there was intent to prevent a witness from testifying.46 As expressed by the California Court of Appeals, “[Giles] did not forfeit his right to confront [Avie’s] statement unless he killed her with the intent to prevent her from testifying.”47 The

37. Giles 1, 19 Cal. Rptr. 3d at 851.
38. People v. Giles, 102 P.3d 930 (Cal. 2004). It limited the issues to 1) more specifically, application of forfeiture by wrongdoing in the Giles case; and 2) more broadly, whether the forfeiture by wrongdoing doctrine applies when the wrongdoing that makes the witness unavailable to testify is the same as the criminal offense. Id.
40. Id. at 444.
41. Id.
42. Id. at 447. The Court found that “independent evidence, considered with the victim’s prior statements, support[ed] the Court of Appeal’s conclusion ...” Id.
44. Giles 3, 128 S. Ct. at 2681.
45. Id. at 2682. By narrowing the issue in this way, the majority relied mostly on pre-Reynolds cases; whereas, the California Supreme Court examined American precedent by focusing on post-Reynolds cases. See infra notes 56-72 and accompanying text (majority’s use of cases); Giles 2, 152 P.3d at 438-42 (California Supreme Court’s use of cases).
46. Giles 3, 128 S. Ct. at 2684, 2687, 2693.
47. Giles 4, at *1 (statement of the Supreme Court’s holding by the California Court of Appeals on remand).
Supreme Court vacated the decision of the California Supreme Court and remanded the case. 48

The majority 49 used three main avenues to support its interpretation of forfeiture by wrongdoing: 1) plain reading of the language, 2) analysis of common law cases, and 3) analysis of subsequent cases. 50

The analysis began with an examination of forfeiture by wrongdoing as defined and understood at common law. 51 Based on Lord Morley’s Case in 1666, “forfeiture by wrongdoing[[] permitted the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.” 52 The majority interpreted the terms in that definition as “suggest[ing] that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying” 53 and determined “that a purpose-based definition of these terms governed.” 54 However, the majority also admitted that under some definitions, all cases where a defendant caused the unavailability of the witness could be included. 55

Next, the majority studied cases that applied the doctrine at the time of the founding. 56 In its examination of common law cases, the majority found an “absence of . . . admitting prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying” and the “uniform exclusion of unconfronted inculpatory testimony by murder victims.” 57 The majority determined that at the founding it was “plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.” 58 In the two main cases espoused by the majority, both courts refused to admit the homicide victims’ statements because they had not been confronted by the defendant, and the statements were not considered dying declarations. 59 The Court also used these cases to show that the prosecutors did not argue, nor did the courts consider on their own, admitting the statements because the defendants had made the witnesses unavailable through murder. 60

The analysis continued with an examination of cases since the founding. 61 The majority reviewed the seminal American case for forfeiture by wrongdoing, 62 Rey-
nolds v. United States. In Reynolds, the defendant was on trial for bigamy. When presented with a subpoena for his alleged second wife, he refused to disclose her whereabouts. When she did not appear to testify, her testimony from a previous trial was read into evidence. On appeal, the defendant argued that her previous testimony should not have been admitted because it violated his confrontation right. The Reynolds Court did not find an error, stating that “[The Constitution] grants [a defendant] the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.” Although admitting Reynolds was based on broad equitable principles, the majority applied a narrow analysis and concluded that the Reynolds Court adopted a forfeiture doctrine that only included conduct by the defendant intending to prevent the testimony of a witness.

From the Reynolds case in 1878 until 1985, courts only applied the forfeiture by wrongdoing doctrine to witness tampering. This narrow doctrine was codified in the Federal Rules of Evidence in 1997.

The majority spent the rest of its argument responding to the dissent. Notably, it did acknowledge that in the context of domestic violence, prior statements of an abused homicide victim may be allowed under forfeiture by wrongdoing, if there was “intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution” when the prior statements were made. Essentially, the majority allowed for forfeiture by wrongdoing to

62. Id. at 2687.
64. Id. at 146.
65. Id. at 148-50.
66. Id. at 151-52.
67. Id.
68. Id. at 160.
69. Id. at 158. The Court further found that the defendant was present in court and had the opportunity to defend against the accusation that he had kept the witness from the trial. Id. at 160.
70. Giles 3, 128 S. Ct. at 2687. The majority argued that if the doctrine of forfeiture by wrongdoing applied beyond intent to prevent witness testimony, “one would have expected it to be routinely invoked in murder prosecutions . . . in which the victim’s prior statements inculpated the defendant.” Id.
71. Id. In 1985, the Eleventh Circuit found that a defendant lost his confrontation right when he murdered the witness. United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).

Rouco waived his right to cross-examine Benitez by killing him. “The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery.” We have previously stated that:

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution “would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause,” … and make a mockery of the system of justice that the right was designed to protect.

Id. (citations omitted).
73. Giles 3, 128 S. Ct. at 2688-93.
74. Id. at 2693. “Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.” Id.
relate back to the time of domestic violence, if there was intent at that time to prevent the victim from “testifying.”

D. Concurring and Dissenting Opinions

1. Concurring: Justices Thomas and Alito

Justices Thomas and Alito each wrote separate opinions pointing out that Avie’s statements did not trigger the Confrontation Clause. Referring back to his concurring opinion in *Davis v. Washington*, Justice Thomas thought that Avie’s statements did not implicate the Confrontation Clause because they were informal, and thus non-testimonial. Similarly, Justice Alito felt “the real problem concern[ed] the scope of the confrontation right,” in that it only applies to out-of-court statements that are parallel to those made by witnesses at trial. Each noted that the challenge was not preserved as an issue on appeal, and consequently their concern was not before the Court. If Avie’s statements did trigger the Confrontation Clause, then both ultimately concurred in the judgment.

2. Concurring in Part: Justice Souter

Justice Souter, with whom Justice Ginsburg joined, wrote a concurrence joining all but one part of the majority’s opinion. He expressed that a showing of intent to prevent a witness from testifying satisfies equity, when the alternative result would be circular reasoning.

If the victim’s prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim’s statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence [of the declarant]; evidence that the defendant killed would come in because the defendant probably killed [the declarant].

He further supported the majority’s conclusion regarding the domestic violence context. Intent could be inferred from a typical domestic violence relationship because the abuser separates the victim from others, including avenues from which

76. *Giles 3*, 128 S. Ct. at 2693-94 (Thomas, J., concurring; Alito, J., concurring).
78. *Giles 3*, 128 S. Ct. at 2693-94 (Thomas, J., concurring).
79. *Id*. at 2694 (Alito, J., concurring).
80. *Id.* at 2693-94 (Thomas, J., concurring; Alito, J., concurring).
81. *Id*. at 2694.
82. *Id*. at 2694 (Souter, J., concurring in part).
83. *Id*.
84. *Id*.
she could get help. “If the evidence for admissibility shows a continuing relationship of [domestic violence], it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.”

3. Dissenting: Justice Breyer

Justice Breyer, joined by Justices Stevens and Kennedy, drafted the dissenting opinion. According to the dissent, Giles forfeited his confrontation right by killing Avie.

Breyer distinguished between the word “intent” and the terms “purpose” or “motive.” He argued that the majority would only apply the doctrine of forfeiture by wrongdoing when a defendant purposely intended to prevent the witness from testifying. Conversely, Justice Breyer would apply forfeiture by wrongdoing when a defendant’s actions resulted in the witness being unable to testify, regardless of whether the defendant had the particular purpose of keeping the victim from testifying.

He also advocated for state rights. A broad reading of the forfeiture by wrongdoing doctrine does not demand admission of all prior testimonial statements. Rather, “[s]tate hearsay rules remain in place; and those rules will determine when, whether, and how evidence of the kind at issue here will come into evidence.”

His underlying concern was that the majority’s rule, requiring a showing of purpose, “grants the defendant not fair treatment, but a windfall” in domestic violence cases where victims are commonly hesitant or unavailable to testify. Under the dissent’s opinion, a defendant could forfeit his confrontation right through threats, by murdering the witness, or by a showing of domestic violence.

86. Id.
87. Id.
88. Id. (Breyer, J., dissenting).
89. Id.
90. See Giles 3, 128 S. Ct. at 2698-99.
91. See id. at 2700. “The majority’s rule, which requires exclusion, would deprive the States of this freedom and flexibility [in applying their evidentiary rules].” Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id. at 2709.
97. Id. at 2708-09.
E. On Remand

On remand, “[the California] Supreme Court transferred the cause back to [the Court of Appeal] with directions to vacate [the] previous decision and to resolve any remaining issues in light of Giles v. California.” On remand, the appellate court reversed its earlier decision, holding that Giles’ confrontation right had been violated when Avie’s statements were admitted because “[t]he prosecution did not establish that Giles procured [Avie’s] absence with the intent to prevent her from testifying.” Assumedly, the next step is for Giles to be retried.

III. HISTORICAL OVERVIEW OF THE RIGHT TO CONFRONT WITNESSES & FORFEITURE BY WRONGDOING

As displayed in the procedural history of this case, an understanding of forfeiture by wrongdoing is dependent on an historical examination of the doctrine. The outcome further depends on the time span of cases that are examined, theories of constitutional interpretation applied, and rules of evidence created. This section provides a brief overview of the confrontation right and doctrine of forfeiture by wrongdoing under the Constitution, common law, and rules of evidence.

A. Constitution

The Sixth Amendment to the United States Constitution contains the Confrontation Clause, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The confrontation right involves two parts: 1) testimony of witnesses under oath, and 2) cross-examination of those witnesses. The aspiration of the confrontation right, and especially cross-examination, is to discover the truth. The reliability of evidence is secured “by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”

98. Giles 4, at *1.

99. Id. at *3-4. The appellate court found that it was not harmless error because “a reasonable doubt exists whether the admission of Avie’s statements contributed to the jury’s verdict.” Id. at *4-5.

100. The appellate court provided guidance to the trial court for retrial. Avie’s statement may be determined non-testimonial if a foundational showing is made of a contemporaneous emergency. Id. at *3-4. Avie’s statements may still be admissible under forfeiture by wrongdoing if it is established that Giles’ intent was to prevent Avie from testifying. Id. at *4. And, there was sufficient evidence of premeditation and deliberation to convict Giles of first degree murder. Id. at *5-6.

101. See supra Parts II.B.2-D.3.

102. U.S. CONST. amend. VI.


104. Id. at 104. “[C]ross-examination is ‘the greatest legal engine ever invented for the discovery of the truth.’” Id. (quoting 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1367, at 32 (1974)).

For twenty-four years, under Ohio v. Roberts, sufficiently reliable out-of-court statements were admissible under the Confrontation Clause. Such statements were deemed sufficiently reliable if they “[fell] within a firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”

Then in Crawford, the Supreme Court determined that “testimonial” out-of-court statements were inadmissible under the Confrontation Clause unless the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant. “Holding that hearsay rules and judicial determinations of reliability no longer satisfied a defendant’s confrontation right, Crawford announced: ‘Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.’”

Despite this dramatic change, the Crawford court explicitly allowed an exception for the doctrine of forfeiture by wrongdoing as an equitable principle. “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . .” This was reaffirmed in Davis: “We reiterate what we said in Crawford . . . . [O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”

Proponents of a broad reading of the forfeiture by wrongdoing doctrine would argue that the “Confrontation Clause does not remedy self-created confrontation problems. . . . When the defendant causes the loss of the witness that makes confrontation impossible, the Sixth Amendment has no role.” On the other hand, defendants’ rights advocates may argue that such a broad forfeiture doctrine is contrary to the presumption of innocence and strips defendants of a basic constitutional right prior to trial.

B. Common Law

Similar to other hearsay exceptions, the forfeiture by wrongdoing doctrine was “ultimately incorporated from English common law, which serves as the foundation for the American legal system.” This section provides a limited chronological overview of historical case law regarding forfeiture by wrongdoing, and begins

107. Id. at 66.
108. Id.
110. Giles 2, 152 P.3d at 437 (quoting Crawford, 541 U.S. at 69-70).
111. Crawford, 541 U.S. at 62.
113. See Flanagan, supra note 105, at 526.
114. Id. at 527-28.
115. Valdez & Dahlberg, supra note 103, at 134-35.
with a response to the majority’s limitation of the doctrine to the time of the founding.

The *Giles* majority recognized that the forfeiture by wrongdoing doctrine existed at the founding; however, they were determined to limit today’s application to that founding-era understanding.\(^{116}\) Their determination to disregard the slow evolution of the law over time is troubling considering the legal status of women at that time. Historically, women were treated as and considered property of men.\(^{117}\) “[W]omen’s testimony [under the common law] was banned in courts of law or subject to limitations not imposed on men’s testimony on the theory that women’s testimony was unreliable.”\(^{118}\) Both of the majority’s supportive cases involved men killing their wives, one in 1789 and the other in 1791, and the women making statements to that effect after the violent act but before their deaths.\(^{119}\) Possible underlying reasons for not allowing the wives’ statements were that women were considered property of their husbands and unreliable by virtue of their gender. The majority’s determination to limit the doctrine of forfeiture by wrongdoing to only the founding-era’s common law understanding is not persuasive because it propagates reliance on an antiquated view of women.

The first significant American case to apply the forfeiture by wrongdoing doctrine, *Reynolds*, took place in 1878.\(^{120}\) The focus was on whether the witness’ absence was caused by the defendant, not on the intent behind his wrongful conduct.\(^{121}\) “The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. . . . [I]f he voluntarily keeps the witnesses away, he cannot insist on his [confrontation] privilege.”\(^{122}\) The Court also propounded the equitable philosophy behind the forfeiture doctrine: “The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . .”\(^{123}\)

The forfeiture by wrongdoing doctrine kept a low profile for nearly 100 years until “the lower federal courts began applying the forfeiture rule extensively in the context of witness tampering cases.”\(^{124}\) In these cases, in an attempt to prevent a

\(^{116}\) *Giles* 3, 128 S. Ct. at 2682, 2864-86. See supra notes 56-59, and accompanying text.


\(^{119}\) See supra note 59 and accompanying text.


\(^{121}\) *Id.* at 158-61. “Notably . . . the court did not suggest that the rule’s applicability hinged on [the defendant’s] purpose or motivation in committing the wrongful act.” *Giles* 2, 152 P.3d at 438.

\(^{122}\) *Reynolds*, 98 U.S. at 158.

\(^{123}\) *Id.* at 159.

\(^{124}\) *Giles* 2, 152 P.3d at 439.
witness from testifying against him, a defendant would procure the witness’ absence.125

The Crawford decision was a turning point; “[a]fter Crawford, the response of many courts . . . was to focus on the equitable forfeiture rationale which could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases.”126 Courts applied the forfeiture by wrongdoing doctrine to cases in which the homicide victim made statements about the violent crime itself,127 and regarding prior statements by the homicide victim.128 “Significantly, the courts in these cases applied the forfeiture by wrongdoing doctrine although there was no indication the defendants killed the victims with the intent of preventing testimony at a future trial.”129

The post-Crawford cases resulted in a split as to whether the forfeiture by wrongdoing doctrine required intent to prevent testimony:

Some state and federal courts have stated that the intent-to-silence requirement is only mandated by the federal rules and not by the Constitution. . . . Other courts have stated that the intent-to-silence requirement is an element of their forfeiture by wrongdoing doctrines, although stopping short of holding that the intent requirement is constitutionally compelled.130

C. Rules of Evidence

The forfeiture by wrongdoing doctrine was codified in the Federal Rules of Evidence as a hearsay exception in 1997.131 Rule 804(b)(6) states in pertinent part:

Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended

125. Id. “As with the federal courts, the state courts generally applied the [forfeiture by wrongdoing] rule when the defendant intended to, and did, tamper with an actual or potential witness to prevent the witness from cooperating with the authorities or testifying at trial.” Id. at 440.

126. Id.


129. Giles 2, 152 P.3d at 441.

130. Id. at 441-42.

to, and did, procure the unavailability of the declarant as a witness.\footnote{132. FED. R. EVID. 804(b)(6).}

The advisory committee stated that the rule was meant “to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.”\footnote{133. FED. R. EVID. 804(b)(6) advisory committee’s note.} Notably, the original title of the rule was altered from “waiver by misconduct” to “forfeiture by wrongdoing.”\footnote{134. See Flanagan, supra note 105, at 478-79. “[F]orfeiture better reflected the rationale of the Rule [and t]he courts had previously made a similar adjustment . . . .” Id. at 478.}

The purpose of the rule was to prevent “abhorrent behavior ‘which strikes at the heart of the system of justice itself.’”\footnote{135. FED. R. EVID. 804(b)(6) advisory committee’s note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).} From this statement, it appears that broad equitable principles were the basis for the rule. However, the rule was actually proposed to “address the problem of witness tampering.”\footnote{136. Minutes of the Committee on Rules of Practice and Procedure, June 19, 1996, available at 1996 WL 936792, *24 (J.C.U.S.).} During drafting, some members were concerned that the rule would allow admission of “any prior statements made by the victim in a murder case,”\footnote{137. Id.} but “[t]he adoption of a specific intent requirement limited the Rule to witness tampering cases.”\footnote{138. See Flanagan, supra note 105.}

IV. EFFECT OF GILES: FROM FORFEITURE TO WAIVER

The effect of the Supreme Court’s decision in Giles is a move from the doctrine of forfeiture by wrongdoing to a waiver of the confrontation right by misconduct, thereby aligning it with other criminal procedure rights under the Confrontation Clause. This section begins with a discussion of the difference between the terms “forfeiture” and “waiver,” then provides a brief overview of other rights under the Confrontation Clause and their waiver requirements, and ends with a comparison of a defendant’s rights under the Giles decision with other confrontation rights.

A. Forfeiture Versus Waiver

The terms “forfeiture” and “waiver” are often substituted for one another, but there is a key difference.\footnote{139. Giles 2, 152 P.3d at 443.} This impacts forfeiture by wrongdoing, because the doctrine “reaches beyond waiver to forfeiture, where the loss of the right is tied to activity months or years before a trial is contemplated, when the consequences of the act cannot be foreseen.”\footnote{140. See Flanagan, supra note 105, at 527.}
A waiver is defined as “an intentional relinquishment or abandonment of a known right or privilege.”\textsuperscript{141} Thus, the mental state of a defendant is at issue when determining waiver.\textsuperscript{142} In criminal procedure, a waiver must usually be done knowingly, intelligently, and voluntarily.\textsuperscript{143}

“In contrast to a waiver, a forfeiture occurs by operation of law, regardless of the state of mind of the defendant. Forfeiture is a consequence of another action performed by the defendant which may have unforeseen and unintended consequences for the affected individual.”\textsuperscript{144}

Furthermore, forfeiture by wrongdoing is a broad concept that encompasses waiver: “Waiver . . . is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver . . . .”\textsuperscript{145} Thus, it is possible for a defendant to both forfeit and waive his rights by the same actions.\textsuperscript{146}

**B. Waiver of Confrontation Rights in Other Criminal Contexts**

A defendant’s confrontation right flows from the Sixth Amendment, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{147} At its foundation, it requires the presence of both the defendant and the witness; if one of those two parties is absent, then the confrontation right is implicated.\textsuperscript{148} There are three typical situations in which one of those two parties is absent, thereby implicating the confrontation right: when a defendant is concealing the location of a witness, voluntarily absenting himself from the trial, or removed from the courtroom due to his misbehavior.\textsuperscript{149} These three “major confrontation cases all satisfy the knowing waiver of rights rationale because they all involve direct decisions by the defendant . . . . The immediate and inevitable consequence of the knowing waiver of rights theory [is] the loss of a Sixth Amendment right.”\textsuperscript{150}

In the first instance, when a defendant conceals the location of the witness, the touted case is *Reynolds*.\textsuperscript{151} If you will recall, Reynolds refused to disclose the whereabouts of his alleged second wife when presented with a subpoena for her appearance as a witness in his trial for bigamy.\textsuperscript{152} By Reynolds’ direct actions in

---

\textsuperscript{141}. *Id.* at 473 (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)).

\textsuperscript{142}. *Id.* at 474.


\textsuperscript{144}. See Flanagan, *supra* note 105, at 474.

\textsuperscript{145}. *Giles* 2, 152 P.3d at 442 (citations omitted) (quoting Freytag v. Commissioner, 501 U.S. 868, 894-95, n.2).

\textsuperscript{146}. See infra note 153 and accompanying text.

\textsuperscript{147}. *See supra* note 102 and accompanying text.

\textsuperscript{148}. “One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.” *Illinois v. Allen*, 397 U.S. 337, 338 (citing *Lewis v. United States*, 146 U.S. 370 (1892)).

\textsuperscript{149}. See Flanagan, *supra* note 105, at 526-27.

\textsuperscript{150}. *Id.*

\textsuperscript{151}. See supra notes 62-69, 120-23 and accompanying text.

\textsuperscript{152}. See supra note 64-66 and accompanying text.
keeping the witness away, he not only forfeited his confrontation rights by wrong-
doing, but in turn knowingly and voluntarily waived his rights.\footnote{153}

Secondly, a defendant may voluntarily choose to be absent from trial. In *Diaz v. United States*,\footnote{154} the defendant was on trial for homicide.\footnote{155} During the trial the defendant was out on bail and voluntarily absented himself by sending a message to the court stating that the trial should proceed without him but with his counsel.\footnote{156} One of the defendant’s arguments on appeal included that the court improperly proceeded in the defendant’s absence because he could not waive his right to be present.\footnote{157} According to the Court:

\begin{quote}
[T]he prevailing rule has been, that if, after the trial has begun in his presence, [a defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.\footnote{158}
\end{quote}

The Court also employed a policy argument, in that a defendant should not be able to “paralyze the proceedings of courts and juries” by not allowing a waiver of the right to be present when a defendant “escape[s] from prison[] or [absconds] from the jurisdiction while at large on bail.”\footnote{159} Thus, a defendant may waive his confrontation right through a voluntary absence because a reasonable person could only conclude that such a choice would result in the consequence of not being present at trial.

Finally, a defendant may be removed from the courtroom due to his own disruptive behavior. In *Illinois v. Allen*,\footnote{160} the defendant refused counsel and was allowed to proceed *pro se*.\footnote{161} However, he refused to follow the judge’s instructions, made abusive comments to the judge, and tore and threw papers in the courtroom.\footnote{162} The judge warned him that if his behavior continued he would be removed from the courtroom, but the defendant continued to proceed inappropriately.\footnote{163} The judge removed the defendant from the courtroom and ordered the trial to continue in his absence.\footnote{164} The defendant was allowed to return when he requested to be present and was given another warning that he needed to act appropriately.\footnote{165}

\footnote{153. See Flanagan, supra note 105, at 527; see also supra notes 145-46 and accompanying text.}
\footnote{154. Diaz v. United States, 223 U.S. 442 (1912).}
\footnote{155. Id. at 444. The crime took place in the Philippines, so their laws were considered, but the Court also considered and examined U.S. law. See id. at 454-55.}
\footnote{156. Id.}
\footnote{157. Id. at 453.}
\footnote{158. Id. at 455.}
\footnote{159. Id. at 458.}
\footnote{161. Id. at 339.}
\footnote{162. Id. at 339-40.}
\footnote{163. Id. at 340.}
\footnote{164. Id.}
\footnote{165. Id.}
However, he interfered with the proceeding and was removed once again. When the prosecution rested, the defendant was allowed to return to the courtroom when he promised to behave. The defendant later alleged that his constitutional right to be present at trial had been violated. The Court held that:

[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Here, the defendant knowingly, intelligently, and voluntarily waived his right to be present at trial because he proceeded with his disruptive actions despite his awareness of the consequences through the judge’s warnings.

Through this synopsis of the three main avenues in which the confrontation right may be implicated, by the absence of either the witness or the defendant, we find that criminal procedure aspires for a knowing, intelligent, and voluntary waiver of the confrontation right. By adding an intent requirement to forfeiture by wrongdoing, the Giles court continues this aspiration. The Giles decision is an attempt to align the forfeiture doctrine with the waiver requirements when other confrontation rights are at issue.

V. CONCLUSION

Brenda is dead. She has been silenced and cannot testify at the trial of her killer. After Giles, there are three options for her voice to be heard at trial: 1) her statements must be classified as non-testimonial, 2) Dwayne must have had the particular intent to prevent her from testifying when he killed her, or 3) Dwayne must have had intent to isolate Brenda and prevent her from reporting domestic violence when the prior statements were made.

By deciding Giles and requiring the particular intent of a defendant to prevent the witness from testifying, the Court has aligned the doctrine of forfeiture by wrongdoing with other criminal waivers of confrontation rights. This alignment provides an extra measure of protection to defendants, but further silences victims.

166. Id. at 341.
167. Id. at 339.
168. Id. at 343.
169. Id. at 346.
170. See supra note 11 and accompanying text.
171. See supra notes 78-79 and accompanying text.
172. See supra note 47 and accompanying text.
173. See supra notes 74-75 and accompanying text.
SOLUTIONS FOR DISPUTES OVER INTELLECTUAL PROPERTY BETWEEN TAIWAN AND CHINA – ANALYZING ARBITRATION

Szu-Chou Peng¹ and Fu-Jung Wu²

ABSTRACT

Increasing business transactions between Taiwan and China have caused international intellectual property disputes to become a new and serious problem for Taiwanese businessmen who have direct and indirect investments in trade. In order to solve this problem, Taiwan and China sequentially set special regulations. For example, section 74 of the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area was enacted by the government of Taiwan to recognize China’s civil arbitration procedures.³ On July 23, 2004, China established the Regulations of the Supreme People’s Court Regarding the People’s Courts’ Recognition of the Civil Judgments Rendered by the Courts in the Taiwan Region to offer an alternate way to look at arbitration decisions that were already made in Taiwan. Arbitration is one of the current methods of resolving intellectual property disputes between China and Taiwan. Arbitration is the best option for Taiwanese businesses, due to its prompt, professional, flexible, confidential, impartial, economical, harmonious and executable advantages.

I. INTRODUCTION

China is an attractive place for any country or enterprise in the world to operate a business. As business transactions increase, business disputes will also increase. Although employing China’s litigation system is one way to solve problems for disputants, litigation usually takes a lot of time and money for an enterprise. Also, an enterprise risks its reputation and any trade secrets that may be disclosed during the litigation. In addition, because of the special political issues between Taiwan and China, the Chinese government does not even allow Taiwanese businesses to apply any international law to solve disputes. Taiwanese businesses face unique challenges in this situation, which become even more complicated when disputes between Chinese and Taiwanese businesses arise.

¹ Assistant Professor, Taipei College of Maritime Technology; B.S. Fu Jen University; Post Doctor Candidate Beijing Renmin University of China, Post Doctor. 212, Sec.9, Yan-Pin N.Rd.,Taipei,Taiwan,R.O.C. Email: sampeng0206@hotmail.com
² SJD Candidate, Indiana University – Bloomington. 800 N. Union St. #814, Bloomington, IN, 47408 Email:fuwu@umail.iu.edu
Taiwan’s and China’s governments, also aware of this situation, enacted special regulations to recognize each other’s judicial injunctions and adjudication decisions.4 For instance, China established the Regulations of the Supreme People’s Court Regarding the People’s Courts’ Recognition of the Civil Judgments Rendered by the Courts in Taiwan Region to legally recognize the execution of Taiwan’s civil procedures in China.5 On July 23, 2004, the Intermediary People’s Court of Xiamen, China made the decision to recognize an award rendered by the Arbitration Association of the Republic of China, Taiwan in accordance with this regulation.6 This has been an important step for Taiwan and China to recognize and execute each other’s adjudications and injunctions. By doing so, once a dispute was solved by a Taiwanese court, disputants did not need to file the same suit again in China.

Although this judicial recognition process saves disputants more time than litigation would take in China, it is still not efficient enough for fast-paced enterprises, especially those involved in intellectual property disputes. Most intellectual property disputes involve an enterprise’s product reputation and the newest technology. Enterprises want to solve these disputes as soon as possible because the longer they wait then the more damage is done to their reputations or their products’ marketability. In order to avoid the disadvantages of slow litigation, arbitration offers a way to solve these types of important issues in a timely manner.

Considering arbitration as a solution to the transactional difficulties between Taiwan and China, this article will explain the context of the problem; compare the past and the present arbitration systems in China; list characteristics of the current arbitration system in China; and analyze the unique advantages of arbitration for Taiwanese businesses in intellectual property disputes. The article concludes that key characteristics of China’s new arbitration system create a lot of advantages for resolving intellectual property disputes between China and Taiwan that are unavailable through traditional litigation in China.

II. THE ARBITRATION SYSTEM IN CHINA

A. Background

In 1978, the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China (“C.P.C.”) was held.7 One of its purposes was to get rid

---

4. Id. Taiwan enacted the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area. Id. Section 74 of this act provides for the recognition of civil arbitration in mainland China. Id.
of undesirable traditions. A reform and opening-up policy, partially adopted from capitalism, was passed to endorse some free markets and private enterprises within an overall framework of socialism. After 1978, China was no longer a traditional communist state but a special socialist state. Therefore, the Chinese government was able to provide a safe and creditable economic environment to attract more foreign businesses. Substantial incentives now exist for international enterprises to invest in China, which includes entry into a large domestic marketplace and the availability of low cost laborers. Intellectual property-related products, which are imported to China, are becoming more intricate and technologically wide-ranging than in the recent past. Thus, it is important to find a better way to protect intellectual property rights and products in China. Previous Chinese law was not enough to protect such complicated intellectual property rights due to a number of factors including: the judge’s inability to understand the intricacies of the technology; the fast paced need for decisions; and the short-comings in the laws which could not keep up with the changing technology. Finding a way to solve these complex intellectual property disputes with speed and accuracy is expected by most international businessmen when the disputed subject matters have huge market values. In order to fulfill these expectations, China amended its arbitration law in accordance with international standards.

In the past, China’s arbitration system was like that of most East European countries, such as Yugoslavia, the Czech Republic, and Poland. As in China, these countries have two separate systems to applying arbitration. The systems are divided into internal arbitration and foreign affairs arbitration. These separated arbitration systems make the arbitration process complicated and are not suitable for international enterprises that need quick resolutions. Given the complicated and unfamiliar litigation system, the arduous process of resolving international business disputes in China has soured the environment causing enterprises to hesitate when investing more money. China could not be bound by these conventions and needed to make some changes in accordance with internationalization. Therefore, on August 31, 1994, China’s Ninth Session of the Standing Committee of the Eighth National People’s Congress passed and promulgated the Arbitration Law of the People’s Republic of China. The China Arbitration Act (“CAA”) was executed on September 1, 1995. The CAA has many innovative characteristics and represents a breakthrough when comparing it with the past system. The next part of this article will summarize the current arbitration law of the People’s Republic of China and point out its main characteristics.

8. Id.
9. Id.
10. Id.
12. Id.
B. Characteristics of the CAA

The CAA is the current arbitration law in China and it was amended in accord with World Trade Organization’s (“WTO”) international standards. The goal of the CAA is to get rid of many inconvenient regulations for disputants trying to apply arbitration in their disputes. The current CAA has some features that the past arbitration system did not have, such as a unified system, more powerful jurisdiction, more autonomy for disputants and united jurisdiction.

Compared to the past systems, the CAA is better in effect for international enterprises. In regards to civil procedure standards in China, a case can take more than six months from the inception of prosecution to receive a judgment. If parties appeal the case it might even last for several years. Contrasting these norms with the simplicity and speed of arbitration causes more and more businesses to choose arbitration. The first characteristic of the CAA is to provide a prompt and impartial arbitration procedure.

Article 1 of the CAA states the following: “This Law is formulated in order to ensure that economic disputes shall be impartially and promptly arbitrated, to protect the legitimate rights and interests of the relevant parties and to guarantee the healthy development of the socialist market economy.” Article 7 states, “[D]isputes shall be fairly and reasonably settled by arbitration on the basis of facts and in accordance with the relevant provisions of law.” This arbitration procedure is regulated under Chapter IV and there are thirty-seven articles in three sections: Section I -- Application and Acceptance for Arbitration; Section II -- Composition of the Arbitration Tribunal; and Section III -- Hearing and Arbitral Awards. The purpose of the CAA and its regulations was to improve the traditional image of Chinese litigation as being slow and constantly delayed.

The CAA arbitration system adopts the continuous trial approach in order to ensure the purpose of arbitration as a simple and timely procedure. There are similar procedures both in Taiwan and the World Intellectual Property Organization (“WIPO”). In the Arbitration Law of Taiwan, Article 21 has a regulated timeline to expedite the arbitration process. It states as follows:

13. CAA, supra note 11, at art. 79.
14. Id. at art. 1.
15. See CAA, supra note 11.
16. Id. at art. 1.
17. Id.
18. Id. at art. 7.
19. Id. at arts. 21-57.
20. CAA, supra note 11, at art. 1.
21. Id.
In the absence of any stipulation in the arbitration agreement as to how the arbitration is to be conducted, the arbitral tribunal shall, within ten days upon receipt of notice of the final arbitral appointment, determine the place of arbitration as well as the time and date for the hearing, and shall notify both parties thereof. The arbitral tribunal shall render an arbitral award within six months of commencement of the arbitration. However, the arbitral tribunal may extend [the decision period] an additional three months if the circumstances so require.  

The WIPO has similar regulations to accelerate the process of arbitration. Being a member of WIPO, the Chinese government tries to make its arbitration law in accordance with the WIPO’s requirements.

Although saving time is one of the advantages when employing arbitration instead of litigation, having impartial processes and awards are also significant factors to be considered. In order to have just decisions, Chinese arbitration associations do not follow the laws established by the Chinese government in the past, but they formulate arbitration rules in accordance with the CAA and domestic civil procedure. In addition, Article 75 of the CAA states that, “[T]he arbitration Commission may formulate provisional arbitration rules in accordance with this Law and the relevant provisions of the Civil Procedure Law before the formulation of the arbitration rules by the China Arbitration Association.” For instance, the China International Economic and Trade Arbitration Commission (“CIETAC”) is the key to a permanent arbitration institution in China. The goal of the CIETAC is to cooperate with the CAA to resolve trade and economic disputes independently and impartially; additionally, party autonomy is a good illustration that arbitration offers a more flexible resolution than the often rigid procedure and timetables of the courts.

---

24. Id.
27. CAA, supra note 11, at art. 15. Article 15:
The China Arbitration Association is a social organization with the status of a legal person. Arbitration commissions are members of the China Arbitration Association. The Articles of Association of the China Arbitration Association shall be formulated by the national general meeting of the members.
The China Arbitration Association is an organization in charge of self-regulation of the arbitration commissions. It shall conduct supervision over the conduct (any breach of discipline) of the arbitration commissions and their members and arbitrators in accordance with its articles of association.
The China Arbitration Association shall formulate Arbitration Rules in accordance with this Law and the Civil Procedure Law.

Id.
28. Id.
29. China Int’l Econ. & Trade Comm’n, http://www.sccietac.org/cietac/en/content/content.jsp?id=861 (Party autonomy is one advantage of arbitration.).
The second characteristic of the CAA is integration of the arbitration system and China’s regulation. In the past, China had a two branch system of internal arbitration and foreign affairs arbitration. Under the old system it was impossible to find a uniform law to deal with arbitration activities taking place in China. Which law or regulation should be followed by the arbitrators was decided by the government with no predictable structure. Also, the government could solely decide whether or not disputes could even be solved by arbitration. Often under this system, even when disputes were solved, results were unsatisfying due to the unpredictable and unfair structure of the law as manipulated by the government.

The predictability of arbitration was greatly improved with the passing of the CAA. According to Article 2 of the CAA, “[D]isputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration.” The government no longer held the only key to resolution through arbitration. After the CAA, the two-pronged system of arbitration law was no longer considered as a valid procedure and any enterprise could apply arbitration to solve a dispute at anytime. This was a significant change and made most international enterprises more willing to apply arbitration when attempting to solve disputes.

The third characteristic of the CAA is to amplify the legal effect of jurisdiction. The hierarchy of laws in China is important in determining the legal effects of the law. There are five hierarchical stages in China’s legal system. The highest and most powerful stage is occupied by China’s Constitution; second, the laws that are set by the National People’s Congress; third, the laws created by the Standing Committee of the National People’s Congress; fourth, the laws and regulations which are established by the State Council of the People’s Republic of China; and finally, the decrees and regulations which are promulgated by the administrations of the State Council of the People’s Republic of China. In the past, internal arbitration applied to laws or regulations which were set by the administrations of the State Council of the People’s Republic of China, whereas foreign affairs arbitration applied the China International Economic and Trade Commission Arbitration Rules (CIETAC Arbitration Rule) and the China Maritime Commission Arbitration Rules which were promulgated by the CIETAC. Due to the past, arbitration laws

30. CAA, supra note 11, at arts. 7-9.
32. Id.
33. CAA, supra note 11, at art. 2.
34. According to the statistics released from the CIETAC, the numbers of cases including foreign-related and domestic which had submitted to the CIETAC have been increased after the CAA was enacted. CIETAC, available at http://www.cietac.org/index.cms (follow “About Us” hyperlink; then follow “Statistics” hyperlink).
35. CAA, supra note 11, at arts. 6 & 21.
37. Id.
were established by the bottom tier administrations; thus, when executing an arbitration award, it had to be examined whether the award was contrary to the hierarchy of laws. 39

However, the CAA was specifically created by the Standing Committee of the National People’s Congress leaving no doubt that the CAA, as arbitration law, has much stronger jurisdiction than past regulations. This is also great news for enterprises when they wish to apply arbitration in China. This change represents that arbitration will be encouraged among international enterprises and that awards will be promptly executed.

The fourth characteristic of the CAA is to raise participant autonomy to the standard of other international arbitration laws. 40 The purpose of arbitration is to offer a private and convenient way for disputing participants to resolve their matter in a “win-win” situation. In the past, Chinese arbitration law had too many limitations for participation by disputants. For example, although parties had the right to appoint an arbitrator, they could only select from the list of arbitrators which was provided by the arbitration commissions. 41 Yet, the appointed arbitrators from the list were not necessarily trusted by the disputants or just to them. Also, it was difficult to execute an arbitration award in the past; if one of the disputants did not satisfy the arbitration result, he still could bring the case to people’s court without the other party’s agreement. 42 These aforementioned concepts are against the principle of autonomy in private law.

The CAA disposes of these disadvantages and illustrates the autonomy principle – the parties adopting arbitration for dispute settlement reach an arbitration agreement on a mutual and voluntary basis. 43 An arbitration commission shall not accept an application for arbitration which is submitted by one of the parties in the absence of an arbitration agreement. 44 Article 31 also provides another good demonstration of how the new Chinese arbitration law updates the autonomy principle since it states the following:

If the parties agree to form an arbitration tribunal comprising three arbitrators, each party shall select or authorize the chairmen of the arbitration commission to appoint one arbitrator. The third arbitrator shall be selected jointly by the parties or be nominated by the chairman of the arbitration commission in accordance with a joint

40. CAA, supra note 11, at art. 1.
43. CAA, supra note 11, at art. 4.
44. Id.
mandate given by the parties. The third arbitrator shall be the presiding arbitrator.\textsuperscript{45}

It is clear that the CAA gives disputants more rights when applying for arbitration in China.

The fifth characteristic of the CAA is to expand the protective scope of arbitration.\textsuperscript{46} In the past, Technology Contract Law of the RPC Regulations for the Implementation, which was abolished on October 6, 2001, was the main internal arbitration sector was required to follow.\textsuperscript{47} However, this provision did not clearly regulate what kinds of disputes could apply to the arbitration process. Although one of the disputing parties could apply for arbitration, whether a case would be accepted or not was unpredictable. This ambiguity steered businesses away from applying for arbitration.

Currently under the CAA, the disputants can apply for arbitration only if both of them have agreed; thus, disputants will not have to worry about whether their dispute will be accepted to arbitration or not.\textsuperscript{48} The CAA expands the protective scope of arbitration to any dispute with the mutual agreement of the parties except in issues involving the public welfare.\textsuperscript{49} Article 77 states that, “Arbitration of labor disputes and disputes over contracts for undertaking agricultural projects within agricultural collective economic organizations shall be separately stipulated.”\textsuperscript{50} Article 3 states that, “The following disputes shall not be submitted to arbitration: (1) disputes over marriage, adoption, guardianship, child maintenance and inheritance; and (2) administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.”\textsuperscript{51} The law excludes the former disputes from being solved in arbitration since they might go against the hierarchy of laws.\textsuperscript{52} Furthermore, private parties should not have the right to decide results independently. In addition, administrative disputes are related to public law and private parties should follow specific administrative litigation requirements in order to solve their disputes. The CAA is mainly established to solve “economic disputes,” which are defined in Article 2 as disputes over contracts, property rights, and interests.\textsuperscript{53}

The sixth characteristic of the CAA is to promote voluntary and exclusive arbitration agreements.\textsuperscript{54} Arbitration of Disputes over Technical Contracts, Arbitration of Disputes over Copyright, and Arbitration of Disputes over Economic Contracts were the main regulations for internal arbitration in the past, which brought consi-

\begin{itemize}
\item \textsuperscript{45} Id. at art. 31.
\item \textsuperscript{46} Id. at ch. 3.
\item \textsuperscript{47} This regulation was replaced by Regulations of Disputes over Economic Contracts, supra note 42.
\item \textsuperscript{48} CAA, supra note 11, at arts. 16-20.
\item \textsuperscript{49} Id. at arts. 2-4.
\item \textsuperscript{50} Id. at art. 77.
\item \textsuperscript{51} Id. at art. 3.
\item \textsuperscript{52} Id. at art. 9.
\item \textsuperscript{53} Id. at art. 2. Article 2: “Disputes over contracts and disputes over property rights and interests between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration.” Id.
\item \textsuperscript{54} Id. at ch. 1.
\end{itemize}
derable positive results in arbitration. This was the main motivation to push the Chinese government to establish a unified arbitration system implementing the voluntary principle. Although the CAA openly adopts the voluntary principle, whereby disputants can reach a voluntary agreement, there are some limitations. For instance, disputing parties must provide a written agreement to apply arbitration. During arbitration, disputants can still form their own settlement agreement; however, they must do so before the commission of arbitration makes the final decision. These limitations show that the autonomy of the CAA still has room to improve even though individual autonomy has increased.

The seventh characteristic of the CAA is the priority to enforce an arbitration award. Although the Chinese government amended its arbitration law in accordance with international standards, causing people to execute the law in an efficient way is another problem. In order to make people adequately employ the current arbitration system, the Chinese government reinforced the legal effect of arbitration by giving the arbitration system priority over the trial system. Therefore, when an arbitral award is submitted, there is no chance to appeal. The court cannot overrule an arbitration commission’s decision because an award is final and disputants should be bound according to Article 5 of the CAA.

Before the CAA, the Law of the People’s Republic of China on Economic Contracts Involving Foreign Interest, Technology Contract Law, and Copyright Law were important laws that were followed for internal arbitration. Under these laws, disputants had the right to choose arbitration or the trial process to solve their disputes. The CAA was amended to encourage disputants to apply arbitration rather than litigation.

Economic Contract Law of the People’s Republic of China was the first of the regulations which was enacted in 1982 to respect the decision of arbitrators. Once the commissions made a decision, both participating parties were effectively

55. Regulations of Disputes over Economic Contracts, supra note 42.
56. CAA, supra note 11, at art. 4. Article 4: “The parties adopting arbitration for dispute settlement shall reach an arbitration agreement on a mutually voluntary basis. An arbitration commission shall not accept an application for arbitration submitted by one of the parties in the absence of an arbitration agreement.” Id.
57. Id.
58. Id. at arts. 8 & 51.
59. Id. at art. 54.
60. Id. at art. 5.
62. CAA, supra note 11, at art. 5. Article 5: “A people’s court shall not accept an action initiated by one of the parties if the parties have concluded an arbitration agreement, unless the arbitration agreement is invalid.” Id.
64. Id. at art. 31.
65. According to the statistics released from the CIETAC, the numbers of cases which had resolved by the CIETAC have been increased after the CAA has enacted. CIETAC, supra note 34.
barred from returning to an arbitration forum with the same matter. 67 The CAA also states this rule in section one of Article 9 as follows:

The single ruling system shall be applied in arbitration. The arbitration commission shall not accept any application for arbitration, nor shall a people’s court accept any action submitted by the party in respect of the same dispute after an arbitration award has already been given in relation to the matter. 68

The eighth characteristic of the CAA is the united jurisdiction. 69 In either the trial system or past arbitration system, jurisdiction was limited by certain factors, which included the amount of money involved in the dispute and/or the place where the contracts were implemented. 70 For example, in the past, the Regulations of the People’s Republic of China on the Arbitration of Disputes over Economic Contracts stated that disputes over economic contracts shall be applied jurisdiction in rem. 71 Article 9 regulates the jurisdiction in rem as follows:

Cases of disputes over economic contracts shall be handled by arbitration organizations in the place where the contracts are implemented or signed. If there is difficulty in execution, it may be referred to arbitration organizations in the places of the accused. 72

Article 10 is about the district jurisdiction and whether disputes over economic contracts shall be handled by arbitration organization of countries and city districts principally. 73 However, if there is a monetary dispute exceeding $500,000 RMB (Renminbi 74), a higher arbitration organization will be required. 75 As illustrated by

---

67. According to the guideline of the China International Economic and Trade Arbitration Commission, it shows that “The arbitration award is final and binding upon both parties. Neither party may bring suite before a law court or make a request to any other organization for revising the arbitral award.” CIETAC, http://www.sccietac.org/cietac/en/content/content.jsp?id=865.
68. CAA, supra note 11, at art. 9.
69. Id. at art. 6.
70. Id.
71. Regulations of Disputes over Economic Contracts, supra note 42, at art. 9.
72. Id. at art. 9.
73. Id. at art. 10.
75. Regulations of Disputes over Economic Contracts, supra note 42, at art. 10. Article 10:

Disputes over economic contracts shall be handled by arbitration organizations of counties (cities) and city districts, with the exception of the following cases:

1) Cases that have a big influence or involve a sum of over 500,000 to 5 million Yuan shall be handled by arbitration organizations of cities under the direct administration of provinces, or prefectures and autonomous prefectures;

2) Major economic disputes of great impact or involving a sum of 5 million to 10 million Yuan shall be handled by provincial, municipal, or autonomous regional arbitration organizations;
the examples above, the past arbitration system contained some seriously complex jurisdictional rules. The CAA does not divide disputes into different jurisdictions by these two aforementioned methods. Article 6 of the CAA clarifies that the limited jurisdiction and the territory jurisdiction should not be applied to arbitration because an arbitration commission is specifically selected by party agreement.

The ninth characteristic of the CAA is that the people’s courts have the right to monitor arbitration awards. The CAA adopts the arbitration or trial system. Thus, once disputants choose arbitration instead of litigation to resolve disputes, then courts have no right to become involved in the arbitration procedure. However, the awards are still monitored and protected by the courts. If a court finds out that an arbitration award is inequitable to execute, then a court has the right either not to enforce the award or to cancel the award. If the award is canceled, then Chapter V of the CAA has more detailed regulations to protect the rights of the parties. This characteristic makes sure the disputants have just arbitration awards, which are only monitored by, but not overly interfered with by, the people’s courts or the Chinese government.

(3) Disputes over economic contracts that will have great impact nationwide or disputes between provinces municipalities and autonomous regions or between central departments and involve a sum of above 10 million Yuan shall be handled by the arbitration board of the State Administration for Industry and Commerce.

Id.
76. See generally CAA, supra note 11.
77. CAA, supra note 11, at art. 6.
78. Id. at ch. 6 arts. 62-64.
79. Id. at art. 9.
80. Id.
81. Id.
82. Id. at art. 63. Article 63: A people’s court shall, after examination and verification by its collegiate bench, rule not to enforce an award if the party against whom an application for enforcement is made provides evidence proving that the award involves one of the circumstances prescribed in Clause 2, Article 217 of the Civil Procedure Law.

Id.
83. Id. at art. 64. Article 64: If one party applies for enforcement of an award while the other party applies for cancellation of the award, the people’s court receiving such application shall rule to suspend enforcement of the award. If a people’s court rules to cancel an award, it shall rule to terminate enforcement. If the people’s court overrules the application for cancellation of an award, it shall rule to resume enforcement.

Id.
84. Id. at ch. V. Articles 58-61 have the detailed regulations about application for cancellation of an award.
III. STRUCTURE OF THE CHINESE ARBITRATION ORGANIZATIONS

There are two types of arbitration organizations under the current system and they are arbitration associations and arbitration commissions. The China Arbitration Association is a social organization which is regarded as an artificial person having a legal identity in which all of the arbitration commissions are members.85 The Association is in charge of regulating the arbitration commissions and supervises the conduct of the arbitration commissions and their members in accordance with its Articles of Association.86 Currently, the CIETAC and China Maritime Arbitration Commission (“CMAC”) are the leading arbitration associations in China.87

To establish the independent arbitration systems, China does not adopt the traditional way of dividing each by level of administrative divisions. Article 10 states the following:

[A]rbitration commissions may be established in the municipalities directly under the Central Government, in the municipalities where the people’s governments of provinces and autonomous regions are located or, if necessary, in other cities divided into districts. Arbitration commissions shall not be established at each level of the administrative divisions.88

The purpose of the current arbitration system is to establish various independent arbitration commissions in order to avoid arbitration commissions which are controlled by the same administrators.89

Although each arbitration commission is independent, there are some regulations which must be followed in order to ensure uniform arbitration procedures. Article 11 contains further requirements for arbitration commissions, which shall fulfill the following conditions: (1) each commission must have its own name, domicile and Article of Association; (2) it must possess the necessary property; (3) it

85. CAA, supra note 11, at art. 15. Article 15:

The China Arbitration Association is a social organization with the status of a legal person. Arbitration commissions are members of the China Arbitration Association. The Articles of Association of the China Arbitration Association shall be formulated by the national general meeting of the members.

The China Arbitration Association is an organization in charge of self-regulation of the arbitration commissions. It shall conduct supervision over the conduct (any breach of discipline) of the arbitration commissions and their members and arbitrators in accordance with its articles of association.

The China Arbitration Association shall formulate Arbitration Rules in accordance with this Law and the Civil Procedure Law.

Id.

86. Id.


88. CAA, supra note 11, at art. 10.

89. Id.
must have its own members; and (4) it must have arbitrators for appointment.\textsuperscript{90} Arbitration commissions should also have a chairman, two to four vice-chairmen and seven to eleven members who have working experience and specialize in law, economics and trade.\textsuperscript{91}

These regulations ensure that the structure of the arbitration commission is complete and that each commission is equipped to provide fair arbitration for disputing parties.

\textbf{IV. REMEDY IN SYSTEM OF DISPUTES OVER INTELLECTUAL PROPERTY RIGHTS FOR TAIWANESE BUSINESSES}

Due to the close business trade with China, disputes over intellectual property rights cannot be avoided. As previously mentioned, there had been no official regulatory solution between Taiwan and China because of the unique political situation. There was an awkward situation in which the Chinese government did not recognize Taiwan as an independent country; furthermore, China did not allow Taiwanese businessmen to apply Chinese laws directly when having disputes.\textsuperscript{92} Until recently, when Taiwanese businesses had any conflicts in China, the businesses could only apply special regulations, such as the \textit{Law of the People’s Republic of China on Protection of Investment by Compatriots from Taiwan}.\textsuperscript{93} Article 14 stipulates that when a dispute occurs, then the region where the dispute occurs has jurisdiction by stating as follows:

As for any investment-related dispute arising between an investor from Taiwan and a corporation, “enterprise,” other economic organization or individual of another province, “autonomous region or municipality directly under the Central Government,” the parties concerned may settle it through consultation or mediation.\textsuperscript{94}

Although these are the legal regulations only for Taiwanese businessmen, there are still other laws and regulations that can be applied when Taiwan or other countries’ businesses face disputes in China, such as the \textit{Law of the People’s Republic of China on Protection of Investment by Compatriots from Taiwan}.\textsuperscript{95} These regulations ensure that the structure of the arbitration commission is complete and that each commission is equipped to provide fair arbitration for disputing parties.

\textsuperscript{90} Id. at art. 11.
\textsuperscript{91} Id. at art. 12. Article 12:

An arbitration commission shall comprise a chairman, two to four vice-chairmen and seven to eleven members. The chairman, vice-chairmen and members of an arbitration commission must be persons specialized in law, economics and trade and persons who have actual working experience. The number of specialists in law, economics and trade shall not be less than two-thirds of the members of an arbitration association.

\textsuperscript{92} See Taiwan – Wikipedia, http://en.wikipedia.org/wiki/Taiwan#Modern_democratic_era (stating that the People’s Republic of China claims and considers itself the successor of Taiwan).
\textsuperscript{94} Id. at art. 14.
of China on Economic Contracts Involving Foreign Interest. 95 According to these regulations, there are at least four methods of attaining a remedy for disputes in China: negotiation, conciliation (known as mediation), arbitration and litigation. 96

Among these four remedies, negotiation and conciliation are commonly used in economic-related regulations in China. Usually, the parties will choose arbitration or litigation unless one of the disputing parties wants to solve a dispute by negotiation or conciliation or if a party is satisfied with the decision which was made through negotiation and conciliation. The reason that negotiation and conciliation attracts most of the parties in disputes is because there are no special requirements for the timing, location or formulation of the remedy. 97 The disputing parties can save a lot of time and money if they choose to solve disputes while avoiding interference from a third party or the government. Some of the most important benefits on negotiation and conciliation are that any business or trade secrets will not be disclosed, and the reputation of the corporation will not be impacted through these private procedures. These two remedies are the most efficient methods since they “value harmony most,” which is a significant concern in Chinese culture. If there are no complex polarizing issues in a dispute, then negotiation and conciliation are good ways to resolve them.

However, a decision stemming from negotiation and conciliation does not have any binding legal authority. 99 Compared with the liberty and the flexibility of negotiation and conciliation, arbitration and litigation have more powerful legal effects. 100 However, there are also huge disparities in the complexity of the procedures in both arbitration and litigation. Arbitration has several advantages that litigation does not have. The first advantage is promptness. This is because time is a key factor to be concerned with because the longer the dispute exists, the more damage it may cause. This applies especially to those disputes over intellectual property in China. The value of intellectual property rights decreases over time. If every dispute had to be litigated through a long, complex and nearly indecipherable process, then most resolution attempts would be bitter and, ultimately, meaningless for the parties. The loss of value for intellectual property on the market is an excellent motivation for parties to pursue alternate remedies to resolve disputes. The phrase “justice delayed is justice denied” can suitably explain this situation.

The second advantage is the specialization of arbitrators. 101 Again, most disputes that Taiwanese businesses are involved in are related to industrial and tech-

96. Id.
97. Law on Economic Contracts Involving Foreign Interest, supra note 63.
99. Id.
100. Id.
101. CAA, supra note 11, at art. 13.
nological-related issues. However, most of the judges in China do not have adequate backgrounds to understand the intricacies of each specialized industry. Hence, litigating in China will be a disadvantage for industry or technology-related businesses from Taiwan. Usually, when a Chinese court accepts these types of cases, the court will appoint other special institutions, such as the State Administration for Industry and Commerce (“SAIC”), to examine and determine what kinds of issues are involved and to provide their professional opinions to the court. Compared with the process of litigation, arbitration can save a lot of time since arbitration committees are composed of members who have the requisite backgrounds needed to understand the disputes. The Arbitration and Mediation Center of the WIPO promulgated the *Explanatory and Guidance Notes* to describe the requirements for arbitrators in various fields. Disputants need only explain the disputed issues and the type of industry in order to find suitable arbitrators. Additionally, disputing parties have the right to appoint arbitrators; thus, they are able to search for suitable arbitrators from their pertinent fields. The important thing is that most arbitrators are experienced and familiar with the business’s specific situation. In order to solve disputes more efficiently, arbitrators consider not only the legal issues at stake, but also the business and other technological issues that come into play.

The third advantage is the flexibility of the arbitration process. Disputants have no right to change the process of civil procedure in litigation. On the contrary, any procedure, law or language can be applied by the disputants’ agreement to arbitration based on the autonomy principle as long as arbitration is not contrary to the public order and good customs principle. Choosing a location for arbitration is another example of flexibility for disputants because they can find a suitable location to provide evidence, to find arbitrators and to submit documents easily. An arbitration commission also has the right to pick the location in different situations. Disputants can ask an arbitration commission to hold the accommodation or cancel the procedure of arbitration any time before a decision is rendered. After cancelling arbitration, disputants can still apply reconciliation and ask that the arbitration commission not interfere. It is clear that the purpose of the arbitration system is to save time and money for disputing parties. If the parties have the agreement for arbitration before or after the dispute, then the procedure of arbitration definitely will be quicker than litigation since there are too many uncertain factors which have delaying affects on the litigation process.

The fourth advantage is confidentiality during arbitration. No disputant wants to disclose his or her business or trade secrets during litigation, especially when it involves intellectual property related issues. Enterprises are willing to pick arbitra-

---

102. *Id.*
104. CAA, *supra* note 11, at art. 31.
106. *Id.*
107. CAA, *supra* note 11, at arts. 61 & 49.
tion to resolve disputes since the protection of a trade secret is a first priority for enterprises. Taiwan promulgated the *Trade Secret Act* in 1996, and China also had similar laws to protect trade secrets such as the *Anti-Unfair Competition Law*. For the protection of a trade secret, it means information which should be related to a formula, practice, process, design, instrument and pattern. Also, trade secrets should meet these three requirements: 1) not generally known by the public, 2) having actual or potential value, and 3) maintained a secret by reasoned efforts. Additionally, the reputation of an enterprise is another main priority to be protected. Any information submitted to a court about an enterprise will be disclosed during trial. This attention may bring a lot of adverse effects on the reputation of an enterprise. For an enterprise, many disputes are merely temporary, but its reputation is established over time and should be protected. On the other hand, arbitration keeps information secret during the whole process unless the disputing parties agree to disclose the content during arbitration. Keeping the process of arbitration private is an explicit regulation by the government. Currently, business competition is drastic. It is often not very prudent to file a suit in court for enterprises that want to maintain privacy for issue related information. Disclosure rules in litigation protect some evidence in special criminal matters, but as a rule, disclose all other information presented to the court. This limitation may allow parties to immediately lose their reputation among their competitors. Thus, when disputes involve complicated technological issues, any wise disputant should take advantage of the confidentiality benefits of arbitration.

The fifth advantage is justice for disputants. Since disputing parties often come from different countries, it is easy to misunderstand the laws and the role of courts due to language barriers, unfamiliar rules and jurisdictional issues. Contrary to deciphering this complicated system, arbitration allows for neutrality in the choice of applicable law. An arbitration process can be adjusted for different necessities, such as having an agreement for the applicable law, languages to be used and the location. This feature of arbitration allows more choice to the participants than the traditional legal systems, which can only use a local law, local language and local jurisdiction.

The sixth advantage is that arbitration decisions are easier to execute than court decrees. Whether or not a court has domestic jurisdiction over an international dispute is a serious problem when disputants file a suit in China. In order to make foreign courts validate and execute a verdict, there should be a multilateral treaty

---

111. MERGES, supra note 110, at 31.
112. CAA, supra note 11, at art. 40.
between the countries involved or between a country and a larger contracting entity such as the European Union; for China, many of these treaties do not already exist. However, there are several international treaties which validate and execute arbitration awards, such as The Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, the 1958 New York Convention or any trade treaty between two countries. Disputants only need to follow an arbitration process that they agree on and it can save a lot of time and money rather than filing suits in different countries. China undoubtedly is a hot spot for international business transactions, such as joint ventures, venture capital firms, strategic alliances, mergers and acquisitions, offset agreements and mechanism of corporations. Each of these business transactions will involve the intellectual property issues of different countries. For example, Biotech Startup, Inc. (“B.S.”) wants to sue Roach, who infringed on its patent, although there is a joint venture agreement between them.\footnote{Julia A. Martin, \textit{Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution}, 49 STAN. L. REV. 917, 917-19 (1997).} Roach did not get any approval from B.S. to manufacture its drug using B.S.’s patent process in Uganda, Malaysia, China, and Peru.\footnote{Id.} Roach is selling the drug worldwide.\footnote{Id.} If B.S. wants to solve this dispute using litigation, it will be faced with lots of problems even before the case actually goes to court.\footnote{Id.} Even if B.S. wins the case, how to execute the verdict in different countries will be another problem.\footnote{Id.} However, with arbitration it is clear that a decision can be more easily agreed upon, and be easier to execute.

The seventh advantage is that arbitration saves more money than litigation. Although litigation fees in China are really low ($30 to $100), attorney fees will cost at least $50,000, especially for international business cases.\footnote{Yang Jing Ho, \textit{Effective, Just and Economic – Analyzing the Value of Arbitration}, available at http://fzj.baiyin.cn/Article/ShowArticle.asp?ArticleID=81.} Besides attorney fees, disputants still need to spend money on other things, such as notarizing documents or gathering evidence. After litigation, it is difficult to say whether disputants will make or save any money over the subject matter at issue. An arbitration fee, on the other hand, is an all-inclusive one-time payment.\footnote{See CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION FEE SCHEDULE, available at http://www.sccietac.org/cietac/en/content/index.jsp?board_id=5 (Amount of claim (RMB): 1,000,000 Yuan or less will be charged 3.5% of the claimed amount and the minimum is 10,000 Yuan. RMB from 1,000,000 Yuan to 5,000,000 Yuan will be charged 35,000 Yuan plus 2.5% of the amount above 1,000,000 Yuan. RMB from 5,000,000 Yuan to 10,000,000 Yuan will be charged 135,000 Yuan plus 1.5% of the amount above 5,000,000 Yuan. RMB from 10,000,000 Yuan to 50,000,000 Yuan will be charged 210,000 Yuan plus 1% of the amount above 10,000,000 Yuan. RMB 50,000,000 Yuan or more will be charged 610,000 Yuan plus 0.5% of the amount above 50,000,000 Yuan).} For example, if the amount of the claim is RMB 1,000,000 Yuan or less, it will be charged 3.5% of the claimed amount and the minimum is RMB 10,000 Yuan. Therefore, arbitration is a much more economical way to resolve a dispute because it can not only save disputants time, but also money.
The eighth and final advantage is the initiation of harmony between disputants. It is difficult for disputants to interact harmoniously during litigation. This is because in order to win the case parties must provide evidence to the court which will likely hurt each other’s public reputations. On the other hand, arbitration is able to deal with each case in a peaceful way, such as picking the location for arbitration and finding arbitrators, all which is supplied through the agreement of the disputing parties. Solving disputes through arbitration will allow disputing parties to preserve their business relationships, and it is also a more suitable practice for Asian culture than litigation. This is because litigation will leave a “residue of hard feelings” between the parties.  

Some scholars disagree that arbitration is quicker than the standard process in China. From their perspective, most of the arbitrators are not in full-time positions, and they do not have the administrative right to investigate. The arbitrators’ decision can only rely on evidence the disputing parties provided. The relevance and the credibility of this evidence are sometimes questionable. Therefore, some people believe that the process of arbitration will take longer than litigation because of such unqualified administrators. There is no doubt that the arbitration process has its weaknesses, but no law or regulation can be perfect. Generally speaking, arbitration still might be a first choice for most enterprises because of previously mentioned advantages. These advantages will save disputants more time and money than is typically spent on litigation, especially for Taiwanese businesses. China, being a socialist country under the rule of law, has a completely different construction of its legal system than Taiwan. In addition, political issues make it impossible for Taiwanese businesses to apply Taiwan’s domestic law as substantive law when transacting with Chinese enterprises. As mentioned previously, arbitration has a lot of advantages and provides the best solution for Taiwanese businesses to solve disputes. In addition, the China International Economic and Trade Arbitration Commission (“CIETAC”) will be working to help participants involved in arbitration. In this way, Taiwanese businesses can not only avoid the litigation system of China, but they can also keep from creating any more political tension due to business related controversies between Taiwan and China.

There are numerous types of intellectual property-related businesses, and as a result, the characteristics and the scope of intellectual property rights are broader than that of general property. It is difficult for the laws to keep up with the development of new types of disputes over intellectual property rights. When Chinese courts deal with disputes over intellectual property rights, especially involving international cases, they have the right to choose the applicable law, but often the compensation might not be satisfactory to the parties involved. In other words, the traditional compensation in litigation is a monetary award or the return of the voucher benefit; this is not enough for industrialists who want to own and control their monopoly right in intellectual property products. The reason that this article

---

121. Martin, supra note 114, at 935.
supports the arbitration system rather than litigation is because arbitration is based on the equity of law and an “amiable compositeur”\(^{123}\) which permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. Through arbitration, disputants have more methods to resolve disputes. Arbitrators not only can apply the substantive law chosen by the parties, but also can utilize equitable law, business customs and non-legal principles to efficiently execute the arbitration to the satisfaction of the disputing parties. The amiable compositeur is established to complement the shortcomings of laws or regulations. Arbitrators can make a decision by justice not only by outdated laws.

V. CONCLUSION

There is no question that China is an attractive place for international enterprises to invest. However, the legal system in China is still growing and adapting to its current culture. Arbitration has a lot of advantages to offer international businesses when they have business-related disputes in China. This article emphasizes the advantages of arbitration and points out why arbitration is the best solution for foreign businesses, especially for the Taiwanese.

Due to the special political situation between Taiwan and China, it is impossible for any Taiwanese business to use their own law of choice and to apply Taiwan’s domestic law as the substantive law controlling disputes with China. Therefore, arbitration plays an important role to deal with business disputes between Taiwan and China. Article 1 of the CAA illustrates the impartiality and promptness with which arbitration can resolve economic disputes.\(^{124}\) This is good news for foreign enterprises. Without a doubt, the current arbitration law rises to international arbitration standards. Specialty arbitration commissions are equipped to deal with disputes in a prompt, flexible, and confidential way to make sure that disputants have access to justice through the execution of an arbitration award. During this process, both disputants can maintain their good business relationship by not having the opportunity to destroy each other’s public reputations. In accord with the international trend, China has worked to establish an effective arbitration system. Though the legal protection is not perfect, it is a huge step in China. This makes Taiwanese and foreign businesses more willing to apply arbitration rather than litigation because of the important advantages of arbitration.

\(^{123}\) BLACK’S LAW DICTIONARY 93 (8th ed. 2004). Also termed “amiable compositor,” means an unbiased third party, often a head of state or high government official, who suggests a solution that disputing countries might accept of their own volition.

\(^{124}\) CAA, supra note 11, at art. 1.

Leticia M. Diaz and Barry Hart Dubner*

I. INTRODUCTION

One cannot pick up a newspaper or watch the news these days without seeing articles or stories about the “Somali pirates.” In fact, piracy has taken an increasing toll on international shipping in the key water link between the Mediterranean Sea and the Indian Ocean. In 2008, a total of forty-nine vessels were hijacked worldwide.1 Forty-two of the forty-nine hijackings occurred off Somalia’s 1,900 mile (3,000-kilometer) coast line, and pirates made an estimated $30 million in ransom for those forty-two vessels.2 Navies from all over the world have begun to show their presence in this area. However, the problem has arisen with regard to whether or not the various countries involved have the prescriptive and enforcement jurisdiction over these pirates. In fact, Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, said that there were legal and military obstacles combating piracy.3 “One of the challenges that you will have in piracy, clearly, is, if you are intervening and you capture pirates, is there a path to prosecute them?”4 This statement by the Chairman of the Joint Chief of Staff is rather surprising because the jurisdiction to prescribe and enforce punishment over pirates has long been settled. If the comment by Admiral Mullen is merely requesting information about where to prosecute the pirates if they are captured, that is a valid query. The purpose of this article, therefore, is to review the evolution of the law of international sea piracy in order to assist people like Admiral Mike Mullen and the Danish Government, among others, in giving them authority for prosecuting pirates. As this article develops, the reader is going to see how property rights have become so

* Leticia M. Diaz, Professor of Law, Dean, Barry University School of Law; J.D., Rutgers University School of Law, Newark (1994); Ph.D. (Organic Chemistry), Rutgers University, Newark (1988). Barry Hart Dubner, Professor of Law, Barry University, Andreas School of Law, Orlando, Florida; J.D., New York Law School; LL.M., University of Miami, School of Law; LL.M., New York University School of Law; J.S.D., New York University School of Law. The authors would like to thank and acknowledge their research assistant, Karen Greene, whose patience in researching, editing, preparing, and organizing the footnotes proved invaluable.

4. Id.
important due to the value of the cargo and ships taken both off the coast of Somal-
bia and in the Gulf of Aden, that human rights, the environment and the sovereign
ing state of at least one State, Somalia, has been trumped by such actions. In other
words, the reader will observe that property is far more important than human
rights and the environment. The question is whether certain U.N. Resolutions have
given the various navies authority to attack targets on land as well as ones in inter-
national waters or territorial seas.

The aforementioned article, which set forth Admiral Mullen’s comment, went
on to say that as of that day, there had been 95 acts of piracy committed in the Gulf
of Aden and the surrounding waters, 39 captured vessels, and 330 sailors from 25
nations who still remain hostage. If the Admiral’s remark was somewhat confus-
ing to those of us who thought we understood jurisdictional matters regarding sea
piracy, it was compounded by the fact that around the middle of November, the
Somali pirates captured a Saudi owned super tanker, VLCC (a very large crude
carrier) Sirius Star, owned by Saudi Aramco’s Tanker Arm, Vela, with about two
million barrels of crude oil aboard the ship. It was the largest ship ever hijacked.
It was hijacked off the Somali coast. The super tanker was a ship that measured 1,080
feet in length (which happens to be the length of an aircraft carrier). It had a 25-man
crew, including Croatian, British, Filipino, Polish, Saudi and American citizens.
Although in most cases ships and crews are freed after payment of ransom money, the
hijackings that have occurred could boost freight rates and insurance. Therefore,
some shipping companies are choosing to divert their ships around the Cape of
Good Hope rather than go through the Suez Canal; such a diversion could add as
many as ten to twenty days to their journeys, as well as increasing fuel costs.

Against this background, we will first look at statistics concerning piratical in-
cidents that have occurred during the past year in order to see the impact that they
are having on the world economy. It is also important to review the total scope of
piracy worldwide with regard to the number and type of incidents thereof, because
Somalia is not the only place in the world where piracy occurs. Thereafter, we will

---

5. Id.
6. Robert F. Worth, Pirates Seize Saudi Tanker off Kenya; Ship Called the Largest Ever Hijacked, N.Y.
7. Id.; see also, Barbara Surk & Tarek el-Tablawy, Daring pirates pull off coup: Seizing giant oil tanker,
Orlando Sentinel, Nov. 18, 2008, at A15.
8. Surk & el-Tablawy, supra note 8, at A15.
10. Id.
11. Id.
REPORT], available at http://omrpublic.iea.org/omrarchive/11dec08full.pdf; Jeffrey Gettleman, Pirates in Skiffs
in Skiffs].
13. IEA REPORT, supra note 12, at 40.
analyze the history of prescribing and enforcing a jurisdiction regarding the international law of sea piracy.

A. Background to “Somali” Piracy

1. The Problems Concerning Piratical Acts

Some of the important facts derived from the news in 2008 regarding the “Somali pirates” should be shown here; inter alia: the number of pirates; the type of vessels attacked; the amount of hijackings; the kidnapping of crews; the ransom demands; the hostages taken, have served to exacerbate the situation with regard to prescribing and enforcing jurisdiction. For example, it was reported on September 27th that pirates have more than 1,000 gunmen at their disposal.\(^{14}\) Mr. Mohamed, a Somali diplomat, said: “This is not a Somali problem. This is an international problem. Shipping across this entire region is imperiled by this.”\(^{15}\) Apparently, the Somali pirates “tend to hide their captured ships in isolated coves, ferrying people and cargo back and forth in dingies which are not exactly built for transporting forty ton pieces of solid steel equipment.”\(^{16}\) On September 28\(^{th}\) and 29\(^{th}\) it was reported that the Ukrainian vessel was taken toward Xarardheere and Hobyo which are isolated fishing villages that have thrived on organized crime and are frequently used as pirate hide-outs and places to keep seized ships.\(^{17}\) The pirates made it quite clear that they were not interested in the tanks aboard the Ukrainian vessel.\(^{18}\) They were interested in reward money or ransom.\(^{19}\) The Somali pirates freed the Ukrainian ship that was carrying tanks and other heavy weapons on Thursday, February 5, 2009 after receiving a $3.2 million ransom which was dropped by air into the water.\(^{20}\) The United States Navy watched the pirates get the money but did not act because the pirates were still holding 147 people from other crews that had been taken as hostages.\(^{21}\)

The piracy “industry” in Somalia started ten to fifteen years ago as a response to illegal fishing of tuna in Somalia waters by various States.\(^{22}\) These “fishermen” armed themselves and became piracy (vigilantes) by confronting illegal fishing boats and demanding that they pay a tax.\(^{23}\) Then the “fishermen” saw how easy it was to obtain ransoms and became greedy.\(^{24}\) Piracy in Somalia is a highly orga-


\(^{15}\) Id.

\(^{16}\) Id. (referring to the kidnapping of a Ukrainian vessel with tanks and other military equipment aboard).


\(^{19}\) Id.

\(^{20}\) Muhumed, supra note 2.

\(^{21}\) Id.

\(^{22}\) Id. [hereinafter, Pirates Tell Their Side].

\(^{23}\) Id.

\(^{24}\) Id.
nized, ransom-driven business. As far as the arms-laden Ukrainian ship is concerned, Somalia officials were quoted as saying that ‘a military operation has to be taken.’ . . . ‘If the Islamists get the arms,’ he said, referring to Islamist insurgents currently waging war on Somalia’s weak government, ‘they will cause problems for all of Somalia.’

Seventeen years ago, Somalia’s central government collapsed and clan warlords divided the country into fiefs, plunging the country into chaos which continues to the present. The fighting has intensified since December 2006 when Ethiopian troops invaded the country in order to rid Somalia of Islamic movements that controlled most of Somalia. The American military helped the Ethiopians hunt down the Islamic leaders because the Islamist leaders were harboring al Qaeda terrorists. As a result of the intensified conflict and a recent drought, more than three million Somalis – nearly half the population – need emergency food to survive. Most of this aid comes by ship, which poses a major problem because “Somalia’s 1,880-mile coastline is crawling with pirates.”

As far as the Ukrainian freighter is concerned, pirates asked for $20 million. The freighter was hijacked 200 miles from the coastline on September 25th and was carrying 33 T-72 tanks, 150 grenade launchers, 6 antiaircraft guns, and heaps of ammunition – including some made from depleted uranium. The Kenyan government claimed Kenya was the final destination of the armament, but some believe the arms may have been heading for Sudan. The ship was owned by an Israeli; the Ukrainians operated it; the crew consisted of seventeen Ukrainian sailors, two Russians, and one Latvian.

B. Somali Pirates and Their Hunting Grounds – The Nature and Extent of the Problem

Hunting grounds for the pirates comprise more than a million square miles. To be safe, merchant ships have to stay in a narrow corridor identified by U.S. Naval authorities. Of fifteen recent pirate attacks, ten took place outside these corridors. Most ships do not have heavy security.

25. Id. at A6.
26. Id. at A1.
27. Id. at A1.
28. Id. at A1.
29. Id. at A1.
30. Id. at A1.
31. Id. at A1.
34. Hijacked Arms Freighter, supra note 33, at A14.
36. Worth, supra note 6, at A6.
37. Id.; IMB ANNUAL REPORT 2008, supra note 1, at 23 (listing the co-ordinates of the corridor).
38. Worth, supra note 6, at A6.
The average ransom for a ship is now in the range of $500,000 to $2 million. In 2008, these sums went up from tens of thousands of dollars to hundreds of thousands, and even millions of dollars. The United Nations estimated the Somali pirates’ profits at $120 million in 2008. The question has been asked why bother paying at all? Why not just give the pirates the vessels? Apparently, ransoms are paid because they are low when compared to the values of the ships.

How do pirates get aboard such large ships? Pirates use ropes and ladders to climb the hulls, which are generally about thirty feet from water to the deck. On large ships with small crews – like the Saudi supertanker, Sirius Star, which had only a 25-member crew on a ship 1,080 feet long – pirates can often board the ship unnoticed. Pirates also use rocket propelled grenade launchers that punch holes on the side of the ships. An example of such an attack was made against a Japanese oil tanker in April, 2008. Oil can be spilled into the sea due to this type of attack, causing heavy environmental damage.

Apparently, pirates are now moving southward into the area of the Indian Ocean, thereby becoming more difficult and costly to patrol. Accidental deaths can occur due to over-anxious sailors. For example, the Indian Navy sank a Thai boat that had allegedly been seized by pirates. ‘This vessel was similar in description to the ‘mother vessel’ mentioned in various piracy bulletins. ‘Mother ships’ are defined as ocean going boats, often large fishing trawlers, that tow or carry speedboats.’ Faster, more nimble speed boats are deployed to attack and hijack commercial vessels, which are then held for ransom. On November 29, 2008, the Orlando Sentinel reported that when Somali pirates seized a chemical tanker, three security guards jumped into the sea and were rescued by a NATO helicopter gunship. There was a crew on board of twenty-five Indians and two Bangladeshis who were taken as hostage. It is important to note the fact that about twenty tankers sail through the international shipping lane daily.

39. Id.
40. Id.
41. Id.
44. Surk & el-Tablawy, *supra* note 8, at A15.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
The pirates seem to be getting bolder. Twenty speedboats filled with pirates launched a simultaneous attack off the coast of Yemen. All ships used evasive maneuvers to prevent boarding during a four-hour attack. According to the New York Times, October 2, 2008, the growing price to free a hijacked ship was between $1 million and $2 million. As of December 10, there were 102 ships attacked off of Somalia and in the Gulf region; forty hijackings; and, “piracy is now a real industry in Somalia. Whole clans are living off it.”

How can pirates in small boats stop a 30,000 ton ship? These ships are usually equipped with a cannon-long-range acoustic devise (or LRAD) that can cost up to $125,000 – which shoots sound waves that can be debilitating at 100 meters or 330 feet. However, pirates usually come at night in speedboats (too small and too fast to be picked up by radar.) Using grappling hooks over the railings and scampering up the sides, the whole process to board the ship takes about five minutes.

In November, 2008, two Chinese ships were hijacked – a fishing trawler and a cargo flying a Hong Kong flag and carrying wheat. “About 60% of China’s imported oil comes from the Middle East, and much of that passes through the Gulf of Aden, along with huge shipments of raw materials from Africa.” To help combat the sharp rise of increasingly brazen pirate attacks in the Gulf, the European Union deployed its first-ever naval mission in December, 2008, a six-ship flotilla. The Union’s operation, code-name Atalanta, joined other navies already patrolling there, including those from the United States, Russia, and India. The article went on to say that the U.N. Security Council passed a Resolution allowing hot pursuit and/or breach of Somalia’s 12-mile territorial sea and internal waters. The Resolution seemed to indicate that they could launch a ground attack against the pirates on Somali soil. (More on that later.) On December 17, 2008, it was also reported that pirates could be attacked on shore. However, the final wording of the Resolution narrowed the application of enforcement by requiring the express consent of Somalia’s government and saying that pirates should be pursued with an

---

56. Id.
57. Id.
58. Id.
61. Id.
62. Id.
63. Id.
64. Mark McDonald, China Seems Prepared to Join Antipirate Patrols, in Rare Move Beyond the Pacific, N.Y. TIMES, Dec. 18, 2008, at A6 [hereinafter, China Seems Prepared to Join Antipirate Patrols].
65. Id.
66. Id.
67. Id.
68. Id.
appropriate level of intensity. The U.N. decided not to send a force to Somalia. According to
CNN, by December 17, 2008, there were 20,000 oil tankers, freighters and merchant vessels that normally passed along the crucial shipping route each year. It pointed out that the U.N. Resolution authorized hot pursuit and coastal attacks on land. However, the Resolution does not state anything regarding enforcing jurisdiction on land.73

As stated earlier, about 60% of China’s imported oil is from the Middle East and most of that passes through the Gulf of Aden.74 The article on December 27, 2008 indicated that 110 ships have been attacked in the Gulf in 2008 and 42 were hijacked.75 Fourteen ships were still being held for ransom as of that day.76 Twelve hundred and sixty-five Chinese commercial vessels passed through the Gulf in 2008, seven of those were attacked.77 Pirates were still holding a Chinese fishing trawler and eighteen crew men as hostage. In response thereto, China sent two destroyers, equipped with guided missiles, a supply ship, special forces, and two helicopters into the region. By doing so, China made a strong showing of force as well as creating a naval presence in the area. The pirates made more than $30 million in 2008. Keep in mind that the Somali coastline is 1,880 miles. As an aside, one third of the world’s merchant sailors are from the Philippines. More than 100 Filipinos have been held by Somali pirates. Nearly 300 sailors in all are being held. As a final touch to end a rather “long” year of Somali incidents, a Greek ship escaped pirates by using fire hoses on January 1, thus, bringing in the New Year of 2009. The incidents of Somali piracy have resulted in higher insurance rates for shippers, higher fuel costs because of detours, new private security bills and million-dollar ransoms.

One of the problems that will be discussed concerning jurisdiction is the attitude of many Western diplomats who have stated that maritime law can be “as murky as the seas.” Several times during 2008, the Danish Navy captured men they suspected of being pirates only to dump them onshore after the Danish gov-

70. Id.
72. Id.
73. Id.
76. Id.
77. Id.
78. Id.
79. Id.
81. Id.
83. Id.
84. Id.
86. Pirates in Skiffs, supra note 6, at A6.
ernment decided that they did not have jurisdiction. The same article reported that it was unclear as to where pirates should be prosecuted. In fact, at a recent antipiracy conference, British officials outlined a plan to try to capture pirates and prosecute them in Kenyan courts. This plan was subsequently adopted.

C. On the Importance of Maritime Shipping and the Problems with “Choke Points”

In order to further our understanding of jurisdictional problems, it is best to give statistics on maritime shipping, in general, especially the shipment of oil. Contained in the United Nations General Assembly Report of the Secretary-General on the Oceans and the Law of the Sea is an excellent summary:

According to a recent UNCTAD publication, world seaborne trade (goods loaded) increased in 2006, reaching 7.4 billion tons. The world merchant fleet expanded to 1.04 billion deadweight tons (dwt) at the beginning of 2007, representing an 8.6-per cent increase over 2006, of which the highest growth was recorded for containerships. Total tonnage on order reached 6,908 vessels with a total tonnage of 302.7 million dwt. The estimated average age of the world fleet dropped marginally to 12 years in 2006. The oldest vessel type remains the general cargo vessel representing 56.8 per cent of all vessels more than 19 years old. It has an average age of 17.4 years. As regards fleet ownership, developing countries controlled about 31.2 per cent of the world dwt, developed countries about 65.9 per cent and economies in transition the remaining 2.9 per cent at the beginning of 2007. Between January 2006 and 2007, the foreign-flagged share for the first time since 1989 slightly decreased from 66.5 per cent to 66.3 per cent of the world total. The 10 major open and international registries account for 53.7 per cent of the world fleet. Of the remaining tonnage, 27.7 per cent is registered in developing countries, 18.9 per cent is registered in developed countries and 1.3 per cent in countries in transition.

In order to better understand the economics regarding oil shipments, one must keep in mind that there are “choke points,” narrow channels along widely used global sea routes. Due to the high volume of oil traded through their narrow

87. Id.
88. Id. at A14.
89. Id.
straits, they are critical to supplying global energy and security. Pertinent to our discussion is the Bab el-Mandab which connects the Arabian Sea with the Red Sea. In 2007, total world oil production amounted to approximately eighty-five million barrels per day and around one-half, or over forty-three million barrels per day of oil, were moved by tankers on fixed maritime routes. The international energy market is dependent upon reliable transport. So if a “choke point” is blocked, even temporarily, it can lead to increased energy cost. In addition, as it will be seen here, “choke points” leave oil tankers vulnerable to theft from pirates, terrorist attacks and political unrest in the form of wars or hostilities, as well as shipping accidents, which can lead to disastrous oil spills and injure the environment.

The two “choke points” that are important for the purpose of this article are the Suez Canal/Sumed pipeline which, at the narrowest point, is only 1,000 feet; and, Bab el-Mandab, which is eighteen miles wide, at its narrowest point. If either of these two “choke points” were shut off, it would be necessary to re-route around the southern tip of Africa (the Cape of Good Hope) which would mean an additional 6,000 miles in both cases. In the case of Bab el-Mandab, northbound traffic can use the East-West oil pipeline through Saudi Arabia. There is no such outlet for the Suez Canal “choke point.”

Having given an overview of the problems created by the Somali pirates and the extent to which the nations of the world are affected by these acts, we now turn to the jurisdictional evolution of international sea piracy. In order to understand the jurisdictional issues, it is first essential to be aware of certain international law of the sea concepts.

II. JURISDICTIONAL ANALYSIS OF LAW OF THE SEA CONCEPTS

The crime of “piracy” means different things to different people. As an introductory statement, it could be said that “piracy” is an act of violence, depredation or detention committed for private ends, delegated to the high seas and committed by one private ship against another ship. The 1982 United Nations Convention

93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
99. Id.
100. Id.
101. Id.
102. Id.
on the Law of the Sea ("UNCLOS") took effect in November, 1994, and 159 nations have ratified it as of July 20, 2009. The UNCLOS’s draft established a framework within which to codify existing customary law, in part, as well as to create new principles for civilized nations. During the course of this article, there are law of the sea terms that need to be understood by the reader. The following is a schematic diagram which has been drawn for the purposes of introductory analysis:


A. Jurisdiction Concepts Regarding Laws of Sea

The coastal State exercises the utmost jurisdiction over its land territory. Every coastal State has a baseline, be it straight or mean average water line, which is used to measure the diminishing jurisdiction of the coastal state as one moves seaward. The coastal State exercises exclusive jurisdiction over its ports and harbors (with possible access to visiting ships). As one moves seaward from the baseline, the State exercises almost total jurisdiction over its territorial sea, except for the doctrine of innocent passage, which is measured twelve miles.

106. Id. at 11.

107. Id. The 1982 Convention defines “baseline” as follows: “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.” 1982 Convention, supra note 103, at art. 5

108. Dubner, supra note 103, at 11.

109. Id.

110. Id. Articles 3 and 4 of the 1982 Convention define the “territorial sea.” “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.” 1982 Convention, supra note 103, at art. 3. “The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.” Id. at art. 4.

111. Dubner, supra note 103, at 11. “Innocent passage” is defined by the 1982 Convention as follows:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
   a. any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   b. any exercise or practice with weapons of any kind;
   c. any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
   d. any act of propaganda aimed at affecting the defense or security of the coastal State;
   e. the launching, landing or taking on board of any aircraft;
   f. the launching, landing or taking on board of any military device;
   g. the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
   h. any act of willful and serious pollution contrary to this Convention;
   i. any fishing activities;
   j. the carrying out of research or survey activities;
   k. any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
   l. any other activity not having a direct bearing on passage.

1982 Convention, supra note 103, at art. 19.
seaward from its baseline. The State’s jurisdiction diminishes further when the continuous zone, which extends twelve miles beyond the territorial waters, reaches the high seas. The continuous zone gives a limited area to jurisdiction of the coastal State (e.g., navigation, sanitation, customs, fiscal) and is actually part of the high seas. The high seas are open to all nations and therefore the coastal State is not allowed to exercise its jurisdiction in this area (with limited exceptions, e.g., the exclusive economic zone).

112. Dubner, supra note 103, at 11.
113. Id. “Contiguous zone” is defined by the 1982 Convention as follows:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
   a. Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
   b. Punish infringement of the above laws and regulations committed within its territory or territorial sea;

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

1982 Convention, supra note 103, at art. 33.
114. Dubner, supra note 103, at 11.
115. Dubner, supra note 103, at 11-12. “Exclusive economic zone” is defined as follows: “The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.” 1982 Convention, supra note 103, at art. 55. Article 56 of the 1982 Convention governs the rights, jurisdiction and duties of the coastal State in the exclusive economic zone:

1. In the exclusive economic zone, the coastal State has:
   a. sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   b. jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      i. The establishment and use of artificial islands, installations and structures;
      ii. Marine scientific research;
      iii. The protection and preservation of the marine environment;
   c. other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

Id. at art. 56. Finally, the 1982 Convention defines the breadth of the exclusive economic zone. “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.” Id at art. 57.
116. Dubner, supra note 103, at 12.
Historically, the high seas have traditionally been open to all nations for the purpose of preserving international shipping and commerce. However, this “freedom of the high seas” did not always exist. In 1494, for example, the Pope, believing incorrectly at that time that Columbus had found the western sea route to Asia, divided the world between the two contending maritime nations by drawing a line through the middle of the Atlantic Ocean. “His ruling, agreed to in the treaty of Tordesillas, assigned all lands 370 leagues (about 1,000 miles of the 75 miles) west of the Cape Verde Islands to Spain, and all land to the east, to Portugal.”

The freedom of the seas doctrine was first espoused by the writings of Grotius in the early 1600s. He believed that the ocean was too vast and too rich in resources for any one nation to have control over its entire length and width. Since that time, the allowing of free maritime commerce and transport in international straits has been one of the hallmarks of the international community. International straits are preserved for international commerce and are open to all nations. At the heart of all major maritime conventions and concerns is the concept that international commerce should not be interrupted by maritime violence (e.g.,

---

117. Id.
119. Id. at 8.
121. Id. at 8.
122. The 1982 Convention governs the legal status of waters forming straits used for international purposes:

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or in the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

1982 Convention, supra note 103, at art. 34. Articles 37 and 38 of the 1982 Convention apply to transit passage for international purposes. Article 37 limits transit passage to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” Id. at art. 37. Article 38 then defines the right of transit passage as follows:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

Id. at art. 38.
piracy and terrorism). In other words, commerce must be able to flow freely, uninhibited, without danger to life and limb, and without the fear of shipping causing widespread environmental contamination.

In order to be cognizant of the political dilemmas that certain countries such as Denmark and the United States (recall Admiral Mullen’s comments) believe they are confronted with, it is necessary to examine the historical background of maritime violence in order to have a sufficient understanding of the jurisdictional problems. The authors will start by defining piracy under treaty law.

III. DEFINITION OF PIRACY, TERRORISM, AND MARITIME VIOLENCE

A. Definitions

“Piracy” as defined in both the 1958 Geneva Convention on the High Seas and UNCLOS were the same crime committed on high seas, as follows:

Article 101 Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102 Piracy by warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103 definition of a pirate ship or aircraft
A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the person guilty of that act.

Article 104 Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 105 Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106 Liability for seizure without adequate grounds

Where seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.124

Prior thereto, the 1958 Geneva Convention on the High Seas defined “piracy” as follows:

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State
which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.  

There was no change in the conventional definitions of “pirates” from 1958 through 1982. Before explaining why there was no change and why the crime of piracy took place on high seas rather than in territorial waters, it is first necessary to look at another definition.

The ICC International Maritime Bureau (IMB) is a specialized division of the International Chamber of Commerce (ICC). The IMB is a non-profit organization which was established in 1981 to gather material and act as a focal point in the fight against all types of maritime crime and malpractice. Their definition of piracy is: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.” This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor, or at sea. Petty thefts are excluded unless the thieves are armed.

The above definition has been adopted by the IMB as the majority of attacks against ships take place within the jurisdictions of States and piracy as defined under UNCLOS does not address this aspect.

The IMB noted that the International Maritime Organization (IMO) at its 74th meeting of MSC addressed this matter in the draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (MSC/Circ./984) article (2.2) (“The Code of Practice”).

The Code of Practice defines “Piracy” and “Armed Robbery against Ships” as follows:


ARTICLE 101

Definition of Piracy consists of any of the following acts:

a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

“Armed Robbery against Ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy,” directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences.”

The above definitions now cover actual or attempted attacks whether the ship is berthed, at anchor, or at sea.

The reader will know right away that IMB’s definition is given “for statistical purposes” and defines Piracy and Armed Robbery in such a way that the definition covers actual or attempted attacks in any water, be it internal, territorial or high seas. Again, this is only for statistical purposes. This is not a treaty signed onto by a consensus of the international community. However, the statistics are very important to any discussion of maritime violence and are so noted.

B. The Harvard Draft

In order to understand why certain states are having difficulty understanding jurisdictional concepts concerning the crime of piracy, it is necessary to look back and see why the articles at the 1958 Convention were originally drafted. Both the 1958 and 1982 definitions of piracy (again, both are identical) are based on the Harvard Research Draft (“Harvard Draft”), which was prepared in 1932 for the purposes of “expediency.” The study itself was extremely comprehensive and has been used and cited in different texts. In 1932, the drafters of the study were presented with a main question: “What initial significance does piracy have in the
In order to find the intents of the drafters, we have selected a few excerpts from the Harvard Draft (a) to demonstrate the thinking of its drafters; and (b) to show their diverse opinions about what the contents of a convention should contain and why. You will observe that many of their comments, and those of the commentaries quoted by them, are applicable to the situation today in Somalia and other areas of the world.

Why was the definition of piracy limited to the high seas? Because the crime of piracy interfered with international shipping on the high seas. It was thought that if the piracy occurred in territorial or internal waters of the coastal State, the coastal State could (and would want to) resolve the situation by prescribing and enforcing its own municipal legislation on sea piracy. There was a disagreement over whether piracy was “an international crime.” The question at that time was “how would we treat the problem of piracy today in the light of the possibility of an international agreement for suppression?” At the time, there was a “modern orthodox view” that the law of nations is a law between States only, and limits their respect of jurisdictions. Since there was no “super-government and no international tribunal to administer international civil or criminal justice against private persons,” and since there was “no provision in the laws of many states for punishing foreigners which political offence was committed outside the state’s ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation will give those terms.”

Proceeding with the discussion regarding any “norms” regarding law of international sea piracy, it is necessary to first set forth statistics regarding this crime so that the readers can understand the true nature of the acts of piracy, where they occur and what is being done by other States to handle the situation.

The IMB reported that there were 293 incidents of piracy during the year 2008. This is more than an 11% increase on 2007, which is attributed to the unprecedented number of attacks in the Gulf of Aden. The number of attacks has increased from the years 2006 and 2007 where there were a total of 239 and 263 incidents reported respectively.

Not only did 2008 see an unprecedented number of attacks in the Gulf of Aden, it also saw the largest tanker ever hijacked, and successful attacks carried out at greater distances from land, along the east coast of Africa, than ever before. Every attack off Somalia is aimed at hijacking a vessel; hence every attempted
attack is a failed hijacking rather than a simple act of robbery.\textsuperscript{149} All types of vessels, with varying freeboards and speeds have been targeted and attacked.\textsuperscript{150} Looking at the number worldwide in 2008, there were a total of forty-nine vessels hijacked, 889 crew taken hostage and forty-six vessels reported being fired upon.\textsuperscript{151} These are the highest numbers ever recorded by the Piracy Reporting Center.\textsuperscript{152} Thirty-two crew members were injured: eleven killed and twenty-one missing, presumed dead.\textsuperscript{153} The nature of the attacks indicates that the pirates are better armed and prepared to assault and injure the usually unarmed crew.\textsuperscript{154} The total incidents in which guns have been used are 139, up from seventy-two in 2007.\textsuperscript{155} Of the 293 worldwide incidents, 111 occurred off the east coast of Somalia or in the Gulf of Aden, an increase of nearly 200\% over 2007.\textsuperscript{156} A total of forty-two vessels were hijacked by Somali pirates and 815 crew taken hostage.\textsuperscript{157} As of December 31, 2008, Somali pirates were holding thirteen vessels for ransom and 242 hostage.\textsuperscript{158} The attacks picked up in September with nineteen attacks.\textsuperscript{159} In October and November there were fifteen and sixteen attacks respectively.\textsuperscript{160} During the first six months of 2009, worldwide piracy attacks numbered 240, more than double the 114 attacks for the same period in 2008.\textsuperscript{161} The rise in numbers is due almost entirely to increased Somali pirate activity off the Gulf of Aden and east coast of Somalia, which accounted for 130 of the 240 attacks.\textsuperscript{162}

One of the trends that the IMB also points out is the increased ability of Somali pirates to go out further to sea than before.\textsuperscript{163} This range, coupled with the inability of the Somali government to respond, encourage the pirates further.\textsuperscript{164} Currently, the reward to risk ratio for the Somali pirates is so large that only robust measures by international governments and navies will enable the safety and security of this major trade route to be restored.\textsuperscript{165} According to the IMB, Nigeria has the second highest number of serious attacks and is viewed as another high-risk area.\textsuperscript{166} The main difference between East and West African piracy is that almost all the incidents in Nigeria are conducted within their territorial waters whereas most of the incidents along the East coast of Africa and the Gulf of Aden occur on the high

\begin{thebibliography}{99}
\bibitem{149} Id.
\bibitem{150} Id.
\bibitem{151} Id.
\bibitem{152} Id.
\bibitem{153} IMB \textit{Annual Report} 2008, \textit{supra} note 1, at 26.
\bibitem{154} Id.
\bibitem{155} Id.
\bibitem{156} Id.
\bibitem{157} Id.
\bibitem{158} Id.
\bibitem{159} Id.
\bibitem{160} Id.
\bibitem{162} Id.
\bibitem{163} IMB \textit{Annual Report} 2008, \textit{supra} note 1, at 26.
\bibitem{164} Id.
\bibitem{165} Id.
\bibitem{166} Id.
\end{thebibliography}
Somalia’s attacks are completely financially motivated, while Nigeria’s attacks are at least partly political. There have been forty confirmed incidents in Nigeria reported via the masters, owners and other risk intelligence gathering organizations. There are also approximately 100 unconfirmed incidents. Of the forty confirmed attacks, twenty-seven vessels have been boarded and five hijacked. Nigeria has the highest number of crew being kidnapped (thirty-nine). Many of the incidents go unreported as owners do not like to see their insurance rates go any higher than they are. The attacks in the Niger delta and the kidnappings are targeted against the oil industry and reportedly for political change. Of course, from the shipping industry’s point of view, these attacks are criminal; seventeen of the incidents were against tankers, seven on supply ships and the remaining on bulk carriers, general cargo ships and container ships. The incidents in Nigeria are often quite violent and the crews are frequently injured and kidnapped. Even ships provided with escort protection and armed security guards are still prey to the dedicated pirates. On the other hand, there are areas where there have been declines in these incidents of piracy. Indonesia is an example. Indonesia reported only twenty-eight, mostly opportunistic, attacks in 2008, down from a 2003 high of 121. The Malacca Strait has seen a further reduction in number of incidents reported with only two reported in 2008 as compared to seven in 2007. Incidents in the Singapore Strait are, however, up from three in 2007 to six in 2008. Malaysia has also seen a slight increase in the number of incidents with three vessels being hijacked and seven boarded as compared to nine boarded in 2007. The reduction on acts of piracy in the Indonesia, Strait of Malacca, areas is due to regional ship controls, increased vigilance and patrolling by the littoral States and the precautionary measures taken on boarded ships. We can only assume that with the world economy being in the State that it is at the time of the writing of this article, there is a strong possibility of various acts of piracy increasing. The number of attacks, and the value of the property involved, has brought a sense of outrage from the ship owners with a degree of response from the States affected thereby.

167. Id.
168. Id.
169. Id.
170. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
180. Id.
181. Id.
182. Id.
183. Id. at 27.
C. The Outrage of the Ship Owners over Property Losses

As the reader has observed, there has been an enormous increase ("unprecedented") in the number of piracy attacks in Somalia/Gulf of Aden. One of the surprising events that have occurred in connection with the attacks by the Somali pirates is that the violence attached to these attacks is unprecedented; the number of crew men hijacked; and, the amount of ransom demanded by the pirates is totally unprecedented in history. Also, all one need do is look at the size of the vessels that the pirates have attacked and one will see size does not matter in this situation. As stated previously in this article, there was a Saudi VLCC oil tanker hijacked and held for ransom as well as a bulk carrier weighing 74,000 tons, the largest bulk carrier ever hijacked. The main problem, however is that according to the IMB, navies are facing restrictions when dealing with the pirates. It is apparently unclear how a naval vessel should proceed if it intervenes and takes pirate prisoners, rather than killing them. According to the IMB, there have been very few flag states and only one neighboring country in the region, which has accepted prisoners for investigation and prosecution. Naval vessels will understandably hesitate to intervene once hijackers have taken over a vessel and are holding crew hostage. Concern of the safety of the hostages may preclude on the intervention except in exceptional circumstances.

The naval units of various governments have been deployed in this area recently. They could certainly deploy in the high seas areas without any Resolution by the Security Council and without the approval of the government of Somalia. Mother vessels could be attacked if found and suspected pirates could have their weapons confiscated and their movements closely tracked as a deterrent. The international shipping industry points out that pirates are now attacking ships on a daily basis with machine guns and rocket propelled grenades and have over 200 to 300 seafarers hostage. They are operating with impunity while governments stand idly by. They point out that if civilian aircrafts were being hijacked on a daily basis the response of governments would be very different. They also state that ships, which are the life blood of the global community, are seemingly “out of sight” and therefore “out of mind.” It shows an indifference to the lives of the merchant seafarers as well as an indifference to the consequences for society at large, which is unacceptable. The shipping industry is also shocked that the world’s leading nations, with the naval resources at their disposal, are unable to

---

184. Id. at 26.
185. Worth, supra note 6, at A6.
187. Id.
188. Id.
189. Id. at 33.
190. IMB REPORT FOR 2008 THROUGH SEPTEMBER, supra note 186, at 35.
191. Id.
192. Id.
193. Id.
maintain the security of one of the world’s most strategically important seaways, like the one from Europe to Asia via the Red Sea/Suez Canal. The shipping industry has spent billions of dollars since 9/11 to comply with stringent new security requirements agreed by the international community in order to address concerns about terrorism. Yet, when merchant ships – which carry 90% of the world trade and keep the world economy moving – are subject to attack by pirates, the response of many governments is that it is not their problem and the shipping companies should hire mercenaries. The arming of merchant ships will almost certainly put the lives of the ships’ crew in even greater danger and is likely to escalate the level of violence employed by the pirates. It would also be illegal under the national law of many ships’ flag states and many other countries with whom they are trading. Thus, the shipping industry requested that the various nations send in their navies and protect merchant vessels. The navies must try to bring the pirates to justice in a court of law. The pirates should not be allowed to resume their piratical activities because of the international community’s unwillingness to take the necessary action. If merchant vessels are forced to redirect their ships via the Cape of Good Hope, this would add several weeks to the duration of many ships’ voyages and would have severe consequences for international trade, the maintenance of inventories and the price of fuel and raw materials. It would also affect not just those countries to which cargos are destined but all other sea born trade, a consequence that, in the current economic climate, must surely be avoided. It cannot escape notice that the supply of consumer goods – the majority of which are carried via this vital sea line – could also be seriously affected.

One wonders where the voice of the shipping industry disappeared to when the Vietnamese refugees were raped and murdered by Thai fishermen many years ago. According to P.W. Birnie, “from 1980-85 the UNHCR received reports that overall 13,076 had been killed, 2,283 women raped and 592 kidnapped by Thai fishermen.” According to piracy statistics based on refugee reports in 1981, for example, 571 rapes occurred; in 1982, 176; in 1983, 95; in 1984, 68; in 1985, 67; in 1986, 58; in 1987, 67; etc. In contrast, the European Union Anti Piracy Operation off the coast of Somalia (named Operation Atalanta) was started on September 12, 2008. The Operation was established in support of the UN Security
Council Resolutions 1814, 1816, 1838 and 1846 (2008).\textsuperscript{207} Its tasks are to (a) protect vessels of the World Food Programme delivering food aid to displaced persons in Somalia; (b) the protection of vulnerable vessels cruising off the Somali coast; and (c) the deterrence prevention and repression of acts of piracy and armed robbery off the Somali coast.\textsuperscript{208} The Operation was originally intended to last for twelve months,\textsuperscript{209} but appears to have been extended indefinitely.\textsuperscript{210}

In addition, China and Iran also sent destroyers and supply ships in order to join the anti piracy patrols off Somalia.\textsuperscript{211} Japan and South Korea were also sending warships to join the missions.\textsuperscript{212}

More surprisingly, the United Nations Security Council authorized nations to conduct land attacks on pirate bases in Somalia.\textsuperscript{215} Then U.S. Secretary of State, Condoleezza Rice, hailed the adoption saying it sent a “strong signal to combat the scourge of piracy and the need to end the impunity of Somali pirates.”\textsuperscript{214} Rice also said that the Resolution will have a significant impact since “pirates are adapting to the naval presence by traveling further into the sea not guarded by warships sent by the United States and other countries.”\textsuperscript{215} Resolution 1851 authorized the States to “take all necessary measures that are appropriate in Somalia” to suppress “acts of piracy and armed robbery at sea.”\textsuperscript{216} Who would bear the cost? The French container carrier CMA CGM will impose a $23.00 per TEU\textsuperscript{217} surcharge for all containers on board ships that are transported through the pirate infested Gulf of Aden which started January 1, 2009.\textsuperscript{218} In addition, the ACC accepted the demand to double pay the crews on board ships that transit through the Gulf of Aden.\textsuperscript{219} Naturally, as the global recession picks up steam, there should be more pirates and illegal activities taking place off of the coast of Somalia and other strategic commercial areas such as the Malacca Strait.\textsuperscript{220} According to a newspaper article from February 3, 2009, the nation’s maritime academies are offering more training to merchant seamen on how to fend off attacks from pirates armed not with cutlasses and flintlocks but automatic weapons and grenade launchers.\textsuperscript{221} Seamen are taught...
to fishtail the vessels at high speed and to drive off intruders with high pressure hoses as well as illuminating the flood lights on their own decks.  

D. The Potential for Environmental Violence

The pirates have demonstrated adaptability to changing circumstances and flexibility in adapting new methods as necessary to achieve their financial objectives. Experts have predicted that ships carrying oil, gas and other environmentally treacherous chemicals are now targeted by terrorists who could sail these ships into a major port and intentionally explode them, echoing the destruction of September 11, 2001. Given their primarily financial motive, pirates will undoubtedly soon seize these ships, holding the environment hostage, for the purpose of seeking a handsome reward in exchange for release of these caustic chemicals. A piratical attack on a ship carrying caustic chemicals could inadvertently cause a chemical spill wreaking havoc on the surrounding ecosystem. The likelihood of such a catastrophic occurrence is a bona fide disaster waiting to happen. However, the odds are increased if piratical acts involving the environment move from inadvertence to intentional. Rather than utilizing conventional techniques such as the kidnapping and ransoming of ship captains and crew members, why not kidnap the root of the world’s food chain – the environment? This refined form of piracy is a calamity in the making, given that many targets could be chemical carriers or ships loaded with nuclear supplies.  

How much of a ransom would be conveyed, and who would pay the ransom, when more than one State could be affected? If the coastal State is not the only one affected, the other States should have the power to act with a degree of urgency even if outside its jurisdictional bounds. Environmental concerns related to piracy have raised the level of unease among nations, who unfortunately lack a uniform international mechanism to attack such a problem. As stated, supra, coastal
States bear the burden of preventing damages to their environments. However, damage to the environment is not always restricted to the waters of the coastal States, and the impact is usually a global one. Oceanic life tainted with chemicals in one part of the world could easily find its way to a dinner plate thousands of miles away.226

For this reason, it is time to implement the concept articulated in the Harvard Draft of 1932, of allowing “hot pursuit” of pirate ships from high seas into territorial waters in certain instances.227 As the comment to section 7 of the Harvard Draft discusses, hot pursuit will “prevent the escape of culprits who seek to elude pursuers by entering territorial waters and who could not be captured lawfully by a foreign pursuer were it not for the license of” the doctrine of hot pursuit.228 In the instance of imminent environmental damage, the hot pursuit doctrine is of the utmost import. Hot pursuit could prevent an ecological disaster prior to its occurrence. As seen with the Exxon Valdez Oil spill, the clean up and recovery of an environmental injury to oceanic life is not always completely possible. Although waters have been cleaned, they will never again reclaim their pristine condition.229 An environmental disaster as a result of piracy must be prevented at all costs. Sovereignty should not trump environmental sustainability.

IV. ON THE HISTORICAL PERSPECTIVES OF ENFORCING PIRACY LAWS – WERE THERE “NORMS” REGARDING THE LAW OF INTERNATIONAL SEA PIRACY?230

The only “norm” that was demonstrated by the Harvard Draft was the fact that a “diversity of opinion” existed in 1932231 that was “especially remarkable with respect to the following fundamental matters”:

1) The definition of piracy in the sense of the law of nations.

2) The meaning and justification of the traditional assertions that piracy is an offence or a crime against the law of nations.


228. Id.

229. The clean-up of the 11 million gallons of crude oil spilled into the formerly pristine Prince William Sound by the Exxon Valdez in 1989 illustrates this point perfectly. Bryan Walsh, Still Digging Up Exxon Valdez Oil, 20 Years Later, Time (June 4, 2009), available at http://www.time.com/time/health/article/0,8599,1902333,00.html. Although the sound has made a “remarkable turnaround” since the day of the spill, and the coast is now clear and clean it is not pristine. Id. Oil is still present in the sand and the animal populations in the region have not yet rebounded fully. Id.

230. See also the previous discussion of these issues in Dubner, supra note 103, at, 31-33.

(3) The common jurisdiction of all states to prosecute and punish pirates. 232

The Harvard Draft explained that there was the “modern orthodox” view as well as other views on the “nature and scope of the law of nations.” 233 The orthodox view provided that:

The law of nations is a law between states only, and limits the respective jurisdictions. Private individuals are not legal persons under the law of nations. The rights, duties, privileges, and powers which it defines are only those of states. There is no legal universal society of private persons regulated by international law. 234

Under the orthodox view, then:

Pirates are not criminals by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offence was committed outside the state’s ordinary jurisdiction; [therefore,] it cannot be truly said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation would give those terms. 235

To the contrary, those with “unorthodox” views would conclude that:

the law of nations is like municipal law except that it has no international governmental agencies to enforce it. These jurists conceive of the civilized states of the world as members of a veritable legal community, all subject to the authority of a definite legal order. Some speak of a citizenship of private individuals in this world community, and of international law as the law of a super-society. Some maintain that there are international law crimes, although because the international community is backward in organization, there are no agencies except those of individual states to punish offenders. Some of these jurists argue that there should be an international tribunal of justice before which private individuals might prosecute their claims against states and private individuals might be prosecuted for crimes against the international community. They would classify piracy as such a crime. Indeed one jurist whose fundamental views on international law are otherwise orthodox, M. Pella of Romania, considers piracy a prototype to which should be assimilated in time all crimes universally recog-
nized as offenses against society. The perpetrators of such crimes, he says, should be punished by any state which seizes them, pending the establishment of an international court of criminal justice.\textsuperscript{236}

The upshot of all this is that by 1932:

[p]iracy lost its great importance in the law of nations before the modern principles of finely discriminated state jurisdictions and... freedom of the seas became thoroughly established. Indeed, the former prevalence of piracy may be assigned as a principal cause of the old reluctance of states to accept the doctrine of the freedom of the seas. Formerly naval powers bought pirates with little regard for the sort of problems which would trouble our modern world of intense commerce and strongly asserted national claims of numerous states, and with an acquiescence of the commercial interests which needed protection against those dangerous common enemies...\textsuperscript{237}

V. ON ADDRESSING THREATS OF PIRACY IN THE SOMALI/GULF OF ADEN REGION

The United Nations General Assembly each year publishes the Report of the Secretary-General on Oceans and the law of the sea. It usually comes out in March or April and there are appendices later added to the Report(s).\textsuperscript{238} Last year, 2008, it was pointed out in this report that according to UNCLOS, all States have an obligation to cooperate to the fullest possible extent in the repression of piracy (Article 100) and have universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the pirates and seize the property on board (Article 105).\textsuperscript{239} Those provisions also apply in the exclusive economic zone (Article 58) (2)).\textsuperscript{240}

Concerning acts of piracy/armed robbery against ships committed in the internal waters or territorial sea of a littoral State, the primary responsibility falls on the coastal State.\textsuperscript{241} Why? Because piracy/armed robbery against ships also constitutes an offense under the 1988 Convention for the Suppression of Unlawful Acts

\textsuperscript{236} Id. at 752.
\textsuperscript{237} Id. at 764-65.
\textsuperscript{238} The annual reports from 1994 to the present, along with their addendices, are available on the website of the United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.
\textsuperscript{239} The Secretary-General, Report of the Secretary-General on Oceans and the law of the sea, ¶ 57, delivered to the General Assembly, U.N. Doc. A/63/63 (Mar. 10, 2008).
\textsuperscript{240} Id.
\textsuperscript{241} Id.
Against the Safety of Maritime Navigation ("SUA Convention") and in some cases the 2000 United Nations Convention Against Transnational Organized Crime.\textsuperscript{242} By Resolution 1816 adopted on June 2, 2008, the Security Council authorized nations to attack pirates in territorial and internal waters of Somalia.\textsuperscript{243} The Transitional Federal Government (TFG) gave its permission for many reasons including the deplorable recent incidents of attacks upon, and the hijacking of, vessels in the territorial waters and on the high seas off the coast of Somalia.\textsuperscript{244} There had been attacks upon, and the hijacking of, vessels operated by the World Food Programme and numerous commercial vessels.\textsuperscript{245} These attacks created a serious adverse impact on the prompt, safe and effective delivery of food aid and all humanitarian assistance to the people of Somalia including the grave dangers they represented to vessels, crews, passengers and cargo.\textsuperscript{246} The Secretary-General noted that the IMO, on July 5, 2007, and again on September 18, 2007, sent letters to the Secretary General regarding the piracy problems that the IMO Assembly Resolution A.1002 (25), which strongly urged governments to increase their efforts to suppress and prevent piracy, also was in effect.\textsuperscript{247} It also noted that the Transitional Federal Government of Somalia needed and requested international assistance to address the problem on the high seas, but also in the territorial waters as well.\textsuperscript{248} The Resolution gives various States the right to enter into territorial waters of Somalia in a manner consistent with such action permitted on the high seas;\textsuperscript{249} this authorization applies only to the situation in Somalia and not to other member States under international law and it shall not be considered as establishing customary international law.\textsuperscript{250} The idea is to protect international shipping, the food program and the international law regarding human rights law, as well.\textsuperscript{251} In addition, Resolution no. 1851, adopted by the Security Council on December 16, 2008, concerned the lack of capacity, domestic legislation and clarity about how to dispose of pirates after they are captured.\textsuperscript{252} This lack in turn, has hindered more robust international action against the pirates off the coast of Somalia and, in some cases led to pirates being released without facing justice (e.g., Denmark dropping pirates off on a beach).\textsuperscript{253} Resolution 1851 reiterated that the 1988 SUA Convention created criminal offenses, established jurisdiction and accepted delivery of persons responsible for, or suspected of, seizing or exercising control over a ship by force or threat and included any other form of intimidation.\textsuperscript{254} It also called on

\begin{itemize}
\item \textsuperscript{242} Id.
\item \textsuperscript{244} Id. at 2.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at ¶ 7(a).
\item \textsuperscript{250} Id. at ¶ 9 (emphasis added).
\item \textsuperscript{251} Id. at 2, ¶ 11.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Pirates in Skiffs, supra note 6, at A6.
\end{itemize}
nations to enter into special agreements or arrangements with other nations willing to take custody of pirates.\textsuperscript{256} This was resolved so that enforcement officials ("shipriders") from the affected countries, in particular, countries in the region, could facilitate the investigation and prosecution of persons detained as a result of operations, conducted under this Resolution, for acts of piracy and armed robbery at sea off the coast of Somalia.\textsuperscript{257} The resolution does require the advance consent of the TFG prior to any action in Somali territorial waters.\textsuperscript{258} States are to establish an international cooperation mechanism so as to have a common point of contact between and among States, regional and international organizations.\textsuperscript{259} States are also encouraged to consider creating a center in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with the systems of UNODC, to arrange effective shiprider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention Against Transnational Organized Crime and other relevant instruments to which States in the region are party in order to effectively investigate and prosecute piracy and armed robbery at sea offenses.\textsuperscript{260} All of these matters should be conducted with regard to applicable international humanitarian and human rights laws.\textsuperscript{261} A further Security Council Resolution stated, \textit{inter alia}, that the arms embargo on Somalia does not apply to weapons, military equipment, technical training and assistance intended solely for support or abuse by the African Union Mission in Somalia and also supplies and technical assistance by the States intended solely for the purpose of helping develop security institutions, etc.\textsuperscript{262}

The reader will observe the evolution of piracy from earlier centuries, where there was an act of one private ship attacking another on the high seas, has evolved into a major industry. We have gone from a state of having the Harvard Draft suggesting that enforcement should be permitted in territorial waters and internal waters (which was not adopted at any of the two prior Conventions) to a state of permitting, by virtue of Security Council resolutions, navies to interdict and attack pirates in territorial waters, internal waters, and on land, all under the guise of protecting shipping, oil supplies, humanitarian supplies to the Somalis and hopefully to protect the environment from oil tankers being ruptured and destroying fragile ecosystems. The Security Council reminded all of us that none of these Resolutions shall become customary international law, that the necessity of protecting shipping and crews trumped the sovereignty of a nation when commercial passage was undergoing severe trauma. The pirates argued that their fishing grounds have been decimated by foreign fishing vessels and that they had to resort to these acts

\textsuperscript{256} \textit{Id.} at \textsuperscript{¶} 3.
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.} at \textsuperscript{¶} 4.
\textsuperscript{260} \textit{Id.} at \textsuperscript{¶} 5.
\textsuperscript{261} \textit{Id.} at \textsuperscript{¶} 6.
of violence in order to make a living. At least one other author has suggested that these piratical acts are acts of terrorism as well as piracy. Our understanding of terrorism is basically that it is an act done for “political” as opposed to “private” ends. Certainly if terrorist groups were to attack merchant ships at “choke points” and elsewhere, they would definitely be considered terrorists. But we think a fair reading of the source material on the subject seems to indicate that these pirates are well organized and have the criminal intent to rob. They are not conducting their acts of piracy for political ends. In fact, if anything, terrorists would want to lure the merchant ships closer to their coast so that they could attack and cause huge explosions and blow up vessels, which is more in line with terrorism. Pirates are interested in ransom money and nothing else. However, there is nothing to prevent pirates joining forces with terrorists and vice versa.

VI. CONCLUSION

The Security Council Resolutions that have been mentioned couched the intrusion into territorial, internal waters and land, by expressing concern for human rights so that food shipments would not be blockaded and hijacked by Somali pirates. Are human rights and the environment more important than the sovereign rights of a State? In our particular situation, this was not a call that had to be made because the temporary government of Somalia granted permission for foreign navies to intercede against the pirates. The more interesting question is what if there were no Security Council Resolutions? Could not one argue that piracy is a crime against mankind? The Harvard Draft stated, in part, because there was no international criminal court (in 1932) to prosecute a crime of piracy, it should not be considered a crime against mankind for treaty (or “expediency”) purposes. However, according to the information supplied by the Harvard Draft, piracy was always considered a crime against mankind and States could punish pirates even if the States had not enacted municipal legislation against the crime of piracy. As one author pointed out:

The Vienna Declaration and the regional declarations reiterated that human rights – civil and political, as well as economic, social and cultural – should be implemented simultaneously, and that neither set of rights (primarily from Asia,) had to do with “private” rights.

All states are willing to accept the universality of a certain core group of rights. These are the rights that are listed in the human rights treaties as “non-derogable” rights or are considered jus cogens.

263. Pirates Tell Their Side, supra note 18, at A6. See also Johann Hari, You are being lied to about pirates, 50 SYNTHESIS/GENERATION 47, Sept. 22, 2009.
The major distinguishing feature of such rules [of *jus cogens*] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy . . .

Other rules probably have this special status include the principle of permanent sovereignty over natural resources and the principle of self-determination.

An International Law of the Sea Tribunal and compulsory dispute provisions were created under UNCLOS. The Tribunal and compulsory dispute provisions exist to deal with rights arising under UNCLOS. An international criminal court is in place; and, treaty and customary international laws regarding the rights of human beings, vis-à-vis the rights of States to proceed on individuals’ behalf, still exist. The doctrine of universality should give every nation the right to try pirates under either treaty or customary law.

International law is an evolving concept. There is no question that the United States, Denmark, and most of the other nations involved believed that it was necessary to obtain a Security Council Resolution(s) in order to pursue pirates into the territorial, internal waters and on the territory of Somalia. This was done for political as well as economic reasons.

Piracy is being conducted more and more by organized gangs in internal waters and territorial seas. It is necessary for States to prescribe and enforce municipal statutes in their internal waters and territorial seas in order to block these acts and to react, in kind, to them. Regional cooperation is currently occurring in certain areas (e.g., Malacca Strait). Under the UNCLOS, it is the duty of the coastal States to prevent damages to their environments as well as to loss of life and property due to the crime of piracy. By preventing these acts in their territory, they are preventing severe damage to other States and to the world community as a whole. They have a duty to do as much as they can and should not be allowed to hide behind the shield of sovereignty.

As was stated prior by one of your authors, international waters and territorial seas should have another layer of jurisdiction in order to fight specific crimes of terrorism and/or piracy: namely, *reaction zones*.

---


well as for those occurring exclusively on the high seas. Are these proposals subject to abuse by the intervening State? Yes, however, there may be no other alternative open in a given situation. Do not think in terms of sovereignty where human rights are being violated and the environment despoiled; it is important to have these rights considered on the same plane as property rights for purposes of obtaining prescriptive and enforcement legislation against pirates. One should not need a UN Resolution to act against pirates.

267. Id.