

The Most-Cited Articles from *The Yale Law Journal*

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INTRODUCTION

On the occasion of the centennial of *The Yale Law Journal*, this essay presents a compilation of the *Journal's* most-cited articles. Such a project, in an age already deluged with lists and rankings, bears a burden of justification. (Sheer curiosity may suffice as a rationale. For those of you who cannot wait to see the compilation, Table I is on page 1462.)

Legal education has been buffeted by its full share of the ranking deluge. For example, *U.S. News & World Report* has published high-profile law school rankings, in the latest of which Harvard Law School placed a surprising fifth because of low scores in three areas not usually thought of as weaknesses of that school—namely, placement success, salaries of graduates, and graduation rate.¹ In the early 1980's, the deplorable *Gourman Report* attracted much attention and, regrettably, influenced the choices of many law school applicants with an ambitious rating of law schools. Among other remarkable features, the *Report* compared schools on a global scale (Paris beat out Harvard, Michigan, Yale, and Oxford for first, with Moscow State fifteenth) and exhibited a 100% correlation among five seemingly distinct components: quality of administration, quality of curriculum, faculty instruction, faculty research, and library resources.²

Another chapter in the legal *Book of Lists* could be devoted to ratings of publishing productivity of law school faculty. This literature includes a study of faculty productivity in leading law reviews, compiled by a law professor at

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1. *Best Professional Schools: Law*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 59.

2. J. GOURMAN, *THE GOURMAN REPORT* 69-77 (2d ed. 1983). For example, according to Professor Gourman, Syracuse University College of Law had the 63d best administration, the 63d best curriculum, the 63d best faculty instruction, the 63d best faculty research, and the 63d best library resources. *Id.* at 73. I have not found a single instance in any of Gourman's tables of one school being superior to a second in one respect but inferior in another.

Arizona State, in which Arizona State ranked seventh in the country in "pages per faculty member."³ An unpublished but well-publicized memorandum from a Northwestern University law professor to the school's faculty and deans, explicitly triggered by the school's disappointing *U.S. News* rating, showed Northwestern as third in "items per faculty member, top ten law reviews" and "out of house pages per faculty, all law reviews."⁴ Productivity charts have now been institutionalized by the *Chicago-Kent Law Review's* promised-to-be-annual "Faculty Scholarship Survey." The first year's lists have IIT Chicago-Kent College of Law as a highly respectable number twenty in both "pages published per faculty member in the twenty leading journals (excluding in-house articles)" and "pages published per faculty member in the ten leading journals (excluding in-house articles)."⁵

Legal statistics freaks have also turned their attention to ranking the most frequently cited law reviews. The *UCLA Law Review* published *The Citing of Law Reviews by the Supreme Court: An Empirical Study*. The *UCLA Law Review* itself only tied for twenty-fifth, but scored an impressive second in the "most improved" category.⁶ An interesting twist on the home-team phenomenon was provided by a scholar who expressed "surprise" in an interview that his article, *The Use of Legal Periodicals by Courts and Journals*, which rated *Hofstra Law Review* ninth in "combined rankings of journal and judicial citations per 1,000 pages,"⁷ was the subject of a front-page story in Hofstra Law School's student newspaper, but was rejected by the *Hofstra Law Review*.⁸

The justification for a ranking of the most-cited *Yale Law Journal* articles (beyond curiosity) is easily summarized. Citation-counting, as I have stated in my previous article on the subject, "falls somewhere between historiography and parlor game,"⁹ but has been shown to correlate highly with peer judgments of scholarly influence. Lists of most-cited works therefore serve to draw attention to authors and publications that, by a rough measure, have had the most extensive impact on scholarship. In Part I of this essay, I further sketch out my own viewpoint, grounded in the findings of information science and the

3. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 688 (1983).

4. Memorandum from Mayer Freed to Faculty and Deans of Northwestern University School of Law (Feb. 1, 1989).

5. Note, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHL.[-]KENT L. REV. 195, 212, 216 (1989).

6. Sirico & Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 142, 147 (1986).

7. Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400, 412 (1986).

8. Coleman, *Reviewing Reviews*, STUDENT LAW., Mar. 1986, at 5. In poking fun at the tendency of authors and law reviews to choose methodologies of comparing faculty productivity or journal-citation frequency favoring their own institutions, I do not mean to impugn the validity of the above-mentioned studies, nor to liken them to the questionable methods of *Gourman* and *U.S. News*. I myself, in submitting for publication an article tabulating most-cited law review articles, Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985), sent it only to reviews that showed up creditably in the listing.

9. Shapiro, *supra* note 8, at 1540.

sociology of knowledge, on the significance of a publication's being highly cited.¹⁰ In addition, I propose avenues of future research in legal citation analysis.

Citation counts can also be a means of focusing on a particular subset within a scholarly literature and spotlighting writings within that subset whose impact has been exceptional. *The Yale Law Journal* has been a central component of legal literature, and its centennial is an appropriate occasion for identifying the "citation superstars" it has published in the course of its century of existence. In Table I,¹¹ I list the thirty most-cited articles from the *Journal*, ordered by the number of citations received within other articles. Part II of this essay explains the sources, limitations, and other characteristics of my data.

For Part III, in order to record other, more personal viewpoints on the significance of supercitedness "straight from the horse's mouth," I invited some of the authors of the most-cited *Yale Law Journal* articles to comment briefly on their citation landmark papers. Because of space restrictions, I was forced to limit this invitation to authors of the sixteen most-cited articles from Table I, two older articles from further down the list, and the two older articles appended at the end of Table I. Where the author was deceased or was unable to contribute a commentary, I asked a distinguished scholar with an interest in the article's subject matter to comment.

In my invitation to the article authors, I suggested that the commentaries address the questions: "What impact do you feel the article has had on other scholars, on the courts, or on legislation? Have your views on the topic changed? Would you write the article differently today?" For the commentators who were not the authors, I posed only the first question. My intention, however, was to give the authors and commentators wide discretion to address whatever issues they preferred, and the commentaries, in fact, take a variety of approaches.

In some cases, the authors' retrospection required revisiting arenas from which their interests have shifted. Some of the authors express or imply disapproval of the enterprise of citation-counting. *The Yale Law Journal* and I are grateful to the article authors for joining, nonetheless, in this commemoration. We would particularly like to thank William R. Perdue, Jr., coauthor with Lon L. Fuller of the milestone 1936 article, *The Reliance Interest in Contract Damages*,¹² and Myres S. McDougal, coauthor with Harold D. Lasswell of *Legal Education and Public Policy: Professional Training in the Public Interest* (1943),¹³ for each sharing the perspective of a half-century's experience. We

10. More extensive discussion may be found in my prior article and sources referred to therein. *Id.* at 1540-44.

11. See *infra* table accompanying note 58.

12. Fuller & Perdue, *The Reliance Interest in Contract Damages* (Parts 1 & 2), 46 *YALE L.J.* 52, 373 (1936-37).

13. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

are equally grateful to the commentators who were not the authors for their participation.

I have suggested that the commentaries may be read as explorations of the question “What does it mean to be frequently cited?” This theme is explicit in a few of the pieces. George L. Priest, for example, writes that William L. Prosser’s *Assault Upon the Citadel*¹⁴ has been heavily cited “not because its ideas were influential, nor, surely, because it initiated a school of thought,” but because it “was perfectly positioned to catch the wave of enthusiasm for greater manufacturer liability.”¹⁵

John Hart Ely distinguishes being cited from being read, asserting that citations to one of his articles pop up in string citations supporting a particular proposition and that “no evidence exists that anyone has read it.”¹⁶ Joseph Goldstein casts the most skeptical eye on citationology, fearing that such ranking “could become an invidious virus in the world of scholarship. It bears no relationship to scholarly merit.”¹⁷ Goldstein also echoes Ely’s distinction between citing an article and reading or understanding it.¹⁸

The other commentators do not controvert the rationale of citation analysis (maybe they are just being polite). I see in most of the commentaries a tacit acceptance of the notion that scholarly influence, though complex and not always reflected in explicit published references, is often articulated through citation links. The commentators who choose to address the question of article impact are describing the flesh and blood of a process of influence—what Carol M. Rose calls a “scholarly conversation”¹⁹—which can also, in a skeletal form, be profitably studied using citation analysis.

I find that a number of the articles on my list share a notable distinction. Part of their impact in breaking new ground is an impact on vocabulary. We speak a different language in their wake. We talk of “entitlement programs” because Charles A. Reich introduced a new sense of the word “entitlement” in his article, *Individual Rights and Social Welfare: The Emerging Legal Issues*.²⁰ The terms “decision-making” and “content analysis” occur in Lasswell and McDougal’s *Legal Education and Public Policy* prior to the earliest examples recorded by the *Oxford English Dictionary*,²¹ and much of the modern connotation of the word “policy” stems from that article and other writings by these two authors. Wesley N. Hohfeld, in *Some Fundamental*

14. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

15. *Infra* commentary following note 70.

16. *Infra* commentary preceding note 82.

17. *Infra* commentary following note 115.

18. *Infra* commentary following note 115.

19. *Infra* commentary following note 107.

20. *Entitlement* in the sense of “right to governmental benefits” appears in Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255-56 (1965). Reich had earlier used the corresponding sense of the verb *entitled* in *The New Property*, 73 YALE L.J. 733, 786 n.233 (1964).

21. Lasswell & McDougal, *supra* note 13, at 220, 287. The *OED*’s earliest citations for both terms are dated 1953.

Conceptions as Applied in Judicial Reasoning,²² contributed a jurisprudential analysis whose impact was in large part terminological. Fuller and Perdue²³ shaped contract law by naming three interests served by contract damage awards.²⁴ Other articles on the list, such as those by Guido Calabresi, Thomas I. Emerson, and Joseph L. Sax, were not specifically neologicistic but influenced the content and range of legal discourse in a broader sense.

Impact on terminology and discourse is a form of influence which may not always be reflected in counts of explicit citations, and thus resembles the phenomenon of "obliteration" identified by Robert K. Merton and other sociologists of science.²⁵ The work of some thinkers is so influential that it is integrated into the common body of knowledge to the point where scholars no longer feel they have to cite it explicitly. "Anybody who cited Einstein's original paper when he writes $E=mc^2$ would be laughed at."²⁶ The most interesting legacy of the articles on my list may well be found in subsequent work which does *not* cite them.

I. LEGAL CITATION ANALYSIS

A. Rationale

Legal communication has two principal components: words and citations. Citations are strings of names and numbers which refer, for a variety of purposes, to prior writings. Richard Delgado and Jean Stefancic recently have echoed my suggestion that the history and structure of legal thought can be illuminated through study of the history of legal words.²⁷ Analysis of the citations employed by legal writers offers similar promise as a tool for exploration of legal thought.

Citation analysis is now extensively used by information scientists and sociologists to study the history and structure of the natural sciences and other disciplines. For example, scientific and scholarly literatures have been "mapped" through document co-citation. Two publications that are often jointly cited by later publications are placed near each other on a pictorial map of intellectual space. Writings that are frequently co-cited with many of the other

22. Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

23. Fuller & Perdue, *supra* note 12.

24. See *infra* commentary accompanying note 120.

25. 2 E. GARFIELD, *ESSAYS OF AN INFORMATION SCIENTIST* 396-98 (1977); R. MERTON, *ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT* 218-19 (1965); R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 27-28, 35-38 (1968).

26. Moravcsik, *Measures of Scientific Growth*, 2 RES. POL'Y 266 (1973).

27. Delgado & Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 224 n.108 (1989) (citing Shapiro, *Legal Data Bases and Historical Lexicography*, 3 LEGAL REFERENCE SERVICES Q., Winter 1983, at 85). I have explored the utility of such historical-lexicographical researches in a number of articles: Shapiro, *A Computer Search for the Origin of Executive Privilege*, 59 AM. SPEECH 60 (1984); Shapiro, *supra*; Shapiro, *Linguistic Applications of LEXIS and WESTLAW*, 30 JURMETRICS J. 147 (1990).

documents in a subject area are placed in the center of the map of that subject, while writings less frequently co-cited appear at its periphery. On a large diagram of a discipline, subfields themselves emerge as core or fringe, and, on the largest map, disciplines are connected and scholarship as a whole is outlined.²⁸

Another application of citation data is the compilation of rankings of journals based on straight citation counts or "impact factors" (the average number of citations received by articles published in a particular journal). Authors too have been evaluated through tabulation of citations to their writings. Citation counts have been utilized in assessing scholars' work for purposes of grant awards, tenure, or promotion decisions.²⁹

Those using citation data for evaluative purposes have justified such use by pointing to research demonstrating a high correlation between the total of citations to a scientist's or scholar's writings and judgments by peers of the "'productivity,' 'significance,' 'quality,' 'utility,' 'influence,' 'effectiveness,' or 'impact' of scientists and their scholarly products."³⁰ One investigator has gone so far as to say that "citations and peer ratings appear to be virtually the same measurement."³¹

Almost all citation analysts, however, are careful to note that citation counts measure a "quality" which is socially defined, reflecting the utility of the writing in question to other scholars, rather than gauging its intrinsic merit. Furthermore, the value of the counts may be lessened by limitations in the accuracy, coverage, or time-frame of the source data. For these reasons and others, evaluative use of citation analysis has remained controversial.³²

Even with their acknowledged limitations, citation counts are attractive as relatively objective tools for assessing scholarly impact. They can be used not only to gauge the impact of a given author or writing, but also to identify which writings are the most frequently cited, taken to be a rough measure of the writings which have had the most extensive impact.

28. Co-citation studies can also focus on authors or journals, rather than documents, as the units of analysis. For more extensive discussion of co-citation analysis, see E. GARFIELD, *CITATION INDEXING—ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY AND HUMANITIES* 98-147 (1979); Bellardo, *The Use of Co-Citations to Study Science*, 2 *LIBR. RES.* 231 (1980-81); Small, *Co-Citation in the Scientific Literature: A New Measure of the Relationship between Two Documents*, 24 *J. AM. SOC'Y FOR INFO. SCI.* 265 (1973); Small & Sweeney, *Clustering the Science Citation Index Using Co-Citations: I. A Comparison of Methods*, 7 *SCIENTOMETRICS* 391 (1985); Small, Sweeney & Greenlee, *Clustering the Science Citation Index Using Co-Citations: II. Mapping Science*, 8 *SCIENTOMETRICS* 321 (1985).

29. See E. GARFIELD, *supra* note 28, for a detailed discussion of citation analysis applications.

30. Lawani & Bayer, *Validity of Citation Criteria for Assessing the Influence of Scientific Publications: New Evidence with Peer Assessment*, 34 *J. AM. SOC'Y FOR INFO. SCI.* 59, 61 (1983).

31. Bensman, *Journal Collection Management as a Cumulative Advantage Process*, 46 *COLLEGE & RES. LIBR.* 13, 23 (1985).

32. See generally E. GARFIELD, *supra* note 28, at 240-52.

B. *Origins*

There is a long history of citation studies in law. Although information science literature³³ frequently repeats the assertion that the earliest instance of citation analysis was a 1927 study by Paul L.K. Gross and E.M. Gross³⁴ tabulating references in the *Journal of the American Chemical Society*, legal citation analysis antedates this "first" by at least thirty-three years. The *Report of the Seventh Annual Meeting of the Virginia State Bar Association* in 1895 noted that:

Among publishers, Mr. [Charles C.] Soule, of the Boston Book Company, is pre-eminent in his knowledge of legal bibliography. In his circular for November, 1894, he gives a table showing the comparative frequency of citation of the Federal, English and State decisions, outside of their own respective jurisdictions, compiled from the last official volume of each prior to 1894.³⁵

A more elaborate citation analysis appeared in the American Bar Association report for 1895. Frank C. Smith, the Secretary of the Committee on Law Reporting, compiled a large table setting forth the number of cases reported from each American court of last resort from June 1, 1894 to May 31, 1895 and the number of times each state and federal court cited each other state and federal court, as well as English courts, during that period.³⁶ Smith also computed the total number of citations in the cases examined, the total of citations to a court's own precedents, the total to other courts' decisions, the totals of citations by common-law tribunals to courts of other common-law states and of code states, and similarly for code-state tribunals.³⁷ He even determined which part of the last-mentioned totals were citations in support of procedural points.³⁸ Smith's prodigious number-crunching was not an idle exercise: he marshalled his statistics to demonstrate that the torrential outpouring of reports volumes could be stemmed by limiting judicial citations to "cases from their own reports covering the same [nonprocedural] ground"³⁹ and that the practices of common-law and code states were not as divergent as had been sup-

33. See, e.g., Hertzfel, *History of the Development of Ideas in Bibliometrics*, in 42 *ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE* 144, 159-60 (1987).

34. Gross & Gross, *College Libraries and Chemical Education*, 66 *SCIENCE* 385 (1927).

35. *Report of the Committee on Library and Legal Literature*, in *REPORT OF THE SEVENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION* 53 (1895). The table, ranking the jurisdictions by number of citations to them by other courts, was reprinted in the Virginia report. *Id.* at 54.

36. *Report of the Committee on Law Reporting*, in *REPORT OF THE EIGHTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 343, 366-B (1895).

37. *Id.* at 364-65.

38. *Id.* at 365.

39. *Id.*

posed.⁴⁰ The study of citations in court decisions has continued to be a popular research endeavor.⁴¹

C. Prospects

The application of sophisticated citation analysis to law has barely begun to be explored. In scientific disciplines, publications and their interconnections are byproducts of the research enterprise. In law, publications and their interconnections are close to the heart of the discipline. The citation analysis techniques developed in studying the natural and social sciences, now established methods for the historiography and sociology of science, possess even greater potential for assisting the historiography and sociology of law.

The principal sources of citation data in the natural sciences, social sciences, and humanities are the indexes published by the Institute for Scientific Information (ISI), a company founded by Eugene Garfield. Garfield is the leading exponent and the virtual inventor of sophisticated citation analysis. ISI publishes, and offers in electronic form as well, the *Science Citation Index*, the *Social Sciences Citation Index*, and the *Arts and Humanities Citation Index*. Each of these lists, for a given publication, the articles from indexed journals that cite it. Because of their wide coverage and the close subject relationship between citing and cited documents, the ISI indexes serve as extraordinarily powerful and intensive subject indexes to the worldwide scholarly literature of virtually all disciplines, and have become basic research tools.

The *Social Sciences Citation Index* includes over one hundred legal or law-related periodicals within its coverage, making it a remarkably powerful legal research tool. Another index source for legal citation data is the Shepard's Citations system of indexes, especially *Shepard's Law Review Citations*. The Shepard's "citators" for court decisions, by far the oldest citation indexes, supplied the inspiration for Garfield's application of the citation indexing principle to scientific and scholarly literature.⁴² *Shepard's* supplements the

40. *Id.* at 366.

41. See, e.g., R. POSNER, CARDOZO: A STUDY IN REPUTATION (1990); Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178 (1985); Daniels, "Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, *October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1 (1983); Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); Johnson, *Citations to Authority in Supreme Court Opinions*, 7 LAW & POL'Y 509 (1985); Landes & Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367 (1980); Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Maggs, *Concerning the Extent to which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930); Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613 (1954); Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977); Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295 (1936); Sirico & Margulies, *supra* note 6.

42. For an historical account of Garfield's development of the principle of *Shepard's* into citation indexes for the sciences and humanities, see E. GARFIELD, *supra* note 28, at 6-18.

SSCI for periodical literature and provides an enormous body of citation data for case law and other primary legal sources.

Perhaps the most interesting use of legal citation data to date is in Richard Delgado's *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*.⁴³ Delgado studied citation counts and concluded that "I have discovered a . . . scholarly tradition. It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each others' work."⁴⁴ His evidence of exclusion of nonwhites and women from the universe of civil rights citations is more impressionistic than quantitative, but Delgado's work suggests an important avenue for future research. Patterns of citation inclusion, omission, and emphasis create a canon of accepted thought which may be analyzed through techniques developed by information scientists.

Co-citation analysis offers intriguing possibilities for mapping legal scholarship or case law.⁴⁵ The links between law and other disciplines, such as economics or literary criticism, could be diagrammed based on patterns of scholarly citation. The internal structure and external connections of intellectual movements such as critical legal studies could be illuminated through investigation of co-citation.⁴⁶ "Research fronts" (subject areas of significant activity) of legal scholarship could be identified. The historical development of areas of legal thought could be charted by means of network diagrams showing citation connections between more recent and older writings, or time series of co-citation maps. Citation connections among publications are likely to be correlated with social links among authors, so that the historical and structural insights of citation analysis could provide grist for a sociology of legal scholarship.

Investigators of legal citation have available to them tools superior to those in other disciplines, making possible correspondingly richer results. Beyond the SSCI and *Shepard's*, the full-text online databases, LEXIS and WESTLAW, offer the capability of retrieving references to any type of source by locating mentions of the name or bibliographic citation of the source in the documents included in the database. LEXIS and WESTLAW also offer highly flexible capabilities for retrieving documents in which a desired combination of citations to different sources is present. The systems can also retrieve documents in which a citation is accompanied by desired words. This kind of citation/word search can be used to limit results to documents where a particular aspect of the cited source is referred to or where the cited source is referred to in a particular context.⁴⁷ It may also be possible, using key-word searches, to focus

43. 132 U. PA. L. REV. 561 (1984).

44. *Id.* at 566.

45. *See supra* note 28 and accompanying text.

46. *Id.*

47. *See* F. SHAPIRO, LEXIS: THE COMPLETE USER'S GUIDE 126-36 (1989) for a thorough discussion of using LEXIS as a citator; analogous techniques are applicable to WESTLAW.

on the verbal context surrounding citations in order to isolate "negative citations" (citations for the purpose of criticism), citations in which the cited source is characterized in a particular way, or citations in which two or more cited sources are associated or contrasted with each other in a particular fashion.⁴⁸

II. THE COMPILATION

My own forays into citation study have consisted of a 1985 article listing the fifty most-cited law review articles since 1947,⁴⁹ followed by an anthology reprinting the most-cited law review articles of all time.⁵⁰ The original article used *Shepard's Law Review Citations* as the basis for a ranking of the post-1947 law review articles most often cited within other law review articles. For the anthology, I supplemented this *Shepard's* ranking with data supplied to me by Eugene Garfield from the *Social Sciences Citation Index* database. The *SSCI* data enabled me to include the most-cited pre-1947 articles and the most-cited articles from certain journals not covered by *Shepard's*, such as the *Journal of Law and Economics*,⁵¹ resulting in a comprehensive anthology.

The present compilation of the most-cited articles from *The Yale Law Journal* is based on data drawn entirely from the citation database of the *Social Sciences Citation Index*. The *SSCI* is a superior resource to *Shepard's* for this purpose because the ISI data include citations to older articles, citations to all types of articles (notes, comments, book reviews, and memorials as well as "leading articles"), and citations appearing in all types of articles.⁵² Like *Shepard's*, the *Social Sciences Citation Index* examines over one hundred law reviews for citations, but, unlike *Shepard's*, the *SSCI* also includes citations to legal articles appearing in any of approximately 1,300 social science journals.⁵³ It seems fitting, given the strong tradition of interdisciplinary orientation at the Yale Law School and *The Yale Law Journal*, to take citations in a broad range of forums into account in compiling a roster of the *Journal's* most-cited articles.

48. Searching for the "introductory signals" which are standardized tokens of citation purpose in legal writing may be useful. Such signals include *accord*, *see*, *cf.*, *compare*, *contra*, *but see*, *but cf.*, and *see generally*.

49. Shapiro, *supra* note 8.

50. F. SHAPIRO, *THE MOST-CITED LAW REVIEW ARTICLES* (1987). This anthology is published by William S. Hein and Company.

51. Other important periodicals covered by the *Social Sciences Citation Index*, but not by *Shepard's Law Review Citations*, include *Journal of Legal Studies*, *Harvard Civil Rights-Civil Liberties Law Review*, *Law and Social Inquiry*, *Administrative Law Review*, *Journal of Legal Education*, *Law and Human Behavior*, *Law and Society Review*, and *Journal of Criminal Law and Criminology*.

52. *Shepard's Law Review Citations* includes only leading articles in both its "cited" and "citing" coverage.

53. The *SSCI's* scope encompasses anthropology, area studies, business, communication, criminology, economics, education, geography, history, industrial and labor relations, law, library and information science, linguistics, philosophy, political science, psychiatry, psychology, public administration, public health, social work, sociology, statistics, urban studies and planning, and women's studies, among other fields.

ISI generously provided me with a printout listing all *Yale Law Journal* articles receiving at least ten citations in the *Social Sciences Citation Index* database for 1966-1986. I then manually examined the 1956-1965 Cumulation of the *SSCI* and the individual volumes for 1987, 1988, January-April 1989, and May-August 1989 to complete the data.

Table I sets forth the thirty most-cited articles from *The Yale Law Journal*, based on the *Social Sciences Citation Index* through August 1989. The articles are ranked by number of citations received within other articles.

This list of most-cited articles is undoubtedly influenced by some chronological biases. Older articles are helped by the fact that they have had more time to accumulate citations, but hurt by the absence of pre-1956 citations in the source data. More recent articles are helped by the greater volume of periodical literature and greater incidence of footnoting in their era,⁵⁴ increasing their opportunities for citation. The most recent articles, those from the 1980's, are still at the beginning of their citation histories and, in all but one instance,⁵⁵ have not yet had time to qualify for such a list.

Because of the above-mentioned biases against older articles, I have made special note at the end of Table I of two articles whose citation totals are not among the thirty highest, but which undoubtedly would have qualified had the data extended further back in time. The inclusion of these articles by Wesley N. Hohfeld and William O. Douglas (with George E. Bates) also helps to add historical balance to the list, which is dominated by articles from the 1960's and 1970's. Similarly, I have included Harold D. Lasswell's and Myres S. McDougal's *Legal Education and Public Policy* and Karl N. Llewellyn's *What Price Contract?*, two older articles ranked twenty-second and twenty-eighth, along with the higher-ranking articles for which commentaries are printed.

I have supplemented the information in Table I with a Table II enumerating the ten articles (actually eleven because of a tie) which have received the most citations over approximately the past five years. The numbers appearing in Table II are the totals of citations in the *Social Sciences Citation Index* for the inclusive period of January 1985 to August 1989. Table II represents a snapshot of *Yale Law Journal* articles with exceptional contemporary impact, as opposed to Table I's long-term cumulative record. The second table is, in addition, a means for drawing attention to 1980's articles that, although precluded by their recency from ranking among the thirty highest overall, are being extensively cited.

There is another bias inherent in citation ranking. Some topics have a far larger scholarly literature than others, resulting in much greater citation potential

54. One researcher found that footnote usage in a sample of American law review articles from 1978 was 48% greater than in a 1928 sample and 61% greater than in 1958. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 *LAW LIBR. J.* 245, 251 (1979).

55. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981).

for an article in a popular subject area than for one in an area less frequented by law reviews. Ashbel G. Gulliver's and Catherine J. Tilson's *Classification of Gratuitous Transfers*,⁵⁶ for example, is a classic article in the law of trusts, but its citation count is modest because the volume of law review literature on trusts is modest. The list of the thirty most-cited *Yale Law Journal* articles leans heavily towards public law, particularly constitutional law; about a dozen of the articles may be categorized as constitutional in focus. No topical area other than constitutional law has more than three representatives.

It is clear, then, that my roster should be viewed as a list of high-impact articles rather than a definitive enumeration of influence, of significance, or of anything else. Even with this caveat, however, a perusal of the attributes of the listing and the listees may be of interest.

There are forty-one authors included in Table I, counting coauthors separately and counting individuals twice if two articles by them appear. The scholars who have two articles are Guido Calabresi, John Hart Ely, Thomas I. Emerson, Charles A. Reich, and Joseph L. Sax.⁵⁷

Of the forty-one authors, twenty-three of them identified their primary affiliation at the time of publication as Yale Law School. Three of these (Barbara A. Brown, Gail Falk, and Ann E. Freedman) were students at the time. Other academic affiliations were: University of California-Berkeley, two authors; Columbia, two; Duke, two (one of them, William R. Perdue, Jr., a student); Harvard, two (one of whom, George E. Bates, was a faculty member at the Business School rather than the Law School); and University of Colorado, Indiana University, Michigan, New York University, Stanford, and University of Utah, one each. Four of the authors were not academics at the time of publication: Edgar S. Cahn was a member of the Connecticut Bar, Jean C. Cahn was an attorney with the Legal Advisor's Office of the Department of State, Laurent B. Frantz was an editor of the Bancroft-Whitney Company, and J. Skelly Wright was a Judge on the United States Court of Appeals for the District of Columbia Circuit.

Nineteen of the authors attended Yale Law School. Other law schools attended were: Harvard, five authors; University of Chicago, three; Columbia, three; University of California-Berkeley, Duke, University of Freiburg, Loyola (New Orleans), University of Minnesota, University of Mississippi, Stanford, and University of Tennessee, one each. Three authors, George E. Bates, Ward S. Bowman, Jr., and Harold D. Lasswell, were, respectively, a finance professor, an economist, and a political scientist and had no formal legal training.

56. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

57. Another of Calabresi's articles, coauthored with Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), qualified for my list of the fifty most-cited articles from all journals. Shapiro, *supra* note 8, at 1550. Sax too had a non-Yale Law Journal publication on the all-journal list: *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Shapiro, *supra* note 8, at 1551.

Of special interest in the context of a centennial is the fact that nine of the individual authors (accounting for twelve of the articles) were members of *The Yale Law Journal*. The *Law Journal* alumni are:

Barbara A. Brown, Editor, 1970-71

Edgar S. Cahn, Article and Book Review Editor, 1962-63

Guido Calabresi, Note Editor, 1957-58

John Hart Ely, Note and Comment Editor, 1962-63

Thomas I. Emerson, Editor-in-Chief, 1930-31

Abraham S. Goldstein, Article Editor, 1948-49

Joseph Goldstein, Article and Book Review Editor, 1951-52

Karl N. Llewellyn, Editor-in-Chief, 1918-19

Charles A. Reich, Editor-in-Chief, 1951-52

TABLE I
MOST-CITED ARTICLES FROM
*THE YALE LAW JOURNAL*⁵⁸

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|-----|-----|---|
| 1. | 667 | Charles A. Reich, <i>The New Property</i> , 73 YALE L.J. 733 (1964). |
| 2. | 404 | William L. Prosser, <i>The Assault upon the Citadel (Strict Liability to the Consumer)</i> , 69 YALE L.J. 1099 (1960). |
| 3. | 380 | John Hart Ely, <i>The Wages of Crying Wolf: A Comment on Roe v. Wade</i> , 82 YALE L.J. 920 (1973). |
| 4. | 332 | Thomas I. Emerson, <i>Toward a General Theory of the First Amendment</i> , 72 YALE L.J. 877 (1963). |
| 5. | 323 | John Hart Ely, <i>Legislative and Administrative Motivation in Constitutional Law</i> , 79 YALE L.J. 1205 (1970). |
| 6. | 293 | Joseph L. Sax, <i>Takings and the Police Power</i> , 74 YALE L.J. 36 (1964). |
| 7. | 267 | Guido Calabresi, <i>Some Thoughts on Risk Distribution and the Law of Torts</i> , 70 YALE L.J. 499 (1961). |
| 8. | 261 | Joseph Goldstein, <i>Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice</i> , 69 YALE L.J. 543 (1960). |
| 9. | 236 | Lon L. Fuller & William R. Perdue, Jr., <i>The Reliance Interest in Contract Damages (Parts 1 & 2)</i> , 46 YALE L.J. 52, 373 (1936-37). |
| 10. | 216 | Sanford H. Kadish, <i>Methodology and Criteria in Due Process Adjudication—A Survey and Criticism</i> , 66 YALE L.J. 319 (1957). |
| 10. | 216 | Charles A. Reich, <i>Individual Rights and Social Welfare: The Emerging Legal Issues</i> , 74 YALE L.J. 1245 (1965). |
| 12. | 215 | Abraham S. Goldstein, <i>The State and the Accused: Balance of Advantage in Criminal Procedure</i> , 69 YALE L.J. 1149 (1960). |
| 13. | 214 | Robert H. Mnookin and Lewis Kornhauser, <i>Bargaining in the Shadow of the Law: The Case of Divorce</i> , 88 YALE L.J. 950 (1979). |
| 14. | 211 | William L. Cary, <i>Federalism and Corporate Law: Reflections upon Delaware</i> , 83 YALE L.J. 663 (1974). |
| 15. | 198 | Guido Calabresi & Jon T. Hirschoff, <i>Toward a Test for Strict Liability in Torts</i> , 81 YALE L.J. 1055 (1972). |
| 15. | 198 | Harry H. Wellington, <i>Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication</i> , 83 YALE L.J. 221 (1973). |
| 17. | 191 | Joseph L. Sax, <i>Takings, Private Property and Public Rights</i> , 81 YALE L.J. 149 (1971). |
| 18. | 180 | Laurent B. Frantz, <i>The First Amendment in the Balance</i> , 71 YALE L.J. 1424 (1962). |
| 19. | 174 | Fritz W. Scharpf, <i>Judicial Review and the Political Question: A Functional Analysis</i> , 75 YALE L.J. 517 (1966). |
| 20. | 167 | Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, <i>The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women</i> , 80 YALE L.J. 871 (1971). |
| 21. | 166 | Charles L. Black, Jr., <i>The Lawfulness of the Segregation Decisions</i> , 69 YALE L.J. 421 (1960). |
| 22. | 158 | Harold D. Lasswell & Myres S. McDougal, <i>Legal Education and Public Policy: Professional Training in the Public Interest</i> , 52 YALE L.J. 203 (1943). |
| 23. | 150 | J. Skelly Wright, <i>Beyond Discretionary Justice</i> , 81 YALE L.J. 575 (1972). |
| 24. | 141 | Ward S. Bowman, Jr., <i>Tying Arrangements and the Leverage Problem</i> , 67 YALE L.J. 19 (1957). |

58. The column of numbers on the left is the ranking. The second column is the total number of citations in the *Social Sciences Citation Index* from 1956 through August 1989 inclusive. For two-part articles, the number given is the total of citations to the first part.

25. 140 Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).
26. 139 Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968).
27. 138 Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).
28. 135 Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).
29. 129 Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078 (1968).
30. 128 Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

ADDITIONAL OLDER ARTICLES

- 127 Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).
- 107 William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933).

TABLE II
 MOST-CITED ARTICLES FROM
THE YALE LAW JOURNAL

Citations from January 1985-August 1989⁵⁹

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|-----|------|---|
| 1. | .114 | Robert H. Mnookin & Lewis Kornhauser, <i>Bargaining in the Shadow of the Law: The Case of Divorce</i> , 88 YALE L.J. 950 (1979). |
| 2. | 105 | Charles A. Reich, <i>The New Property</i> , 73 YALE L.J. 733 (1964). |
| 3. | 99 | Bruce A. Ackerman, <i>The Storrs Lectures: Discovering the Constitution</i> , 93 YALE L.J. 1013 (1984). |
| 4. | 89 | Frank R. Easterbrook & Daniel R. Fischel, <i>Corporate Control Transactions</i> , 91 YALE L.J. 698 (1982). |
| 4. | 89 | Joseph William Singer, <i>The Player and the Cards: Nihilism and Legal Theory</i> , 94 YALE L.J. 1 (1984). |
| 6. | 76 | John Hart Ely, <i>The Wages of Crying Wolf: A Comment on Roe v. Wade</i> , 82 YALE L.J. 920 (1973). |
| 7. | 73 | Owen M. Fiss, <i>Against Settlement</i> , 93 YALE L.J. 1073 (1984). |
| 8. | 68 | Paul Brest, <i>The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship</i> , 90 YALE L.J. 1063 (1981). |
| 9. | 61 | William L. Cary, <i>Federalism and Corporate Law: Reflections upon Delaware</i> , 83 YALE L.J. 663 (1974). |
| 10. | 58 | John Hart Ely, <i>Legislative and Administrative Motivation in Constitutional Law</i> , 79 YALE L.J. 1205 (1970). |
| 10. | 58 | Laurence H. Tribe, <i>The Puzzling Persistence of Process-Based Constitutional Theories</i> , 89 YALE L.J. 1063 (1980). |

59. The column of numbers on the left is the ranking for this time-period. The next column is the total number of citations in the *Social Sciences Citation Index* from January 1985 through August 1989 inclusive.

III. COMMENTARIES

Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (ranked first).

Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (ranked tenth).

Commentary by Charles A. Reich,
Marshall P. Madison Visiting Professor of Law,
University of San Francisco Law School.
Editor-in-Chief, *The Yale Law Journal*, 1951-52.

I call this form of wealth "property" because it is inseparable from citizenship and personhood. I cannot accept the idea of a propertyless people in a democratic society. Yet that is what will happen if we limit the concept of property to its traditional forms.

Charles A. Reich

The New Property and *Individual Rights and Social Welfare* were both responses to the rise of the administrative state. I felt that this major transformation of the American system required an equivalent revision of law. For the first time in American history, the state had become powerfully involved in the economic life of every individual and business, as well as the manager of an ever greater area of public resources. *The New Property* addressed the question of substantive and procedural rights in the new system. As new forms of wealth, from welfare to television broadcast licenses, are created by the state, what kind of protection should they be given by the law?

Individual Rights and Social Welfare was a call for the development, in the law schools and the profession, of a field of "public interest law," for unrepresented but vital interests affected by the managerial state.

Both articles were cited as support for the landmark decision in *Goldberg v. Kelly*,⁶⁰ establishing constitutional protection for welfare benefits. This was the first of a series of court decisions dealing with "new property interests" spanning the spectrum from government employment, management of public lands, allocation of highway funds, and professional licensing to food stamps and foster care of children. "New Property Law" has become a standard part of the casebooks and law school curricula in property, constitutional law, and administrative law. In addition, the fields of welfare law, family law, employment law, health law, and environmental law all have been influenced by new property issues. I expect this trend to continue as the legal system becomes an ever more important source of benefits and security for rich and poor alike.

60. 397 U.S. 254 (1970).

Several of our most important ongoing public policy debates concern new property issues. The problem of poverty raises the question of "entitlements" (a word whose current usage was established by *Individual Rights and Social Welfare*) and whether there is a constitutional right to shelter, subsistence, health insurance, and other minimum necessities of life. The use of government benefits as devices to extend the regulatory power of the federal government over the states and individuals has led to a debate over "unconstitutional conditions." For example, can federal highway funds be conditioned on agreement by the states to raise the drinking age, a subject admittedly beyond direct federal regulation?⁶¹ Can food stamps be denied to strikers and their families?⁶² There is a growing debate in employment law over "property rights" in jobs.⁶³ As competition for use of the national forests and other parts of the public domain increases, the debate over recognizing individual or group environmental interests grows.⁶⁴ The rights of public employees, teachers, students, and members of the armed services have been a source of ever-widening debate.⁶⁵ In private law areas there are also ongoing controversies, such as the debate over whether a spouse's professional degrees or licenses should be considered marital "property" in divorce actions.⁶⁶

The rise of vigorously contending schools of legal theory has meant that new property has been a focus of much jurisprudential debate. *The New Property* has been attacked by both the left and the right. Scholars of the Critical Legal Studies Movement have asserted that new property rights are illusory promises to the powerless, made by the liberal establishment to quiet discontent by victims of the system. Conservatives have objected to new property rights as an interference with the free market and an unjustifiable attempt to "constitutionalize" the welfare state. For feminist legal scholars, new property theory has provided a foundation for asserting a legal status for services and values such as child care that have traditionally received scant legal protection. And the struggle for anti-discrimination protection by feminists, racial minorities, and gay-lesbian advocates has taken as its underlying premise the idea that educational credentials, jobs, and positions of power within the system are

61. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning highway funds, as indirect encouragement to obtain uniformity in States' drinking ages, is valid use of congressional spending power).

62. See *Lyng v. International Union*, 485 U.S. 360 (1988) (statute denying new or increased food stamp allotment to employee on strike does not violate First Amendment).

63. See *Board of Regents v. Roth*, 408 U.S. 564 (1972) (state University professor hired for one year did not have constitutional right to statement of reasons and hearing on university's decision not to rehire him for another year).

64. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (free exercise clause does not prohibit government from permitting construction of road through portion of national forest traditionally used by American Indian tribe for religious purposes).

65. See *Goss v. Lopez*, 419 U.S. 565 (1975) (students facing temporary suspension from public school have liberty and property interests protected by Fourteenth Amendment due process); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (upholding discharge from Navy for homosexual conduct).

66. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (husband's license to practice medicine is "marital property" in divorce action).

interests deserving constitutional protection. Civil liberties lawyers have fought an array of cases in which government benefits or licenses have been denied or revoked as a way of curbing political dissent—without resort to the criminal justice system with its accompanying safeguards.

The growth of public interest law during the past twenty-five years is well known and need not be detailed here. For example, there was no recognized field of welfare law when *Individual Rights and Social Welfare* was published in 1966; today welfare law is an established part of the law school curriculum and an important area of the profession, providing an essential service to many hitherto powerless individuals as well as an outlet for the most dedicated and idealistic members of the legal profession. In many other areas, notably the environment, public interest law has provided badly-needed balance in the administrative state.

As I look back on *The New Property* and *Individual Rights and Social Welfare* today there is nothing of importance that I regret (except the use of the masculine pronoun), but much that I would expand. Instead of an exclusive focus on economic interests deriving from government, I would now place equal emphasis on private employment and interests deriving from private corporations. Today corporations and government are virtually indistinguishable when it comes to their leadership, objectives, and power over individuals. Corporate new property such as pensions and health benefits is just as important as government new property. I believe that many jobs in the private sector should receive the same protection as government jobs. Academic tenure provides a good model. Originally justified as necessary to protect academic freedom, tenure has long since outlived this justification and has become primarily a form of job security. As such, it has demonstrated the value of employment security and should be extended to similar jobs in the rest of the private sector, because a workforce dominated by fear of dismissal for political or personal nonconformity is a major threat to the survival of our democratic values. The worker and the citizen can no longer realistically be compartmentalized; when the worker is unprotected, the citizen is endangered.

With respect to entitlements for those in need, today I would argue that the due process clause guarantee against deprivation of life, liberty, or property must be interpreted to mean that there is an affirmative obligation on the part of the state to provide shelter, health care, care for children and the aged, and minimum sustenance to all persons. We now live in a managed economy; economic power is concentrated as never before, and decisions are centralized and beyond individual and even democratic influence. The Federal Reserve can throw people out of jobs and homes. Ordinary people have lost control over their economic fates. Free land and other sources of support for the unattached individual have virtually disappeared. Exclusion from the system has become a form of internal exile, and dispossessed people such as the homeless have been deprived of the means of survival. In this context, the command of due

process can no longer be satisfied by merely leaving people alone. In a centrally managed economy, the state must take affirmative steps to see that no one is deprived of basic economic support.⁶⁷

I would also extend new property thinking to embrace environmental rights. We should all have a right to a safe, clean, and intact natural environment, a right to be free of toxic threats, a right to participate in the management decisions concerning the public domain. Pollution of the ocean, or lumbering the last ancient forests, or commercial development of the national parks should be held to involve "new property rights" because these actions have a direct impact upon the quality of our lives and are part of each person's share in the commonwealth.⁶⁸

There has been considerable academic criticism of my use of the concept of "property" to describe non-traditional economic interests. I enjoy this controversy, but I continue to insist that property is not merely a technical concept but an essential support of constitutional liberty. To the Framers, property was equivalent to economic independence, which in turn was the foundation of all other freedoms. I think it was a mistake to separate economic and personal liberty into unrelated categories governed by different rules, as the Supreme Court has done since the New Deal. The distinction has proven unworkable; all too often repression has taken the form of avoiding the criminal process in order to "get people where it hurts"—i.e., by attacking their economic security.

More basically, new property represents the birthright of every individual. I reject the idea that new property is value transferred to the needy from another group in society; I call this form of wealth "property" because it is inseparable from citizenship and personhood. I cannot accept the idea of a propertyless people in a democratic society. Yet that is what will happen if we limit the concept of property to its traditional forms. I believe it is better social policy to allow and encourage the concept of property to evolve as society changes, keeping the *function* of the property alive whatever the form.

Looking to the future, I see new property-public interest law thinking as leading to an ecological view of our constitutional rights. Today the individual needs comprehensive protection just as nature requires comprehensive protection. As individuals become excessively dependent upon large organizations, many dangers to our society arise. There is no one with sufficient independence to correct the system when it goes wrong, as it must inevitably go wrong from time to time. This results in political stalemate, a system that is frozen and unable to change or adapt even to the most urgent needs. Submergence of the individual in organizations produces a vast passivity and apathy, a lack of courage and vision. When people are dependent, they lose the ability to control their own lives, and this results in out-of-control behavior from drug abuse to

67. Cf. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL'Y 37 (1990) (notion of minimal entitlements obligatory under Constitution).

68. See Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

violence. The insecurity of dependent people leads to widespread repression that threatens our tradition of liberty. Many of these evils are similar to those which caused the revolutions in Eastern Europe, directed against states which were Socialist in name only, but in essence bureaucratic and administrative like our own.

Under an ecological view, the individual would receive protection not merely through a series of disparate, historically-based rights, but through a functional concept of the individual's role and domain in a democratic society. Life, liberty, and property would be seen not as separate entities, but as the boundary markers of an "individual sector" where the powers of the individual would limit and balance the powers of the state.

William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 7 1099 (1960) (ranked second).

Commentary by George L. Priest,
John M. Olin Professor of Law and Economics
and Director, Program in Civil Liability,
Yale Law School.

Prosser's article became central because, of the assortment of articles floating above the legal surface at the time, Assault upon the Citadel was perfectly positioned to catch the wave of enthusiasm for greater manufacturer liability.

George L. Priest

It should not be surprising that Prosser's *Assault upon the Citadel* is among the most frequently cited articles in *The Yale Law Journal*. Prosser's article at once predicted, justified, and outlined the implementation of the shift from warranty law to strict liability for product defects which, along with *Brown v. Board of Education*,⁶⁹ constitutes one of the two most sudden and momentous changes in our legal regime of the past century.

Prosser's article became heavily cited, however, not because its ideas were influential, nor, surely, because it initiated a school of thought. *Assault upon the Citadel* is hard to distinguish in content from an assortment of articles published in the late-1950s criticizing the regime of warranty law for consumer products and urging that the nearly uniform adoption of automatic liability for food poisoning be extended to other consumer goods.⁷⁰ Rather, Prosser's article became central because, of the assortment of articles floating above the legal surface at the time, *Assault upon the Citadel* was perfectly positioned to catch the wave of enthusiasm for greater manufacturer liability. Prosser's article condemning warranty law and proposing automatic consumer recovery for product defects was published almost simultaneously with the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors, Inc.*,⁷¹ invalidating warranty law and providing for automatic consumer recovery for product defects.⁷² Shortly thereafter, *Assault upon the Citadel* was propelled even further by the decision of the California Supreme Court in *Greenman v. Yuba*

69. 347 U.S. 483 (1954)

70. See e.g., Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Wilson, *Products Liability* (Parts 1 & 2), 43 CALIF. L. REV. 614, 809 (1955).

71. 32 N.J. 358, 161 A.2d 69 (1960).

72. I present the details of the publication timing of *Assault upon the Citadel* and *Henningsen* in Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461, 506-07 (1985).

Power Products, Inc.,⁷³ defining a new standard of strict tort liability for defective products which Prosser, though not the New Jersey Supreme Court, had recommended.

I have earlier remarked upon the simultaneity of prediction in *Assault upon the Citadel* and confirmation in *Henningsen* as equivalent to the delivery of Einstein's relativity paper to its readers exactly during the 1919 eclipse of the sun.⁷⁴ In retrospect, this description does not adequately distinguish Prosser's ambition from his reception. Readers at the time may well have been amazed to see Prosser's predictions in *The Yale Law Journal* appear within months in the pages of the New Jersey Reports. But Prosser viewed himself not as a positive scientist whose theory generates predictions, but as a reformer whose persistence may generate change. Prosser had been predicting the imminent demise of warranty law and the adoption of strict products liability as part of his propaganda in favor of reform, repeatedly—in treatise (1941), article (1943), treatise (next edition, 1955), and article (1960)—for almost two decades.⁷⁵ And in *Assault upon the Citadel* he finally got lucky. A better description of Prosser in *Assault upon the Citadel* is that of a Jeremiah who finds that he is finally getting an audience as the earthquake begins.

The subsequent success of *Assault upon the Citadel*, however, was hardly accidental. Prosser exploited *Henningsen* and *Greenman*, his commanding authority in the field, and his position as Reporter for the ALI Restatement of Torts to cement the achievement and channel products law toward modern strict liability. Prosser's initial hopes for legal change were modest. In now little-remembered passages of *Assault upon the Citadel*, Prosser predicted that expansion of the strict liability concept beyond cases involving food or skin products would likely proceed slowly.⁷⁶ Extension of the concept to allow recovery by bystanders "may perhaps never come."⁷⁷ He admiringly quotes at length from Justice Traynor's concurrence in *Escola v. Coca-Cola Bottling Co.*⁷⁸ recommending extension of strict liability to all consumer products, but concludes gloomily, "[t]hus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead."⁷⁹

Prosser progressively abandoned this conservatism, however, as, in 1961, 1962, and 1964 (following *Greenman*), he implored the ALI to adopt strict liability, respectively, for food products, products for intimate bodily use (a category including food), and finally all consumer products, defective and

73. 2 Cal.2d 57, 77 P.2d 897, 27 Cal. Rptr. 697 (1963).

74. Priest, *supra* note 72, at 507.

75. *See id.* at 516-17.

76. Prosser, *supra* note 14, at 1139.

77. *Id.* at 1142.

78. 24 Cal. 2d 453, 150 P.2d 436, 440 (1944).

79. Prosser, *supra* note 14, at 1120.

unreasonably dangerous.⁸⁰ Section 402A was adopted in 1964 accompanied by extensive Comments drafted by Prosser, drawing examples—even taking full paragraphs—from *Assault upon the Citadel*.

The accumulation of citations to *Assault upon the Citadel* came in the years following the adoption of Section 402A. By this time, the world had accepted its points; there surely was no new ground for the article to break. Instead, *Assault upon the Citadel* climbed up the list of the most frequently cited because of its convenience. It provided by far the most accessible summary of the case law preceding Section 402A,⁸¹ which in turn seemed to provide the strongest support for the new legal regime. *Assault upon the Citadel*, thus, became at once the beacon and the bowsprit of the modern expansion of civil liability that has so significantly changed tort law over the past thirty years.

80. A description of the ALI history appears in Priest, *supra* note 72, at 512-17.

81. *Assault* was distributed far more widely than the working drafts of section 402A that Prosser had prepared for the ALI Restatement (Second) of Torts § 402A (Tent. Draft No. 6, April 7, 1961); Restatement (Second) of Torts § 402A (Tent. Draft No. 7, April 16, 1962); Restatement (Second) of Torts § 402A (Tent. Draft No. 10, April 20, 1964).

John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (ranked third).

John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (ranked fifth).

Commentary by John Hart Ely,
Robert E. Paradise Professor of Law
and Senior Research Fellow,
Hoover Institution on War, Revolution, and Peace,
Stanford University.

Note and Comment Editor, *The Yale Law Journal*, 1962-63.

Of the two articles, Motivation is by far the more important contribution. Unfortunately, no evidence exists that anyone has read it.

John Hart Ely

There's a chance you missed the 1969 movie *A Walk in the Spring Rain*. Most of the details have mercifully faded from memory, but the general plot line was that Ingrid Bergman, temporarily resident in a pastoral mountain locale and driven up the wall by her wearisome husband, resisted but finally succumbed to an affair with a virile local man-child—if he wasn't actually a gamekeeper, he should have been—played by Anthony Quinn.

In order to keep the audience from simply dismissing Ms. Bergman as an unsympathetic trollop, the husband, played by Fritz Weaver, had to be portrayed as one pretty desiccated prune, and he was: they made him a professor. Not just any professor would do, though—Indiana Jones is a professor—so they made Fritz a professor of constitutional law. I always figured that that had tedium pretty well cornered—until I received the fateful letter from Mr. Shapiro telling me my place in the scheme of things. Third. Maybe fifth. Something in that general range. Not something you're exactly tempted to put on your résumé, but enough to rob you of the rationalization that your work is so brilliant or controversial that others are afraid to cite it. Sentenced to a sabbatical with me, Ms. Bergman would probably take up with the Hell's Angels.

Of the two articles, *Motivation* is by far the more important contribution. Unfortunately, no evidence exists that anyone has read it. (True, it gets mentioned, but generally in string citations supporting the proposition that questions of motivation are complicated and have spawned some literature.) There are at least three reasons for this. The first is that the title doesn't begin to reveal what the article is about. True, it's about the constitutional relevance of official motivation. But it makes other general theoretical points as well, including the insight that, the usual rhetoric notwithstanding, it is not the case that we either

do or should enforce a background requirement that government choices be rational. And it was an important first step toward a modest paradigm shift in the analysis of constitutional suspiciousness to which my later work has also contributed, from a victim perspective (who's getting screwed, and how) to a perpetrator perspective (who made this allocation, and with what incentives).

Since it purports to explore the relevance of motive in essentially all areas of constitutional law, *Motivation* necessarily attempts, albeit often briskly, to identify the sorts of evils to which the document's various clauses are addressed, before attempting to say how motivation should fit into the analysis. Thus it discusses not simply a wide range of equal protection problems, but, among other things, the state action doctrine, the range of federal power, congressional control of the jurisdiction of federal courts, congressional investigations, and a host of First Amendment problems as well. The discussion of the religion clauses, for example, is an important one, yet it is seldom even mentioned in the voluminous subsequent literature on that subject. The reason seems obvious: there isn't a hint of religion in the article's title, any more than there is of the other topics I have mentioned.

There are at least two other reasons *Motivation*, while often cited—well, fifth—is seldom read. One is that it is much too long (136 pages); the other is that it is not very well written (especially the off-putting introductory summary I added during the editing process). I wrote it my second year in teaching. (“Hey, why wait? I’m a teacher now, and teachers write, and if you have to clean up all of constitutional law before you can make your point, I guess that’s what you do. Does the school furnish a dictaphone?”) Had I realized that Yale was about to embark on a siege of not promoting anybody for a decade or so, I wouldn’t have been so cocky. In fact I suppose I’d have developed a block of my own. Some would say the profession would be better off for that, but I continue to believe that, despite its lack of discipline, *Motivation* is an important piece. Fewer people should cite it; more people should read it.

Wages may have been more conspicuous politically—how many law review articles get mentioned in presidential speeches?—but it is substantially less important theoretically. I haven’t yielded an inch on my criticism of *Roe* (which isn’t, as I have explained elsewhere, necessarily to say that the case should now be overruled). However, writing a convincing criticism of *Roe v. Wade* was hardly an assignment requiring a rocket scientist. Merely a kamikaze pilot. (*Wages* would surely rank first on any list of articles with which other academics have expressed agreement privately but never gotten around to doing so publicly. Such a study is thus far lacking.)

Yet *Wages* gets cited a lot—well, third—and there is some evidence it actually gets read as well. I’d learned some lessons in the intervening three years. *Wages* is short. It is better written than *Motivation* (not that it was written any more deliberately, but diatribe is an easier milieu). And since it isn’t about very much, the title was able comfortably to capture the subject.

Finally, of course, abortion is a hot topic—or at any rate the Supreme Court made it one.

If three and five were unsettling numbers, however, 1970 and 1973 were more so, even causing me briefly to wonder whether I'd somehow missed my own obituary. I quickly consulted my bibliography to make sure I'd published some things since these two, and was relieved to learn that I had, albeit in other forums.⁸² In the context of this celebration, however—Dean Calabresi's various communications to the alumni are calculated to instill the same doubts—one is compelled to wonder whether, in the overall scheme of things, publication anywhere other than in *The Yale Law Journal* really . . . well, counts.

I leave you with one final thought: Cite this piece! I've still got an outside shot at a low straight.

Fritz Weaver's kind of hand.⁸³

82. A mistake I'm not likely to make again. In introducing the review-specific citation study, Mr. Shapiro has created the academic equivalent of the frequent flier club.

83. Having implied some skepticism about citation studies, I should admit my awareness that Mr. Shapiro's list—I'll even grant it can't be a complete coincidence—is a very distinguished one. And if you promise not to tell—I have my reputation to think about—I was actually delighted to learn I was on it. Reich, Prosser, and Emerson are men it is an honor to finish even close to: in fact two of them—I never met Dean Prosser—were important influences on me not only as a scholar but also, I hope, as a person.

Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (ranked fourth).

Commentary by Norman Dorsen,
Stokes Professor of Law,
New York University School of Law.
President, American Civil Liberties Union, 1976-1991.

Tom Emerson's article was exceptional because it had enormous influence despite the fact that its central thesis was not adopted.

Norman Dorsen

Tom Emerson's article was exceptional because it had enormous influence despite the fact that its central thesis was not adopted. The thesis was that "the essence of a system of freedom of expression lies in the distinction between expression and action"⁸⁴ and that a major problem in First Amendment theory is "to formulate [the distinction] in detail."⁸⁵ Notwithstanding the sophisticated way in which Emerson explored this question in the article and a subsequent book,⁸⁶ his approach was rejected for both analytic and instrumental reasons. The Supreme Court has essentially adopted Louis Henkin's conclusion that a "constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak."⁸⁷ And those concerned with maximum protection of free speech, such as the American Civil Liberties Union, balked at Emerson's theory because of the fear that the uncertain line between speech and conduct would be drawn by judges who were insensitive to First Amendment values.

Nevertheless, Emerson's article has had an important influence. First, there is the lingering impact of his four-part exposition of the reasons to protect free speech: attainment of truth, participation in decisionmaking, the balance between stability and change, and especially the nonutilitarian justification of individual self-fulfillment (which never has been expressed more effectively). Franklyn Haiman, author of a leading First Amendment work,⁸⁸ has said that whether a scholar "simply accepts and reiterates that litany (Haiman), chooses just one of them as the be-all and end-all (Baker, Redish), critiques all of them (Schauer), or comes up with a new one (Blasi, Bollinger, Chevigny), I can't

84. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 955 (1963).

85. *Id.* at 917.

86. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). The article was published, without most of its footnotes, as a book in 1966. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966).

87. Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (emphasis in original).

88. F. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* (1981).

think of anyone who either ignores the Emerson list or doesn't begin with it."⁸⁹

A second legacy of the article is its recognition of intensely practical reasons for protecting freedom of expression. The earlier works by Zechariah Chafee and Alexander Meiklejohn⁹⁰ did not focus on the everyday realities of censorship. Moreover, they wrote in the 1940's, when judicial experience with free speech cases was still modest. Emerson, on the other hand, took pains to isolate the "[d]ynamics of [l]imitation" in a wide variety of contexts. He identified the "powerful forces that impel men toward the elimination of unorthodox opinion," the "inherent difficulty of framing limitations on expression," the "apparatus required for administration and enforcement" (those assigned the task "have or soon develop a tendency to pursue it with zeal"), the fact that limitations on speech "are readily subject to distortion and to use for ulterior purposes," and the "whole impact of restriction on the healthy functioning of society."⁹¹ Practical insights infuse Emerson's analysis and have become a regular feature of judicial opinions and scholarly articles.⁹² A third product of Emerson's article flows from his purpose in drawing a hard-edged line between "action" and "expression"—to immunize as much speech as possible from government restrictions that courts otherwise might permit under the prevailing judicial standards of "bad tendency," "clear and present danger," "ad hoc balancing," and even the "absolute test."⁹³

Although Emerson's basic theory did not take hold, its influence may be seen in the way that courts continue to distinguish between "content-based" and "content-neutral" regulations. Significantly greater protection is accorded speech that is singled out for its message than speech that is curbed because government is pursuing other goals, such as reducing noise or beautifying highways.⁹⁴ The content-based/content-neutral distinction antedated Emerson's article and its application has often been confusing. Nevertheless, like Emerson's speech/action dichotomy, it sharply limits certain types of government regulation of expression while permitting other types that directly reduce the sum total of communication.

From a broader perspective, *Toward a General Theory* was merely one of Tom Emerson's unmatched scholarly contributions to every sphere of civil liberties, including free expression, academic freedom, privacy, the rights of

89. Letter from Professor Hairman to the Author (March 9, 1990).

90. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

91. Emerson, *supra* note 84, at 887-91.

92. E.g., Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937, 1013-18 (1983); Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFFALO L. REV. 175, 206-07, 217-18 (1983).

93. Emerson, *supra* note 84, at 908-16.

94. See D. BOGEN, *BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT 77-78* (1984); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789-804 (2d ed. 1988).

women and racial minorities, fair legislative apportionment, and the struggle for open and compassionate government.⁹⁵

95. See Dorsen, *Thomas Irwin Emerson*, 85 YALE L.J. 463 (1976) (includes bibliography).

Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (ranked sixth).

Commentary by Carol M. Rose,
Professor of Law,
Yale Law School.

[L]ike much interesting scholarship, the article set off a new scholarly conversation, and we are still learning where that conversation will lead. As a result, of course, the takings issue is even more of a mess—but also a more interesting mess—than it was in 1964.

Carol M. Rose

Joseph Sax's 1964 article, "Takings and the Police Power," endeavored to clarify the notoriously inconsistent and messy case law on governmental "takings" of private property. It pointed to a fundamental divide between types of governmental actions: takings issues, Sax argued, have seldom arisen where governments act in an "arbitrage" capacity, mediating and settling rights among property owners. On the other hand, when governments exercise an "enterprise" function, they are more likely to act arbitrarily and in ways that raise takings problems, and that may require compensation to affected owners.

What emerged as the most productive point in Sax's article was not the arbitrage/enterprise distinction, which in some ways echoed older accounts,⁹⁶ but rather the historical analysis in which he identified arbitrariness as the touchstone of takings doctrine. Within three years, Frank Michelman addressed the takings issue with another extremely widely-cited article.⁹⁷ Michelman's article sidelined the arbitrage/enterprise division, but powerfully analyzed the question of arbitrariness, particularly as that issue relates to people's expectations about property. Drawing on Bentham and Rawls, Michelman pointed to a convergence of fairness and utilitarian reasoning in our restraints on governmental violation of property expectations.

Michelman's focus on expectations in turn inspired new takings scholarship. One direction concentrated on the *content* of people's expectations about property: Robert Ellickson⁹⁸ and Bruce Ackerman⁹⁹ explored property expectations by analogy to a somewhat changeable ordinary language, while Richard Epstein argued that property is akin to a "natural kind," with certain universal

96. See E. FREUND, *THE POLICE POWER* 546-47 (1904) (distinguishing governmental actions that merely suppressed harms from those that required benefits from private property owners).

97. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 HARV. L. REV. 1165 (1967).

98. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

99. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

features that are always expected.¹⁰⁰ Another and more recent branch of the expectations literature has suggested that takings compensation acts as a kind of surrogate insurance.¹⁰¹

In the meantime, Sax himself had begun to doubt his own "enterprise" category. His second thoughts responded in some measure to three developments of the later 1960's: the emergence of the environmental movement; the beginnings of a "public choice" literature;¹⁰² and the further evolution of his own scholarship, especially his revival of the historic concept of a "public trust" in natural resources.¹⁰³

In the earlier arbitrage/enterprise divide, Sax had envisioned "arbitrage" as a governmental balancing between two more or less equal private competitors, whereas he had seen governmental "enterprise" as potentially an uneven deal: as an "enterpriser," government could stack the deck in the public's favor against the individual owner. It was this latter point that Sax began to doubt. By the late 1960's, the public choice and governmental "capture" literature was already suggesting that small and well-organized groups could aggressively promote their own intensely-felt interests—usually at the expense of interests that might be more widespread, but that were also more diffuse and weakly-held by individuals. These considerations seemed to suggest to Sax that the deck might be stacked *against* the public, and that it was the responsibility of our governmental institutions to protect the diffuse but widespread "public rights" that might otherwise be sacrificed to private overreaching.

All this put governmental "enterprise" in a different light. In a 1971 revisitation of the takings issue,¹⁰⁴ Sax suggested that it was proper for government to act positively in a way that simply protected these widespread and diffuse "public rights" against private depredations. One sees Sax's change of heart best in his altered attitude about wetlands, the protection of which he classed negatively as an "enterprise" in 1964, but as a positive protection of "public rights" in 1971.

Once again, Sax's revisitation spawned a cottage industry. First, numerous writers have been attracted to the idea that government may act positively to protect public rights, in the exercise of a "public trust."¹⁰⁵ Second, a number of writers have followed Sax's lead in another historical direction, and have suggested another realm of positive action for government, namely its provision

100. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

101. See, e.g., Fischel & Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269 (1988).

102. Important early works were J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1965), and M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

103. Sax, *supra* note 57.

104. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

105. For a recent example, see *Symposium: The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*, 19 ENVTL. L. 425 (1989), and the literature cited therein.

of a forum for the working out of “civic republican” self-government.¹⁰⁶ Sax himself has seen a connection between his own interest in public rights in natural resources and public consciousness in communities, and has suggested that communities as a whole might have rights that center on the common life of the citizenry.¹⁰⁷

All this of course has come a great distance from Sax’s original 1964 takings article. But like much interesting scholarship, the article set off a new scholarly conversation, and we are still learning where that conversation will lead. As a result, of course, the takings issue is even more of a mess—but also a more *interesting* mess—than it was in 1964.

106. See, e.g., *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); *Symposium: Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. L. R. 1 (1989).

107. Sax, *Do Communities have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984).

Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (ranked seventh).

Commentary by Guido Calabresi,
Dean and Sterling Professor of Law,
Yale Law School.

Note Editor, *The Yale Law Journal*, 1957-58.

Many questions left unanswered in that class, and in torts literature generally, like the reason for the "scope of employment" limitation on master-servant liability, seemed to me easy ones from even a simplistic economic perspective. Why, then, not look at torts law, indeed at all of law, from that perspective and see what one might learn?

Guido Calabresi

The first impression I had on rereading *Some Thoughts* thirty or so years after its publication, and thirty-five years after it was begun, is that much that was novel then seems obvious today; the second (more self-serving) impression is that it remains considerably more subtle in its appreciation of the limits of economic analysis than much that followed it.

The article had its genesis in the fall of 1955, when I was a student in Fleming James' Torts class. Many questions left unanswered in that class, and in torts literature generally, like the reason for the "scope of employment" limitation on master-servant liability, seemed to me easy ones from even a simplistic economic perspective. Why, then, not look at torts law, indeed at all of law, from that perspective and see what one might learn? Why not make that perspective more subtle; why not go beyond the limits economists themselves accepted, and see where that would lead?

The first full version of the article was submitted to *The Yale Law Journal* as my draft "comment" in the competition for Law Journal Officers. Though I was selected a "Note Editor," it was clear that my draft had disappointed the outgoing board, which included people of unusual brilliance who today properly dominate the profession. It was too complex and it didn't sound like law. This cold reaction led to a happy result for me: instead of being published and forgotten as an anonymous student comment, the manuscript was set aside to reappear four years later, when I was a junior faculty member, as my first article.

Perhaps there were new readers, or the times had changed. In any event, the reaction was totally different. Ronald Coase's magisterial article, *The Problem of Social Cost*, appeared some months later,¹⁰⁸ as did Pietro

108. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). As Judge Richard Posner has pointed out in his book, *THE ECONOMICS OF JUSTICE* 4 n.6 (1981), though Coase's article was properly dated

Trimarchi's stunning book, *RISCHIO E RESPONSABILITÀ OGGETTIVA*, which was published in Italy.¹⁰⁹ Harry Kalven and Walter Blum attacked my article brilliantly, but in precisely the way any author hopes to be criticized.¹¹⁰

Of course, many remained unaffected. At the Harvard Law School, it took some ten years before the approach evoked significant response. While at the Max Planck Institute in Hamburg, in 1965, my thesis was greeted icily by its great Director, Professor Konrad Zweigert, who commented, "Very interesting, very interesting, but of course you must realize it isn't legal scholarship." I rather rudely retorted: "It soon will be." If anything, it was quickly to be too much so!

I have one regret with respect to the article. An early version of it contained a fairly full analysis of causal reciprocity which paralleled that which Coase made so famous in *The Problem of Social Cost*. This draft was read by a distinguished economist who told me that I was quite wrong, citing, of course, Pigou. Coase received the same reaction from Stigler and the whole of the University of Chicago Economics establishment when he presented his manuscript at a workshop there.¹¹¹ Like Coase, I was not convinced; indeed, I did not understand the Pigovian reasoning. Unlike Coase, however, who stuck to his guns, I was not sufficiently sure of myself (or of my economics) and so removed the section. All that I left was a footnote, which, discussing the failure to charge drivers for injuries to pedestrians, says:

In effect such a result would amount to a decision that automobile accidents are more a true cost of walking and of living generally, than of automobile driving. Actually they are probably a cost of both.

I have not, in this article, attempted to probe what influences our decision that a particular "cost" is caused by one activity rather than another. Clearly this is an important question. Indeed, it is the next step in any thorough analysis of risk distribution. At this stage of analysis, however, when we have not yet examined the need and the effect of charging activities with those costs which all would agree they cause, that step seems somewhat far removed.¹¹²

That "next step" was not, of course, "far removed." My unwillingness to include a Calabresi version of Coase's theorem marked the last time I ever omitted something I thought correct as a result of criticism that I did not understand. In one sense, the matter is of no importance. Coase's analysis was so much more compelling than mine, and he understood its significance so

1960, it did not appear in print until later because the *Journal of Law and Economics* was several issues behind. This explains why neither he nor I cited the other.

109. P. TRIMARCHI, *RISCHIO E RESPONSABILITÀ OGGETTIVA* (1961).

111. See Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983).

112. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 506 n.24 (1961).

much more than I did (witness my failure in a subsequent article to grasp fully the total force of Coase's theorem¹¹³), that it would seem that all that was involved was the question of whether one or two people had the same insight at the same time; surely a trivial issue.

Unfortunately, however, that is not all there is to it. In *The Problem of Social Cost*, Coase presented his insight, and transaction costs analysis, from a distinctly anti-interventionistic, laissez-faire perspective. My ideological framework in the late '50s and '60s was very different (though nowhere near as skeptical of markets as Coase's had been twenty-five years earlier, when he wrote *The Nature of the Firm*).¹¹⁴ Accordingly, my version of Coase's theorem—like my whole article—served to justify intervention in order to assign costs in a way that reduced transaction costs. Had it been published, it would have been impossible for many to reject "Coase's Theorem" as mere "right-wing" ideology, since a "liberal" version would have been available at the creation. Similarly, those who tried to make of economic analysis of law a basis for blindly supporting the status quo would have found their path more difficult.

The fact of the matter is that Coase's insight, like all lasting contributions, transcended the politics of its author. Coase, of course, knew and appreciated this fully. Others, however, did not; some still don't. Had I not been frightened by an erroneous criticism, this fact would have been patently obvious and the Coase Theorem might well have had both a fuller and a more intelligent acceptance than it did.

Thirty years later the fundamental import of Coase's theorem is clearly recognized, and the point is of antiquarian interest only. It remains true, however, that advances in scholarship are richest when they occur independently to several people whose work imparts differing nuances to the insight. Hence my regret.

113. See, Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965) (which does not understand why Coase's theorem, on its terms, must apply to long-run as well as to short-run cost allocations). The error was noted and corrected in Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67 (1968).

114. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386 (1937). In retrospect one can see that *The Nature of the Firm* is based on an insight analogous to that in *The Problem of Social Cost*. In *The Nature of the Firm*, the insight explains why "command" or "collective" arrangements are frequently used in lieu of market ones; in *The Problem of Social Cost*, it explains how markets frequently modify and correct errors made by "command" or "collective" arrangements. The insight is enormously important and essentially the same; it is perhaps no accident, however, that in 1937 Professor Coase was a socialist, while in 1960 he was a libertarian.

Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960) (ranked eighth).

Commentary by Joseph Goldstein,
Sterling Professor of Law,
Yale Law School.

Article and Book Review Editor, *The Yale Law Journal*, 1951-52.

About to land their plane, with the fuel needle quivering at empty, in a dense fog that emergency field lights could not penetrate, Cabot (or was it Cagney?) opined: "It looks like low visibility all the way . . ." At that moment I found the words I was looking for to characterize police decisions not to enforce the criminal law.

Joseph Goldstein

I was watching a war movie starring Bruce Cabot (or was it Jimmy Cagney?) as U.S. Air Force pilots. About to land their plane, with the fuel needle quivering at empty, in a dense fog that emergency field lights could not penetrate, Cabot (or was it Cagney?) opined: "It looks like low visibility all the way . . ." At that moment I found the words I was looking for to characterize police decisions not to enforce the criminal law. Out of that film and out of confidential American Bar Foundation reports of day-to-day decisions of a large metropolitan police force came my first signed Law Journal article, vintage 1960, entitled: *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*.¹¹⁵

Some thirty years later, Yale Law librarian Fred Shapiro tells me that my article ranked eighth on a list of most-cited Yale Law Journal Articles and asks "What impact do you feel the article has had on other scholars, on the courts, or on legislation? Have your views on the topic changed? Would you write the article differently today?" I leave it to others to answer his first question. My response to his second and third question is "No."

Before saying something about the current relevance of what I attempted to do in the article, I wish to say that ranking by citation counts could become an invidious virus in the world of scholarship. It bears no relationship to scholarly merit. It is nondiscriminating in its discrimination. It is not even a reliable indicator that the work cited was read, let alone understood by the citer. But I suppose that at a time when law schools are ranked, like Miss Americas, by a national periodical, it should come as no surprise that in partial celebration of its 100th Anniversary *The Yale Law Journal* ranks its articles by the numbers.

115. 69 YALE L.J. 543 (1960).

In the article I identify the multiple, often conflicting, purposes of the criminal law and describe the interrelated points of decision from legislature, to police, to prosecutor, to grand jury, to trial judge, to petit jury, to review courts, to prison, to probation, to parole and pardon authorities and back. In three case studies I develop and demonstrate the application of a model for assessing the practices of these decisionmaking agencies, with primary focus on police decisions not to enforce.

Unfortunately, the problems presented in the studies remain unresolved. To take but one of them, a police department's policy not to enforce the drug laws against certain violators who serve as informants, is to recall questions from the past only to recognize that they are present-day issues.

I urged that legislatures be provided with a basis for evaluating their narcotics laws and for answering such questions as:

Will full enforcement increase the price of narcotics to the user? Will such inflation increase the frequency of crimes committed to finance narcotics purchases? Or will full enforcement reduce the number of users and the frequency of connected crimes? Will too great or too costly an administrative burden be placed on the prosecutor's office and the courts by full enforcement? Will correctional institutions be filled beyond "effective" capacity?¹¹⁶

Finally the article suggests that failures of enforcement might lead to recommendations to increase treatment facilities and to legalize the sale of narcotics. The question posed for debate was then and is now, thirty years later, whether taking the enormous profits out of the prohibition on sales "would lessen peddler incentive to create new addicts and eliminate the need to support the habit by the commission of crimes."¹¹⁷

116. *Id.* at 573 (emphasis omitted).

117. *Id.*

Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (Parts 1 & 2), 46 *YALE L.J.* 52, 373 (1936-37) (ranked ninth).

Commentary by William R. Perdue, Jr.,
Former Executive Vice-President,
Inmont Corporation.

The Reliance Interest presented an innovative revision of the theoretical structure by analyzing the "interests" served by awarding contract damages—interests that reflected underlying purposes of contract law. Fuller posited three "interests"—restitution, reliance, and expectancy.

William R. Perdue, Jr.

Few law review articles have affected legal thinking so powerfully as *The Reliance Interest in Contract Damages*.¹¹⁸

The article appeared at a time when contract doctrine was swathed in tension. Classically, a contract arose only from a "bargain," that is a promise for a promise or for specified action. On breach, a plaintiff recovered the value to him of full performance ("lost profit," expectation). No contract, no recovery.

Then came the doctrine of restitution, and ways were found to compel the return of the value of a benefit received by a defendant from a plaintiff. Conflict arose over a remedy for reliance—compelling compensation for detriment done to the promisee, arising from the promisee's action (or nonaction), done in reliance on an unbargained promise *and producing no benefit to the promisor*.

Reliance produced strain. Classical rules said no relief, but it was demonstrable that courts often granted relief for it. The Restatement (First) of Contracts responded by recognizing a restricted right to recover based on reliance (Sections 90 and 333).¹¹⁹

The Reliance Interest presented an innovative revision of the theoretical structure by analyzing the "interests" served by awarding contract damages—interests that reflected underlying purposes of contract law. Fuller posited three "interests"—restitution, reliance, and expectancy. Each provided a motive for remedy and a measure of damages, but, in a given situation, one interest

118. Fuller & Perdue, *supra* note 12.

I was Professor Fuller's student research assistant and he graciously named me as co-author; hence, I received the invitation to write this commentary.

He was the architect of the theoretical structure and the principal author. I did the extensive research in American and British cases, prepared footnotes, and drafted much of the second installment which dealt with existing case law. Fuller and I also engaged in some of the most stimulating and educational dialogues of my life.

The Fuller-Perdue collaboration is commemorated by an endowed fund at Duke Law School providing financial assistance for similar faculty-student partnerships.

119. RESTATEMENT (FIRST) OF CONTRACTS §§ 90, 333 (1932). For a fuller background analysis, see Feinman, *Promissory Estoppel and Judicial Method*, 97 *HARV. L. REV.* 678 (1984).

might provide the motive, another the measure. The article discussed, in various aspects, the interplay of interests, explored the reliance interest in depth, and urged that compensating reliance should have wider recognition as "a distinct promissory interest, deserving recognition on its own account."¹²⁰

The article had no prestigious background. Fuller was then a young professor at Duke Law School, which was only beginning to achieve status as a topflight national institution. He had written articles which attracted attention, but not on contracts.¹²¹ Interest analysis and its terminology had no place in existing literature. In fact, the article questioned positions of eminent expositors of accepted doctrine. And it made a frontal attack on the inadequate treatment of reliance in the Restatement (First) of Contracts which appeared four years earlier with formidable sponsorship and praise.¹²²

Yet, in a field rich in scholarly writing, the article received wide acclaim and exerted tremendous influence. As Professor Feinman puts it:

The simplicity and power of Fuller's interest analysis have made it highly influential. Because of its consistency with traditional values, its links to established doctrine, and its versatility, it is now used generally as a basic conceptual framework for contract law.¹²³

Another writer says "[its] analysis has served a generation of contracts scholars as a model of how to think about contract law generally."¹²⁴ And another suggests it "may well have had more influence in changing American contract jurisprudence in the past forty years than any other single article or book."¹²⁵ And, prefacing a somewhat critical examination, one concedes "*The Reliance Interest* is our most significant article on contract law."¹²⁶

LEXIS currently lists references to the article in seventy-seven law review articles and forty-one reported cases. Other cases, without citing the article, apply the reliance interest. The Restatement (Second) of Contracts accepted the structure of interests and made changes in substance and language to meet Fuller's criticisms.¹²⁷

The article has not wholly escaped criticism of some details.¹²⁸ But after more than fifty years the central structure of interest analysis retains its validity

120. Fuller & Perdue, *supra* note 12, at 420.

121. See Winston & Paulson, *Bibliography of the Published Writings of Lon L. Fuller*, in L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 305 (K. Winston ed. 1981).

122. Fuller & Perdue, *supra* note 12, at 89-95; see also Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981).

123. Feinman, *supra* note 119, at 685.

124. Hudec, *Restating the "Reliance Interest"*, 67 CORNELL L. REV. 704, 733 (1982).

125. I. MCNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* 98 (2d ed. 1978), quoted in Birmingham, *Notes on the Reliance Interest*, 60 WASH. L. REV. 217, 217 (1985).

126. Birmingham, *supra* note 125, at 217.

127. Farnsworth, *supra* note 122; Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

128. See, e.g., Birmingham, *supra* note 125, at 220.

and the reliance interest long ago received the wider recognition urged by Fuller. As his junior partner, I do not believe he would, in the light of subsequent developments, modify in any significant way the views expressed in the article—nor would I.

Fuller went on to write extensively in jurisprudence, and his biographer counts him as “one of America’s foremost jurists.”¹²⁹ Nonetheless, *The Reliance Interest* may prove to be his most important and most enduring work.

129. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 433 (1978).

Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957) (ranked tenth).

Commentary by Sanford H. Kadish,
Alexander and May T. Morrison Professor of Law,
Boalt Hall School of Law,
University of California, Berkeley.

The piece is redolent of John Dewey's confidence that conflicts of value can be resolved through practical intelligence and the processes of deliberation he termed "valuation." I no longer believe that goal to be remotely attainable by the Supreme Court.

Sanford H. Kadish

Reflecting on a piece of work you did almost thirty-five years ago can be a disquieting experience. It certainly has been for me. The inadequacies of the ancient work loom out, producing a powerful desire to deny any relationship to the author. The better features of the work, such as they may be, while bringing some solace, carry their own pain in compelling recognition that getting older is no assurance of getting better.

It is plain to me that I am far less sanguine than I was that there is a rational way for the Supreme Court to elucidate the meaning of procedural due process. The piece is redolent of John Dewey's confidence that conflicts of value can be resolved through practical intelligence and the processes of deliberation he termed "valuation." I no longer believe that goal to be remotely attainable by the Supreme Court. Valuation requires the patient examination of the facts of experience, the rigorous scrutiny of ends and means, the imaginative projection of alternatives and the estimation of their consequences. As an institution, the Court is simply not equipped for that task.

Moreover, I have come to have some doubt that Dewey's methodology, no matter how well applied, can do the job. Recent years have seen a competitive perspective gain prominence, one which seeks instead to solve such questions as the requirements of due process by invoking fundamental rights and which sees Deweyian instrumentalism as a threat to these rights. Not that I am now convinced that rights theorists have the right answers. Their arguments settle disagreements at the price of an absolute and dogmatic posture toward certain selected values. In that way they gain a tactical advantage in resisting competing values, but bring us no closer to whatever truth there may be in these matters. Still, some rights theorists have mounted enough of a case to weaken the hold of John Dewey upon me.

Of course there is another alternative—that determining the meaning of due process (or other constitutional terms calling for broad value judgments) is a process altogether controlled by the contingent alignments of power and will

on the Supreme Court; that we delude ourselves in thinking there are other ways of giving meaning to constitutional texts. This I believe today no more than I believed it 35 years ago, although I now have fewer reasons to offer than I had then.

Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960) (ranked twelfth).

Commentary by Abraham S. Goldstein,
Sterling Professor of Law,
Yale Law School.

Article Editor, *The Yale Law Journal*, 1948-49.

My object was to demonstrate that even Learned Hand's generalization lacked sufficient context and conceptual clarity to permit him to strike the balance fairly between prosecution and defense.

Abraham S. Goldstein

Strange as it may seem from today's perspective, criminal procedure was an underdeveloped academic field in 1960 when *The State and the Accused* was written. There were very few courses on the subject and virtually no case-books. Though much of the empirical research which arose from, and influenced, legal realism had been done in the criminal justice field, the results had not yet reached the legal literature. But in the period following World War II, and particularly in the 1950's and 1960's, criminal procedure came of age—both in the courts and in legal scholarship. Bridges were built between the newly acquired facts and an older set of institutions and doctrines that had often been based on idealized conceptions of how the law worked. Police and prosecutorial discretion were “discovered,” as was the remarkable extent to which pretrial release was effectively denied, contested trials rarely occurred, counsel for the defense were absent or ineffective, and rights of all sorts were routinely waived. Pressed by field studies and by a conception of law which looked beyond the case, legal scholars began to consider the full range of institutions in which decisions are made about criminal law. Inquiries followed on how the several segments of the system connect, and whether legal doctrines were being distorted by institutional failures.

It was in that context that I wrote *The State and the Accused*. There had been too few overviews of criminal procedure and most of those had been insufficiently anchored in empirical reality or in a systemic perspective. It was all too easy, therefore, for facile generalizations to be made which had undue impact on the field. The often quoted statement by Judge Learned Hand, on how our system of criminal procedure gave “every advantage” to the accused, exemplified such generalizations.¹³⁰ My object was to demonstrate that even

130. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923):

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole

Learned Hand's generalization lacked sufficient context and conceptual clarity to permit him to strike the balance fairly between prosecution and defense.

It is not for me to comment on how my article may have influenced general conceptions of criminal procedure. I can, however, trace more particularly the role it played in changing the law of pretrial discovery. The article was frequently referred to by legal scholars and law reformers as they urged and won greater pretrial discovery for defendants in criminal cases.¹³¹ Its suggestion that defendants might be required to provide reciprocal discovery in return for access to the government's case was adopted in part in the Federal Rules of Criminal Procedure.¹³² And its comparative assessment of the access each had, over all, to the other's case may well have influenced the movement towards making more of the defendant's case available to the prosecution.¹³³ The article also had some influence on discussions of pretrial screening processes, such as the preliminary hearing and the grand jury, and their relation to prosecutorial discretion and the guilty plea. And the article laid a foundation for my later work on systems of criminal prosecution here and abroad, and on how "inquisitorial" procedures and a role for victims might have to compensate for the limits of adversary processes.

Would I write the article differently today? The details would, of course, not be the same but the approach would be. In a system still pervaded by bitter conflicts between those who weigh differently the importance of due process and crime control, there is a continuing need to determine what prosecution or defense may gain or lose, over all, if adjustments are made in legal doctrine at any point in the process or in institutions which administer those doctrines. If I were to try today to strike the appropriate balance between state and accused, I would probably trace again along the lines I set out in 1960.

evidence against him to pick over at his leisure, and make his defense fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused

What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

131. See Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1571 n.9 (1986).

132. See FED. R. CRIM. P. 16.

133. See *Wardius v. Oregon*, 412 U.S. 470 (1973).

Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (ranked thirteenth).

I

Commentary by Robert H. Mnookin,
Adelbert H. Sweet Professor of Law
and Director, Stanford Center on Conflict and Negotiation,
Stanford University.

The article's core idea is deceptively simple, and is encapsulated by the "shadow" metaphor: expectations about what might happen in court affect negotiated resolutions outside of court.

Robert H. Mnookin

Bargaining in the Shadow of the Law: The Case of Divorce explores the effects of the formal legal system on dispute settlement outside of court—where most of the action takes place. The article's core idea is deceptively simple, and is encapsulated by the "shadow" metaphor: expectations about what might happen in court affect resolutions negotiated outside of court. The law's shadow is cast by legal rules and procedures, as well as by other institutional features of the formal legal system. The article suggests, however, that the connection between what courts do and how parties might negotiate is neither simple nor certain. Bargaining is also affected by the characteristics of the particular disputants themselves, including their preferences about outcomes, attitudes towards risks, and capacities to bear the transaction costs of litigation. To make matters yet more complicated, the possibility of strategic interaction—i.e., the idea that each party's bargaining behavior affects the response of the other, and vice versa—suggests that no existing theoretical model can predict with certainty the outcome in a particular dispute or how different legal rules or procedures will necessarily affect negotiated outcomes.

The article's conceptual model, as the title suggests, is used to examine in some detail how the shadow of the law affects bargaining in the specific context of divorce. To a substantial degree, family law scholarship and policy debates had previously focused primarily on judicial regulation of the lives of divorcing families, the effect of legal rules and procedures on judicial behavior, and the resolution of conflict inside the courtroom. The article makes the normative claim that the primary purpose of the legal system at the time of divorce should be to provide a framework for private ordering. It then demonstrates that various family law doctrinal distinctions and policy proposals look very different from the bargaining perspective of spouses negotiating a settlement. For example, child support, alimony, and marital property all concern

money and may very well be linked in negotiations to custody issues. It pleases me that in the decade since the article was published, policy debates about family law reforms have commonly included an analysis of the possible impact of proposed changes on the relative bargaining endowments of men and women, and that the legitimacy of private ordering at the time of divorce is now widely accepted. I remain of the view that within suitable limits, a regime premised on the idea of private ordering is legitimate and appropriate.¹³⁴

I continue to be fascinated by bargaining in the law's shadow. With an interdisciplinary group at Stanford, I am presently studying the barriers—strategic, institutional, and cognitive—to the negotiated resolution of conflict. Why do some negotiations fail, even though the parties would all benefit from a resolution? Divorce bargaining in particular remains near the center of my research concerns. The Stanford Child Custody Study is a large-scale empirical study of divorce custody that, among other things, confirms to a remarkable degree the extent to which negotiation, not adjudication, characterizes dispute resolution at the time of divorce. Of the 908 families in our study who had completed their divorce by 1988, it appears that a judge was required to adjudicate a custody issue in only thirteen.¹³⁵ This striking finding poses many interesting questions. Can a match stick on top of a pyramid cast a shadow large enough to influence the expectations of hundreds standing in the sand? To what extent do parties bargain outside the law's shadow, influenced largely by non-legal norms?¹³⁶ To what extent do various institutional elements of the legal system—such as the organization of the bar, the availability of mediation or other alternatives, and the substantive rules themselves—affect the shape of the dispute pyramid? In a variety of contexts, further theoretical and empirical research concerning how people bargain in the shadow of the law remains indispensable if we are to understand better how the legal system affects behavior and to appraise better the consequences of legal reform.

134. See Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015 (1985).

135. Mnookin, Maccoby, Albiston & Depner, *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 37 (S. Sugarman & H. Kay eds. 1990).

136. See Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

II

Commentary by Lewis A. Kornhauser,
Professor of Law,
New York University School of Law.

Analyses of judicial opinions commonly assume that the behavior required by a legal rule is normatively desirable. Bargaining denies this assumption. It states clearly that society may best meet its goals indirectly, by requiring some behavior other than the behavior it desires most. Bargaining also suggests that society may not always be able to get what it most desires.

Lewis A. Kornhauser

Bargaining in the Shadow of the Law: The Case of Divorce (hereinafter *Bargaining*) makes two simple claims. First, the behavior specified (or required) by a legal rule may differ from the behavior induced by that legal rule. This point underlies the economic analysis of law, though, at the time *Bargaining* was published, economic analysis of law primarily focused on the effects of the legal rule on "pre-dispute" behavior. Second, and following from the first, one should evaluate legal rules in terms of the actual behavior induced rather than in terms of the behavior the rule demands.

Throughout the writing of the article and for some time afterward, I regarded these two points as uncontroversial. Recently, I have more fully understood the radical implications they have for the understanding of adjudication. Analyses of judicial opinions commonly assume that the behavior *required* by a legal rule is normatively desirable. *Bargaining* denies this assumption. It states clearly that society may best meet its goals indirectly, by requiring some behavior other than the behavior it desires most. *Bargaining* also suggests that society may not always be able to get what it most desires.

The discussion in *Bargaining* of the "best-interest-of-the-child" and joint custody standards suggests both these points. Actual settlements under each standard differ from the announced norm. Implementation of the best-interest standard may require mandating some other rule. The joint custody standard illustrates a second difficulty: it imposes an outcome that is desirable if consensual but undesirable if coerced. It may thus be difficult for a court to announce a legal rule that both requires and induces socially desirable conduct.

The debate between the alternative dispute resolution movement and those "against settlement" revolves around this elision of required-to-desired behavior. Those who oppose settlement contend that litigation, unlike settlement, announces public values. The expression of public value, however, might occur in two different ways. The value might be embodied in the actual rule; the required behavior is the publicly valued behavior. Or the expression of public values in a judicial opinion may occur through the reasoning and rhetoric that

justify and support the announced legal rule. The logic of *Bargaining* favors this latter understanding of adjudication, while those against settlement apparently endorse the former, and urge that judges have the obligation to announce only legal rules that embody the values and aims the society seeks to promote.

I hope to address elsewhere and at greater length the implications of this central assumption of *Bargaining*—the tension between the embodiment (in rules) and the realization of social values.

William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (ranked fourteenth).

Commentary by John C. Coffee, Jr.,
Adolf A. Berle Professor of Law,
Columbia University Law School.

Among academics, the "race to the bottom" thesis received a more skeptical reception, with "law and economics" scholars pointing to it as an object lesson in how to misunderstand the impact of competitive markets. Yet, I would predict that a revival of interest in the Cary thesis is likely, because his critics are increasingly vulnerable.

John C. Coffee, Jr.

The publication of Bill Cary's *Federalism and Corporate Law: Reflections Upon Delaware* had the impact of a firecracker in a hornets' nest. Its claim that Delaware had led a race to the bottom that left shareholders without adequate protection (i) embarrassed and infuriated the Delaware bench and bar, (ii) may have been responsible for a surprising string of pro-shareholder decisions in Delaware over the next decade,¹³⁷ (iii) provoked the then adolescent "law and economics" movement to respond that the race was to the top, not the bottom,¹³⁸ (iv) motivated Ralph Nader and his cohorts to recommend federal chartering of corporations,¹³⁹ and (v) generally gave law students a simple phrase by which to understand a complex phenomenon.

Among academics, the "race to the bottom" thesis received a more skeptical reception, with "law and economics" scholars pointing to it as an object lesson in how to misunderstand the impact of competitive markets. Yet, I would predict that a revival of interest in the Cary thesis is likely, because his critics are increasingly vulnerable. Although Professor (now Judge) Winter answered that corporations that adopted sub-optimal rules would be compelled to pay more for their equity capital and so would be at a competitive disadvantage in their product markets,¹⁴⁰ the force of this argument depends on the degree

137. See, e.g., *Unocal Corp. v. Mesa Petroleum, Co.*, 493 A.2d 946 (Del. 1985) (establishing "reasonableness" standard for review of takeover defensive tactics); *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985) (imposing liability on corporate directors for breach of the duty of care); *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (adopting intermediate standard that permits some judicial review of justifications advanced by a special litigation committee for dismissal of a derivative suit); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) (requiring "business purpose" and new standard of valuation in parent/subsidiary squeeze out mergers).

138. See Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). This article was later expanded into a book. R. WINTER, *GOVERNMENT AND THE CORPORATION* 28-42 (1978).

139. See R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976).

140. R. WINTER, *supra* note 138, at 10-11 ("[A] corporation's ability to compete effectively in product markets is related to its ability to raise capital, and management's tenure in office is related to the price of [its] stock").

to which public corporations rely on the equity markets as a source of capital. Much evidence suggests that they place little reliance on this market.¹⁴¹ Also, with takeover premiums averaging around fifty percent, it is highly questionable whether a small discount in stock price attributable to the use of a sub-optimal jurisdiction of incorporation will trigger capital market discipline. Similarly, while Professor Roberta Romano has accurately observed that Delaware's unique dependence on charter revenues as a source of tax income amounts to a form of bonding mechanism,¹⁴² this implies only that Delaware is likely to continue to serve the interests of those whom it believes determine the incorporation decision. Thus, this conclusion leaves the ultimate issue unresolved: who are the "consumers" of corporate law—that is, shareholders or managers—whose collective preferences represent the demand curve in the market for corporate charters?

The most important statutory development in corporate law over the last decade may shed some light on this question. A majority of state jurisdictions have enacted stringent anti-takeover statutes since 1982.¹⁴³ Few, if any, believe that these statutes have maximized shareholder welfare, although they have certainly protected managerial interests. In the case of other states, one can explain this development as the product of in-state interest groups (particularly local labor and management) whose desire for protection outweighs the interest of the state's taxpayers in maximizing franchise tax revenues. Yet this explanation does not apply to Delaware, which essentially lacks these constituencies because it has few local industries. Thus, Delaware's adoption of a relatively "weak" anti-takeover statute¹⁴⁴ and its subsequent pro-management decision in *Paramount Communications, Inc. v. Time, Inc.*¹⁴⁵ seem to corroborate the Cary thesis because they cannot be explained as aiding in-state interest groups. Indeed, the curtailment of takeovers they caused reduced litigation and thus worked against the interests of the Delaware bar. From a public choice

141. See M. FOX, FINANCE AND INDUSTRIAL PERFORMANCE IN A DYNAMIC ECONOMY: THEORY, PRACTICE AND POLICY 337, 345-49 (1987) (internal cash flow has funded an average 90 percent of real investment of largest U.S. industrial corporations, in part because of legal disincentives to public offerings).

142. See Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, J.L. ECON. & ORG. 225 (1985). Supplementing Professor Romano's thesis, Professors Macey and Miller have focused on the "supply side" of the market for charters and argued that states may adopt or tolerate sub-optimal rules because they advance the interests of powerful interest groups within the state (most typically, the local bar). See Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

143. One recent survey shows 42 states have adopted some form of "major anti-takeover legislation." See 42 States Currently Have Anti-takeover Laws, ABA Group Told, 22 Sec. Reg. & Law Rep. (BNA) No. 33, at 1216 (Aug. 17, 1990).

144. DEL. CODE ANN. tit. 8, § 203 (Supp. 1988) falls into the category of a "moratorium" statute; it restricts mergers or other business combinations for three years, unless certain conditions are satisfied. However, because the Delaware law is not applicable if 85 percent of the shares are tendered or if a subsequent shareholder vote waives the statute's restrictions, it is considered far milder than other "moratorium" statutes.

145. 571 A.2d 1140 (Del. 1989) (approving defensive takeover tactics under deferential standard of judicial review).

perspective, only a concern about loss of tax revenues because of outward corporate migration can logically explain these events. If so, the demand side of the equation would sometimes appear to be driven by managerial, not shareholder, preferences, and the race does not necessarily lead to the top. The takeover movement may have stalled, but in so doing it suggests that Bill Cary's thesis should survive to be debated for decades to come.

Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (tied for fifteenth).

I

Commentary by Guido Calabresi,
Dean and Sterling Professor of Law,
Yale Law School.

Note Editor, *The Yale Law Journal*, 1957-58.

[T]he failure to have all the relevant tests described in one place, at the time when product liability law was exploding, has probably meant that judicial language in the area will never achieve the kind of lucidity one might have wished for and expected.

Guido Calabresi

When Jon Hirschoff and I set out to write *Toward A Test for Strict Liability in Torts*, we had, I think, several objectives in mind. The first was to point out the fundamental difference between cost-benefit based tests for liability (such as the Learned Hand Fault test) and tests (such as the one we called the Strict Liability test) in which the decisionmaker eschewed cost-benefit judgments. Second, we wished to point out that the recent move to strict liability in torts could not be explained predominantly on wealth distribution or spreading grounds, as was commonly stated, but was likely to stem from dissatisfaction with the meager accomplishments of fault type tests in reducing the sum of accident and safety costs.

Third, we wanted to emphasize the importance of practical over theoretical issues in determining which approach to tort liability ought to predominate. In particular, we wanted to explore the effect that (a) the level of generality at which a liability rule worked best, (b) the existence of insurance, and (c) the presence of third party victims, would have on whether fault or strict liability tests were likely to be most effective in achieving optimal degrees of safety. Fourth, we hoped to give courts some guidance in product liability cases by helping them see how strict product liability fit with older examples of non-fault liability (such as extra hazardous activity liability and assumption of risk), and how they might approach the question of whom to hold strictly liable. Finally, we wished to indicate the relationships and tensions between those goals which focused on yielding an optimal degree of safety and other goals, like those concerned with distribution of wealth.

While I believe the article succeeded very well in much that it set out to do, several changes would have made it stronger. First, the article took for granted that readers and courts would understand that strict liability, as we used it, did not mean *injurer* liability, but meant a way of determining when injurers

and when victims should bear losses regardless of fault. Most of the criticisms of the piece, including Richard Posner's,¹⁴⁶ center on this simple (and, if I may say so, simplistic) misreading of the article. I still believe that our meaning should have been obvious. How else could one explain the extended discussion of assumption of risk (which placed losses on faultless victims) as a paradigm, albeit an often misapplied one, of a strict liability rule? How else could one deal with the then predominant legislative effort toward what was universally termed strict liability: first party automobile liability laws, which assigned losses primarily to the injured party?

Nevertheless, many critics failed to see the point, and therefore necessarily failed to see the more subtle, and crucially important point, that strict liability tests, no less than fault tests, could, and often should, divide losses among injurers and victims in order to optimize safety. This point was explicitly made in various places (e.g., p. 1068, where the limited liability of a steel mill for the hand of a worker who is also a great violinist is discussed). But, like the fact that strict liability could mean victim liability, it should have been emphasized more.

Second, the article missed the fact that courts, especially in product liability cases, were sometimes using a *non*-fault test which *was* based on a cost-benefit analysis and hence differed both from the true fault tests (Learned Hand and reverse Learned Hand) and what we termed strict liability tests. The definition of this ex-post, or non-fault Learned Hand test, and its significance, especially in product liability and nuisance cases, had to wait years for fuller examination in an article by Calabresi and Klevorick.¹⁴⁷ This delay inevitably made the Calabresi-Hirschhoff article less useful to courts than it might have been. Indeed, the failure to have all the relevant tests described in one place, *at the time when product liability law was exploding*, has probably meant that judicial language in the area will never achieve the kind of lucidity one might have wished for and expected.

Finally, while a short piece like the Calabresi-Hirschhoff article could not have done much more than it did, I nevertheless today find the discussion of

146. See, e.g., Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 205 n.1, 208, 213-15 (1973); Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 327-28, 338 (1973); England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 49 (1980); see also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 160-67 (3d ed. 1986); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 (1972). Scholars are apt to misread the article on this point, even when they do not criticize it. Shavell, *Strict Liability versus Negligence*, 9 J. LEG. STUD. 1, 3 (1980). See, e.g., Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1170 n.77 (1981); Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions*, 37 AM. U.L. REV. 285, 287 & n.5 (1988); Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 550 n.118 (1983); Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 862 n.66 (1987); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 865 nn.62 & 63 (1984); Winter, *Economic Regulation v. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890, 899-900 n.25 (1973).

147. Calabresi & Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

the relationship of the strict liability and fault-based tests to goals other than safety optimization to be inadequate. The lumping of all other goals together under the rubric of distribution is not helpful. It combines issues as different as taste or value shaping with notions of just desert and decisions based on wealth and class or caste differences. That is not only not useful but inevitably tends to understate the significance of the goals that are lumped together.

The principal point, that courts and juries have a role to play as to these, was correct then, and is still. But had we not been so concerned with rebutting Fletcher's recent article,¹⁴⁸ I think we could have said it, and more, more profoundly.

II

Commentary by Jon T. Hirschoff,
Partner,
Tyler, Cooper & Alcorn,
New Haven, Connecticut.

If negligence and strict liability could be subsumed in a new doctrinal structure in which information about risks and ability to act with respect to risks are central, it would be worth asking whether we can afford the administrative complexity, jury confusion, and other costs of having accident cases pleaded and tried simultaneously in negligence and strict liability.

Jon T. Hirschoff

Guido Calabresi's comment looks back on the objectives we had in mind when we set out to write *Toward a Test for Strict Liability in Torts*. I would like to consider instead some implications of our article which I am not sure we had in mind.

We suggested that in formulating a test for strict liability for product defects, courts should look to factors such as knowledge of the risk (and thus adequacy of warning) and appropriateness of use to determine who was in the best position, with respect to the accident risk, to make a cost-benefit analysis and act upon it. Such factors, we pointed out, are commonly mentioned in assumption of risk cases and in traditional strict liability cases. In many of these cases, liability turns not on whether the defendant and plaintiff *ought* to have acted as they did, but rather on who was in a better position to perceive the risk, make the cost-benefit analysis, and act upon it.

A question worth examining, I think, is whether a test like ours could serve as a more general test for liability for accident risks, facilitating the eventual

148. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

abandonment of the distinction between fault-based liability and strict liability. We did not mention the many cases in which liability for conduct which ought not have occurred is said to be limited, by language sounding in duty or proximate cause, because the harm which occurred was not a risk with respect to which the defendant's conduct was negligent.¹⁴⁹ In many of those cases, it could be said that the defendant was in no better position than the plaintiff to perceive the risk which is the subject of the litigation, make the cost-benefit analysis, and act upon it.

It would be worthwhile to examine the extent to which cases like *Palsgraf* imply that the purpose of the negligence inquiry is not the establishment, by judges and juries, of standards of behavior, but is the determination of whether the defendant's negligence has frustrated the plaintiff's legitimate expectations about accident risks. Similarly, it is worth asking whether the reason for the absence of liability for non-negligent activity which carries with it the statistical risk of accidents is that the utility of the activity justifies the taking of lives and limbs, or is instead that such activity is part of the background of accident risks which individuals generally expect to bear.

If negligence and strict liability could be subsumed in a new doctrinal structure in which information about risks and ability to act with respect to risks are central, it would be worth asking whether we can afford the administrative complexity, jury confusion, and other costs of having accident cases pleaded and tried simultaneously in negligence and strict liability.

149. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) (tied for fifteenth).

Commentary by Harry H. Wellington,
Sterling Professor of Law,
Yale Law School.

[I]t must be that the process of adjudication profoundly influences the way courts interpret legal materials. My 1973 article—and much contemporary writing—seems innocent of this obvious truth.

Harry H. Wellington

First, this 1973 article is not sufficiently attentive to the process of adjudication. It sees the judge as a legal scholar working alone in a quiet corner of the library. The trouble with this picture is that judges deal with disputes framed by lawyers arguing to win for their clients and—as Bob Cover has taught us—often urging the court to commit violence. Moreover, at the appellate level, more than one judge is involved in the case. This means that negotiation is part of the process of adjudication; and it means that in the field of law, interpretation is different from interpretation in other humanistic disciplines. For it must be that the process of adjudication profoundly influences the way courts interpret legal materials. My 1973 article—and much contemporary writing—seems innocent of this obvious truth.

Second, my discussion of conventional morality may be misleading. It is wrong to think about *finding* conventional morality. It is not like digging for gold and discovering the ore. Among the participants in adjudication—the lawyers and judges—there must be a constructive reexamination of the attitudes that I contend reveal our public values and comprise our conventional morality.

The Yale University Press has recently published my book, *Interpreting the Constitution*.¹⁵⁰ In that book, I revisit some of the problems addressed in the article and take account of what I seemed innocent of in 1973.

150. H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990).

Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) (older article, ranked twenty-second).

Commentary by Myres S. McDougal,
Sterling Professor of Law, Emeritus,
Yale Law School.

[A] jurisprudence which stops short at national boundaries, as most of our inherited frames of jurisprudence do, is hopelessly inadequate in the contemporary interdependent world. It remains our conviction that a theory for inquiry about law which would serve the needs of a free society, whatever the community, must contain components at least comparable to those recommended in our initial article.

Myres S. McDougal

In our first collaborative publication, *Legal Education and Public Policy: Professional Training in the Public Interest*, Harold Lasswell and I sought to add a more constructive dimension to the emerging jurisprudence of American Legal Realism. Like the Realists, we emphasized that the most viable conception of law is that of the process of authoritative decision by which the members of a community clarify and secure their common interests, but we made call also for a comprehensive, systematic, and deliberate focus, in legal scholarship and education, upon the making and application of community policy.

We observed that the most rational method for integrating claims of particular interests into a common interest requires a careful, contextual examination of all particular claims in relation to the community values at stake, and the creative estimation of the decision that—under the conditions of an evolving future—might best approximate common interest. The appropriate contextual examination and estimation required, we suggested, three major components: a framework of theory for the formulation and location of problems in their larger community context; the explicit articulation and postulation, for general guidance in the decisions, of a community's most fundamental, constitutive policies; and the employment of a comprehensive set of distinctive, though interrelated, intellectual tasks in the making of, and inquiry about, particular decisions.

The necessary framework of theory demanded an empirical, designative reference to all features of community process, at all levels of community, and included processes of both effective and authoritative power, as well as of other cherished values. The fundamental community policies recommended for postulation were those commonly characterized as the values of human dignity, now made authoritative for the global community by the human rights conventions and other decisions. The intellectual tasks described as relevant included

the detailed clarification of policies in relation to particular problems, the examination of past trends in decision (and their value consequences) upon comparable problems, the exploration of the predispositional and environmental conditions affecting past decisions, the projection of probable future conditions, and, finally, the calculation of the decision that under the circumstances would appear most likely to express the common interest.

In a seminar on "Law, Science, and Policy," designed largely for prospective teachers and offered for several decades in the Yale Law School, Lasswell and I sought to build upon and develop the themes announced in the article. In collaboration with our students and other associates, we made application of the recommended theories and procedures in many books and articles, most notably in international law, property law, and criminal law.¹⁵¹ A book to be published in 1991—Lasswell & McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy*—will contain the lectures and other materials, somewhat revised and updated, prepared by Lasswell and me to conduct the seminar.

At the present time, Professor Michael Reisman in the Yale Law School and associates elsewhere offer strong leadership in the application—and improvement—of the recommended theories and procedures in relation to global and other transnational processes of authoritative decision. The importance of a beginning emphasis upon transnational processes of decision derives from recognition that a jurisprudence which stops short at national boundaries, as most of our inherited frames of jurisprudence do, is hopelessly inadequate in the contemporary interdependent world. It remains our conviction that a theory for inquiry about law which would serve the needs of a free society, whatever the community, must contain components at least comparable to those recommended in our initial article.

151. The range of publication is indicated in R. MUTH, M. FINLEY & M. MUTH, HAROLD D. LASSWELL: AN ANNOTATED BIBLIOGRAPHY (1990); R. SHIMANE & R. RICH, WORKS OF MYRES S. MCDUGAL (Asa V. Call Law Library Bibliography Series No. 97, University of Southern California Law Center, 1980); Tipson, *Bibliography of Works By and In Relation to Myres S. McDougal*, in appendix to W. REISMAN & B. WESTON, TOWARD WORLD ORDER AND HUMAN DIGNITY (1976).

Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931) (older article, ranked twenty-eighth).

Commentary by Paul Gewirtz,
Professor of Law,
Yale Law School.

Note and Project Editor, *The Yale Law Journal*, 1969-70.

What moved me then, and still moves me, is that its intellectual ambitiousness and personal voice pointed to a possibility I cherished—the possibility that the study and profession of law could engage our deepest human yearnings.

Paul Gewirtz

Sixty years after publication, Llewellyn's article still amazes with the richness of its ideas, the scale of its ambition, and the craggy grandeur of its execution.

*What Price Contract?*¹⁵² is an interpretive essay about the relationship between contract law and society, investigating contract's features as a social institution rather than dissecting legal doctrine. With Llewellyn widely regarded today as the most important "legal realist," this article's protean quality continues to make it influential.¹⁵³

Several themes stand out, and they retain much of their radical edge:

(1) *Social Practices*. First, and most importantly, Llewellyn exhorts us to "awake to people and their doings," to the life of commercial customs and other social practices that exist "apart from law."¹⁵⁴ Llewellyn's goal is partly descriptive: pointing to the diversity of bargaining relations that other scholars ignore, describing how contracting practices have adjusted to an evolving economic system. But his normative claim is central: the truest bases for sound judicial decisions are "understandings in the world of dealings"¹⁵⁵ and "pressure from the facts."¹⁵⁶

(2) *System, Rule and Form*. Insisting on the primacy of social practices has other consequences. Unlike other legal realists, Llewellyn was not contemptuous

152. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931). The first part of the title apparently alludes to a well known anti-war play of the 1920's, *What Price Glory?*, by Maxwell Anderson and Laurence Stallings.

153. For example, both critical legal studies scholars, *see, e.g.*, Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 568; Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 380 n.49, 384 n.54 (1973), and law and economics scholars of various stripes, *see, e.g.*, Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993, 1025 n. 177 (1990); Williamson, *Intellectual Foundations: The Need for a Broader View*, 33 J. LEGAL EDUC. 210, 216 (1983), have recently spoken of the article's continuing importance.

154. Llewellyn, *supra* note 152, at 705, 713.

155. *Id.* at 714.

156. *Id.* at 749.

of legal rules, formality, or the scholar's impulse to systematize. But he thought all systems, rules, and forms tend to become rigid, to insulate us from the rich particularity in fact situations and the ongoing changes in social practices—indispensable ingredients for rightly resolving cases. He thus underscores a perpetual tension: inescapably, life in its urgent particularity strains against and modifies ever-ossifying generalizations and forms.

(3) *Law's Place*. Emphasizing social practices also brings Llewellyn to insist that contract law plays a more marginal role than commonly assumed. In most commercial relations (for example, long-term contractual relationships), nonlegal sanctions shape behavior more than legal sanctions do. Parties continually make informal adjustments with little attention to the contract terms, and typically resolve disputes without resort to law. Law reporters, therefore, contain the rare "hospital case," not the typical commercial transaction. Thus, Llewellyn sees contract law as a backdrop to the world of bargaining and dealing, providing rarely-invoked sanctions and, perhaps more importantly, quietly strengthening an "ideology of duty" that encourages adherence to promises.

(4) *Power*. Finally, Llewellyn's attention to social context leads him to identify unequal bargaining power as a recurring problem (intensified by the emergence of standardized contracts) that requires a judicial remedy. Here, however, a central uncertainty surfaces about Llewellyn's focus on social practices—an uncertainty that pervades his writings.¹⁵⁷ Llewellyn suggests at times that a sound contract law should enshrine commercial norms. But in the face of unequal bargaining power, Llewellyn recognizes that commercial norms may be unfair and that other values are relevant in shaping the law. He leaves us uncertain, then, about what is the source of values in law.

We miss something fundamental, though, if we talk about this article only as its ideas. Equally remarkable is—I can think of no better phrase—the heroic sensibility pervading it.

From enigmatic title to florid close, *What Price Contract?* is fired by imaginative desire. Throughout, one experiences the presence of a passionate, ambitious explorer, an utterly original mind excitedly seeking the new, taking intellectual gambles, striving for the deepest understanding from the widest perspective, discovering "meaning, . . . opalescence, . . . vibrancy, . . . fragile beauty,"¹⁵⁸ "return[ing] with fresh eyes and fresh zest to the study of the heaped up cases"¹⁵⁹

We might see this passion—with the sprawling footnotes, the patches of fevered prose, the exuberant, sudden leaps from subject to subject and continent to continent, the abrupt proclamation halfway through that "too late for remedy"

157. See, e.g., Gewirtz, *Editor's Introduction* to K. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* at xx-xxi (P. Gewirtz, ed., M. Ansaldi, trans.) (1989).

158. Llewellyn, *supra* note 152, at 707.

159. *Id.* at 705.

he finds that “this whole paper is thrown off center”¹⁶⁰—as simply self-indulgence. But to do so ignores the link in *What Price Contract?* between grand manner and dramatic substantive achievement. More to the point, it ignores that an aspect of this article’s originality is Llewellyn’s unique sensibility—reflected in rhetoric, approach, and form, even (or rather especially) when these seem most curious.

The notion that what is most original in a legal mind may be one’s sensibility, not simply summarizable ideas, strikes many in the legal academy as very odd. That notion means, after all, that often the most interesting thing is to observe a mind moving along a thought, not so much the thought itself. For some, this smacks too much of the literary. But it is the sensibility and spirit pervading *What Price Contract?* that I think explains much of the power it has always wielded over readers, why so many discuss it with an attitude of awe. (One shudders to imagine how the student editors of today’s law reviews would try to “edit” the article—restraining the leaps, toning down the intensity, smoothing out the jagged shapes, trying to conform the exceptional to the ordinary.)

I remember precisely my first encounter with *What Price Contract?* I was a first-term law student, and I am sure much of the article’s substance eluded me. But the article struck me as no other legal writing did in those formative days. What moved me then, and still moves me, is that its intellectual ambitiousness and personal voice pointed to a possibility I cherished—the possibility that the study and profession of law could engage our deepest human yearnings. The article’s closing—for all its melodrama—remains unforgettable:

One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—“pity and terror—.” Law means so pitifully little to life. Life is so terrifyingly dependent on the law.

160. *Id.* at 733 n.63.

Wesley N. Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (not ranked because of earliness).

Commentary by Frank I. Michelman,
Professor of Law,
Harvard Law School.

To Hohfeld's effort, . . . we stand directly indebted for insight derived from the claim that in a modern, positive legal order the normatively significant entities are dyadic relations exhaustively reducible to two master types: right/duty and power/liability (convertible by negation into no-right/privilege and disability/immunity).

Frank I. Michelman

Hohfeld's article¹⁶¹ is remembered today as a major contribution to modern legal science. The article did not pioneer the work of conceptual schematization called analytical jurisprudence.¹⁶² Rather, it gave the scheme its lasting, canonical form. It also prompted a surge of interest in the scheme's utility for precise description, comparison, and evaluation of cases under legal disputation. To Hohfeld's effort, as sympathetically elucidated by Arthur Corbin¹⁶³ and Walter W. Cook,¹⁶⁴ we stand directly indebted for insight derived from the claim that in a modern, positive legal order the normatively significant entities are dyadic relations exhaustively reducible to two master types: right/duty and power/liability (convertible by negation into no-right/privilege and disability/immunity).

Hohfeld stipulated these names for the four resulting entitlements and their four correlative disentitlements. He neatly defined each entitlement and disentitlement in terms of its simple, logical relations to all the others. He thereby furnished a device for precise discrimination among legal issues that ought to be held distinct for purposes of ethical evaluation, but were prone to confusion in ordinary legal rhetoric. An important example, elaborately worked up by Cook,¹⁶⁵ is the ease of leaping—erroneously—from (i) an employer's acknowledged *privilege* of soliciting temporally binding service contracts from uncontracted workers and (ii) an employer's acknowledged *right* (and worker's correlative *duty*) of performance of a contract once made, to (iii) a *duty*

161. Hohfeld, *supra* note 22; see also Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

162. For an account of the earlier development of analytical jurisprudence, see generally Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

163. See Corbin, *Jural Relations and their Classification*, 30 YALE L.J. 226 (1921).

164. See generally Cook, *Introduction to W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING* (W. Cook ed. 1934); Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918) [hereinafter *Privileges of Labor Unions*].

165. *Privileges of Labor Unions*, *supra* note 164, at 787-88.

assertedly owed by *third parties* to employers to refrain from enticing contract workers into violation and (iv) a *third party's* (asserted) *duty to employers* to refrain from competition for the services or loyalties of workers not yet under contract. Cook made effective use of Hohfeld's discriminating vocabulary¹⁶⁶ to demonstrate that issues (iii) and (iv) are analytically distinct from issues (i) and (ii), so that resolutions of (iii) and (iv) cannot be deduced from resolutions of (i) and (ii) without fresh exercises of ethical judgment.¹⁶⁷

Cook was engaged in denouncing the Supreme Court's generous construal of the entitlements secured to employers by "yellow dog" contracts at common law.¹⁶⁸ There was much in the Hohfeldian analysis that proved to be of great argumentative service to legal Progressives and social democrats. The analysis made clear that there is no such thing as one person's positive legal entitlement unaccompanied by another's corresponding disentitlement.¹⁶⁹ It further strongly implied that duty-free zones of conduct (Hohfeldian "privileges") are no more (or less) "natural," no more (or less) politically chosen—hence no more (or less) demanding of ethical justification—than legally actionable "rights."¹⁷⁰ These points became strongly thematic in Progressive legal classics by Morris Cohen,¹⁷¹ Robert Hale,¹⁷² and Karl Llewellyn,¹⁷³ and have remained so in our own day's works of social-democratic inclination.¹⁷⁴

Yet Hohfeldian analytical jurisprudence also functions conservatively, in defense of exclusive, anti-redistributive property rights. The tendency of its individualist methodology is to reduce every question of policy or value to one of private-party contention.¹⁷⁵ If the analysis teaches that every legal entitlement in *A* entails the exposure of some *B* to *A*'s state-sanctioned power, it correlatively teaches that every legal measure undertaken for the sake of *B*'s emancipation is an intrusion on the property of some *A*.¹⁷⁶ The Hohfeldian relation between *A* and *B* is relentlessly zero-sum. There can be no Hohfeldian cooperative commonwealth.

166. *See id.* at 787-92.

167. *See id.* at 790.

168. His specific target was the opinion of Justice Pitney in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 219 (1917).

169. *See also* Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 759-60 (1980).

170. This was a point much emphasized by Corbin. *See* Corbin, *supra* note 163, at 237-38; Kennedy & Michelman, *supra* note 169, at 761-62, 769-70.

171. *E.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

172. *E.g.*, Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

173. *E.g.*, Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

174. *See, e.g.*, Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985); Singer, *supra* note 162.

175. *Cf.* R. EPSTEIN, *supra* note 100, at 13, 36, 318-19 (1985) (asserting, and attributing to Locke, principle that government's rights and privileges vis-a-vis individuals are no greater than those of individuals *inter sese*).

176. *See id.* at 36. *See generally* Hartog, *The Constitution as Aspiration and "The Rights that Belong to Us All,"* 74 J. AM. HIST. 1013, 1020-25 (1987).

William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933) (not ranked because of earliness).

Commentary by Louis Loss,
William Nelson Cromwell Professor of Law, Emeritus,
Harvard Law School.
Note Editor, *The Yale Law Journal*, 1936-37.

The article reflects . . . a "conservative" (if not establishmentarian) "Wall Street lawyer" who, while accepting arguendo the need for certain reform, properly worries about the unsettling effect on the law and his clients.

Louis Loss

The Douglas-Bates article was written in late 1933, when the infant statute was still administered by the Federal Trade Commission and before the passage of the 1934 Act, which created the SEC and softened somewhat the 1933 civil liability provisions. As a senior in college at the time, I was blissfully unaware of Congress' gift to the investing public (not to mention the Bar). I would have been surprised to be told that two years later I would be sitting at Professor Douglas' feet in New Haven, and that two years after that I would be a freshman in the office of the SEC's General Counsel.

Having now spent a half-century and more exploring the manifold mysteries of the body of securities law that began with the little 18-page statute of 1933, I picked up 43 *Yale Law Journal* wondering what I would find on a rereading of the famous article after so many years. It was not quite what I had expected. To take a few of the article's central themes:

Theme one, vagueness: "the Act promises to defeat in part its purpose by virtue of its uncertainties," which will require a "decade" of judicial interpretation.¹⁷⁷ The reality: After almost six decades the Supreme Court has just decided its tenth case on the definition of the keystone term, "security."¹⁷⁸

Theme two, the Cassandra quality: The cumulative effects of the strict civil liabilities make it apparent that "the Act will prevent a great amount of financing by many companies with well established businesses and will continue to deter refunding operations and reorganizations."¹⁷⁹ The reality: The 30,000 registration statements filed during the first thirty-five years of the SEC's

177. Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 173 (1933).

178. *Reves v. Ernst & Young*, 110 S. Ct. 945 (1990).

179. Douglas & Bates, *supra* note 177, at 192. The reference here is to § 11, under which an issuer is subject to strict liability with respect to the registration statement and every director, officer, expert, or underwriter, as well as (under § 15) every person who "controls" any such defendant, is individually liable subject to various defenses as to which the defendant has the burden of proof.

history resulted in two adjudicated recoveries together with six reported decisions approving settlements of class actions.¹⁸⁰

Theme three, administrative excess: "It is idle to speculate on the extreme limits to which a tolerant judiciary might" sustain the power to define something as broad as "trade terms."¹⁸¹ The reality: What would Douglas have said to a Rule 506 that takes several columns of the SEC Docket, complete with filing requirements, to "define" the phrase, "transactions not involving any public offering"?

This is hardly the "liberal" (if not radical) Douglas who in 1971 upheld a private right of action under Rule 10b-5—with the resulting federalization of a vast body of corporate law—by a footnote stating: "It is now established that a private right of action is implied under 10(b)."¹⁸² The article reflects, rather, a "conservative" (if not establishmentarian) "Wall Street lawyer" who, while accepting *arguendo* the need for certain reform, properly worries about the unsettling effect on the law and his clients.

This is not to fault the article for reading the entrails incorrectly. Just two years ago the Supreme Court analyzed, as the article did along the same lines, the question of who "sells" within the meaning of section 12(1).¹⁸³ And there are many other examples.

Most amazing of all is that this middle-aged man, as I viewed him on the lecture platform, was all of 35 years old when he co-authored this trail-blazing critique.

180. 6 L. LOSS, SECURITIES REGULATION 3842 (2d ed. Supp. 1969).

181. Douglas & Bates, *supra* note 177, at 213.

182. Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).

183. Compare Douglas & Bates, *supra* note 177, at 206-07, with Pinter v. Dahl, 486 U.S. 622, 643 (1988). Douglas wrote of the identical language in section 12(2).