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THE DAYS WHEN U.S. SUPREME COURT JUSTICES RAISED A LITTLE HELL

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". . . the Supreme Court is nothing other than nine sometimes wise, sometimes unwise, but always human men." [386]

Most everyone at some point in their life gets into some type of trouble or controversy which hopefully they overcome and become better individuals for having experienced. U.S. Supreme Court Justices have been no exception. I present the following to demonstrate the need for a Bar admissions process that does not result in exclusion from the practice of law of people who ultimately become the greatest legal minds in the nation. Most of them (although not all) are Justices who I believe, became more morally qualified and of stronger character, as a result of trouble they got into and learned from. To this extent, that which might result in their exclusion from the practice of law today, is specifically what inspired the greatness within them. As you read this section, reflect upon whether these Justices might have difficulty today meeting the contemporary irrational standard of "good moral character" applied by State Bars. The most significant point I seek to make is that the Justices are not the infallible, always wise, detached, apolitical, impartial, unbiased, individuals they claim to be. Quite to the contrary, like everyone else, they come loaded with an abundance of emotional sensitivities, insecurities, vanities, errors in life, and errors in judgment. The Greatest Justices we have had, have been more than anything else, human beings who have lived life to its fullest and have had many, many vices that would today be condemned by pompous, hypocritical, sanctimonious State Bars and State Supreme Courts.

U.S. SUPREME COURT JUSTICE WILLIAM O. DOUGLAS

The title of the first volume of his autobiography describes the man as good as anything else. "Go East, Young Man." The nonconformist adaptation of the old saying, "go west, young man." Douglas later continued his autobiography in a second volume, "The Court Years." He grew up in poverty and always considered himself a loner. He had sympathy for the radical and was viewed by many as a radical. He was the first U.S. Supreme Court Justice to hire a female law clerk, and the longest serving Justice ever on the Court. He tells the following stories of his childhood:

"Every summer, starting at the age of eleven, I disappeared into the wilds of the Cascades for three weeks. Even I did not know where I was going. During those absences, Mother must have died a thousand deaths, and if the following letter is typical, the news I sent home was scant comfort:

Dear Mama and J.D.R. and Bill July 11, 1915
If the mosquitoes don't chew me up before I get them I will attempt to drop you a line. . . ." [387]

> "Our backyard neighbor on Sixth Avenue was a man whom we disliked. He was small and wiry, and thoroughly obnoxious to us. We spent hours each Halloween in wait for him to leave his home and enter his outhouse. Once we heard the latch click, we would give one big heave and push it over with the door down, leaving him two possible exits. We met with success year after year. I did not understand the German he spoke, but I could tell the substance of the imprecations coming from the pushed-over little house." [388]

> "While there were many children's parties in Yakima, we were never invited to a single one, and we were far too poor to have one in our own home. . . . In the after years I thought it was a blessing that I had not. For if I had been united with the elite of Yakima even by so tenuous a cord, I might have been greatly handicapped. To be accepted might then have become a goal in later life, an ambition that is often a leveling influence." [389]

As a teenager, he became what is known as a "stool pigeon" for the local police and tells the following story:

> "That is why he approached me. Would I, for one dollar an hour, spend Saturday and Sunday nights "working Front Street"? My instructions were, "See if you can get a woman to solicit you. See if you can buy a drink from someone. When the night is done, check in at the office, execute an affidavit, and the police will move in." [390]

> "And so a teen-age boy became a stool pigeon in the red-light district. Never did I have such a shabby feeling, and in the end, never did I feel sorrier for people than I did for those I was supposed to entrap." [391]

In the fall of 1916, he attended Whitman College on a scholarship and tells the following story:

> "Students have always had their protests, and my generation at Whitman was no exception. Most of us started with a dislike of President Penrose and his pompous manner. . . .Our peak of reaction against him personally was an episode during an outdoor opera held on the campus pond.
>
> President Penrose was coming across the pond in a skiff, his fine barritone voice resounding across the water. . . . Still singing, Penrose prepared to leave the boat by mounting a few steps on a short staircase built to the water's level. But we had sawed the step, and our president's barritone was quickly muffled by the murky waters of the pond." [392]

After graduating from Whitman College, he taught high school in Yakima, Washington for a short period. He then received a scholarship to Columbia law school, but there was one problem. He had only $ 75 and no way of getting from Washington State to New York State. So he hopped a freight train and traveled across the country. In law school, he took up drinking and smoking. He writes:

> "In New York City, drinking was the thing to do. So I started taking a few drinks, mostly of miserable gin.
>
> After I got to Columbia, I also tried very hard to learn to smoke cigarettes. . . .

. . .
Having acquired the habit, however, I became an inveterate smoker. I . . . became so accomplished that I could smoke three packs a day." [393]

He worked his way through law school by tutoring other students and writes:

"I prepared students for college-entrance examinations for Princeton, Yale and Columbia. To obtain my services, . . . students needed to be both stupid and rich. My boast was that I never failed to get even a dumb student into Princeton." [394]

Although he graduated second in his class at Columbia Law School, he got a "C" in constitutional law which he writes about with pride as follows:

"Meanwhile, I had formed the Powell C. Club. Combing school records I collected the names of men who had received a C from Reed Powell and who later became prominent in the law. . . . Our purpose was to remind him of his fallibility in handing out grades in constitutional law." [395]

Both William O. Douglas and Hugo Black consistently ruled in favor of the Applicants in State Bar admission cases. U.S. Supreme Court Justice John Harlan consistently ruled against the Applicants and in favor of the Bar. Harlan himself, however was no choir boy. Douglas writes the following story about John Harlan when they worked together early in their careers:

"John Harlan, later to be on our Court, was at the Root-Clark firm. The big firms in those days held an annual party, a stag affair in a suite in some midtown hotel. . . . John Harlan used to tell, with humor . . . of a party his firm had in the Commodore Hotel. They ordered up a piano to make the occasion more festive, and by four in the morning every sliver of the piano - every key, every string, every screw or nail, every bit of wood - had been thrown out the window." [396]

Douglas tells the following story about working in New York City:

"In New York City, I learned about the devilish work of the police. . . . When I practiced in Wall Street, the police were obtaining confessions by tying suspects in dental chairs and drilling their live teeth. It was a technique Hitler later used in Germany." [397]

He was universally recognized as a champion of the poor man and writes:

"Never did I dream that I would live to see the day when a court held that a person could be too poor to get the benefits of bankruptcy. Yet, in 1973, the Court in *United States v. Kras* (409 U.S. 434), held by a five-to-four decision that an indigent who could not pay the bankruptcy filing fee could not be discharged of his debts." [398]

As a child, he was physically very weak. He describes how that became a catalyst for him throughout life:

"But my rebellion against the shame of being called a weakling had lasting effects. As already noted, it caused me to become very much a loner. Moreover, it inured me in a subtle way to all criticism. Not that I enjoyed criticism, I certainly did not, but criticism never made me turn tail and run. Rather, it impelled me forward into the thick of the fight." [399]

He was married four times. At age seventy, he married his fourth wife, Cathy a law student at American University. He met her one evening when she waited on his table in a Washington restaurant.[400] His children from a prior marriage came to resent him for many different reasons, and so his following thoughts on raising children are not all that surprising:

> "Few people I have known are competent to be parents. . . .
> . . .
> I doubt if I rated high as a father although I did receive a Father of the Year award once. I think it is a near-impossibility for a child of a celebrity to be "normal." The son of a coal miner or the daughter of a charwoman has no competition, the sky being the limit. But what chance did FDR's sons have? [401]

He writes about the highly controversial case of Alger Hiss, which was a product of over-zealous Congressional investigations intended to filter out Communists, at any cost to those who were not:

> "The people I thought were members did not include Alger Hiss, and though Hiss later received an overwhelming volume of adverse publicity he was never tried or convicted of espionage or sedition, only of perjury.
>
> Hiss was tried twice, the first jury being unable to agree. The second jury returned a verdict of guilty on the perjury counts. Reed and Frankfurter; while members of the Court, testified at the first trial as character witnesses. So when the Hiss case reached the Court on a petition for certiorari, Reed and Frankfurter, being disqualified, did not vote. Neither did Justice Tom Clark because he had some connection with the case when he was with the Department of Justice. That left six Justices, a bare quorum. . . .
> . . .
> Thus a six-man Court, with only Black and me voting to grant, denied the petition. If either Reed or Frankfurter had not testified at the trial, we would doubtless have had three to grant; and in my view no court at any time could possibly have sustained the conviction.
> . . .
> . . . the result of the Hiss case was to exalt the informer, who in Anglo-American history has had an odious history. It gave agencies of the federal government unparalleled power over the private lives of citizens." [402]

Commenting generally on the Congressional investigations, Douglas writes as follows:

> "Parallelism was really the high crime. If one believed in free medical care, he was a communist because Russia had that system. If one proposed disarmament. . . he was a communist because Russia proposed it too. . . .
> . . .
> . . . The low ebb was reached when the committee investigated the movie None But the Lonely Heart. In this film a mother ran a store, and her son said, "You are not going to get me to work here and squeeze pennies out of little people poorer than I." This line was taken as evidence that the movie was designed to criticize the free enterprise system, to make people lose faith in it, so that the communists would take over. . . .
> . . .
> . . . It became dangerous to be a free-wheeling and innovative person. Only those wearing homburgs and neat clothes and thinking in Legionnaire terms were beyond reach. Thus did this

early witch hunt have a great leveling effect, driving some of our best men and women out of the federal service.

. . .

. . . committees were more interested in publicity than in the truth; they thrived on accusation and made it the basis for casting a citizen into the outer darkness. . . ." [403]

In his second book, "The Court Years," he comments further about the congressional hearings as follows:

"Another defect of these hearings was that the charges against employees were worded in the broadest possible terms. The usual pattern was to charge the employee with "sympathetic association" with named individuals or named organizations. There was no statement of why the employee was deemed to have been in "sympathetic association. . . .""" [404]

Douglas emphasizes how so very often, those that engage in abusive investigative tactics are typically the most unscrupulous and deceptive individuals, when he writes about former President Richard Nixon (a key player in the Congressional investigations):

". . . under the Nixon regime, the accused need never know who his accuser was; and under the Nixon regime, a person could be condemned not for his actions, but merely for his thoughts or beliefs." [405]

It was Douglas' opinion that the real threat was not from those being investigated, but rather with those doing the investigating, as exemplified by the following passage:

"The timid, frightened, cautious men were the real "security" risks. They cast into oblivion the men of talent. That is the price we pay when we forsake the formula of an open society." [406]

He was strongly opposed to the executions of Julius and Ethel Rosenberg, which he tried to stop and describes the event as follows:

"And when that happened the people in this country experienced a thrill. Mrs. Rosenberg was the first woman to be executed. She, like her husband, was electrocuted and her death received the greatest publicity. What does a woman who has received a lethal electric shock look like? The photographers were accommodating. The front pages the next day showed Mrs. Rosenberg's face as the electric charge hit her body. Her face at once became bloated. There were visible liquid excretions through the skin. It was as if one were an eyewitness to the suffering and torture that a sinner receives in hell. Many people in the nation felt a glow of sadistic satisfaction in viewing this picture." [407]

Due to his own attempts to save the Rosenbergs, he became a political outcast, as indicated by the following passage:

"As a result of my action in the Rosenberg case I became temporarily a leper whom people avoided, just as later old friends avoided Judge J. Skelly Wright in Louisiana because of his court orders desgregating the public schools. I was dropped from social lists. . . ." [408]

The following passage is also interesting:

> "I know of no more serious danger to our legal system than occurs when ideological trials take place behind the facade of legal trials." [409]

The danger of subjective assessment of character is exemplified by the following:

> "One of my most vivid memories of China came from a prison in which one third of the inmates were there because of "counterrevolutionary" activities. On close analysis it turned out their crime was that they espoused the cause of capitalism. . . . We profess great enlightenment, yet we have a degree of intolerance that puts us on a par with most other people. . . ." [410]

On a lighter note, Douglas writes the following story about his close friend, Jerry Frank who was a Second Circuit, Federal Court of Appeals Judge:

> "Jerry Frank . . . and Learned Hand were sitting on a panel together, hearing cases. The first one was argued by a beautiful as well as brilliant woman who had come up from Washington the day before and had stayed in Jerry's guest room. She and her husband were old, old friends of Jerry. Learned Hand knew nothing about them. . . . So during the course of the argument Jerry whispered to Learned as he pointed to the lady lawyer, "She stayed with me last night." And instantly Jerry and the lady lawyer rose very high in Learned's estimation. . . .
>
> Jerry made a distinguished record on the Court of Appeals; of all the principles for which he stood, one is outstanding, namely the use of the legal concept of "harmless error." It was the practice of the court he served, when "the smell of the case" was strong, to affirm a conviction even though error had been committed at the trial. Jerry Frank, in a long list of dissents . . . pointed out that where the error was substantial and not merely a matter of etiquette, the reviewing court in calling the error "harmless" was in effect giving the defendant a "juryless" trial, for the judge reached the conclusion that guilt had been established "on a record other than that which the jury considered; for the judges are able to and do disregard the improper matter, but it is impossible to know that the jury did." [411]

Jerry Frank once wrote a letter to Douglas, about what a critic said. Douglas wrote Jerry back a letter that read in part as follows:

> "What is good for you may be spinach to me or vice versa. But what the hell? Because you like gin and bitters, is there any reason why I should not get tight on long drinks of Scotch and soda ?" [412]

Douglas was friends with the esteemed Justice Brandeis and admired his statement in the 1928 U.S. Supreme Court, *Olmstead* case which read as follows:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." [413]

Douglas was not however, particularly fond of the Oregon State Bar and tells the following story:

> "To give an example of the wariness a public official must exercise: in 1948 . . . I was invited to Portland to address the Oregon State Bar Association, which put me up at the Benson Hotel. When I checked out of the hotel, I was told that the bill had been taken care of by the association.
>
> . . . Lindsay C. Warren, the Comptroller General of the United States . . . . told me he had learned that I had been a guest of the Oregon Bar Association at the Benson Hotel in Portland, and that the association had not paid the bill but had routed it to a shipbuilding company that had a contract with the U.S. Navy. The contractor had in fact paid the hotel bill.
>
> . . . I phoned the Benson Hotel to get the amount of the bill and immediately sent off a check in payment. I also wrote a letter excorciating the president of the Oregon Bar for doing anything that would link a member of the Court with such a highly unethical practice. . . ." [414]

In his early years on the U.S. Supreme Court, he served with Justice James Clark McReynolds, an ultra-conservative. Douglas tells the following story about McReynolds, which exemplifies how prejudiced the Court was in those days:

> "One day McReynolds went to the barbershop in the Court. Gates, the black barber, put the sheet around his neck and over his lap, and as he was pinning it behind him McReynolds said, "Gates, tell me, where is this nigger university in Washington, D.C.?" Gates removed the white cloth from McReynolds, walked around and faced him, and said in a very calm and dignified manner, "Mr. Justice, I am shocked that any Justice would call a Negro a nigger. There is a Negro college in Washington, D.C. Its name is Howard University and we are very proud of it." McReynolds muttered some kind of an apology and Gates resumed his work in silence." [415]

Douglas was not a fan or supporter of the American Bar Association and writes:

> "I think the explanation lies in the fact that it is apparently the practice of politicians to join all sorts of vote-getting groups or societies. They are our original joiners. Not being a joiner, I do not appreciate the philosophy behind it, for if I ever joined an organization, I would feel committed, as I was with the American Legion and the American Bar Association until I learned their true character. At that point I resigned." [416]

He described U.S. Supreme Court Justice Felix Frankfurter as follows:

> "Frankfurter had a basic weakness. I think he had deep inside him a feeling of inadequacy. He was a man of short stature. Perhaps that was part of it. He longed to be accepted. He was an artist at teasing and taunting the Establishment and its advocates. He loved to see the Dean Achesons of the world squirm. But he also needed to be accepted by them and honored and admired by them." [417]

He described U.S. Supreme Court Justice James F. Byrnes as follows:

> "James F. Byrnes, who served for a year or so beginning in 1941, was a misfit on the Court and was himself the first to admit it. He disliked the Court work, preferring the helter-skelter life on the Hill, where he had served for years, or in the executive branch. His contribution to the Court was gaiety." [418]

He described U.S. Supreme Court Justice Fred Vinson as follows:

> "Vinson was warm-hearted and easygoing. He was a happy party man, enjoying bourbon and branch water. . . ." [419]

He described U.S. Supreme Court Justice Charles Whittaker as indecisive and constantly changing his mind. In one case, Whittaker was assigned to write the opinion for the majority, and Douglas was Dissenting. Whittaker was having trouble writing the majority opinion. Since Douglas knew the case so well, he took the incredible step of offering to help Whittaker write the majority opinion, which Whittaker accepted. The case was *Meyer v. United States*, 364 U.S. 410. Although Douglas did not sign the majority opinion since he was Dissenting, he characterizes it as one of the few cases "in which the majority and minority opinions were written by the same man." [420]

In 1946, Justice Robert Jackson was on a leave of absence from the Court, functioning as U.S. prosecutor at the Nuremburg trials. Chief Justice Stone died and the position of Chief Justice needed to be filled, which Jackson wanted. Jackson believed that Hugo Black had urged President Truman to not appoint him as Chief Justice. Douglas asserts that Black did not. In any event, Jackson sent an excorciating letter to the committee that was considering Fred Vinson's nomination as Chief Justice. In the letter, he sharply criticized Hugo Black. He objected to the fact that two former law partners of Justice Hugo Black had argued cases before the U.S. Supreme Court and that Black did not disqualify himself. Jackson had written a scathing opinion in one of the cases, *Jewell Ridge*. Douglas includes part of Jackson's letter in his autobiography which reads:

> "However innocent the coincidence of these two victories at successive terms by Justice Black's former law partner, I wanted that practice stopped. If it is ever repeated while I am on the bench, I will make my Jewell Ridge opinion look like a letter of recommendation by comparison." [421]

One of the most interesting facts Douglas writes about is how alcohol was regularly served during Court Conferences in the early years. He writes:

> "Prior to 1910, there was a bar in the Conference Room with an attendant who served both soft drinks and hard liquor." [422]

He had no tolerance for the reluctance of Courts to decide difficult issues, writing:

> "If the judiciary . . . puts questions in the "political" rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, the judiciary has become a political instrument itself." [423]

He was generally suspicious of Courts and properly recognized the frailties and vanities of Judges writing:

> "The judicial world can reek with passion and prejudice which only full publicity can crush."[424]

When the other Justices of the Warren Court sought additional law clerks, Douglas teasingly countered with a suggestion to abolish all law clerks. He then made the following comment at Conference:

> "why don't we experiment with doing our own work? You all might like it for a change." [425]

Even U.S. Supreme Court Justices can lose their temper. Douglas tells the following story about Chief Justice Fred Vinson and Justice Felix Frankfurter:

> "One day Frankfurter kept baiting Vinson with barbed taunts. At last Vinson left his chair at the head of the Conference Table, raised his clenched fist and started around the room at Frankfurter, shouting, "No son of a bitch can ever say that to Fred Vinson!" [426]

He tells the following story about when Chief Justice Earl Warren resigned from the American Bar Association:

> "When he resigned from the American Bar Association because he did not believe in some of its policies, the then president of the bar spread the rumor that Warren was dropped from the membership roll because of nonpayment of dues. Warren was furious and went to great pains to correct the record in correspondence with the bar." [427]

Justice Rehnquist once said that Douglas seemed disappointed if the other Justices agreed with him, "because he would therefore be unable to write a stinging dissent." On one occasion, Justice Warren Burger explained at length his reasons to affirm in a case. Douglas responded:

> "Chief, for the reasons you have so well expressed, I vote to reverse." [428]

I close this section on Justice Douglas with one of the most interesting pieces of advice he gave to President Franklin D. Roosevelt, near the end of FDR's career. Douglas and FDR were very close friends and played poker together regularly. They were talking about the type of person that should be appointed to the Supreme Court, although no vacancy existed at the time. Douglas writes about the exchange as follows:

> "I told him that there was nothing in the Constitution requiring him to appoint a lawyer to the Supreme Court. "What?" he exclaimed. "Are you serious?" I answered that I was. He lit a cigarette, leaned back and after a moment's silence said, "Let's find a good layman." . . . There was no vacancy then, and none occurred before FDR died. But a plan had been laid to shake the pillars of tradition and make the Establishment squirm by putting an outstanding, liberal layman on the Court." [429]

NOTE: Presentation of most facts about Justice Douglas' life herein is based on his autobiographies:

1. William O. Douglas, *Go East, Young Man* - The Autobiography of William O. Douglas, (Random House, NY 1974)
2. William O. Douglas, *The Court Years 1939-1975,* The Autobiography of William O. Douglas, (Random House, NY 1980)

U.S. SUPREME COURT JUSTICE OLIVER WENDELL HOLMES

He is regarded as one of the greatest Justices of the U.S. Supreme Court. He was known as the "Great Dissenter." He served on the Court from 1903-1931. He is not one of my favorites. I do not agree with many of his opinions. Many are in fact, quite irrational, particularly in the area of civil rights where his record was horrible. This is a remarkable fact because during his youth he was a fervent supporter of the abolitionists. Alger Hiss, discussed at length in other sections of this book, was one of Holmes' clerks. Holmes definitely, falls squarely into the category of a Justice that would not be able to satisfy the irrational "good moral character" standard of State Bars today.

At the age of seven, he attended a private school. His father was a prominent doctor. One of his report cards in grammar school contained the notation, "talks too much."[430] As a Harvard University student, he described himself to Lucy Hale, a woman he was interested in as, "being of a slightly jealous disposition."[431] In 1861, at age twenty while a student at Harvard he participated actively in antislavery rallies. Shortly thereafter, the Harvard Faculty decided that he should be publicly admonished for "repeated and gross indecorum" and "acts of disrespect" to faculty members.[432] In addition, reference was made to his "oral acts of disrespect."[433] His biographer, G. Edward White writes as follows:

> "Holmes himself was to run afoul of Harvard's disciplinary emphasis. As early as his freshman year, he and a companion were fined a dollar each for "writing on the posts in Tutor Jennisons's room." On three occasions he lost points for "playing," "whispering," or being regularly unprepared for class. After his last examinations had concluded in his sophomore year he was "privately admonished" for "creating a disturbance in the College Yard," and during his senior year he was "publicly admonished" twice, the first for "repeated and gross indecorum in the recitation of Professor <Francis> Bowen," the second for "breaking the windows of a member of the Freshman class." The last two offenses prompted Harvard President Cornelius Felton to write Dr. Holmes about his son, whom Felton characterized as "an excellent young man" but noted that "as of late . . . his conduct has been frequently the subject of complaint."[434]

Shortly thereafter, Holmes joined the army. He fought in the Civil War on the side of the Union. He was seriously wounded three times. He was shot in the chest and in the back of the neck on different occasions. While recuperating, he wrote a letter with the assistance of a young woman, to his parents that read in part as follows, regarding his condition:

> "not yet dead but on the contrary **doing all that an unprincipled son could do** to shock the prejudices of parents & of doctors." [435]

Holmes participated in some of the most violent battles of the Civil War. White writes:

> " "Passion" was as important as "action" in explaining the positive features of a wartime experience. . . .
>
> What seemed to be ennobling about war for Holmes was that it was the end result of "passion," that it was a particularly satisfying release of passion - "action" - and that it was spontaneous, impulsive, and selfless action, action engaged in without any assurance that the actor would find his passion vindicated." [436]

Holmes himself stated:

> "As long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war. . . ." [437]

He also stated:

> "Out of heroism grows faith in the worth of heroism . . . . Therefore I rejoice at every dangerous sport which I see pursued. . . . If once in a while in our rough riding a neck is broken, I regard it, not as a waste, but as a price well paid. . . ." [438]

Personally, I have difficulty subscribing to such viewpoints, and believe them to be irrational. But Holmes isn't my hero, he's the respected hero of the contemporary Judiciary today. After the war, he returned home and lived with his parents. He married Fanny Dixwell in 1872 and both of them lived with his parents.[439] In 1864, he entered Harvard Law School. Five years later he characterized Harvard as follows:

> "for a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts." [440]

Holmes and his wife never had children. Later in his life, he wrote in reference to that decision as follows:

> "I am so far abnormal that I am glad I have no children."[441]

He committed adultery on numerous occasions, and historical evidence suggests his wife was aware of it. His most significant extramarital romance was with a woman named Clare Castletown. He wrote letters to her throughout his life. In a letter to his earlier romantic interest Lucy Hale, Holmes once wrote that he would:

> "like to be on intimate terms with as many women as I can." [442]

In many respects, Holmes concededly had a very pragmatic understanding of life and government as indicated by the following:

> "If a man is on a plank in the deeps sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing." [443]

Ultimately, he taught law at the same school that he had attended and criticized so severely. He became a Harvard Law School faculty member. He then suddenly resigned without notice to accept a position on the Supreme Judicial Court of Massachusetts. The manner of his resignation prompted an intense attack on his "moral character." Professor Thayer of Harvard who was the main instigator, characterized what occurred as follows:

"Holmes accepted the offer . . . and conferred with no one representing the college. . . . the year at the school had only begun; students were here who had been mainly induced to come by his being here, and all the students had rights - as the college had - which he was bound to consider carefully. But he accepted and it was blown abroad at once." [444]

The primary issues were whether Holmes' decision to leave the University to become a Judge was consistent with the terms of his acceptance of the professorship. Most everyone involved, asserted that it was not. By accepting the judgeship and allowing the news to be made public without consulting anyone at Harvard, most everyone felt Holmes was "selfish" and "thoughtless." Harvard was definitely embarrassed by the incident because Holmes left in the middle of the term without any notice. [445] It was suggested that Holmes:

"seems never to have thought and not to know now that it was an . . . indecent action." [446]

The essence of Oliver Wendell Holmes is captured in this historic passage he wrote and which has been quoted repeatedly throughout the twentieth century:

"Only when you have worked alone - when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and despair have trusted to your own unshaken will - then only will you have achieved." [447]

Holmes is considered today as a Great Justice for two reasons. First, his Dissenting opinion in *Lochner v. New York* (1905). The *Lochner* majority invoked a liberty of contract argument to hold legislation unconstitutional that was designed to help non-unionized workers, who were an essentially powerless group at that time. Under the *Lochner* doctrine, social legislation to help disadvantaged individuals was typically held to be unconstitutional. By the mid-1930s, *Lochner* was discredited, in reliance on the Dissenting opinion of Holmes.

The second primary cause for his recognition as a Great Justice was his comparatively liberal application of the First Amendment, and his formulation of what came to be known as the "clear and present" danger test. In very general terms, Holmes formulated the notion that speech was protected by the First Amendment unless the words spoken posed a "clear and present" danger. For instance, shouting "fire" in a movie theater would still be unprotected speech under his doctrine because it posed a "clear and present" danger.

I agree that his opinions in these two subject areas are brilliant. My dislike of him is attributable to his horrible record in civil rights. In *Giles v. Harris*, black citizens were precluded from registering as voters in Alabama. They alleged that the state arbitrarily excluded them by prescribing restrictive qualifications. Holmes concluded that relief could not be granted because even if the black plaintiffs were correct and the entire registration system in Alabama was being fraudulently administered, ordering the system to register black voters would not cure its deficiencies. That in my view, is illogical reasoning.

In *Bailey v. Alabama*, the Court was faced with the legality of a state law that made breach of contract a criminal offense. The effect was to create a system of involuntary servitude, since blacks typically contracted to work on farms. The Court held the state law to be invalid, but Holmes Dissented. It was his view that the state had the right to throw its weight on the side of ensuring that citizens perform on their contracts. The fact that the contracts at issue created a system of involuntary servitude was not sufficiently relevant to him.

He also was a strong supporter of the now totally discredited reasoning of *Plessy v. Ferguson,* that held "separate but equal" accommodations for blacks was constitutional. I find it virtually impossible to reconcile his civil rights opinions, with his strong support of abolitionism.

He also wrote two opinions which are universally recognized as "notorious." One of them is frankly speaking, more ridiculous than anything. The issue of negligence in the case of *Baltimore and Ohio Railroad Co. v. Goodman,* involved determining what responsibilities the driver of an automobile had at a railroad crossing. In that case, a truck driver was hit by an oncoming train. Holmes laid down the now discredited "grade-crossing rule" which was as follows:

> "If a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle. . . ." [448]

Essentially, under Holmes' theory, the railroad company was not liable when a train hits an automobile, because it was the duty of the automobile driver to get out of their car at each railroad crossing to make sure a train was not coming.

The most disturbing case that has consistently troubled those who try to describe Holmes as a champion of civil liberties is *Buck v. Bell*. The State of Virginia sought to sterilize a woman named Carrie Buck, under a state statute that provided for the sterilization of "mental defectives" when the superintendent of state institutions believed "the best interests of the patients and of society" would be served. Her lawyer contended that under "no circumstances could such an order be justified." Holmes wrote the opinion justifying her compulsory sterilization. He wrote as follows:

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, **if instead of waiting to execute degenerate offspring** for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. **The principle** that sustains compulsory vaccination **is broad enough to cover cutting the Fallopian tubes.** . . . **Three generations of imbeciles are enough**." [449]

NOTE: The presentation of most facts herein about Justice Oliver W. Holmes life is based on his biography: **G. Edward White,** *Justice Oliver Wendel Holmes - Law and the Inner Self,* (Oxford University Press, 1993)

U.S. SUPREME COURT JUSTICE HUGO BLACK

The First Amendment judicial opinions of Hugo Black are my favorites. Perhaps, even more than the opinions of William O. Douglas. Black and Douglas consistently voted in favor of the Applicants in the Bar admission cases. Typically, Black wrote the opinions and Douglas signed onto them. For the most part, subject to very few exceptions Black was an absolutist when it came to the First Amendment. He did not believe that any balancing was required between the government's interest in restricting speech and the citizen's right to engage in speech. It was his position that the framers of the Constitution did all the balancing required when the First Amendment was written.

His record for enhancing civil liberties as a Justice is probably better than any other Justice who ever served on the Court, with the possible exceptions of Thurgood Marshall and William O. Douglas. This is particularly remarkable because he came from Alabama and early in his career was a member of the Ku Klux Klan. His membership in the KKK was not publicized until immediately after his confirmation as a Supreme Court Justice. Yet, once he was on the Court, he established one of the most impressive records, consistently voting in favor of the civil rights of racial and ethnic minorities.

Dissent was in Hugo's blood. His mother's name was Martha Ardella Toland Black. In the 1700s, Elihu (Hugh) Toland, an ancestor of Black, was sentenced to be beheaded for his activities against the crown, but before the sentence could be executed he fled the country and came to America. Another ancestor, Robert Emmet, also of the Toland family line was hanged in 1803 after participating in the murder of the Irish chief justice.[450] Hugo became acclimated to Dissent, early as a child. In 1901, a high school principal punished his sister for whispering and ordered her to stand in a corner on one leg. Hugo told the teacher to let her go home. The following then transpired:

> "The professor then announced he was going to "whip" Hugo. Hugo was in his seat when Turnipseed came over with a switch and started to hit him. Hugo grabbed it and broke it into pieces. . . . Turnipseed asked Professor Yarbrough, his co-principal, to bring another switch and to hold Hugo. Both of them tried to whip Hugo, but he broke all their switches. . . . After the family talked it over, Hugo never again attended Ashland. . .. It was his first questioning of authority, his first dissent, his first experience acting as a defense lawyer, protecting himself and his sister from unjust punishment, and he met it with defiance." [451]

After the above episode, Hugo left school. He was a high school dropout at age sixteen. In 1903, he took a statewide test to become a teacher, but failed it. He then entered Birmingham Medical College, but decided he was not interested in medicine and dropped out of there also. In 1904, with an obviously scattered academic record and no degree, he entered the University of Alabama Law School. The Law School's admission requirements at that time required a person to be either a college graduate; or alternatively pass an examination in English and History. Hugo did neither. His biographer, Roger K. Newman writes:

> "As Hugo had not been graduated from any institution nor taken any examination, he was apparently admitted in violation of the regulations." [452]

He developed a reputation as a tough lawyer. One day a woman walked into his office and his partner asked if he could help her. She responded:

> "No, not you," . . . I want the mean-looking one." [453]

In 1911, he became a Birmingham, Alabama trial court judge. A drunk, old black man was brought into his Court for violating liquor laws. Hugo fined him $ 2 which the drunk did not have, and so Hugo loaned him the money. When the drunk was brought in a second time, Hugo did the same thing, fining him and then loaning him the money to pay the fine. On the third occasion, Hugo sentenced him to a short period in jail.[454] He left the bench in 1912 and returned to private practice. In 1914, he was elected as a prosecutor. In 1917, he volunteered for the army and in 1921, at age 32, he married Josephine Foster who was 19 years old, thirteen years his junior. [455] He then went back into the private practice of law, practicing almost exclusively in the personal injury field. His abilities were described as follows:

> "In the courtroom he was nearly unbeatable. Hugo had a way with juries, Cocky, sure that he could persuade any juror, he was satisfied only if he won 90 percent of his cases. He bluffed and gambled, making jurors think that there was much information on the sometimes blank paper he waved in front of them. . . .
>
> To Hugo the courtroom was virtually his. . . . "That's my turf," he once said. . . .
> . . .
> "During trial, he was usually feisty and contentious. He deliberately skirted the limits, provoking foes and infuriating judges who often threatened to, but never did, charge him with contempt of court. ("If you're not threatened at least once during a case, you're not doing your job," he said.)" [456]

He then became a member of the KKK, which is obviously incongruent with his exemplary record supporting civil liberties as a U.S. Supreme Court justice. He joined the KKK on September 13, 1923, took the Klan oath and shared its political platform and ideology. No reasonable assertion can be made that he had illusions about the group he was joining. He knew exactly what it was and deliberated for over a year before deciding to join. He was active in the organization, marched in parades, and dressed in full costume including hood and mask.

The most that can be said for the matter is that he ultimately resigned, and subsequently was viewed by the organization as a traitor for his later contributions to furthering the civil rights of minorities and eliminating prejudice. It is nevertheless, nothing short of absolutely incredible that one of the greatest civil rights champions of the U.S. Supreme Court was at one time an active member of the KKK.

His membership in the KKK became his skeleton in the closet. He tried to never talk about it, possibly suffering from a guilty conscience, and always came up with some different type of lame excuse to explain away his membership. Certainly, he failed to provide "full disclosure" on the matter. At varying times, he explained that he joined because his old law partner convinced him, he wanted to get the Klan recruiter off of his back, and that it was not in those days what it became later. His explanations all lacked creditability, and there is little doubt that he knew exactly what he was doing. He resigned from the KKK in 1926, approximately three years after joining and just before he began campaigning to become a U.S. Senator. The KKK supported his candidacy and helped him get elected. Even throughout the early 1930s, he continued to retain his prejudicial attitudes.

As a U.S. Senator in the early 1930s, Hugo led a committee investigating lobbying. His investigative tactics were ruthless. Comments were made that the Black Committee had "virtually set up a grand inquest on Capitol Hill," [457] engaged in unconstitutional searches and seizures, [458] and unjustly intruded on the privacy of citizens. Quite a far leap from the Hugo Black that would later condemn investigative tactics by State Bars. He attempted to justify his committee's conduct stating:

> "The power of the probe . . . is one of the most powerful weapons in the hands of people to refrain the activities of powerful groups who can defy every other power. That is because special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity." [459]

He also asserted that after an investigator:

> "has tried every technique, politeness, kindness, blandishment, . . . he is sometimes driven in the presence of a witness who is deliberately concealing the facts to attempt to shake it out of him with a more drastic attack." [460]

His biographer, Randall Newman writes:

> "Black's hatred of business interests caused him to trample over witness's rights protected by the Fourth Amendment."[461]

As a father of three children, he was tyrannical. It was his hope that by continually discouraging his sons he would stimulate them. He did not reward them when they did well, but punished them when they did bad. He banned them from reading the comics in the newspapers. One of his sons, Sterling Black as a child, after getting a perfect report card in school felt the ban on reading comics shouldn't apply to him. The following transpired:

> "So, early the next morning Sterling called a friend and they just started to walk. But by night they had become tired and the friend called his father to pick them up. When Sterling came home, neither Hugo nor Josephine said anything or asked why he had run away. Hugo immediately locked Sterling in the attic for several days of solitary confinement, and warned the rest of the family not to see him."[462]

In 1935, an anti-lynching bill was introduced in the U.S. Senate that called for federal prosecution of any public official, if a mob tried to injure or kill a person in its custody. Hugo voted against it, although ostensibly he said that he favored the bill's objective. By 1936, his main role was assisting FDR with passage of New Deal legislation and having it upheld by the U.S. Supreme Court. The Court at that time was invalidating most of FDR's New Deal.

He began reading extensively about the history of the Court to find its' point of vulnerability. The ultimate result of his efforts was known as the Court-packing plan. The intent was to leverage the U.S. Supreme Court into rendering rulings on behalf of the President's legislation, by threatening to dilute the Court's authority by adding additional members to the Court. The plan succeeded to the extent that from that point forward, the Court validated FDR's New Deal. The U.S. Supreme Court had been leveraged. Hugo's study of the Court had the effect of beginning to change his ideology. He stated:

> "I regret to say that a real study of impartial history has changed a great many of my preconceived ideas about the aloofness of the Supreme Court on political issues. In my judgment, it has simply not been "aloof." On deciding these political interpretations they have always followed the economic predilections of the individual members. Nothing is clearer than this." [463]

In 1937, FDR repaid Hugo's support by nominating him to be a U.S. Supreme Court Justice. From the moment his nomination was announced, his connection with the KKK became a "quiet" topic of conversation in the Senate. [464] No one however, could find concrete proof of his membership. It wasn't until he was sworn in as a Justice that the proof was found and the story went public. When his membership became publicly known, senators and congressman publicly demanded that he resign.

His house was picketed and the public was outraged. The nation was in a virtual uproar. In October, 1937, Justice Hugo Black addressed the nation on radio about the KKK issue. All three networks carried his speech. His audience of forty million was the largest ever, except for that which heard King Edward VIII abdicate the throne the year before. [465] Prior to his radio address, in a conversation with James Roosevelt, Black admitted that he had joined the KKK, stated that he had resigned, repudiated it, characterized his membership as a mistake and asserted that he owed no allegiance to them.[466] The KKK became furious in future years with Hugo for disavowing them.

Hugo Black quickly became a different man. His support from the State of Alabama was gone, and he consistently ruled against Alabama while on the Court. The people of Alabama felt they had been betrayed by him. Hugo on the other hand, felt he had to prove to the nation that he did not subscribe to KKK ideology. He proved such in his judicial opinions. He became a champion of civil liberties. Like so many others who won their fame as "Inquisitors" (McCarthy and Nixon) only to ultimately have similar investigative techniques used to uncover their own "moral character" flaws, Hugo Black became the strongest critic of unconstitutional investigations. He was now the Protector of the constitutional rights of those being investigated. He went from one end of the spectrum, all the way to the other.

He was undoubtedly a great politician. Faced with the public clamor over his KKK membership, the first thing he did upon taking office was to hire a Catholic secretary, a Jewish clerk, and a Black messenger. In 1951, his wife Josephine died at the age of 52. In 1956, his secretary retired and he needed to find a new one. A woman named Elizabeth DeMeritte was recommended to him. Hugo's biographer describes the situation as follows:

> "One possible problem gave the justice pause : Elizabeth was separating from her husband. "I don't want a woman with middle-age problems on my hands." But Daddy, she's so good-looking," Hugo Jr., replied. "Send her up," Black said." [467]

Approximately, one year later Justice Hugo Black married his new secretary. He was 71, and she was 49. What is the proper assessment of Hugo Black? He was certainly a man whose life had astounding contradictions. He was a member of the KKK, but did more for civil liberties than perhaps any Justice on the Court other than Thurgood Marshall and William O. Douglas. He was a strict, moralistic disciplinarian with his children, but ultimately married his secretary who was 22 years younger. His first wife was 13 years younger. He engaged in ruthless investigative techniques as a Senator, but later condemned the use of such tactics in his judicial opinions. He was the ultimate Dissenter, and the ultimate politician.

Stated simply, he was a Judge. And Judges have "moral character" flaws. Every one of them has engaged in conduct that could result in denying their admission to the State Bar. So, it's time they get off their pompous high-horse. Hugo Black succeeded in doing so.

NOTE: The presentation of most facts herein about Justice Hugo Black's life is based on his biography: **Roger K. Newman**, *Hugo Black - A Biography,* (Fordham University Press, 1997)

U.S. SUPREME COURT JUSTICE STEPHEN FIELD

One day Hollywood producers have to make a movie about Justice Stephen Field. I'm not sure whether he should more properly be called a Supreme Court Justice or a Cowboy. He was either a hero or a criminal depending on who you ask. I suspect that he was a bit of both. He served on the Court during the 1800s and wrote one of the most famous U.S. Supreme Court opinions ever, that of *Ex Parte Garland*. It's a case the State Bars just can't get rid of, no matter how hard they try. It established conclusively in no uncertain terms that the ability for a qualified individual to engage in the practice of law was a "right," rather than a "privilege." The case has survived almost 150 years and is still cited today. The following story captures the essence of Stephen Field perfectly:

> "In June 1850 the new district court judge, William R. Turner, replaced Field as the highest judicial authority in Marysville, and it was not long before the two men clashed. On June 7, while representing John Sutter in Turner's court, Field said something that obviously irritated the new judge. It irked him so much, in fact, that he held Field in contempt of court, ordered him to be confined for forty-eight hours, and fined him $ 500. . . . Field claimed that Turner, a southerner, was prejudiced against him because he was from New York. For his part, Turner claimed that Field had been disrespectful in court, a charge that is not altogether unbelievable . . . .
>
> . . . Field petitioned the county court for a writ of habeas corpus. . . . Technically, the county court's jurisdiction was inferior to that of Judge Turner's district court. Nevertheless, county court Judge H.P. Haun granted the petition and ordered Field released. . . . Field celebrated by buying drinks and cigars for a crowd that had gathered to observe what was going on. . . . Field claimed the crowd acted spontaneously after Turner had gone from saloon to saloon threatening Field and his friends and calling them "perjured Scoundrels." Turner claimed that Field incited the mob, exhorting them to throw the district judge into the Yuba River. . . .
>
> Whatever actually happened, the following Monday Turner responded by holding Judge Haun in contempt and ordering Field . . . disbarred. When the sheriff and twenty armed men arrived in the county court to carry out Turner's order, Judge Haun expelled the posse from the courtroom and fined the sheriff $ 200 for contempt. Later, Field was locked up and Haun quietly paid his fine, but the matter of disbarment remained. Acting for himself and two other attorneys, Field appealed to the state supreme court, which ruled in Field's favor, ordering that he . . . be reinstated to the bar. Turner first complied . . . by reinstating Field . . . but then he disbarred Field once again. Field again appealed to the supreme court, and again it ruled in his favor." [468]

In view of his own personal history, it's easy to see why he would feel strongly about the ability to practice law being a "Right." He had personally experienced the manner in which subjective judicial vindictiveness based on a personality clash, and "attitude" could be used to assert that one's conduct was "immoral," and purportedly justified revocation of their law license. Another story about him during his early years was as follows:

> "Then the Justice said: he would not allow such language by the Counsel – and would Himself protect the Jury, and, doing what I never saw before – drew from his breast pocket an eight-inch Bowie knife, placed its back between his teeth, and from his Holster drew a Navy Colts revolver, cocked it, and placing its muzzle within six inches of the offending Counsels head – Hissed at him the command "Eat those words, or Dam you, I'll send you to Hell." The Counsel meekly said "I eat," and the pistols were returned to their holsters. . . .

That justice of the peace . . . was Stephen J. Field, late . . . Justice of the Supreme Court of the United States." [469]

Field did not respond particularly well to criticism as indicated by the following which occurred while he served on the U.S. Supreme Court:

"Recounting the contents of the article, he expressed dismay at its "bitter and malicious spirit." Field speculated that the correspondent must have been bribed by rivals or was "some old enemy whom I have probably given a just judgment." Then he requested his brother take action.

> "I wish you would call upon the editor of the Herald and ask him to give you the name of the writer of the article in question. My impression is that the writer is a miserable scalawag in California and, if I am correct, it would be a very easy thing for me to have his political head decapitated or his political nose sufficiently pulled to make him hereafter politically silent."

". . . Demanding "personal satisfaction" and warning that he "would not be trifled with" Field again demanded to know the writer's identity. "I say to you that if they do not give me the name of the man who wrote that article it will be the saddest day for Mr. Bennett <of the Herald> that ever has been in his life, and those very men who refuse will before the month goes around, regret it bitterly."[470]

Field also has the notable distinction of being the only "tenth" justice to ever serve on the U.S. Supreme Court. On March 6, 1863 Congress enlarged the U.S. Supreme Court to ten seats and Field was appointed by President Lincoln to fill the tenth seat. The Court would have ten justices for the short period of 1863 - 1869, when it returned to having nine seats. [471]

Field is a good example of how the same Judges that continually stress the importance of complying with the rule of law are often the Judges who violate it. Early in 1862, Field was Chief Justice of the California Supreme Court. The losing attorney in a litigation filed a motion for writ of error which would start an appeal to the U.S. Supreme Court. The motion was granted and the California Supreme Court was Ordered to send its files up for review. Field refused to comply with the Order and held that the Supreme Court of California does not recognize an unlimited right of appeal to the Supreme Court of the United States. [472] Yet, unsurprisingly, once he became a U.S. Supreme Court Justice, he was very protective of federal power and consistently held that State Supreme Courts were unlawfully acting beyond their authority.

Then, of course there is the Terry incident involving Field. A story that is absolutely amazing. Justice Field's bodyguard shot and killed David Terry, a former Justice of the California Supreme Court. Terry and Field had served together on the California Supreme Court and did not get along, to put it mildly. Subsequently, Terry represented and then married Sarah Althea, rumored to have been a prostitute. Terry represented her in a lawsuit against former U.S. Senator William Sharon. Sarah contended that Sharon had kept her as a mistress (prior to her marriage with Terry) and had contracted to marry her. The California Court ruled in her favor.

Senator Sharon then took the case to federal court where Judge Sawyer ruled in his favor. Sarah in response physically attacked Judge Sawyer. Field took the case over from Judge Sawyer and also ruled in Sharon's favor. Sarah then started yelling in the courtroom that Field had been bribed and Field ordered her to be removed from the courtroom. Sarah proceeded to slap the Marshal in the face, which caused former California Supreme Court Justice David Terry (now married to Sarah) to act. Terry was

66 years old and told the Marshal, “Don’t touch my wife.” The Marshall did not relent and Terry punched him in the face. Judge Field then sentenced Terry to six months in jail for contempt and his wife to three months. Terry served the entire sentence.

After their release from jail, the Terrys found themselves on a train with Stephen Field. What happened next has been the subject of bitter dispute. Field and his bodyguard said that when Terry noticed Field, he struck Field with a violent blow to the face. A witness, F.J. Lincoln swore that Terry merely brushed Field with an open hand as if to insult him. Whatever really happened, Field’s bodyguard David Neagle took immediate action and shot Terry twice, killing him. Neagle swore that he thought Terry was reaching for a knife, but no knife was ever found.

Terry had been a powerful man with many friends in California. It was publicized that he had been murdered and an inquiry was held. The sheriff served an arrest warrant on Field, who submitted to the arrest. Ultimately the charges against him were dismissed, along with the charges against his bodyguard. The Terry incident ultimately established the doctrine of immunity from prosecution for federal officials carrying out their official duties, as the charges against Neagle were ultimately heard by the U.S. Supreme Court. [473]

Justice Stephen Field of the United States Supreme Court. Disbarred twice, arrested for murder and a U.S. Supreme Court Justice. I can only imagine how they would have treated an NCBE character questionnaire that he would have submitted in today’s world. No wonder the State Bars don’t like the case of *Ex parte Garland*, that he wrote the lead opinion on. One thing is certain. It would be an incredible experience to listen to former U.S. Supreme Court Justice Stephen Field at a State Bar admissions interview today.

NOTE: The presentation of most facts herein about Justice Stephen Field's life is based on his biography: **Paul Kens**, *Justice Stephen Field - Shaping Liberty from the Gold Rush to the Gilded Age,* (University Press of Kansas, 1997)

U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL

He was the great-grandson of a slave and the grandson of a Union soldier. He was perhaps the greatest civil rights attorney this nation has ever produced and became the first black Justice of the U.S. Supreme Court. His appointment to the Court was particularly interesting because he was the first Marylander to sit on the Court since Chief Justice Roger B. Taney, who 110 years earlier wrote the Court's opinion in the *Dred Scott* case which held that black Americans had no constitutional rights and slavery was constitutional.

Along with Justices Earl Warren, Hugo Black, William O. Douglas and William Brennan, Marshall led America during the 1960s and early 1970s in the civil rights cause. By the late 1980s and early 1990s, at the end of his career, his opinions were no longer in the majority and he regularly Dissented. The Court had become more conservative and Marshall saw a great deal of the work he dedicated his life to, erased, as the Warren Court decisions were diluted. He tried to stay on the bench as long as possible so that his seat would not be given up to a more conservative Justice and he was not at all happy with the Court when he finally retired. In 1988, he told a group of judges and lawyers who questioned him about the Supreme Court's increasingly conservative composition:

"Don't worry, I am going to outlive those bastards." [474]

From the earliest years of his childhood, Marshall coupled his strong sense of justice with a personality and attitude that was high-spirited, fun-loving, and smart-alecky. As a grammar school student:

> "His elementary school principal would send recalcitrant students to the school's basement with a copy of the Constitution and orders to memorize a passage before returning to the classroom. Thurgood spent many hours in the basement. "Before I left that school," he later told a reporter, "I knew the entire Constitution by heart." [475]

When he was a little child, he asked his father what the word "nigger" meant. His father responded that if anyone ever called him that, Thurgood not only had permission to fight the person, but was under "orders" to fight him. It was an order that Thurgood followed physically and legally for the rest of his life. In 1922, when he was a 14 year-old high school student, a white man called him, "Nigger." Marshall described what he did next as follows:

"I tore into him." [476]

In his sophomore year of college, Marshall and fellow students participated in the hazing of freshmen. One night they descended on the freshman dormitory and shaved the heads of most of the underclassmen. [477] The school's administration charged them with the incident. They were suspended for two weeks and collectively fined $ 125. In 1929, he married Vivian Burey, a University of Pennsylvania graduate who he described as a "cute chick." [478]

The marriage brought a conclusion to his days of campus carousing. They were married for 25 years until her death from cancer in 1955. She had four miscarriages and they had no children. Socially, the Marshalls enjoyed the night life. They frequented Harlem nightclubs and after-hours jazz clubs. He also loved to gamble at the race-track and ultimately became a pretty good handicapper. Eleven months after Vivian's death, he remarried and ultimately did have children with his second wife.

He was a champion of the poor, minorities and those unempowered in society. At his last press conference after announcing his retirement, when asked what major tasks the Supreme Court faced in the years ahead, Marshall replied:

"To get along without me." [479]

His discontent with the Court when he retired was exemplified by his final Dissenting opinion, in which he wrote:

"Power, not reason, is the new currency of this court's decision making. . . ." [480]

His pinnacle of influence was during the Warren Court years. One of the most interesting stories concerned the Supreme Court's growing docket of pornography cases. In order to determine whether a movie was obscene, the Justices at that time would view the movies. Each week they gathered in a basement room to watch the adult movies they were called upon to review. It became irreverently known as "Dirty Movie Day."

Marshall would regularly make loud wisecracks during the viewing, especially if he had a few drinks at lunch which was not unusual. He would sometimes comically request a copy of the movie, to show his children when they reached college age. [481] The most interesting aspect of this is that the one other Justice, who seemed to particularly enjoy "Dirty Movie Day" was John Harlan. Harlan would also joke about the movies. Unlike Thurgood, however, Harlan was a conservative Justice. He was known as the Great Dissenter of the Warren Court. It is interesting that of the two Justices with the most interest in "Dirty Movie Day," one was a liberal and the other a conservative. Black and Douglas, incidentally never attended "Dirty Movie Day."

Marshall and Douglas had several personality clashes on the Court and did not get along at all. This might seem surprising because their civil liberty opinions are very similar. They were both champions of the poor. The best explanation is that they both had such strong personalities, a clash was inevitable. Douglas was closest friends with Hugo Black. Marshall's closest friend was William Brennan. Douglas got along with Harlan, even though they opposed each other in virtually every civil liberties case. Marshall ultimately got along with Warren Burger although their opinions also opposed each other consistently. Clearly, whether the legal opinions and ideology of two U.S. Supreme Court Justices are in agreement, is not determinative of whether they get along personally.

In the early 1970s, after Earl Warren retired, and the conservative Warren Burger was appointed to take his place as Chief Justice, Justice Marshall enjoyed putting Burger ill at ease with black street-corner colloquialisms. He would customarily greet Burger by saying:

"What's shaking, Chiefy baby ?" [482]

The conservative Burger at first returned the greeting with a puzzled look, as if he had no idea what Marshall was saying. There is little doubt that Marshall did it purposely to rattle him. The two did however ultimately develop a cordial relationship.

Marshall graduated first in his class from Howard law school in 1933, and in 1935 scored his first major civil rights victory which was a case of sweet revenge. He won a suit to integrate the University of Maryland law school which years earlier had rejected his own application because of race. In *Murray v. Pearson*, Marshall represented Donald Gaines Murray, an Amherst graduate who upon filing an application for admission to the University of Maryland law school received the following letter in response:

"President Pearson has instructed me today to return to you the application form and the money order, as the University does not accept Negro students. . . ." [483]

Marshall won. When he retired in 1991, he was asked during a press conference about the University of Maryland case which was his first great victory. Reflecting back upon his own denial of admission from that law school, Marshall responded:

"It was sweet revenge, and I enjoyed it to no end," [484]

In the 1940s, he called travel agencies to uncover whether their booking practices were discriminatory. On one occasion, he was surprised when a travel agent agreed to reserve a room for him in a Florida hotel. He then asked, "Excuse me, is this hotel restricted ?" The travel agent replied, "Oh, Mr. Marshall, I didn't know you were Jewish!" Marshall then feigned a heavy black dialect and responded, "Ahh, sister, have I got news for you!" [485]

He ultimately became counsel for the NAACP and in 1954 won the historic case of *Brown v. Board of Education* that struck down segregation in public education which he argued before the U.S. Supreme Court. In 1962, he was appointed by President Kennedy to be a Second Circuit Federal Court of Appeals Justice. In 1965, President Johnson appointed him to be Solicitor General for the United States. He caught some bad press for having a reputation as a heavy drinker who polished off three cocktails at lunch, which he diffused by freely admitting and joking about it. He was never particularly concerned about his telephone being wiretapped, although he thought it was and joked that:

"All they would have heard was me cussing and my wife gossiping." [486]

Thurgood Marshall did everything he possibly could to bring equality to America both as an attorney and U.S. Supreme Court Justice. He was a champion of the underdog and all races. He dedicated his life to helping others. He was smart, tough, eloquent and brave. At the same time he was emotional and a lot of fun to be with. He always had jokes to tell and was very affable. He loved women, booze, gambling, partying and used profanity often. He got in trouble many times during his own life, particularly during his youth. He was also a true American hero, with an incredibly strong sense of justice and accomplished great things for this nation.

Yet, in today's world, he easily could be denied admission to the State Bar due to the arbitrary manner in which the irrational "good moral character" standard is applied. In many respects, it's the same reason he was denied admission to the University of Maryland law school. And he made them change.

I definitely would have considered it to be an honor to party with Thurgood Marshall.

NOTE: The presentation of most facts herein about Justice Thurgood Marshall's life is based on his biography: **Michael D. Davis and Hunter R. Clark**, *Thurgood Marshall - Warrior at the Bar, Rebel on the Bench*, (A Citadel Press Book Published by Carol Publishing Group, 1994)

U.S. SUPREME COURT JUSTICE JOHN MARSHALL HARLAN

Sometimes I just don't know what to do with John Marshall Harlan. He was known as the Great Dissenter of the Warren Court. It is important to remember that being a Dissenter on the Warren Court, meant that he was a conservative. Typically, Dissenters are viewed as liberals, but the Warren Court was liberal and therefore the Dissenters occupied the unusual role of being conservative.

In many respects, the State Bar admissions debacle which is the central thesis of this book is entirely Harlan's fault. He wrote virtually every major opinion ruling in favor of the State Bar. He was the absolute antithesis of Justices Black, Douglas and Marshall who consistently ruled in favor of the Applicants. If Harlan had voted differently, the irrational nature of State Bar character inquiries would no longer exist today.

Yet, by the same token I must concede there are aspects of his personality that I like immensely. He was certainly very bright and a good writer. At the end of his career, he was also beginning to see the other side of the State Bar admissions problem as pointed out in the section of this book dealing with the 1971 cases of *Stolar, Baird* and *Wadmond*. I honestly believe that if Harlan had remained on the Court for a few more years, he would have changed his vote.

Harlan's Grandfather, the first John Marshall Harlan also served on the U.S. Supreme Court and also had a reputation as a Dissenter. In fact, the first Harlan, arguably wrote the most significant Dissent in the history of the United States Supreme Court. He was the lone Dissenter in *Plessy v. Ferguson* in 1896, where the majority held that separate but equal accommodations for blacks was constitutional. It would take more than 50 years for the U.S. Supreme Court to overrule its' holding in *Plessy*, when it determined that segregation was unconstitutional in *Brown v. Board of Education*. Harlan II however, was nothing like his Grandfather. Based on his own voting record, he seems to have regretted his Grandfather's courageous lone dissent in *Plessy*. The first Harlan was a liberal. The second Harlan was a conservative.

With a Grandfather who was a U.S. Supreme Court Justice, Harlan grew up in a world of societal privilege. He was a Rhodes Scholar and attended Princeton University. He became a U.S. attorney during the Prohibition era and was named to head the office's Prohibition division. This was somewhat remarkable because he was quite skeptical from the start about the legitimacy of Prohibition. His sister Edith stated:

> "He thought it was ridiculous. . . . We all did. Here we were making gin in our own bathtubs. I made some myself lots of times. We all had our own bootleggers." [487]

When Edith graduated from Vassar, Harlan asked her what she would like as a graduation gift. When she asked for a bottle of scotch, he obliged. Edith and her friends proceeded to drink the entire quart after which she recalled they made a terrible scene at the class supper. [488] In 1928, Harlan married a divorced woman, Ethel Andrews. Although he grew up with societal privilege, it was clear that he was no prude. He liked booze and married a divorced woman during a period when society frowned greatly on such a marriage.

His father, John Maynard Harlan was never a Judge and brought scandal upon the family. John Maynard and his brother Richard were not adept at managing money. They lost a tremendous amount and in a desperate attempt to cover it up, falsified accounting records. Ultimately, the scheme fell apart and resulted in protracted litigation over many years between Harlan's father and his uncles. Harlan himself, does not seem to have been involved. [489]

In 1930, after leaving the U.S. attorney's office and resuming private practice, Harlan assisted Emory Buckner in defending heavyweight boxer Gene Tunney. A Bronx speakeasy operator was the best possible witness for them. Harlan later recalled :

"days drinking with him before he agreed to testify." [490]

In 1940, he represented British scholar Bertrand Russell. Russell was imprisoned in 1918 for four and a half months for seditious writings. He had a reputation as a great philosopher, but also led an unorthodox personal life. He was allegedly involved in several adulterous relationships. Russell was offered a professorship at City College by the Board of Education. In response, a civil suit was instituted against the Board challenging Russell's appointment on moral character grounds. Specifically, it addressed his "notorious immoral and salacious writings."

The trial court judge ruled against Russell. Harlan represented the Board, (on behalf of Russell) at the appeals court. He asserted that the trial court's conclusion was arbitrary and capricious. He lost the case.

The issues involved were remarkably similar to those in State Bar admission cases. Louis Lusky who was a co-member of Harlan's law firm later recalled that when Harlan lost the case, it was the only time he ever saw Harlan "really angry." [491] This was quite a far leap from the Harlan that years later would himself write such opinions. In 1949, he and an associate functioned as a subcommittee for the New York City Bar Association. They reviewed the credentials of a woman candidate for a federal district judgeship and concluded that:

> "If the appointing power is determined to fill one of the vacancies . . . by appointment of a woman judge" she was "**better qualified than any other woman**. . . . " [492]

In 1961, as a U.S. Supreme Court Justice, he wrote for the Court in upholding a Florida law that exempted women from jury service, stating:

"woman is still regarded as the center of home and family life." [493]

From 1948-1950, he was Vice-President of the American Bar Association. Their political support became the fulcrum of his career, and probably explains why he became so deferential to abusive State Bar investigative tactics. In October, 1954 Justice Robert Jackson died and President Eisenhower nominated Harlan to fill the vacancy. On November 12, 1954, Harlan wrote Justice Burton requesting a briefing on cases pending on the Court so that he would be able to begin promptly if his nomination was confirmed. Burton shared the note with Chief Justice Warren. Warren wrote Harlan a letter back, after speaking with the other Justices. The letter was designed to provide Harlan with the advice of the other Justices, concerning the questions that would be posed to Harlan by the Judiciary committee as part of the confirmation process. It read in part:

> "Most of them were of the opinion that if they were in your place, **they would not answer** questions relative to their views on the Constitution, statutes or legislation. Two of the Justices stated they would answer very general questions in this field but nothing that was specific. It seems to me that if the Committee attempted to probe your mind on legal matters, it would be for a definite purpose and they would not be satisfied with general questions and answers. . . ."[494]

At the confirmation hearings, concern was expressed about Harlan's membership in the "Atlantic Union." The concern was that the organization's goals would contribute to a relinquishment of American control by supporting a union between England and America. In January, 1955, Harlan wrote a letter indicating that he planned to resign from the Atlantic Union if his nomination was confirmed. He assured the secretary of the Atlantic Union that he had "no apologies to make for his membership in the Union." At the confirmation hearings however, he emphasized the limited, pro forma character of his association with the Union and professed scant knowledge of its' goals. He stated:

> "I do not think I even paid my dues. I attended no meetings of the committee. . . . I have never spoken on behalf of the committee, nor have I discussed the affairs with anybody even informally. If you want me to be completely frank about my relationship to it, until this matter came up in connection with my nomination, I am afraid that if anybody had asked me if I was a member of the Atlantic Union Committee **I might have been mistaken in saying "No.""** [495]

Mississippi Senator Thomas Eastland, who was Harlan's fiercest interrogator during the confirmation hearings opposed his nomination on grounds that included:

> "The **character and nature of his evasive answers** lends weight to the conclusion that he sides with those who would forfeit our sovereignty." [496]

Eastland also stated:

> "Mr. President, here is an able lawyer, a man who represented the DuPonts in a great antitrust case, a man who was on the bench of the circuit court of appeals. . . . **He stated that he did not know what the Bricker amendment was. . . . It seems peculiar to me that that fact did not trickle down to this nominee.** . . ." [497]

Harlan refused to answer numerous other questions of the committee and was the subject of substantial criticism for his refusal. Many of his answers were evasive and his disclosures incomplete. Apparently, this obvious hypocrisy did not bother him when he later wrote State Bar admission opinions. By then he had been confirmed. Harlan wrote Felix Frankfurter a letter about the confirmation process characterizing it as an:

> "experience - one that should never have been associated with a nomination to that great Court." [498]

In the mid 1960s, Harlan's household cook, Leanna Mitchell was being pressed by the Internal Revenue Service for unpaid taxes. Harlan violated judicial ethics by writing a lengthy letter to the IRS on her behalf explaining that she was making monthly payments under a prior agreement with the agency. Mrs. Mitchell then took the letter with her to an interview that she had scheduled with an IRS official. As a result of Harlan's unethical intervention (which reflects adversely on his "moral character") the prior agreement was allowed to stand. [499]

As indicated previously herein, the U.S. Supreme Court in the 1960s had a growing docket of pornography cases. In order to determine whether a movie was obscene, the Justices at that time would view the movies. Each week they gathered in a basement room to watch the adult movies they were

called upon to review, on what was known as "Dirty Movie Day." At one time, Harlan was responsible for scheduling the screenings. In his memo announcing the viewing for "Language of Love" he noted comically that "No tickets are required." When he missed a screening, he enjoyed probing his embarrassed clerks for detailed description of the film at issue. About every five minutes when watching one of the porno flicks he was known to exclaim, "By George, extraordinary!" [500]

In 1967, the U.S. Supreme Court extended the protection of the Fourth Amendment to government eavesdropping, which was running rampant throughout the 1960s. Harlan received a letter from Chief Justice William Duckworth of the Georgia Supreme Court. Duckworth was irrationally angry about the Supreme Court's decision. Duckworth's letter to Harlan stated disrespectfully:

> "By such nearsighted decision. . . . you victimize the innocent public and force them to endure crime. . . . (Judges) willing to assault the bed-rock of our liberties which is our government on **the flimsy pretense that the Constitution requires it** . . . should resign . . . . " [501]

Overall, Harlan was a disappointment. He consistently ruled against the underprivileged. His career on the Supreme Court for the most part is reflective of the societal privilege that he was able to enjoy as a youth. Unlike Douglas, Marshall and Black he lacked the ability to identify with the feeling of hopelessness and despair that economically disadvantaged citizens endure. Arguably, but by no means certainly, it could be asserted that he simply lacked compassion. His own life was certainly filled with numerous so-called "moral character" flaws. He was a bright man, but he dropped the ball.

One thing is certain. The moral character review process that he condoned and supported could have resulted in denial of his own admission to the State Bar. But, he was lucky enough to have the arbitrary nature of the process function in his favor.

NOTE: The presentation of most facts herein about Justice John M. Harlan's life is based on his biography:

Tinsley E. Yarbrough, *John Marshall Harlan - Great Dissenter on the Warren Court,*

(Oxford University Press, New York 1992)

U.S. SUPREME COURT JUSTICE LEWIS F. POWELL, JR.

Louis Powell proved that people can change. When he assumed his seat on the Court, he was a staunch conservative. When he left the Court, he was every liberal's favorite conservative. He grew up in Virginia in the early 1900s, when racism was running rampant. His family had black servants. He attended all-white schools and never met a black as an equal.

As a child, he had difficulty getting along with other kids at school His biographer, John C. Jeffries tells the following story of his grammar school years:

> "At recess the first day, the other boys demanded Lewis's lunch and gave him a "hell of a beating" when he refused. For the next two days he stayed in the classroom with the teacher but soon realized that "if I didn't go out and brave the other boys, I would be a sissy." Lewis faced his tormentors and was accepted at his new school, but he never fit in with the rowdy working-class style of south Richmond.
>
> Lewis Jr. was not the rough-and-tumble sort. He was a thin child, . . . with a head almost too large for his body and ears that stuck out so sharply that for a time he tried taping them flat when he slept. Well-mannered and quiet, he excelled at his studies." [502]

On his twenty-first birthday, his father wrote to him:

> "never in your life have you given me one moment's worry or concern." [503]

His younger sister, Zoe was another story. She was a flamboyant party girl, who wore spike heels and dyed her hair. She was considered a "law unto herself, always charging around in a very un-Powell like manner." [504] Powell combined his undergraduate college studies at Washington and Lee University, with law school. When he received his undergraduate degree in 1929 graduating magna cum laude, he had already completed one year of law school. He also had been elected president of the student body. In 1931, he graduated first in his law school class, and left to spend an extra year at Harvard Law School. As he grew older, his self-confidence increased. As his self-confidence increased, he became more emotional. In one instance, the following transpired:

> “The same case produced the only known instance when Powell completely lost his self-control. . . . the counsel tables in the Spartanburg courtroom were arranged two deep. One day Powell was speaking from behind the rear table when a lawyer seated in front of him turned around and called him a “goddamned liar.” Powell climbed across the table and took a swing at the man, for which he was promptly held in contempt of court.” [505]

In 1941, he became Chairman of the Junior Bar Conference of the American Bar Association. Like most southerners, he was of the belief that the constitutionality of segregation was long established and he did not question its' legitimacy. In 1951, just a few years before *Brown v. Board of Education* was decided by the Supreme Court, Powell became a member of the Richmond School Board. One year later, he was the board's chairman. Richmond at that time did not admit black children into white public schools, and Powell was a strong supporter of the detestable policy. The Richmond School Board with his assistance and leadership, did everything it could to frustrate the *Brown* decision.

This came back to haunt Powell during his confirmation hearings in 1971. He was justifiably accused of participating in the extensive scheme of southern states to destroy constitutional rights. In

1960, Richmond began admitting black children to white schools. Immediately thereafter, Powell submitted his resignation to the School Board.

By the early 1960s, Powell had the strongest base of clients of any lawyer in Virginia and was a partner in the large firm of Hunton, Williams. One of his most significant clients was Philip Morris. In support of his client, Powell took up smoking. The wife of one his clients remarked, "It's a good thing they don't sell condoms." [506] In 1964, he became President of the ABA. In numerous presentations, he emphasized the importance of complying with the rule of law (notwithstanding his own attempts to defy the law while on the Richmond School Board), condemned civil disobedience of any nature, and asserted that the cause of crime was excessive tolerance of drinking and gambling by society.

His ultra-conservatism, won him immense praise and support from the ABA crowd. It also caught the attention of President Richard Nixon. In 1971, Nixon appointed Powell to the U.S. Supreme Court. At one point during the confirmation process, he was backed up against the wall of the Senate Office Building by a group of women's rights activists. Attempting to be somewhat humorous, he stated:

> "Ladies . . . I've been married for thirty-five years and have three daughters. I've got to be for you." [507]

The crucial issue for Powell however, would not be gender, but race. He belonged to all-white organizations and sat on the board of directors of several large corporations, including Philip Morris. There was also an allegation that his firm had a policy against hiring blacks, but it could not be proven. The main subject was his Richmond School Board experience. The claim was made by Congressman John Conyers, Jr. that Powell "participated in the extensive scheme to destroy the constitutional rights that he had sworn to protect." [508] Less than three months before his nomination to the Supreme Court, Powell had written "Civil Liberties Repression: Fact or Fiction?" which challenged the legitimacy of the civil rights movement. Notwithstanding, he was confirmed and sworn into office in 1972.

Unsurprisingly, Powell initially joined the conservative bloc of the Court consisting of Rehnquist, Burger, Blackmun and himself. They were all Nixon appointees. They consistently went up against Douglas, Brennan and Marshall (Justice Black had died and was no longer on the Court). Powell detested Douglas and thought he was a Son of a Bitch. [509] Interestingly, most of Douglas' friends also considered him a Son of a Bitch. In fact, Douglas himself would probably not only have admitted to such, but took pride in it. Like everyone else, Powell could not help but admire Douglas' intellect and was probably intimidated by him.

Powell's legacy on the Supreme Court was the issue of affirmative action. Beginning in 1978, with his opinion in the historic case of *Regents of the University of California v. Bakke*, and continuing to the conclusion of his sixteen years on the Court, Powell never Dissented in an affirmative action case. He was in fact the decisive vote, with the remainder of the Court aligned 4 to 4, awaiting his vote. He consistently voted in favor of affirmative action and minority preferences. It is difficult to reconcile this fact with his experience on the Richmond School Board, where it seems clear that he not only supported segregation, but attempted to frustrate desegregation.

One theory that has been advanced is that Powell felt it was simply "too late in the day" to forbid racial preferences. [510] As a result of the civil rights movement, affirmative action had become entrenched. Powell may have felt that if affirmative action was to be ended, it had to be done gradually. In the 1960s, he had spoken out against any type of civil disobedience. In the affirmative action cases, he had to balance his personal feelings about race, against the probability of the occurrence of civil disobedience if affirmative action were abruptly halted. This however, is concededly only a theory.

One of Powell's other interesting cases was *Lewis v. New Orleans,* in which he concurred with the liberal bloc that a person could not be criminally prosecuted for public use of the word "mother-fucking."[511] Burger, Blackmun and Rehnquist all Dissented in the case, but Powell concluded that abusive language in and of itself should not be constitutionally punished. It was a surprising opinion for him, particularly considering all of his earlier presentations condemning any type of civil disobedience. He also ruled in favor of free speech rights in the flag desecration cases.

When he left the bench in 1987, he was no longer characterized as a staunch conservative Justice. The Court itself had become immensely more conservative, and Powell was considered as being in the middle. He had become every liberal's favorite conservative.

NOTE: The presentation of most facts herein about Justice Lewis F. Powell's life is based on his biography: **John C. Jeffries Jr.**, *Justice Lewis F. Powell Jr.* (Charles Scribner's Sons, New York, 1994)

U.S. SUPREME COURT JUSTICE BENJAMIN CARDOZO

In the nineteenth century, the name Cardozo stood for judicial corruption. Benjamin's father, Albert Cardozo resigned from the bench in disgrace. He was as a Justice of the Supreme Court of New York and resigned when Benjamin was only two years old. Today, Benjamin Cardozo is regarded as one of the most respected Justices ever. Frankly speaking, I'm not one of his fans. He was too old-fashioned and traditional. I have difficulty identifying with his personality and his old-fashioned beliefs. Some of his opinions are totally ridiculous. It is irrefutable however that Judges and law professors today, admire and respect him.

Ben was born in 1870. Shortly after his birth, one of his uncles Benjamin Nathan Cardozo was savagely beaten and murdered. It was featured on the front pages of New York newspapers. His son, Washington Nathan Cardozo was named as a suspect, but no one was ever prosecuted. Around the same time, 200 hundred New York lawyers responding to public perceptions of judicial corruption created the New York City Bar Association and began a process of judicial reform. They forwarded to the New York legislature a report outlining various abuses of judicial power which named judges including Albert Cardozo. It ultimately resulted in his resignation from the bench.

For the rest of his life, Ben felt a need and desire to win back the honor of the family name, which he succeeded in doing.[512] His mother, Rebecca suffered from severe mental problems and spent time in a sanitarium. She ultimately had a stroke and died in 1879, when Ben was only nine years old.[513] After her death, Ben was raised by his older sister Ellen, who became his closet companion throughout life. She was eleven years older than him and they lived together until her death. He never married and never had children. In fact, it appears that he never even had a relationship with another woman and was celibate for his whole life. His other sister Emily, was the only one of the six children to marry.

He started college at Columbia University at age fifteen and was the youngest in his class. Two months into his freshman year, his father died. Newspaper reports of his father's death reminded his teachers and classmates of the judicial corruption associated with the Cardozo name.[514] He entered Columbia law school at age 19. During his second year of law school, there was a major upheaval, when the faculty announced the course of study was being lengthened from two to three years. Most of the students were angered by the unexpected change and left the school. Ben was one of them. U.S. Supreme Court Justice Benjamin Cardozo never graduated from law school.[515]

The fact that he had not graduated from law school was not particularly relevant at the time. He was admitted to the Bar and became a practicing attorney. He was sufficiently successful that by 1913 the name Cardozo carried a closer identity with the son, than the father. In 1914, he assumed a seat as a justice of the New York Supreme Court, the same Court his father had resigned from in disgrace 42 years earlier. One month later he was appointed to the New York Court of Appeals. Although in most states, the "Supreme Court" is the highest state court; in New York the Court of Appeals was the highest.

His views pertaining to a woman's right to vote were interesting to say the least. He was old-fashioned and his traditionalism caused him to emotionally oppose the right of women to vote. By the same token, he felt that common justice and conscience mandated that a woman be allowed to vote. When the New York suffrage amendment was put to a vote, Cardozo's sister said that he split the difference between his conflicting feelings. He voted in favor of giving women the right to vote, but felt guilty about it.[516] In his capacity as a Judge, his perceptions about women emerged in his opinions. In *Proctor v. Proctor*, the trial court denied a woman's petition for separation, finding that the couple's "disputes" were largely due to the influence of the husband's mother. Cardozo affirmed the trial court writing:

"I take it that the term "disputes" was meant by the judge as a euphemistic synonym for a trifling physical encounter, hardly more in his opinion than one of the usual amenities to be expected of a spouse when the influence of a mother-in-law is aggressive and disturbing."[517]

Cardozo's opinion presented the picture of Mr. Proctor's mother egging him on so much, that he slapped his wife in the face. Thus, in his opinion Mrs. Proctor's injury was not her husband's fault, but rather the fault of his mother.[518] There is little doubt in this author's mind, that if any Judge in today's world wrote such an opinion, they would be removed from the bench in record time. Such however was not the case in Cardozo's time. He went on to have a great judicial career. Another case, *In re McKenna,* involved a lawyer's appeal from a decision disbarring him for misusing the money of his client. Cardozo wrote:

"It is possible that this attorney is the victim of the typical woman client, who leaves everything to her lawyer, and then forgets her own acts or misconceives their significance."[519]

In 1920, at age 49, having been on the bench for six years, he was invited to deliver a series of lectures at Yale law school. He was to speak about the process a judge uses to arrive at a decision in a case. The hall was so crowded and the lectures so successful that faculty members asked him for a manuscript so they could publish it. Cardozo responded that he did not "dare to have it published" adding that:

"if it were published, I would be impeached." [520]

On occasion, he became angry when he disagreed with a decision of the U.S. Supreme Court. When the Supreme Court struck down a District of Columbia statute in *Adkins v. Children's Hospital*, Cardozo wrote to Felix Frankfurter who had argued on behalf of the statute at the Court:

"the District of Columbia case left me speechless, or at least ought to have left me that way, for such speech as I uttered was not respectful." [521]

On the issue of "candor," Cardozo's biographer Andrew Kaufman writes:

"Opinions have ranged from Cardozo as paragon of candor to Cardozo as master of deception. . . .
. . .
. . . Did he relate fully the governing legal reasons for his conclusion? . . .

Cardozo's desire to write with "style" affected his presentation of the facts in many cases. . . . he left out some facts that now seem important . . . especially from the perspective of the losing party. . . .

. . . **Likewise, occasionally he . . . did not present contrary authority** . . . ." [522]

Cardozo was sworn in as a U.S. Supreme Court Justice in 1932, after being appointed by the President. Justice McReynolds who he would serve with hated Jews and refused to associate with

Cardozo on the Court. McReynolds commented that all one needed in order to get on the bench was to be the son of a crook, obviously referencing Cardozo's father. When Cardozo died, McReynolds did not attend any of the three sessions at the Supreme Court honoring him.

Cardozo was undoubtedly a great intellect, but never got to enjoy life. From the day he was born, life hit him and his family hard. His opinions in the area of domestic relations exemplify his own inability to develop relationships, and the existing societal beliefs of the time. He had many emotional shortcomings, but the general consensus seems to be that he was just a very shy and bookish type of person. Frankly speaking, I just wish the guy had some more fun in his life.

Unlike many of the other Justices discussed herein, Cardozo probably would not have much difficulty satisfying today's contemporary State Bar moral character review process. The reason is that he never got to really enjoy life. They wouldn't be able to find anything negative about his past, because he didn't do much more than read and write. Oh wait, he never graduated from law school, so that would eliminate him too.

NOTE: The presentation of most facts herein about Justice Benjamin Cardozo's life is based on his biography: **Andrew L. Kaufman,** *Cardozo* (Harvard University Press, 1998)

U.S. SUPREME COURT JUSTICE EARL WARREN

Earl Warren was one of the most conservative law and order oriented politicians you could find. He was Governor of California for three terms. He subsequently became the most liberal Chief Justice the U.S. Supreme Court Justices has ever had. He was solidly aligned with the Douglas, Black, and Marshall power bloc. Intellectually, he wasn't quite as smart as any of them, but ideologically, he was with them all the way.

Warren's father taught him the importance of saving money early in life. He told Warren as a child that saving was a habit like drinking and smoking. [523] I've never heard that analogy before, but I like it. He also taught Warren the importance of education. In fact, through his middle age years, Warren's father took courses in accounting and mechanics (he was a car repairman). By the age of five, Warren's father had taught him to read and had him doing homework in advance of class at school.

In 1938, his father was murdered by an unknown assailant in Bakersfield. His mother, Chrystal Warren had already left his father. Warren at that time was in the midst of his campaign for Attorney General which he won. His mother died three years after his father's murder. [524]

In his high school years, Warren had what he described as a "cat and mouse" relationship with his high school principal. The principal had a suspicious accusatory mind and would often charge an entire class of wrongdoing, when no more than one or two had committed some type of prank. This inspired among Warren and his friends a behavior of, who could outwit whom. In his senior year, Warren was expelled. [525]

In law school, his "attitude" caused him further problems. At the end of his first year he was reprimanded by Dean William Carey Jones who suggested that he might not ever receive his J.D.. Warren also violated law school rules by obtaining outside employment with a local law office. In all likelihood, he would have been immediately dismissed from law school if they discovered, but they never found out. [526] In 1926, he was elected district attorney. In 1934, he lobbied the legislature for passage of an amendment that would allow prosecutors and judges to comment on a defendant's failure to take the stand in a criminal case. [527] This was a far cry from the Earl Warren that would write the Miranda opinion as Chief Justice in the 1960s.

In 1936, his office prosecuted the most notorious case of his career, the Point Lobos cases. The defendants were convicted, but many people thought they were innocent. His office was accused of engaging in "gross fourth amendment violations" and a "frame up." [528]

In 1938, he was elected Attorney General of California. In 1941, four years after the Point Lobos verdict, evidence surfaced that the chief prosecutor in Warren's office had a close relationship with one of the jurors. [529] Throughout the early 1940s, Warren was one of the individuals most responsible for the forcible relocation of Japanese-American citizens during World War II, into what were essentially concentration camps. The camps were enclosed with barbed wire and patrolled by armed guards. They were prisoners. They had violated no laws, and two-thirds of them were born in America. As Attorney General, he was in position to influence all other policy makers, but he eagerly supported the plan of relocation. It is the starkest contradiction of the career of one of the most liberal Justices ever on the Court. Decades later, he stated in his memoirs:

> "I have since deeply regretted the removal order and my own testimony advocating it. . . ." [530]

He also stated on another occasion late in life:

> "Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. . . ." [531]

In 1943, he was elected Governor of California on a conservative platform of law and order. He remained Governor until 1953. In 1953, he was nominated by President Eisenhower to be Chief Justice of the U.S. Supreme Court. Eisenhower nominated him mistakenly believing that he would be a conservative Republican Justice. The rest of the nation thought similarly. Everyone would be totally shocked. Warren would lead the most liberal Court of the century. He was a staunch adversary of Richard Nixon. Warren characterized Nixon as "untrustworthy, a scoundrel, a liar, completely unprincipled, and an exceedingly dangerous person." [532] Facetiously, this author must state that it's no wonder Nixon satisfied the State Bar's "good moral character" assessment.

When Warren became Chief Justice, he had absolutely no experience as a Judge. The case that allowed him to establish his strong presence on the Court was *Brown v. Board of Education*. He wrote the opinion for a unanimous Court overruling *Plessy v. Ferguson* and holding that segregation in public schools was unconstitutional. From that moment on, his presence was conclusively established. He was a solid member of the Black, Douglas, Marshall power bloc. Most notably, while Chief Justice of the U.S. Supreme Court, Earl Warren resigned from the American Bar Association because he did not agree with their ideological beliefs. After he resigned, the ABA falsely asserted that he failed to pay his dues and was therefore no longer a member. In doing so, the ABA lacked candor and was untruthful which reflects adversely on their moral character.

NOTE: The presentation of most facts herein about Chief Justice Earl Warren's life is based on his biography: **G. Edward White**, *Earl Warren - A Public Life,* (Oxford University Press, New York 1982)

U.S. SUPREME COURT JUSTICE BYRON "WHIZZER" WHITE

In Junior High School with his older brother Sam, who was in high school, Byron rented 25 acres of land and contracted to bring in the acreage's beet crop. They hired other boys to work for them. Neither of his parents graduated from high school. [533] Byron was extremely bright and studious. When he was in high school, the teacher gave the class a 200 question test and Byron scored the highest getting only one wrong. The next highest grade was 50% (100 wrong). He graduated with a straight "A" average. Even as a youth, he measured every single word and rarely showed emotion. [534]

After high school, he attended the University of Colorado where his nickname quickly progressed from "Straight-A White" to "Whizzer White," when he became a star football player. In 1937, he was selected as the first draft choice for the Pittsburgh Pirates. He also played baseball and became a Rhodes Scholar. In fact, he won seven letters, three in basketball, two in football and two in baseball. The press constantly wanted to interview him, and he detested the interviews. A few times, the interviews portrayed him poorly. His biographer Dennis Hutchinson, who also clerked for White when he was a Supreme Court Justice writes:

> "The only Denver reporter present was Chet Nelson, sports editor of the *Rocky Mountain News*. . . . "Would he play for Colorado again during the spring ?" Yes.
>
> A week after the luncheon, **White made a liar out of himself**, evidence that the weight of the decision and the relentless publicity attention were taking their toll. On March 31, he informed Harry Carlson, dean of men and coach of baseball, that he would not play baseball that spring."[535]

White was tough on the football field, but other players were jealous of his fame and gave him a hard time, to put it mildly. The following is an example:

> "In fact, White's body absorbed brutal physical punishment all season. His black eye was only the first, and he frequently found himself with a fist in the solar plexus or a knee in the kidneys after being tackled. . . . More than twenty years after his professional football career was over, when he was deputy attorney general of the United States, White explained . . . how he coped with the on-field muggings he received early in the season. . . .
>
> > "I was with the <Pirates>, and after the whistle was blown, they were kicking me in here and I asked the coach, "What'll I do?" and he said, "Wait till you catch one of them out of bounds and after the whistle's blown, then you kick him there and kick him in the face but be sure you kick them in both places and be sure the whistle's blown and everybody sees you. It'll cost the team twenty-five yards, but I'll be able to keep you for a couple of seasons." So Byron said he did just exactly that. He said he did a very good job of it. . . . and he said he never had any trouble after that." " [536]

He went on to Oxford and spent the summer of 1939 touring Germany. He got out of Germany in just the nick of time. White cabled his parents on August 29, 1939 indicating he had just left Munich. Three days later, on September 1, 1939, Hitler sent 1.5 million troops into Poland. Two days after that, Neville Chamberlain declared war on Germany. [537]

On May 6, 1942 White was appointed to be an ensign in the U.S. Navy. He was stationed in the Pacific. He had become friends with the Kennedys when he was at Oxford. John F. Kennedy was also

stationed in the Pacific. On the night of August 1-2, 1943, Kennedy was on patrol on PT 109. There was no moon and it was pitch black. His boat was rammed by a 2000-ton Japanese Destroyer, which then sped off into the night. Two crew members on the Kennedy boat were killed. Kennedy heroically guided most of the survivors on a four-hour swim to a safe island. In 1946, this event would be glorified to help win his congressional seat, and then later again in 1960 during the presidential election.

Immediately after the PT 109 incident, navy officials were faced with the question of how Kennedy's small boat which was considered to be the most maneuverable vessel in the world, could have been overtaken by a slow moving, huge Destroyer. The Navy Intelligence Report describing the incident, was written by Intelligence Officer Byron White. The White Report has been criticized by historians because it failed to address troubling questions. It lacked full, complete and accurate disclosure of material matters. An Annapolis historian characterized the PT 109 incident as follows:

> "PT-109 was the *only* patrol craft ever hit by a Japanese destroyer during the Pacific war. That particular night, Kennedy's command was part of a three-boat picket line that was *expecting* Japanese destroyers. When the collision came . . . two of Kennedy's men were asleep, and two were lying on deck. Visibility was almost one mile. . . . "Kennedy had the most maneuverable vessel in the world," recalled one PT squadron leader. "All that power and yet this knight in white armor managed to have his PT boat rammed by a destroyer. . . ." [538]

The White Report provided no information explaining why Kennedy was taken by surprise. White accounts for the locations of only 8 of the 13 crewmen, and it later emerged that Lennie Thom, the executive officer, was lying down on deck, not "standing beside the cockpit" as White falsely reported. [539] At best, the White report was uneven, providing an incomplete disclosure of the circumstances. [540] In 1946, at age 30, he left the Navy, obtained his law degree from Yale Law School and accepted a position clerking for Chief Justice Fred Vinson of the Supreme Court. The following occurred:

> "Vinson volunteered White - without his knowledge to speak at one of his sons' prep school sports banquets. When White learned of the obligation, he told Vinson, *I don't want to do this*. Vinson insisted and implored : *You can't make me look bad in front of my son*. "That was that," . . . "and Byron complied reluctantly." " [541]

Chief Justice Vinson's principal contribution to the Supreme Court involved "*in forma pauperis"* petitions (cases in which indigent prisoners cannot afford to pay filing fees). Vinson streamlined analysis by having Court clerks perform the initial review process. Of the 528 i.f.p. filings in the 1946 term, 322 (61 percent) came from Illinois. White declined to suggest that the Court review any. [542] Not even one.

In 1947, he entered the private practice of law in Colorado and became politically active. He assisted John F. Kennedy in his 1960 presidential campaign serving as national chairman of Citizens for Kennedy. The typical campaign work was as follows:

> "When White was in town, he worked a fourteen-hour day, capped at 10 p.m. by a drink with whoever else was still around, with Thompson serving as bartender . . . ." [543]

An interesting story related to the campaign involved civil rights leader, Martin Luther King, Jr., also involved Byron White. King was arrested at a sit-in at a segregated lunch counter in Atlanta, Georgia. He was taken 230 miles away to serve four months at hard labor. Black leaders feared that

King would be murdered in prison. Robert Kennedy took the extraordinary step of directly calling Judge Oscar Mitchell who had ordered King to prison and suggested that King should be allowed to post bail for the offense and be released. The Judge did so. The propriety of Kennedy's call was attacked by the media. After the election, Robert Kennedy was appointed attorney general, and Byron White was appointed deputy attorney general. Professor Harris Wofford of Notre Dame was trying to be appointed assistant attorney general, and had Robert Kennedy's support. Byron White and Wofford got together for a drink. Wofford described the meeting with White as follows:

> "The encounter was disastrous. Just back from teaching a weekly Notre Dame law course on professional responsibility, I told how I had spent the entire session on the propriety of Bob Kennedy's call to the Georgia judge requesting Martin Luther King's release from jail. The class was divided on the question of whether he should be disbarred for such behind-the-scenes intervention in a matter before the court. White asked me what I thought. . . . I said . . . reprimand, yes; disbarment, no. White was not amused. He commented sourly, "You might be interested to know that I recommended to Bob that he call that judge." [544]

In 1962, White was sworn in as a Justice of the U.S. Supreme Court. Most people expected him to sign on with the Warren, Black, Douglas liberal power bloc, but it soon became evident that he would not. His voting pattern was similar to Harlan. It is said that Harlan "weighed opposing arguments and White destroyed them." [545] White Dissented in the historic case of *Miranda v. Arizona,* which mandated the reading of constitutional rights to criminal suspects. He sarcastically wrote:

> "The real concern is. . . the impact on those who rely on the public authority for protection . . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." [546]

He also Dissented in *Roe v. Wade,* which constitutionalized a woman's right to abortion. Years later, he classified *Roe* as an "illegitimate decision." [547] He was known for making smart-alecky, biting, sarcastic comments. He said to one of his clerks in 1971:

> "You write very well," . . . "Justice Jackson had that problem, too." [548]

The most interesting and commendable aspect of White's career, in my view, concerned Justice William O. Douglas. In 1974, Douglas suffered a debilitating stroke on New Year's Eve, and sat out for most of the 1974 term. He tried to return in 1975, but appeared half-crippled, unable to remain alert and was incapable of speaking clearly. Nevertheless, he refused to resign. His condition prompted the other eight justices to meet secretly and they reached a decision that was unprecedented in the history of the Court. They took away his vote.

They secretly "agreed that no case would be decided five-four with Douglas in the majority." The policy would be invisibly enforced by simply ordering re-argument in any case where Douglas held the decisive vote. Byron White commendably objected to the decision. In his view, his colleagues had conducted a secret, and constitutionally unauthorized impeachment. He wrote a historic letter to Chief Justice Burger which he considered to be so sensitive in nature, that he would not even show a copy to his clerks. Three weeks after White's letter, Douglas agreed to retire. White's letter read in part:

"Dear Mr. Chief Justice :

I should like to register my protest against the decision of the Court not to assign the writing of any opinions to Mr. Justice Douglas. As I understand it from deliberations in conference, there are one or more Justices who are doubtful about the competence of Mr. Justice Douglas that they . . . . would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority. . . .

. . . In this instance, the action voted by the Court exceeds its powers and perverts the constitutional design.
. . .
. . . How does the Court plan to answer the petitioner who would otherwise have a judgment in his favor, who claims that the vote of each sitting Justice should be counted until and unless he is impeached by proper authorities and who inquires where the Court derived the power to reduce its size to eight Justices ?
. . .
. . . It would be better for everyone, including Mr. Justice Douglas, if he would not retire. . . .
. . .
If the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action. If it is an impeachable offense for an incompetent Justice to purport to sit as a Judge, is it not the task of Congress, rather than this Court, to undertake proceedings to determine the issue of competence ? . . .

This leads to a final point. The Court's action is plainly a matter of great importance to the functioning of the Court in the immediate future. . . . The decision should be publicly announced; and I do hope the majority is prepared to make formal disclosure of the action that it has taken.

Knowing that my seven colleagues, for whom I have the highest regard, hold different views, I speak with great deference. Yet history teaches that nothing can more readily bring the Court and its constitutional functions into disrepute than the Court's failure to recognize the limits of its own powers. . . . . " [549]

Byron White is to be commended for this letter. He was absolutely correct. It was an incredibly brave and courageous letter for him to write. As for the other Justices, both conservative and liberal alike, there is not a miniscule degree of doubt that the action they were planning to take was unlawful. The intended course of action of <u>seven</u> Justices, liberal and conservative, was unlawful thereby reflecting adversely on their moral character. This one, sole event, could conceivably have knocked out seven U.S. Supreme Court Justices from admission to the practice of law. Luckily, Byron "Whizzer" White, politically tackled them first.

NOTE: The presentation of most facts herein about Justice Byron White's life is based on his biography: **Dennis J. Hutchinson,** *The Man Who Once Was Whizzer White,* (The Free Press, New York, 1998)

SECOND CIRCUIT COURT OF APPEALS JUDGE LEARNED HAND

> *"Our dangers. . . are not from the outrageous but from the conforming; . . . from those, the mass of us, who take their virtues and their tastes, like their shirts and their furniture, from the limited patterns which the market offers."* [550]

Learned Hand was never a U.S. Supreme Court Justice. He was however one of the most well- known and respected Judges in the legal profession. He served 50 years on the federal bench, first appointed as a Federal District Judge in 1909 and marking his fiftieth year in 1959. Many historians and U.S. Supreme Court Justices consider him to have been the unofficial "tenth" Justice of the U.S. Supreme Court. Those who are knowledgeable of the reputations, opinions, beliefs, and background of U.S. Supreme Court Justices would have difficulty finding either a liberal or conservative who does not respect him, even if they don't agree with his opinions in certain areas.

I agree with some, but not all of his opinions. I definitely have respect for his logic and writing style. In today's world it is difficult to classify him as liberal or conservative. Viewed from the perspective of societal values and beliefs in today's world, he probably would be classified as a conservative. Yet, appraised within the context of his own time, he was undoubtedly liberal. In many respects, this paradox occurs because he served for such a long period of time on the bench. When he first became a Federal Judge, his opinions were considered liberal, perhaps even radical. Yet today, most of his opinions would probably be considered conservative.

His reputation is that of a ground-breaker in First Amendment law, yet many of his opinions in that area I find to be extremely disturbing. His reputation is that of a Judge who staunchly supported equality, and yet there seems to be substantial evidence that he had prejudicial tendencies. He seems to have had an unappealing tolerance for racism. Once again, in all fairness, I believe he must be assessed within the context of his time. In a letter to his wife, he wrote in reference to one of his daughters:

> "She has also changed a great deal in her attitude about Jews whom she can now see as humans. . . . She even regretted that she did not have a tincture of Jew in herself. So you see there has been a great change. [551]

Frankly speaking, I'm not entirely certain how to assess the foregoing quote. Overall, Learned Hand is by no means one of my favorite Judges. He is however, probably the one Judge I am unable to figure out the least, and that alone makes him worthy of consideration to me. Learned Hand along with Louis Brandeis, Oliver Wendell Holmes and Felix Frankfurter were arguably the equivalent of the Warren Court in the early 1900s, although Hand himself was not even on the U.S. Supreme Court.

He was renowned as the Justice who set the groundwork for a reformulation of First Amendment law in the 1960s. Yet, he held that the Smith Act of 1940, which prohibited the teaching of strict communistic doctrine, to be constitutional. This would seem to cut directly into the face of his reputation as a fervent supporter of the First Amendment. I have read conflicting assessments of him as both a liberal and a conservative. Frankly speaking, I am not entirely sure which category he belongs in. One thing is certain about Learned Hand however. He has the respect of other Judges, even in today's world.

While William O. Douglas, Hugo Black, and Thurgood Marshall have for the most part been unjustly and irrationally scorned by many ignorant members of the Judiciary in today's legal environment, Hand is universally admired. This provides an opportunity. Essentially, to the extent I demonstrate that my beliefs regarding the State Bar admissions process are supported, not only by prior U.S. Supreme Court Justices Douglas, Warren, Black and Marshall, but also by someone who was

arguably a "conservative," like Hand, my position gains credibility. It is for this reason that I include discussion of him herein.

He was not a brave man. His biographer, Gerald Gunther writes that even as a child he was beset with extraordinary self-doubts, indecision and anxiety. [552] His family was wealthy, and his father served on the New York Court of Appeals for a brief period. Throughout the early years of his life and as a student at Harvard, he felt that he was an outsider who just didn't fit in. He referred to himself as one of the obedient, docile boys who didn't drink, and worked every night. [553] He had no success with women and Gunther writes that as he neared age thirty in 1901 there was no indication that he had ever even kissed one. Ultimately he married Frances Fincke, a graduate of Bryn Mawr, at a time when it was virtually unheard of for a woman to be a college graduate.

The relationship between Learned and Frances was strange to say the least. Frances was extremely close friends with a woman named Mildred Minturn throughout her college years. If Gunther's biography of Hand is accurate, the relationship between Frances and Mildred seems to border on lesbianism, although Gunther suggests there was no sexual contact between the two. The letters between Frances and Mildred while possibly only representative of the times, would undoubtedly raise a circumspect eye in today's world. Gunther writes as follows:

> "Though Frances's and Mildred's effusive expressions of love to each other might arouse suspicions of lesbianism today, their mutual endearments were acceptable and conventional at the time, and there is no indication that their relationship was ever marked by overt sexual behavior." [554]

After they got married, Frances developed a long lasting "friendship" with a man named Louis Dow, who was also a friend of Hand. Throughout the years, Frances spent about as much time with Dow as she did with Hand. They constantly went on walks together, studied French together, went on picnics, ate dinner together and would even vacation together without Hand present, but with his knowledge. She would spend weeks at a time with Dow, while Learned was in a different city serving on the Court of Appeals. At dinnertime, Dow would often sit at the head of table. When Hand was not present, Dow would listen to the children's problems. Like I said, it was a strange marriage to say the least. [555]

Hand himself, was never a good lawyer by his own admission. [556] He was too intellectual and his presentations to the Court were too complicated for the Judges to appreciate or understand. He was not an exceptionally strong proponent of individuality, yet he did have a fervent belief that people should be able to express their opinions and beliefs. One of the statements he made that I like is:

> "Opinions are at best provisional hypotheses, incompletely tested. . . we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own." [557]

He believed in protecting dissenters stating:

> "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

Yet, once again I can not square this assertion with his opinion holding the Smith Act of 1940 to be constitutional. He supported Teddy Roosevelt, who vehemently attacked the legitimacy of the Judiciary. Teddy Roosevelt promoted ideas such as giving the general public the power to overturn judicial decisions through the voting power and judicial recall. This does not seem to reconcile with Hand's loyalty to the Judiciary, but does coincide with his belief that the Judiciary should not function

as a super-legislature. He was always extremely reluctant to declare any legislative statute unconstitutional. He believed in judicial independence, but did not feel it encompassed the power to override legislative decisions except in the rarest cases. His concern was that the tendency of Courts to function as super-legislatures threatened judicial independence.

Although admired by virtually all Judges today, Hand was not particularly fond of the U.S. Supreme Court which invalidated many progressive measures under both Teddy and Franklin Roosevelt. In a letter to Felix Frankfurter, later to be a renowned U.S. Supreme Court Justice, Hand denounced:

> "**the fatuous floundering of the Supreme Court** which goes by the name of Constitutional Law. . . . They suppose they are compelled by a rigid dialectic, that they are engaged in a deductive analysis (those of them who would know what the words meant), and **their work is pitiable from that aspect; most of it would disgrace any capable boy of 20** who had been trained by you or your colleagues. . . . **Let all <the> ponderous asses . . . be condemned to the pleasant Hell for them of smearing and gumming up the glutinous heterogeneous mass with their secretions in saecula saeculorum**" [558]

In response to the U.S. Supreme Court's decision in *Coppage v. Kansas* which struck down a Kansas law prohibiting the "yellow dog" labor contract under which non-membership in a labor union was a condition of employment, Hand wrote an essay printed in the February 6, 1915 issue of the New Republic. He criticized the U.S. Supreme Court as follows [559]:

> "Are we not finally driven to the conclusion that such decisions come from the prejudices of that economic class to which all the justices belong, and that they are merely unable to shake off the traditions of their education. . . . How else is it possible to understand such blindness to the beliefs of certainly half the economists of the present time?"

He is most well-known for his opinions on the Second Circuit Court of Appeals. They contain wit, sarcasm, and severe criticism of lower court judges and attorneys. Frankly speaking, I think this is what draws me to him more than anything else. In one case, he wrote in reference to another Judge:

> "Once I had the honor to sit in a court with the Hon. Henery Wormwood Rogers, a knight errant of the law, well know for voluminous comment on the principles of jurisprudence. . . chiefly perhaps because he never took his eye off the ball, for he never saw it. . . . If he got the ball himself and had an open field, he could have run as much as ten yards when he tripped over his own feet and fell. . . ." [560]

In addressing administrative boards he wrote:

> "In the hands of a biased Board such a power can become a fearful engine of oppression; and I am personally extremely skeptical as to their superior insight . . . . However, there cannot be any doubt that acquaintance with the field does make one's judgment better than that of the **ordinary boob judge**. . . ." [561]

He does not seem to have supported the prosecutions of those accused during the first "Red Menace" aimed at quelling Communism in this nation when the 1920s began. Yet, once again I can not

square this with his holding the Smith Act of 1940 to be constitutional. He wrote to a friend in reference to Congressional attempts aimed at the "Red Menace":

> "They worked themselves up into a frenzy of witch-hunting. . . . In doing that my own judgment is that they make two for every one they suppress, besides losing their heads and forgetting their most honorable traditions." [562]

Militating against his reputation as a liberal justice was his view on the Bill of Rights. He was not a proponent of liberal application of the Fourteenth Amendment due process clause and in fact even suggested that due to the overbroad nature of the due process clauses that they should be eliminated entirely. He stated:

> "It seems to me that the place to hit is the Amendments themselves. . . ."

To properly understand his early views on the due process clauses, one must understand the role of due process during the early 20th century. The due process clause of the Fourteenth Amendment at that time was used by the U.S. Supreme Court to inhibit reform by holding that legislative progressive measures were unconstitutional. Typically, application by the Court of the Fourteenth Amendment would be used at that time to invalidate legislative economic reforms that improved working conditions for laborers. The Court would hold that the legislative enactments violated the due process clause because they infringed on an individual's "liberty" to contract.

For instance, in perhaps the most famous case of all, *Lochner v. New York*, the U.S. Supreme Court invalidated a New York law that prohibited the employment of bakers for more than 60 hours per week, on the ground that it infringed on their liberty to contract freely with their employer. Liberal application of due process in that case, had a conservative result predicated on an arguably overbroad application of the due process clause.

In the 1950s and 1960s however, under the Warren Court, the due process clauses would be used by liberals to enhance individual liberty. Hand' s disdain for overbroad application of the due process clauses must be considered within the context of his time.

While due process in contemporary times is valued as a vital element of individual liberty, the U.S. Supreme Court in the early 20th century perverted the due process clauses to accomplish goals designed to frustrate legislative aims. Taken within this context, Hand's criticism of overbroad application of substantive due process, while undoubtedly paradoxical in the contemporary context of how one views a liberal, was at least logically fluent to the extent such laws were aimed at economic regulation in the early 20th century.

In 1925 after a referendum initiative drive, heavily backed by the Ku Klux Klan, the State of Oregon enacted a law that effectively banned private schools. Most of Oregon's private schools were religious ones, and the law was designed to stem "the rising tide of religious suspicions." The U.S. Supreme Court invalidated the law on substantive due process grounds. In this instance, striking down the law had a liberal, rather than a conservative result which was somewhat rare for the early 20th century. Both Justices Holmes and Brandeis, the most liberal members of the U.S. Supreme Court joined in with the majority opinion.

Hand disagreed with the result. The conclusion to be drawn is that Hand disagreed with overbroad application of the due process clause whether it had a liberal or a conservative result. He viewed due process not from a perspective of liberalism or conservatism, but rather from a perspective that the Court should not be functioning as a super-legislature. I have difficulty accepting his viewpoint in many regards, but I must concede that it is extremely consistent which lends towards his credibility.

I now turn to the impact of his ideas on the State Bar admissions process. In 1935, he was asked to fill out a questionnaire for the Tennessee Valley Authority (TVA) which was considering hiring one of his former law clerks. One of the questions in reference to the clerk inquired as follows:

> "To what extent is he motivated by professional ethics and considerations of the public good, rather than by the desire for personal profit ?"

Hand drafted the following reply:

> "I suppose he wants to make a living. I decline to answer such a silly question."

Another question on the form inquired in reference to the law clerk:

> "What contribution has he made without financial gain to himself to the well-being of his community?"

Hand's drafted response read as follows:

> "I don't know. Do you want competent lawyers, or unctuous self-righteous busy bodies? You can get here a perfectly reliable, capable young man with a sense of obligation to his job. I can't tell you more and would not answer such an absurd inquiry if I could." [563]

In August, 1947, as McCarthyism was in its' earliest stages, Hand wrote to his friend, Bernard Berenson:

> "the frantic witch hunters are given freer rein to set up a sort of Inquisition, detecting heresy wherever non-conformity appears." [564]

In the early 1950s, when McCarthyism flourished throughout America, during a speech to the Board of Regents of the University of New York, Hand stated:

> "Risk for risk, for myself I had rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust. . . . Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil as any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion. . . ." [565]

In 1955, at the forty eighth annual session of the American Jewish Committee where he received an American Liberties Medallion, Hand stated in his speech that the true "principles of civil liberties and human rights":

> "lie in habits, customs-conventions, if you will - that tolerate dissent and can live without irrefragable certainties" [566]

In 1953, he wrote a stinging Dissent predicated on governmental misconduct in the case of William Remington, a government economist who was a victim of McCarthyism and convicted of perjury for denying before a grand jury that he had "ever been a member of the Communist Party." His

Dissent focused on the grand jury's interrogation of Remington's former wife who tried to avoid testifying because "her husband's conviction would imperil the support he gave her and her children." Hand characterized the grand jury interrogation of Ann Remington as follows:

> "Pages on pages of lecturing repeatedly preceded a question; statements of what the prosecution already knew, and of how idle it was for the witness to hold back what she could contribute; occasional reminders that she could be punished for perjury; all was scattered throughout. Still she withstood the examiners, until, being much tried and warned, she said : " I am getting fuzzy. I haven't eaten since a long time ago and I don't think I am going to be very coherent from now on. I would like to postpone the hearings. . . . I want to consult my lawyers. . . ." This was denied, and the questioning kept on until she finally refused to answer, excusing herself because. . . she . . . "would like to get something to eat. . . . Is this the third degree, waiting until I get hungry, now?" Still the examiners persisted, disregarding this further protest : "I would like to get something to eat. But couldn't we continue another day?" [567]

The prosecutor's staff subsequently said the following to Ann Remington:

> "Mrs. Remington, I think that we have been very kind and considerate. We haven't raised our voices and we haven't shown our teeth, have we? Maybe you don't know about our teeth. A witness before a Grand Jury hasn't the privilege of refusing to answer a question. You see, we haven't told you that, so far. You have been asked a question. You must answer it. . . . You have no privilege to refuse to answer the question. I don't want at this time to – I said "showing teeth." I don't want them to bite you." [568]

Hand noted that the Fifth Amendment privilege against self-incrimination arose because of the abuses of the Star Chamber in the seventeenth century. He wrote:

> "Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked ex parte examination." [568]

That is essentially how the Bar admission interview functions. The Applicant is not given the right to decline to answer unconstitutional questions. It is an ex parte examination that is adversarial in nature, although Courts repeatedly state falsely that it is not an adversarial proceeding. The Courts clearly lack candor in this area of the law. The concept from the State Bar and State Supreme Court's perspective is similar to that of the grand jury. Two goals exist, which are as follows. First, leverage the Applicant by holding the promise of a legal career over his head, and then wear down the Applicant by tiring him out.

On April 15, 1953, William Remington began serving his three-year prison term for perjury at the federal penitentiary. On November 22, 1954, eight months before he was to be released, while resting in his prison dormitory, three prisoners entered and beat him over the head with a brick wrapped in a sock. He died two days later. The image of government economist William Remington, convicted on questionable grounds at best, being bludgeoned to death in prison, haunted Learned Hand for the rest of his life. [569]

Hand's most significant contribution towards demonstrating the unconstitutionality of overbroad moral character assessment is evident in the opinions he wrote pertaining to immigration. U.S. naturalization laws in the late 1940s and 1950s required applicants for citizenship to show that during the five years immediately preceding the filing of a petition for naturalization they were "a person of good moral character." In *Schmidt v. United States*, 177 F.2d 450 (2nd Cir. 1949) the Second Circuit

had to determine whether an unmarried 39 year old college teacher who told the examiner that he had "now and then" engaged in acts of sexual intercourse with single women could qualify as a "person of good moral character." Gunther writes about Hand's approach to moral character issues as follows:

> "he considered it beyond a judge's duty and competence to impose his own moral standards upon the community." [570]
>
> "A criminal conviction alone did not suffice to justify deportation; Congress, with its "moral turpitude" language, had added the additional element that the crime "must itself be shamefully immoral." [571]
>
> "Hand never liked the open-ended, vague nature of the "good moral character" standard. Still, as a dutiful lower court judge, he did not feel free to refuse to take on the "absurd" task imposed by Congress. His resort to the "common conscience" formula was an effort to escape judicial subjectivism by relying on some outside source. One commentator has suggested that his escape route was in effect a plea "to Congress to get him out of the morals business" [572]
>
> "More than two decades later, several Supreme Court justices indicated sympathy with Hand's doubts. Justice Jackson's 1951 dissent in Jordan v. De George, joined by Justices Black and Frankfurter, insisted that the phrase had "no sufficiently definite meaning to be a constitutional standard for deportation" [573]
>
> "none of the judicial efforts "to reduce the abstract provision . . . to some concrete meaning" had been successful; not even a phrase akin to Hand's "common conscience" test – "the moral standards that prevail in contemporary society" – was sufficiently definite." [574]

Hand's test for "good moral character" was that which failed the "common conscience" test. In only one citizenship case did he ever hold that an alien's behavior indicated they lacked "good moral character." That case, ***Repouille v. United States***, 165 F.2d 152 (2d Cir. 1947) involved a man who committed euthanasia on his thirteen year old blind, mute and deformed son. The "common conscience" test described by Hand was as follows. Good moral character called NOT for those standards which we might ourselves individually approve, but rather for the moral feeling prevalent generally in the country. [575] The inquiry was to focus on whether in light of such moral standards prevalent in the country, one would be "OUTRAGED" by the conduct in question.

In ***U.S. v. Francioso***, 164 F.2d 163 (2nd Cir. 1947) the moral character issue involved an alien who had married his niece in 1925, knowing that under Connecticut law it was a forbidden, incestuous marriage. Hand ruled in favor of granting citizenship on the moral character issue stating:

> "Once more I wish to pay my respects to the sanctimonious, hypocritical, illiterate animaleulae who infest and infect the Naturalization Bureau." [576]

Hand adhered consistently to his "common conscience" standard in "moral character" cases.[577] In ***U.S. ex rel Guarino v. Uhl, Director of Immigration***, 107 F.2d 399 (2d Cir. 1939), he determined that possession of a "jimmy," a burglary tool, with criminal intent did not constitute a crime of "moral turpitude." In a pre-conference memorandum he wrote as follows:

> "This alien was then a boy of seventeen and such boys might delight in having jimmies to pry their way into buildings or boxes or barrels for curiosity or mischief. Those would be crimes, it is true, but they would not be morally shameful." [578]

In the Second Circuit's published opinion in the *Guarino* case, he wrote:

> "Such crimes by no means "inherently" involve immoral conduct; boys frequently force their way into buildings out of curiosity, or a love of mischief, intending no more than to do what they know is forbidden. Such conduct is no more than a youthful prank, to which most high-spirited boys are more or less prone; it would be to the last degree of pedantic to hold that it involved moral turpitude and to visit upon it the dreadful penalty of banishment, which is precisely what deportation means to one who has lived here since childhood." [579]

Posusta v. United States, 285 F.2d 533 (2d Cir. 1961) involved a Czechoslovakian woman who had been the mistress of a married man since 1936. They married in 1959. Hand wrote as follows:

> "the test is not the personal moral principles of the individual judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time." [580]

The fact that a person had "been delinquent upon occasion in the past," did not preclude a finding of "good moral character." Rather instead, it is enough if he shows that he does not transgress the accepted canons more often than is usual." [581] *Yin-Shing Woo v. United States*, 288 F.2d 434 (2d Cir. 1961) involved a petitioner who was a native of China and translator for the State Department who had been arrested in New York City as a "scofflaw." He failed to answer 23 parking tickets and was released from jail after paying a fine of $ 345. The question was whether violation of these city ordinances indicated that he was not "well disposed to the good order. . . of the United States." Hand determined that disregard of parking regulations was not inimical to the "good order."

Hand was not a proponent of the Hugo Black – William Douglas power bloc which dominated the U.S. Supreme Court during the late 1950s and early 1960s. Black and Douglas were the strongest and most fervent critics of the ambiguous and vague moral character standards that were used as "dangerous instruments" by the State Bars. If Hand had been nominated to the U.S. Supreme Court, either in the 1930s or 1940s, it is strongly suggested by his biographer, Gunther that he would have consistently voted against Black and Douglas in many cases. Hand's ideological beliefs were more in accord with Felix Frankfurter who repeatedly opposed Black and Douglas.

Hand believed that courts had no more justification to intervene on behalf of personal rights such as speech and religion than on behalf of economic rights. That forms the foundation for his support from conservatives. I do not agree with his perspective. Courts should use the due process clauses aggressively to protect personal rights.

Nevertheless, it is irrefutable that Hand's beliefs with respect to due process are extremely consistent and this contributes to his credibility. There is little doubt that specifically because of his reluctance to use the courts for the enhancement of personal rights, he would have been one of the more conservative justices on the U.S. Supreme Court, if he had been on that bench in the 1950s. He sharply criticized the Court's opinion in *Brown v. Board of Education*, in which segregation was held to be unconstitutional. He rejected the view that underlay many of the Warren Court decisions justifying judicial activism on behalf of personal rights, but not economic regulations.

Yet, there is similarly no doubt that his reluctance to use the due process clauses for the purpose of invalidating legislative economic reforms would have made him one of the most liberal members of the U.S. Supreme Court, if he had been on that bench in the 1920s or 1930s. In many respects, this is the reason that he appeals to both conservatives and liberals. It is also the reason why his opinions on the moral character issue, although not equaling the support for this author's position that can be found in Black or Douglas' opinions, are important. When presenting an idea, concept or belief, if one finds support for their position in the viewpoints of both liberals and conservatives, the probability of that viewpoint being correct is dramatically increased. Gunther writes:

> "Frankfurter, Hand's sole intimate correspondent on the Warren Court, had grown increasingly bitter about most of his colleagues. He poured out scathing denunciations in letter after letter – and often added an "I could unto you a tale unfold" refrain." [582]

In a letter from Frankfurter to Hand dated September 17, 1957, Frankfurter wrote as follows regarding an issue pertaining to racial discrimination that might potentially be heard by the Court, and which the Court was reluctant to hear:

> "We twice shunted it away and **I pray we may be able to do it again, without being too brazenly evasive**." [583]

The operative term was "evasive." That is the term used consistently by the State Bars to deny admission to Applicants on the ground that "evasiveness," is demonstrative of a lack of good moral character. Yet, Frankfurter himself, one of the more conservative Justices on the Warren Court, concedes to the existence of the trait. Such being the case, application of "evasiveness," as a ground for denial of admission to the Bar must in all fairness be viewed as a hypocritical, double standard. Hand and Frankfurter did not like the Warren Court, and that Court is by far my own personal favorite, specifically because of its willingness to apply due process for the enhancement of personal rights. Yet, both the Warren Court and Learned Hand in one form or another, provide substantial support for the views I have presented herein on the moral character standard. That carries a lot of weight.

NOTE: The presentation of most facts herein about Justice Learned Hand's life is based on his biography: **Gerald Gunther,** *Learned Hand-The Man and the Judge*, (Harvard University Press, Mass. 1994)