A JURISPRUDENTIAL APPROACH TO COMMON LAW LEGAL ANALYSIS

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I. Introduction

Developing a theoretical construct to explain judicial decision making is a daunting task. On the micro-level, the individual biases of the judge and/or jurors and the skill of the advocates presenting the facts of the dispute affect each trial court determination. The introduction of expert testimony and scientific evidence also affects the trial outcome. Likewise, at the appellate level, judicial panels are often concerned with following precedent while still being cognizant of the impact any decision will have on future cases and on society.

On the macro-level, an examination of our society's ultimate goals, commonly referred to as public policies, can discern important generalities about judicial decision making. These public policies may be viewed as individual threads that are woven together into the fabric of the law. The threads are pulled in many directions as a consequence of changing morality and technological advances. Nevertheless, in most instances these public policies are sufficiently flexible and strong to enable the fabric to stretch without tearing. Once identified, such policies provide a degree of consistency that ties seemingly disparate judicial precedents together. Certain policies, however, are inherently in conflict with each other. When judges apply these competing policies to a variety of factually distinct disputes, the legal fabric may be pulled in different directions. In limited circumstances, the legal fabric may be pulled so violently in a new direction that it is torn. This usually represents the law attempting to pull societal views in a new direction before a newly formed public policy has developed wide-spread acceptance.

This Article will identify different definitions of law in an attempt to establish that law and legal analysis are policy-based regimes that must often balance competing underlying policies. General policies that underlie judicial dispute resolution will be identified and a variety of legal areas that demonstrate the universality of these policies will be examined. Additionally, specific underlying concerns that are peculiar to certain areas of the law and their interaction with general polices will be explored. Finally, the evolving "right of publicity" cause of action will be analyzed. The future direction of this cause of action will depend upon the underlying policies that serve as its foundation.

II. A Definition of Law--Differing Perspectives

Legal analytical theory must start with a basic question--what is "law"? The definition of law may then serve as a basis for subsequent critical analysis.[1] One starting assumption, however, is that law is viewed differently by various members of society.

A. The Layperson's View

At its most basic level, law can be defined as the set of rules promulgated by society via its legislative and/or judicial branches of government. This perspective typifies the layperson's view of law-- that a set of written rules exists for everyone to read. Consequently, to many members of the public, resolving a legal question merely requires finding the precise written rule that governs the dispute. Once that rule is discovered the answer to the dispute is revealed.[2]

An alternative layperson's view is that the law is uncertain. Therefore, in the absence of clear legal rules, the decision maker, typically a judge, may rely on her personal views or biases to resolve the dispute. Consequently, the resolution will be a function of the particular decision maker. Since people, as individuals, are the sum total of their differing genetic makeup, societal influences, cultural upbringing, and life experiences, they each have different views, biases, and general belief structures that are part of their persona.[3] These differences will result in varying analyses of similar disputes by each decision maker and may ultimately lead to competing resolutions.

B. The Legal Academic View

In addition to the lay public, the constituents of the law include legal academics who think about law, write about law, and train those who will "do law" (i.e., judges, lawyers). Contemporary academics generally view law as a set of rules that provides guidelines for resolving disputes. [4] Underlying policy reasons for a particular rule of law are often championed as highly relevant to deciding whether to apply that rule. A traditional law school class often involves a protracted interchange between the teacher and the students in an attempt to unearth the policy considerations that inform the rule at issue.[5] The exploration for underlying policy considerations can sometimes resemble a hunt for buried treasure. Often the judicial decision that a class is discussing makes little or no mention of underlying policies. Rather, the decision usually focuses on the specific facts of the dispute and then analyzes whether those facts fit within the elements of an existing legal rule. Nevertheless, class discussion will often focus heavily on identifying the policy concerns involved in arriving at the decision, despite the failure of the decision maker to provide more than passing reference, at most, to any policy concerns. Sometimes law professors focus on legislative history as a source of underlying

policies. At other times, however, policies seem to come out of the "ether." Following such a class discussion, law students are likely to complain about judges who fail to include the actual reasons for their decision in the published opinion.

C. The View of the Practicing Lawyer

Those who "do law"--practicing lawyers--often believe that the public misunderstands the complexity of law due to its uncertain nature. Practitioners frequently reject the legal academic view of law, perceiving it as ivory tower philosophical musing. At best, they view such musing as simply a useful tool in developing analytical skills. The competing views of practitioners and academics are analogous to a philosophical discussion of whether there is noise if a tree falls in the forest and no one is present to hear it fall. Such a discussion is useful to develop reasoning and verbal communication skills; however, it is not likely such an issue will ever arise in any real-world endeavor. The disjuncture between the practitioner view and the academic view may extend farther. Some practitioners perceive the legal academic view of law as nothing more than the puffing of supercilious academics who like to justify their existence by making things artificially complex.

Practitioners also have a different purpose within the law from legal academics. Lawyers who toil daily in the legal trenches rarely focus on ascertaining the theoretically correct result in a dispute. Rather, the result they must advocate is determined once the client walks through the office door and retains them. The lawyer's ethical obligation is to represent her client as zealously as possible.[6] Therefore, the lawyer is duty bound to advance any and all reasonable legal arguments to support her client. Whether the client should prevail is not an issue. The lawyer's focus is narrowly directed to establishing the applicability or non-applicability of a specific rule of law to a specific dispute. For example, when a business client seeks an opinion letter from her attorney regarding a transaction, the client typically wants that attorney to draft an opinion validating the transaction. Rarely does the client actually want the attorney to act as a neutral decision maker in rendering an opinion. As a result, practitioners are more narrowly focused on using the law to advance their clients' interests rather than examining the public policy underpinnings of the law in an effort to ascertain the proper result.

D. The Judicial View

Judges also fall into the category of those who "do law." Judges, who usually start their careers as practicing lawyers, face a difficult challenge upon making the transition from attorney to judge. Unlike the attorney, a judge must sift through the evidence and the arguments presented by competing lawyers and decide who is correct. Often at the trial level, underlying policy considerations do not factor heavily into the decision making.[7] At trial, real people testify--lay people whose business may be anything but the study of law. Often testimony is equivocal or contradictory. The demeanor of witnesses and the amount and type of demonstrative evidence is critical to the judicial decision.[8] In contrast, appellate courts, especially courts of last resort, are often very concerned about the effect of their decision. Appellate decisions tend to be closer to the academic musings of law professors than to the judicial approaches of trial judges. This may be related to the context in which their decisions are made. Appellate tribunals rely on a written record rather than live witnesses. Additionally, an attorney for each litigant has only a limited time to present an argument to the appellate judicial panel and to respond to the panel's questions and concerns. Such an environment is more analogous to a traditional law school classroom than to a trial courtroom.

III. A Proposed Definition of Law

A. The Goals of Law

At a rudimentary level a legal system is organized to regulate the conduct of members of society. Law can be viewed as a set of behavioral norms that regulates how members of society must act.[9] These norms often reflect the collective morality of society and consequently mirror rules that the majority believes should apply to human behavior.[10] The source of such collective beliefs is not always clear. Often they emanate from religious upbringing or other factors that have a formative effect on individuals during their early years.[11] Nevertheless, such beliefs exist, and, often without regard to logic, they establish what people view as acceptable and unacceptable behavior.[12] The existence of such collective societal beliefs can be seen in everyday endeavors. For example, it is acceptable for a spectator at certain sporting events, such as a baseball game, to scream often and loudly during a game. In contrast, it is unacceptable for a spectator to engage in such behavior during a tennis match. This distinction may be a result of many factors, including the cultural origins of the sport, the upbringing of the spectators, and possibly even the application of fan interference rules by the referees. Nonetheless, distinctions such as these are now simply accepted and abided by without question.

Law may also reflect desired goals for society that are contrary to common societal behavior. Such goals are aspirational because they reflect an attempt to alter actual societal norms. Consequently, while law can be viewed as codifying existing accepted behavior, it can also be viewed as serving as a tool to alter societal behavior.[13]

The use of law to either reinforce existing behavior or to alter societal norms is dependent on the society involved. In a totalitarian society, law may be used to alter previously accepted societal behavior to conform with the reigning political ideology. If a state mechanism of enforcement exists, such as a state police force, the law may effectively reshape behavior by instilling in individuals a fear of reprisal for non-compliance.[14] This technique was effectively utilized by the former Soviet Union; currently, it is effectively utilized by countries such as Iraq.

Nazi Germany is one historical example of how the legal system can be used to alter societal behavior to reflect the State's ideology. Prior to the existence of the Nazi regime, Jews lived as citizens of Germany and were integrated into many aspects of German society.[15] The Nazi government altered this arrangement. They used the law to disfranchise Jews[16] by creating a legal definition of who was a Jew.[17] They then used the law to deprive those defined as Jews of their property ownership.[18] Ultimately, for approximately six million Jews, the Nazi government went much further and deprived them of the basic human right to live.[19] In this way the law was a flagrant vehicle for changing the norms of German society and legitimizing conduct that was legally and morally unacceptable prior to the Nazi rise to power.

By contrast, in a democratic society, such as the United States, the law is primarily utilized to codify the collective morality and norms of the society at large. In certain circumstances, however, the law is utilized to alter societal behavior to achieve results that reflect a

larger good. For example, the federal government used civil rights laws to erode racial discrimination.[20] Another example is the Vermont Supreme Court's radical modification of the common law of residential leaseholds.[21] The court created an unprecedented warranty of habitability for residential leases which requires the lessor to maintain the leasehold property so the premises "are safe, clean and fit for human habitation."[22] The doctrine is an implied term of every residential lease that may not be bargained away by the parties under any circumstances. Furthermore, breach of the warranty entitles the tenant to a panoply of remedies. Remedies may include termination of the tenant's obligation to pay rent without having to relinquish possession of the premises, or contract remedies, including compensatory damages, damages for annoyance and discomfort, and punitive damages.[23] Unlike typical remedies, however, the court-created remedies make it difficult for a lessor to predict the economic results of failing to fulfill her obligations as lessor. Additionally, the ability of the tenant to remain on the defective premises without paying rent creates an incentive for the landlord to repair the premises. The court's decision is designed to reform the behavior of landlords who rent to low-income persons. This decision was a departure from the typical compensatory remedy designed to make an aggrieved party whole. Therefore, unlike a typical judicial determination which is designed to resolve a dispute between specific parties, the Vermont Supreme Court altered the way all residential landlords were required to conduct business in the future.

In the United States, societal response to judicial decisions is often an indicator of whether the law simply codifies existing collective societal morality or is really an attempt to alter such collective morality. To put it another way, societal response can be viewed as a litmus test of whether the law merely reflects societal views or is an attempt to alter such views.

Early federal court decisions that attempted to end racial discrimination were not widely embraced either by all members of the public or by all state governmental agencies.[24] In Alabama, court-ordered integration of educational facilities required the deployment of federal agents to keep the peace. The news reports at the time showed the governor of Alabama, George Wallace, standing in the doorway of the University of Alabama in an attempt to block the entry of two African-American students.[25] Clearly, such a response by the Governor, coupled with the federal government's show of force, indicated that the judicial decision being enforced was inconsistent with Alabama's then existing societal norms. In this instance, the judicial decision was designed to alter those societal norms.[26] In contrast, court orders that conform to existing societal norms are more easily enforceable without extraordinary measures.

B. The Controlling Nature of Underlying Policy Considerations in Shaping the Law

Legal decision making can appear to turn on the application of rules which have evolved over time to reflect societal values, viewpoints, and underlying policy concerns. Such rules are accepted as law and seem to require only an application of the law to the facts at hand. For example, agreements must be supported by consideration to be enforceable;[27] transfers of real property and certain personal property must be in writing to be enforceable;[28] and the benefits of limited liability are only available to a business operating as a corporation if its articles of incorporation are properly filed with the appropriate state agency.[29] Nevertheless, such rules of law, like almost all rules of law, are merely conclusions. Case law exists where courts have failed to apply the above rules of law.[30] Whether a court will apply a rule of law is reflected in the conclusion reached after policy considerations are weighed and balanced against one another.[31] Additionally, facts that necessarily differ between disputes can cause policy considerations to weigh more or less heavily on the scale.[32] As a result, courts sometimes appear to reach contradictory results. But, in fact, the law is typically not contradictory or inconsistent. Such differing decisions merely represent a different balance struck due to different surrounding facts and circumstances.[33]

Two early cases involving ownership rights of wild animals help to illustrate this point. In *Pierson v. Post*,[34] a classic legal decision taught to almost all American first-year law students, the court rejected prevailing custom to arrive at a legal decision. *Pierson* involved a hunter in hot pursuit of a wild fox. Just as the hunter was closing in on the fox, an interloper killed the fox and carried it off. The court was asked to decide whether the hunter or the interloper owned the fox. The custom in the region at the time was that the party in hot pursuit had rights superior to those of the interloper.[35] Nevertheless, the court rejected this custom and awarded the fox to the interloper. Conversely, in the second case, the court, in *Ghen v. Rich*[36] accepted the prevailing local custom as the basis for its decision. In *Ghen*, a commercial whaler pursued and killed a whale, which later sunk and washed up on shore, where it was claimed by another person. The commercial whaler and the finder both claimed ownership of the whale. Bowing to local custom, the court awarded ownership to the whaler.

On the surface, *Pierson* and *Ghen* seem inconsistent with regard to the controlling nature of custom on a legal determination. The different factual circumstances of each case, however, provide support for the different results. In *Ghen*, the custom was related to the commercial whaling business, which was a significant part of the local economy. The court was legitimately concerned that ignoring local custom could potentially destroy the local whaling industry and cause dire economic consequences.[37] In contrast, *Pierson* involved sport only; therefore, unlike in *Ghen*, the decision was not likely to have any significant economic consequences. Likewise, the absence of any concern about a negative economic impact on society enabled the court in *Pierson* to focus on the need for predictability in the law, which is necessary to limit litigation. The court adopted a bright line test--the first party to gain possession of a wild animal earned ownership rights in that animal. Consequently, *Pierson* and *Ghen*, rather than being inconsistent, represent the different weight given to different underlying policies as a result of the particular factual circumstances surrounding each dispute.

Geographically distinct regions of the country may also place different levels of importance on different social policies based on the ethnic history of the area. For example, recent legislation in Hawaii allows a tenancy-by-the-entirety property interest to be created among same-sex couples.[38] Historically, a tenancy-by-the-entirety, both at common law and in states other than Hawaii, could only be created between traditional male-female married couples.[39] Fearing that Hawaii would go on to legalize same-sex marriage, Congress enacted the Defense of Marriage Act.[40] This Act defines "marriage" as only involving "a legal union between one man and one woman as husband and wife."[41] The Act permits other states to refuse to recognize same-sex marriages in their jurisdictions.[42] Such diametrically opposed viewpoints regarding same-sex marriages are arguably a reflection of the different ethnic history and dominant ethnic culture in Hawaii as compared to the rest of the United States.[43]

Geographical distinctions throughout the United States understandably result in varying balances between private property rights and the need to limit such rights for the public benefit. For example, in sparsely populated regions of the country, individuals believe strongly in private property rights. They often see limited necessity for government regulation of their property usage. In contrast, in crowded urban centers and the surrounding suburban areas individuals often view property restrictions as both desirable and necessary. The market value of residential property is usually enhanced in suburban areas if property rights of landowners are restricted. Use restrictions are often found in city or township zoning laws. Additionally, residential developers often convey fee simple interests subject to real covenants that significantly limit the rights of property owners.[44] Such real covenants often impose more restrictions on land use than the applicable zoning law.[45] Zoning laws, however, can be altered via the political process, whereas covenants are typically immune from the political process. Once created, real covenants are real property interests which are difficult to eliminate absent approval of all the owners of property subject to the covenants.[46] The desire to use property freely is often in direct conflict with the desire to control and regulate the use of small residential lots that are in close proximity to one another. Nonetheless, most Americans continue to view private property rights as sacred. In sparsely populated regions of the country, property owners are likely to reject governmental regulation of what an owner is entitled to do with her property. This view is also shared by property owners in urban and suburban areas. However, in urban and suburban areas where population density is high, incompatible property uses are likely to have a significant detrimental effect on nearby property owners. Also, real property in such areas is often divided up into small contiguous plots. This exacerbates the effect of incompatible property use on other owners. Consequently, urban and suburban property owners often want restrictions on property rights to preserve their own desired use and enjoyment of their property.

Changing societal norms, technological innovation, and alterations in societal power structures may affect the balancing of competing policies.[47] Such developments can result in changes to the relative importance assigned to underlying considerations. Additionally, new considerations, not previously relevant, could develop.

Historically, the collective society of the United States did not generally embrace equal rights for all persons. Consequently, the founding fathers utilized the law, through the Constitution, to codify this societal view. Important rights pertaining to personal liberty were granted only to some privileged members of society. For example, the Constitution was used to legitimize depriving certain persons, specifically African-Americans, of their rights.[48] Likewise, the law historically deprived women and Native Americans of many rights typically enjoyed by others in the United States.[49] During World War II, the law deprived American citizens of Japanese descent of their liberty.[50] The law has even been relied on to deprive citizens of their liberty because they contracted a disease that frightened the public.[51] Today, modern societal views embrace equal rights for all members of society, although the definition of the scope of those rights remains contested in the courts. Therefore, these new societal norms have been codified in the law through a variety of methods which include amending the Constitution[52] and judicial rejection of discrimination based on race.[53]

The human factor must also be considered. Decision makers place greater or lesser weight on different underlying policies based on the perceived importance that the decision makers attribute to such policies. Often the language used by the decision maker signifies which underlying policy is dominant.[54] For example, a judge who views the issuance of a patent as a grant of a "monopoly" signifies that he places great importance on viewing monopolies as improper interferences with free competition.[55] Such a view tends to result in patent invalidity.[56] In contrast, a patent grant may be viewed as a "property interest" which reflects a view that embodiments of useful ideas are just as valuable as tangible personal property and real property.[57] Ownership of real property and tangible personal property confers on the owner exclusive rights of control over the property. Nevertheless, the exercise of such exclusive ownership rights is not viewed as engaging in unfair competition that interferes with a freely competitive marketplace.[58] Hence, such a view of a patent tends to lead to strict enforcement of patent rights.

The protection of ideas under state common law often turns on whether a court views such protection as a function of property or contract law. If freedom of contract is the dominant underlying policy, a court may allow a breach of contract action if a person's idea is utilized in violation of a contractual agreement not to use it.[59] If ideas are viewed as property, however, such a contract action is typically denied unless it can be shown that the idea in question is novel and in a concrete or sufficiently developed final form that renders it useful.[60] Under this rationale, the idea cannot be the subject of a contract action if the idea is in the public domain.[61] The right to control something and exclude others from using it is a typical attribute of property.[62] Therefore, an idea in the public domain will cause the contract to fail for lack of consideration.[63] This property notion is also part of a tort action for misappropriation of an idea. Such an action requires that the idea must be novel and in a concrete or sufficiently developed final form that renders it useful.[64] Typically, when a court relies on a property rationale it is signaling that an action for unauthorized use of the idea will fail.[65]

C. Universal Underlying Policies: Equity and Predictability

Certain underlying policies are universal in their application in the legal system.[66] The ultimate goal in conflict resolution is to reach just or equitable results when disputes arise among members of society. A civilized society wants to discourage self-help and the attendant physical violence that often results from disputing parties being left to resolve their own disputes.[67] A judicial tribunal acts as a neutral party that can reach an unimpassioned decision that resolves the dispute. Despite this laudable goal, a system organized solely around a desire to produce equitable resolutions between disputing parties has certain consequences for society as a whole. First, the system would tend to produce unpredictable results. Every dispute involves unique facts and a unique cast of parties. Therefore, it would be difficult to predict an outcome in a given dispute based on the resolutions of prior disputes between other parties. This unpredictability would have significant societal costs. Individuals and especially commercial enterprises would have difficulty adjusting their behavior to comport with the existing state of the law in order to avoid becoming embroiled in legal disputes. The resulting increase in disputes would only further strain an already overburdened legal system. In light of this unpredictability, our legal system has evolved a structural framework of rules that govern relations among individuals and between individuals and the State. These rules have slowly evolved over time by the step-by-step application of common law principles to individual disputes until rigid black-letter rules have been created.[68] The resulting rules are either contained in the common law of the state, when they are based solely on the cumulative wisdom of judicial decisions, or they are contained in legislative enactments that often represent the codification of common law principles or ideas.[69]

The law has reacted differently to specific types of conduct. Modern jurisprudence has developed distinct bodies or categories of law that are associated with these different types of conduct. A review of the first-year course offerings of an American law school provides an overview of these categories--civil procedure, contract law, tort law, property law, and criminal law. In many respects, this "categorization" of the law can be viewed as an outgrowth of the underlying policy of the law that favors uniformity and predictability. (Link to Appendix, Figure 1.)

Civil procedure regulates access to and behavior within the judicial system.[70] Contract law regulates the behavior of parties who have voluntarily entered into agreements to do or to refrain from doing something.[71] Tort and criminal law set standards of conduct which are binding upon members of society. Tort law provides a means for parties injured by the conduct of fellow members of society to bring an action against the injuring party to personally compensate the injured party. Criminal law is analogous to tort law and often provides parallel actions. Criminal law, however, views certain types of conduct as an affront to society. Therefore, society, through the government, is granted the right to bring an action against the individual who violates society's code of conduct. It is also granted the right to impose penalties and punishment on persons who violate the code of conduct.[72] Property law regulates the relationship between members of society and things. Despite this simplified overview of the categories of law, overlaps often exist between various categories. For example, property law may govern the ownership rights in real property, but contract law may be relevant to an agreement by the real property owner to sell realty to a buyer. Additionally, tort law could apply in a situation involving a third party who interferes with the agreement and causes the buyer to "back out" of the agreement.[73] Finally, tort and criminal law could be applicable if the seller intentionally makes material misrepresentations about the property.

Predictability would be greatly enhanced if disputes were resolved by merely applying rigid black-letter rules. Once a party determines which rule applies to a specific behavior, the consequences of that behavior can be evaluated. The party can then either modify her behavior or take steps to minimize the consequences of the behavior. In either case, the person can rationally plan for the risks that accompany certain behavior. Unfortunately, such predictability, although beneficial to society as a whole, may not always produce the most equitable result in a specific dispute. As previously stated, every dispute is unique and cannot be easily placed into a specific legal category where a black-letter rule controls. Hence, strict application of established legal rules may produce inequitable results between particular disputing parties.

The law, in an attempt to serve both its goals of equitably resolving specific disputes and producing consistent precedents, is difficult to apply because these goals are inherently in conflict. This dilemma has created a bi-polar foundation underlying virtually all aspects of dispute resolution in the American legal system. This bi-polar foundation is best represented by a continuum. At one end of the continuum is resolution of a dispute that is equitable to the parties. At the other end is a resolution that is consistent with existing precedents to insure uniformity in the law so that the legal decision is predictable. A specific dispute must be evaluated to determine where on the bi-polar continuum it falls and whether equity or uniformity should be the controlling policy.[74]

The bi-polar continuum is exemplified by the simultaneous existence of both rigid black-letter rules and established equitable doctrines. For example, contract law specifically requires that an agreement can only be enforceable if the requirements of offer, acceptance, and consideration exist between the parties to the agreement.[75] Rigid application of these requirements provides predictable results that encourage parties to comply with these requirements when entering into commercial transactions. Nevertheless, in some situations rigid adherence to these requirements may produce inequitable consequences. As a result, when one party reasonably relies to her detriment upon the promise of another party, the promise will often be made enforceable despite a lack of consideration. This exception, called "promissory estoppel," is memorialized in the *Restatement (Second) of Contracts*.[76]

The mirror-image rule is another common law contract rule that promotes predictability. The mirror-image rule requires the terms of a valid acceptance to be identical to the terms in the offer. This rule minimizes disputes over the terms of the resulting bargain.[77] Nevertheless, such a rule is inequitable in most commercial transactions among merchants who rely on an exchange of pre-printed form documents that rarely contain identical terms.[78] Consequently, with regard to transactions in the sale of goods, Article 2 of the *Uniform Commercial Code* has replaced the mirror-image rule with a more equitable rule that allows a contract to be created by an exchange of different pre-printed forms.[79]

Agency law provides that a principal is bound only by actions of her agent if the agent has acted on behalf of the principal, provided the agent has the authority to act on behalf of the principal.[80] If the agent acts without authority, the agent is personally liable.[81] These rules are necessary to enable business to be conducted by agents. Absent such limitations, it would be unwise to employ an agent because of the unknown potential liabilities for the principal. Despite the necessity for and the logic of the authority requirement, situations arise when it would be inequitable for a principal to avoid liability because authority is lacking. To avoid such unfair results courts have developed the doctrine of "ostensible" authority which can be used as a legal fiction to create authority when it is absent.[82]

Limited partnerships and corporations are statutory business entities which can only be created by compliance with appropriate statutory formalities. Typically, a certificate of limited partnership or a certificate of incorporation must be filed with a state agency before the limited partnership or the corporation comes into existence.[83] Some courts have rigidly applied this requirement in an effort to insure compliance with statutory formalities.[84] Other courts have recognized that this rule can sometimes result in unfair consequences. This inconsistency prompted the development of the doctrines of "defacto incorporation"[85] and "corporation by estoppel."[86] These doctrines bar asserting the lack of existence of a corporation or limited partnership in an effort to avoid inequitable consequences.[87]

The use of black-letter rules of law and equitable doctrines to avoid the effect of such rules in certain circumstances is not limited to the above examples. This pattern is repeated in virtually every area of law. Although the equitable doctrines are viewed as exceptions to the rule of law, courts often refer to them as "estoppel" doctrines. Nevertheless, this common framework of rules of law, which coexists with estoppel doctrines, exemplifies the existence of both equity and predictability as universal underlying polices of the law.

Even in the absence of an established equitable doctrine, courts often fashion relief that is contrary to existing law in order to achieve a fair result. For example, if competing commercial enterprises each adopt and use a trademark to identify and sell their goods, the first party to use the trademark acquires exclusive rights in the mark. This well-established common law rule serves the underlying policy of predictability.[88] In a dispute involving two parties who each sought to use the mark "Kimberly" for clothing, after a prior owner of the mark abandoned his property rights, a federal district court applied the traditional rule by giving the rights to the first party who used it.[89] Nevertheless, on appeal, the Second Circuit opted not to apply the traditional rule. Instead, the court found that it would be more equitable to ignore the traditional rule.[90] Both parties were allowed to use the "Kimberly" trademark provided it appeared on "sufficiently distinct labels" which enabled consumers to distinguish each company's goods.[91]

Even statutes which are clear on their face, such as the statute of limitations, are subject to judicially engrafted equitable limitations. In this regard, the New Jersey Supreme Court stated that

[t]he purpose of a statute of limitations is to "stimulate to activity and punish negligence" and "promote repose by giving security and stability to human affairs." A statute of limitations achieves those purposes by barring a cause of action after the statutory period. In certain instances, this Court has ruled that the literal language of a statute of limitations should yield to other considerations.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law.[92]

D. Other Underlying Policies

In addition to the policies of equity and uniformity, other underlying policies exist in every area of the law. For example, the American common law system is designed to take into account new situations, innovations, and societal norms.[93] These factors tend to be in opposition to the policy of predictability. Predictability, which is exemplified by strict application of rules of law, often limits the law's ability to respond to changes in society since it favors the status quo. Moreover, focusing on uniformity trivializes the law and actually undermines its long-term predictive value. This approach to the law is evidenced by the rush to create new statutory law to deal with factual situations that arise out of societal and technological changes. The result of this process is the creation of new bodies of law which lack the benefit of judicial wisdom spread over long periods of time in a myriad of judicial decisions. Instead, the new body of law creates numerous unanswered questions that must await future judicial interpretation before parties can safely use the law to evaluate behavior and plan conduct accordingly.

The preferable approach in applying the existing law to new situations, such as those created by technological innovation, is to focus on the underlying fundamental policy considerations that form the basic presumptions upon which a particular rule of law or body of law is based. If those considerations are furthered by applying the existing rules of law to the new situation, then it makes sense to utilize such existing law. Conversely, if the considerations are not furthered by application of the existing rules of law, then application of such law is inappropriate to the situation. Then, and only then, is it proper to either utilize a different rule of law or to create a new rule of law because it is mandated by the uniqueness of the dispute. This approach maximizes the best qualities of our legal system by allowing the law to accommodate new situations without discarding existing rules of law. Likewise, it produces more equitable results since the focus is on the underlying policy which provides the rationale for the existence of a rule of law, rather than merely focusing on application of a rule of law in a vacuum.[94]

Typically, every rule of law is based on at least two, and often several, underlying considerations. These competing considerations can also be expressed in the form of a bi-polar, or in some cases, a multi-polar continuum. The resolution of a legal dispute can therefore be viewed as the evaluation of a multi-layer, bi-polar, or multi-polar continuum.

E. Examples of the Controlling Nature of Underlying Policies

1. Vicarious Liability

The employment requirement of vicarious liability provides an example of a multi-layer, bi-polar continuum. Tortious liability for the actions of a worker in the scope of her employment can be imputed to the employer, despite a lack of employer culpability, if the worker is in an employer-employee relationship.[95] The common law test for determining an employer-employee relationship is the "right to control test."[96] Under this test, the worker is considered to be in an employer-employee relationship if the employer has the right to control the physical actions of the worker in the performance of the worker's conduct on behalf of the employer.[97] This right to control test exemplifies a bi-polar continuum. At one pole is the employer-employee relationship represented by total control of all aspects of the worker's conduct. At the other pole is a non-employer-employee relationship represented by the absence of control over any aspects of the worker's conduct. Typically, most relationships between employers and workers fall along the continuum between the two poles. Nevertheless, the law requires, for purposes of vicarious liability, that the worker's status be determined to be either an employer-employee or a non-employer-employee relationship. In determining where on the continuum the relationship is located, a judicial tribunal evaluates various objective factors that establish the degree and type of control the employer has over the worker.[98] This analysis merely represents one layer of the continuums to be evaluated. The underlying purposes of vicarious liability must also be considered. These purposes include a deliberate allocation of risk to spur accident prevention, an assurance of compensation for injured third parties (also called the "deep pocket" justification), and a distribution of loss to the beneficiaries of the business enterprise employing the worker who committed the tortious conduct that injured a third party (also called the "risk spreading" justification).[99]

Each of these three underlying purposes also represents a bi-polar continuum. At the first pole of the accident prevention continuum is the conclusion that an enterprise will take steps to prevent a repeat of the worker's conduct that injured a third party to avoid future imputed liability under the doctrine of vicarious liability. At the second pole of the continuum is the conclusion that imputed liability will not spur the employer to take any action to prevent similar consequences from a worker's conduct. If the court perceives that the first

pole is present, it will support the application of vicarious liability. But if the second pole is applicable, its presence militates against vicarious liability.

The first pole of the deep pocket continuum is represented by an enterprise that has adequate assets to compensate the third party injured by the enterprise's worker without such payment of compensation having an adverse impact on the enterprise. This pole favors invoking vicarious liability. The opposite pole of this continuum is represented by an enterprise that lacks the assets or the ability to acquire the assets to compensate the injured third party. This pole favors finding vicarious liability inapplicable to the enterprise.

The risk spreading continuum has one pole that is represented by an enterprise that has the ability to distribute the cost of compensation paid to an injured third party among numerous customers of the enterprise. Typically, such an enterprise would be a large enterprise with many customers where marginal cost increases to customers would not have an adverse effect on sales. Because of the number of customers, adequate revenue to fund the third party compensation would be raised. This pole of the continuum would favor applying vicarious liability. The other pole of the continuum would be represented by an enterprise that cannot raise prices due to limited customers, or due to price sensitivity of the particular market. Also, an enterprise that does not sell its product or services to customers would fall on this side of the continuum because it would be impossible to distribute the cost of compensating the injured third party. This pole of the continuum would militate against imposing vicarious liability.

Finally, the underlying equity/predictability bi-polar continuum is also relevant to determine whether vicarious liability will apply in a given situation. However, it should be recognized that this continuum is often implicit in the specific continuums applicable in a specific area of law. For example, the right to control test used in vicarious liability provides predictability.[100] Employers know that by exerting control over their workers they are assuming the risk of the worker's tortious conduct being imputed to them via vicarious liability. This allows an enterprise to plan behavior accordingly. For example, many employers train workers in an effort to minimize tortious conduct. Additionally, employers typically purchase adequate insurance to limit financial exposure due to imputed liability. In contrast, some enterprises minimize their control over workers which prevents imputed liability via vicarious liability.[101] This practice is commonly used in the construction and home improvement industries via the widespread use of sub-contractors.

The equity end of the continuum is implicit in the accident prevention, deep pocket, and risk spreading continuums discussed above. For example, it may be inequitable to impute liability to a non-culpable employer if the enterprise cannot absorb the liability without significant adverse effects. Additionally, it may be inequitable to impute liability if the enterprise is unable to pass the cost along to the beneficiaries of the enterprise.

This multi-layer, bi-polar continuum approach to legal analysis is rarely expressed explicitly by a judicial decision. Nevertheless, it is implicit in many decisions. The apparent inconsistencies among judicial decisions purporting to apply the identical rule of law are traceable to this continuum analysis. The right to control test, previously discussed, is the generally accepted test for determining the existence of an employer-employee relationship. A mere examination of the existence and degree of employer control in a vicarious liability situation, however, is insufficient to rationalize the cases dealing with this issue. At this level many of the cases appear inconsistent.[102] A different conclusion, however, can be drawn if the underlying considerations of equity, predictability, accident prevention, the existence of a deep pocket, the ability to spread the risk, and any additional policy considerations that relate to the specific facts at issue are evaluated. Consideration of these factors typically results in an apparent inconsistent body of cases falling into a consistent and predictable pattern.[103]

2. Covenants-Not-to-Compete

Employee "covenants-not-to-compete" exemplify a multi-layer continuum. Such covenants are contractual in nature. Therefore, they must meet the requirements of a valid contract.[104] Unlike an ordinary contract, however, covenants must also be reasonable to be enforceable as written.[105] Normally, the reasonableness of a contract is not an issue. A contract supported by a valid offer, acceptance, and consideration is enforceable.[106] Each contracting party freely agreed to the contract after evaluating whether it was beneficial to her. It would be presumptuous of a court to second-guess their agreement.[107] This position represents the general underlying policy of freedom of contract. More specifically, such freedom of contract can be viewed from an economic perspective. In a competitive free-market system, things do not have intrinsic value. Instead, the marketplace provides the valuation medium. Therefore, the price a party freely agrees to pay for something is the market value. Any judicial examination of whether the agreed-upon price was reasonable is inconsistent with the underlying policy of utilizing the marketplace as the valuation mechanism.[108] Nevertheless, some freely-agreed-to bargains are manifestly unfair. To recognize this possibility, contract law developed the concept of "unconscionable" contracts.[109] This concept allows a court to decline to enforce grossly unfair contracts. Nevertheless, it is infrequently invoked by courts because allowing parties to freely bargain in a competitive free-market economy is an important policy.[110] Consequently, both the bargaining process (procedural unconscionability) and the actual bargain (substantive unconscionability) must render a bargain manifestly unfair before a court will find a contract unconscionable.[111]

Covenants-not-to-compete, unlike contracts in general, pose some potential problems. First, they can potentially interfere with the ability of an employee to earn a livelihood and to freely pursue new employment opportunities.[112] For example, assume Molly, a computer consultant employed by Acme Consulting, a national firm, is prohibited from competing with Acme for one year after terminating her employment. If Molly leaves Acme she will be unable to earn a livelihood as a computer consultant in the United States for one year since Acme is a national firm. Molly could work in another field for one year. However, in our highly specialized society, Molly would be unable to earn an income equal to what she previously earned working for Acme unless she works in the same field.[113] Her options would be to remain at Acme, seek alternate lower paying employment for one year, or seek retraining in a new field. Seeking alternate employment could have permanent career costs. A one year employment gap could limit future employment opportunities for Molly since many employers find employment gaps problematic. Retraining would also involve an investment of time plus the monetary costs of tuition and lost salary for the time Molly spends in school.

Despite the effects of a covenant-not-to-compete on employees, these agreements are necessary in employment situations to protect the interests of employers. Molly, in the course of her employment, may learn Acme's trade secrets or other confidential information. Additionally, Acme may provide Molly with specialized training. Molly may also develop important business contacts in

the scope of her employment, which could benefit a competitor who hires her.[114] Such employer concerns are heightened today in light of employee mobility, the rapid growth of service businesses, and an enterprise's growing dependence on technology.

Covenants-not-to-compete, by their very nature, are anticompetitive.[115] By restricting the ability of employees to freely change jobs, the available pool of talented employees is limited. This limitation can adversely effect the ability to compete in the marketplace. For example, assume Northern Freeze is one of five purveyors of fast food in a local market area. All of the fast food restaurants have difficulty finding adequate numbers of part-time employees to work as cashiers. Almost all cashiers are college students who are in dire need of funding to afford tuition and monthly room and board expenses. Northern Freeze decides to pay its cashiers an additional fifty cents per hour above the market rate if they sign an agreement that they will not work for a local competitor for one year after ending their employment. If Lenny, a college student, freely executes this agreement, he is bargaining to receive extra pay in return for restricting his ability to work for one of the other four competitors. From Lenny's perspective, this decision benefits him since virtually no other part-time employment exists in the area. In light of the limited labor pool, however, Northern Freeze may have an advantage over its competitors. The college student employees are wedded to continued employment at Northern Freeze since it is unlikely that they could afford to stop working for a year. The result is that the available pool of employees for competitors of Northern Freeze is limited. Even if the four competitors decide to challenge Northern Freeze's policy by paying higher wages, Lenny and other Northern Freeze employees will not be immediately available. The decreased size of the labor pool puts additional pressure on the competitors to pay even higher wages. The ability of the five enterprises to freely compete by providing different benefits to all members of the available labor pool is interfered with by making a portion of the labor pool temporarily unavailable. Maintaining competition is a necessary ingredient of our economic system; consequently, covenants-not-to-compete can be injurious to the public by interfering with competition.

In light of the above concerns, courts have found that the policy of freedom of contract is not properly balanced by unconscionability when a covenant-not-to-compete is involved. Therefore, an additional counter-balance is needed. The counter-balance is provided by subjecting covenants to a reasonableness test.

In determining what is reasonable, the Goddess of Justice that hovers over the American court house with scale in hand has a delicate job of weighing; and it is a three-not a two-pan scale for she must balance the conflicting interests of employer, employee and public. Hers is the tedious task of reconciling the head-on clash of various, very basic policies, namely: freedom of contract, freedom of trade, sanctity of contract, individual liberty, protection of business, right to work, making of training available to employee, earning a livelihood for one's self and family, utilization of one's skill and talent, continued productivity, betterment of one's status, avoidance of one's becoming a public charge, encouragement of competition and discouragement of monopoly.[116]

The reasonableness test can be summarized as follows: (1) "Is the restraint reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate interest?"[117] (employer interest); (2) "Is the restraint reasonable in the sense that it is not unduly harsh and oppressive on employee?"[118] (employee interest); and (3) "Is the restraint reasonable in the sense that it is not injurious to the public?"[119] (public interest).

The reasonableness test of a covenant-not-to-compete represents a three level, bi-polar continuum that determines whether such a covenant is enforceable. The "employer interest" can be viewed as a continuum (the employer continuum). At one pole of the continuum is very valuable information utilized by an employer to maintain a competitive advantage in the marketplace. For example, important trade secrets that resulted from substantial investments of time and capital may be critical to the survival of a business enterprise in a highly competitive industry. Therefore, if an employer has critical interests needed to maintain competitiveness, or even marketplace survival, a covenant-not-to-compete appears reasonable and therefore enforceable.[120] The other pole of the employer continuum represents the absence of a critical employer interest that needs protection. This end of the continuum supports finding a covenant unreasonable, and therefore, unenforceable as written.

If the employer continuum supports upholding a covenant-not-to-compete, the "employee interest" must be evaluated within the context of a continuum. One end is represented by a covenant-not-to-compete which impedes the ability of an employee to find gainful employment. If the covenant falls at this end of the continuum it suggests that the covenant is unreasonable and therefore should be unenforceable. The other end of the continuum is represented by a covenant which has little effect on the ability of the employee to find gainful employment in the same or similar field at a comparable compensation level. This pole of the continuum strongly supports finding the covenant reasonable and consequently enforceable.

Finally, if the employer interest supports enforcing a covenant-not-to-compete, the effect of the covenant on the public must be examined. The "public interest" can likewise be viewed as a continuum (public interest continuum). One pole of the continuum represents a covenant-not-to-compete that is injurious to marketplace competition. This end suggests finding the covenant unenforceable because it is unreasonable. The other end of the public interest continuum represents a covenant which has little or no effect on the marketplace. This end of the continuum supports enforcing the covenant as reasonable.

The importance of protecting an employee's ability to obtain meaningful employment is a strong underlying policy. Hence, long term employee covenants-not-to-compete are rarely upheld. In contrast, very long term covenants-not-to-compete, coupled with the sale of a business enterprise, are often upheld as both reasonable and enforceable.[121] This difference, despite application of an analogous reasonableness test, is a response to different weights attached to the underlying policies of such covenants in different situations. In the sale of the business, a covenant-not-to-compete is critical to the success of the enterprise for its new owner. Absent such a covenant, the business seller could establish an enterprise to compete with the one sold immediately after consummation of the sale, thus significantly undermining the value of the enterprise just sold. Arguably, such a result would be inequitable to a business buyer since the seller who was already paid for the business might be able to recapture her old customers by quickly establishing a new enterprise in the same location as the business that was just sold.[122] Additionally, such action, which is inherently anticompetitive, could reduce the marketability of business enterprises. Consequently, these factors make the ability of the business seller to gain meaningful employment after the sale of the enterprise less important than the impact of covenants-not-to-compete on employees who wish to find alternate employment.

IV. Examination of Underlying Policies to Predict Future Direction of the Law: The Right of Publicity--A Case Study

The right of publicity is a relatively new cause of action.[123] It recognizes the economic value that attaches to the public status or reputation of a well known celebrity.[124] Increasingly, such reputational value enables celebrities to gain financially by allowing their names or likenesses to be associated with specific products or services. The widespread use of mass media, such as television, radio, and print publications, permits such celebrity affiliation to reach many members of society. The effect is increased sales, the extent of which can be dramatic; as a result, some celebrities, ironically, earn substantially more for commercial endorsements then they do for the activities which made them celebrities.[125]

Existing trademark and unfair competition law allows a celebrity to bring an action against someone who, without authority, engages in conduct which would indicate that the celebrity endorsed or approved of her affiliation with certain products or services. The basic legal test is whether the conduct would result in a likelihood of confusion for typical customers.[126] Absent confusion, a trademark or unfair competition action will fail. Nevertheless, the same facts could support a common law right of publicity action despite an absence of even a likelihood of confusion.[127] The different treatment of such actions is attributable to the underlying policy justifications for each action. Trademark and unfair competition laws are designed to regulate commercial and business conduct.[128] Preventing consumer confusion is a primary goal.[129] Additionally, protecting the reputation of a commercial enterprise, and thereby protecting future investment in the business, is important.[130] However, protecting this investment is typically also based on a consumer confusion analysis.[131] A property interest per se in a trademark is not recognized. Rather the interest protected is the mental association in the minds of the consuming public between the trademark and a particular product or service.[132] Consequently, a valuable trademark which registers a strong mental association with consumers with regard to a specific product or service is legally protectable. However, if that mental association dissipates, the trademark is no longer legally protectable.[133]

The right of publicity is based on a property theory.[134] Hence, unauthorized utilization of a celebrity's name or likeness as well as anything that conjures up an association with that celebrity is actionable under a right of publicity theory even if a consumer did not believe the celebrity endorsed the product or commercial enterprise.[135] Reliance on an underlying property theory supports the current expansive judicial application of this action.[136] Arguably, an underlying aspect of a property based theory is that the property owner acquires limited monopoly rights in the property. Most third party uses of the property are unlawful unless the owner has granted the third party the right to utilize the property.

It can be argued, however, that any rights in celebrity status should be treated like other intellectual property rights.[137] An underlying goal of intellectual property law is achieving a public benefit. Therefore, the law typically only grants property protection to intellectual property if the public benefits from bestowing such status.[138] Additionally, such property status is typically limited.[139] The goal is to only provide enough incentive to inspire creativity which ultimately benefits the public. Consequently, intellectual property protection pursuant to patent and copyright law is time limited.[140] Intellectual property protected by trademark law exists only as long as a mental association exists between the trademark and a particular product or service associated with the trademark.[141] Trademark rights, pursuant to an infringement action, can only be asserted against a third party whose actions result in a likelihood of consumer confusion.[142] These limitations are deemed acceptable by the law since they do not provide a disincentive to creativity.

If the underlying policies of intellectual property protection are applied to the status of a celebrity, the scope of protection may be more limited than what is currently provided by the right of publicity. The first question in these cases is whether the minimum protection needed to spur individuals to create a public persona exists. Great scientific discoveries that may change the face of the world are only capable of twenty years of protection via patent law.[143] Nevertheless, significant sums of money are devoted to research and development by United States' companies.[144] Is it reasonable to assume that individuals will not engage in conduct that makes them a public persona absent legal protection for that persona via the right of publicity? Arguably, the right of publicity has no effect on spurring individuals to achieve celebrity status. Such status alone provides adequate financial rewards.[145] The right of publicity merely maximizes or enhances the potential financial gain associated with being a celebrity. Unauthorized affiliation of a celebrity with a commercial endeavor is already protected, via unfair competition or trademark law, when such affiliation would confuse consumers. Consequently, the future expansion of the right of publicity depends upon whether the law will continue to rely exclusively on an underlying property theory as the policy reason for such a cause of action. In contrast, if the underlying policies of intellectual property are applied, the scope of the right of publicity will decrease.[146]

V. Conclusion

Law is defined differently by various categories of people. Members of the public tend to view law as a set of rules which are clear and ascertainable. Legal academics often think of rules of law as guidelines for resolving disputes. Underlying policy considerations are highly relevant in the determination of whether a rule is applicable to a specific factual dispute. Practicing attorneys focus on advancing arguments to further a client's position. These arguments rely on factual distinctions and/or policy considerations depending upon what best serves a client's interests. Judges, unlike attorneys, must steer a path among competing arguments to reach a resolution in a dispute. Trial courts pay attention to witness demeanor and the inferences raised by demonstrative evidence. On the other hand, appellate tribunals rely on written records only. Therefore, they have a heightened concern for underlying policy considerations.

At its rudimentary level law regulates conduct. Depending on the society involved this concern may be used either to shape new conduct or to reinforce existing conduct. United States' law generally reinforces existing conduct by developing rules that are consistent with societal norms and reflective of the collective morality of society. To a limited extent United States' law is aspirational in nature when it is used as a mechanism for changing the norms of society. Such attempts to alter norms often produce societal conflict.

Legal complexity exists because the underlying policies of the law are often numerous and inconsistent. Law attempts to be uniform to enhance predictability. This goal facilitates compliance with legal rules. However, law also seeks equitable resolution of disputes. These twin goals are inherently in conflict. Numerous other policies, specific to a particular area of law, are also relevant. Different regions of the country weigh underlying policies differently. Society evolves over time so different considerations become important.

Individual decision makers assign different weight to the same policies based on upbringing, biases, and other formative factors that define the decision maker as a person. Ultimately, balancing of these competing policies provides the basis for dispute resolution. The relative importance of particular policies determines the scope and direction of an area of law.

FOOTNOTES

1. Any definition of law is intertwined with the basic question of whether we need law or a legal system. The existence of law is a necessary ingredient in any organized society whether democratic, communist, or totalitarian. Absent law, anarchy would result. *See, e.g.*, Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 183 So. 759, 764 (Fla. 1938) (asserting that a government enacts regulations to preserve order in society).

It is instructive to note that both current and past societies have utilized systems of law. The Jewish legal system, whose origins are over two thousand years old, is the "oldest continuously applied legal system in the world." Edward H. Rabin, *The Evolution & Impact of Jewish Law*, 1 U.C. Davis J. Int'l L. & Pol'y 49, 50 (1995). Some ancient societies had oral law while others had written codifications of the law such as Hammurabi's code. For an English translation, see *The Avalon Project at the Yale Law School: The Code of Hammurabi* (visited Feb. 1, 1999) <http://www.yale.edu/lawweb/avalon/hammenu.htm>; or *Law Research: The Code of Hammurabi* (visited Feb. 1, 1999) <http://www.lawresearch.com/v2/codeham.htm>. Perhaps the best known codification of law, which has been incorporated into the law of most countries, is the Ten Commandments. *See Exodus* 20:2-14.

2. Many people dislike lawyers because they perceive that lawyers fail to do their jobs. Instead of revealing or finding the applicable rule, an attorney must oten tell a client that the law is unclear and the resolution of their dispute could be decided in a variety of ways by a court. To many people, such legal advice is viewed as worthless since it fails to reveal how the law would resolve the dispute. Further, they believe it demeans the value of law because it fosters the idea that law is unresolved and unclear. Worse yet, it leads some persons to believe that the law is "dishonest" and subject to manipulation by the deepest pocket. After all, the thinking goes, if law is unclear, then a dispute can be decided either way without being wrongly decided. This approach to law invites outside influences to be exerted on the decision maker because she is insulated from being charged with dishonesty, since whatever decision is reached is correct. *See, e.g.,* Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405, 1414 (1999) (discussing the public desire to codify existing law to fight judicial discretion which is necessary under the common law system).

3. *See* Joel Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 Harv. L. Rev. 1551, 1552 (1966) (arguing that personal values and experiences of a particular judge affect her decisions). *See generally* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. Rev. 1377, 1451-98 (1998) (discussing an empirical study of factors affecting judicial determinations). One group of legal academics, members of the Critical Legal Studies movement, view legal rules as indeterminate and subject to manipulation. Consequently, such rules can be used to support almost any result in a particular situation. *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 303 (1987).

4. For an historical review of different phases of jurisprudential scholarship, see generally, Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan. L. Rev. 199, 202-13 (1984). *See also* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 501-03 (1948) (asserting that legal rules are never clear as they are applied to differing facts).

5. It should be noted, however, that some law professors resort to predominantly teaching via lecture. This methodology reflects a less policy-oriented approach to law that is closer to a layperson's view of law than to the view shared by many legal academics. Even if such lecture-oriented teachers fail to agree with this assessment, the implicit message communicated to their students is that they have been given the "law" in the form of rules coupled with examples of how the rules are applied. Consequently, such students have a higher than normal tendency to view a legal cause of action as a set of prima facie elements which the facts either satisfy or fail to satisfy. They view the question of whether the elements are met as a factual question devoid of any underlying policy considerations that could influence a court to interpret the elements and the facts either broadly or narrowly. *See* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 Temp. L. Rev. 393, 393-98 (1997) (decrying the failure to teach legal method generally in law schools today which results in over reliance on rules rather than understanding complexities of law).

6. *See* Model Rules of Professional Conduct Rule 1.3 (1998).

7. I can recall sitting in on a non-jury trial for a petty criminal offense in a local courthouse. The defendant's attorney raised a Fourth Amendment argument. The judge informed the attorney that such arguments were irrelevant in his court; they were for the appellate court. Perhaps this is an extreme example, but to some extent this often typifies trial court decision making.

8. For example, in a municipal court landlord-tenant dispute where three witnesses provided conflicting testimony, the judge, using credibility assessment and other surrounding facts, gave significant weight to testimony of one tenant, little weight to testimony of the other tenant, and only a modicum of weight to the landlord's testimony. *See* Proctor v. Frame, 695 N.E.2d 357, 358 (Akron Ohio Mun. Ct. 1998).

9. *See* United States Fidelity & Guar. Co. v. Guenther, 281 U.S. 34, 37 (1930) (defining law in a generic sense as meaning "rules of action or conduct duly prescribed by controlling authority, and having binding legal force"); Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 183 So. 759, 764 (Fla. 1938) (stating that "[l]aws are nothing more than rules promulgated [to preserve] an ordered society"); City of Bangor v. Inhabitants of Etna, 34 A.2d 205, 208 (Me. 1943) (quoting Blackstone that law is "`[a] rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong'"); *see also* Black's Law Dictionary 884 (6th ed. 1990) (defining law as "[t]hat which is laid down, ordained, or established"); VI The Oxford English Dictionary 113 (1933) (defining law as "[t]he body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects"); Webster's Third New International Dictionary (1961) (defining law as "a binding custom or practice of a community"); Arthur Corbin, Corbin on Contracts § 1, at 1 (1952) (stating that "[t]he underlying purpose of law and government is human happiness and contentment, to be brought about by the satisfaction of human desires in the highest practicable degree"); Cappalli, *supra* note 5, at 444 (asserting that legal methodology at its most basic level can be viewed as a "belief structure") (citing R. W. Gordon, *New Developments in Legal Theory*, *in* The Politics of Law: A

Progressive Critique 420 (David Kairys ed., 1982)). *See generally* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1001 (1985) (discussing how the contractual doctrines of duress and unconscionability represent a limitation on the freedom to bargain in exchange for achieving social norms of fairness).

10. *See generally* Harry M. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 244 (1973) (asserting that judicial reasoning necessarily reflects societal morals and ideals).

11. It is interesting to note that in the Jewish legal system, which dates back over two thousand years, morality, religion, and rules governing behavior are intertwined. This understanding of law is exemplified in the Ten Commandments, which include rules mandating certain religious rituals (e.g. maintain the Sabbath), rules regulating behavior (e.g. prohibition on murder), and moral obligations (e.g. prohibition against coveting). *See* Rabin, *supra* note 1, at 52. The Torah, which is the basic source of Jewish law, contains 613 commandments or laws which regulate both religious practice and conduct among people. *See* Stephen J. Werber, *Ancient Answers to Modern Questions: Death, Dying, and Organ Transplants--A Jewish Law Perspective*, 11 J.L. & Health 13, 15 (1996); *see also* James Scheinman, *Jewish Business Ethics*, 1 U.C. Davis J. Int'l L. & Pol'y 63, 64 (1995) (noting that Jewish law does not distinguish between morality and lawfulness). In contrast, American law does separate moral and legal behavior. *See* Werber, *supra* at 15. Arguably, this is an overstatement about American law. Ultimately law reflects societal underpinnings, which spring from the collective morality of society. Legal questions involving organ donations, withdrawing life support for the terminally ill, and assisted suicide are obvious examples of contemporary legal issues that are imbued with moral concerns that ultimately effect their judicial and legislative treatment. *See, e.g.,* Norman L. Cantor, *The Real Ethic of Death and Dying*, 94 Mich. L. Rev. 1718, 1723 (1996) (arguing that morality should factor into sanctity-of-life decisions in the law).

12. An example of an illogical belief structure is the general societal acceptance of alcohol use but the lack of acceptance of the use of marijuana. Both products have the potential to adversely affect the health of users, so logic would suggest either legalizing both products or outlawing both products. Likewise, the general American notions of individual autonomy and freedom of choice seem at odds with recent societal opposition to smoking. This societal opposition is evidenced by the number of ordinances prohibiting smoking in many public areas combined with the number of private companies and organizations that unilaterally prohibit smoking on their premises. Recently, the university where I teach declared that smoking would no longer be allowed in any buildings on campus. The unilateral nature in which the new rule was promulgated, plus the total lack of any opposition to the new rule, strongly suggests that this rule is in conformance with general societal views.

13. Sometimes it is not always clear if law follows collective societal norms or if it leads to changes in societal norms. For example, did the liberalization of divorce laws in the 1970s lead to increased divorce rates or did such liberalization reflect societal norms which made divorce more acceptable? *See* Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 3 U. Ill. L. Rev. 719, 724-25 (1997) (contending that U.S. divorce rates steadily increased since 1860 and have varied without regard to widespread adoption of no-fault divorce laws which made divorce easier to obtain). *But see* Martha Heller, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 Va. J. Soc. Pol'y & L. 263, 264 (1996) (noting that some family values advocates and some elected officials blame no-fault divorce laws for the current high divorce rates).

14. One effective technique of creating a totalitarian society is to eliminate lawyers who are the guardians of freedom. Then government officials, who answer only to the head of State, are utilized to both decide and enforce legal decisions. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting). Even Shakespeare understood the concept that lawyers were a necessary defense against a totalitarian government. *See id*. at 371 n.24 (quoting the character of Dick in Shakespeare's *King Henry the Sixth*, who said "`[t]he first thing we do, let's kill all the lawyers,'" and noting that this statement was made by "`a rebel, not a friend of liberty'").

15. *See* 20 The New Encyclopedia Britannica 121 (15th ed. 1991) (discussing Germany under the Nazi regime).

16. *See* 8 The New Encyclopedia Britannica 833 (15th ed. 1991) (describing the Nuremberg laws passed by the Nazis to take German citizenship from the Jews, thereby turning them into "`subjects of the state'").

17. *See id*. (noting that German law defined Jews as all persons with one or more Jewish grandparents).

18. *See* 6 The New Encyclopedia Britannica 13 (15th ed. 1991) (detailing the atrocities committed by the Nazis against the Jews during the Holocaust, including the confiscation of property and the prohibition against land ownership).

19. *See id*. at 14 (describing the upper limit of the death toll of Jews during the Holocaust as being six million).

20. *See, e.g.*, 42 U.S.C. § 1982 (1994) (promising as part of the Civil Rights Act of 1866 that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property"). Federal tax law and immigration law are also frequently used by Congress to bring about societal change. *See* Kurt Hartmann, Comment, *The Market for Corporate Confusion: Federal Attempts to Regulate the Market for Corporate Control Through the Federal Tax Code*, 6 DePaul Bus. L.J. 159, 168-70 (1994) (discussing how tax penalties and expenditures influence taxpayer behavior); *see also* Katherine L. Vaughns, *Retooling the `Refugee' Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 Rutgers Race & L. Rev. 41, 59 & n.76 (1998) (examining Congressional expansion of the definition of a refugee in an attempt to overcome a long history of discrimination in immigration policy).

21. *See* Hilder v. St. Peter, 478 A.2d 202, 207-08 (Vt. 1984).

22. *Id*. at 208.

23. *See id*. at 208-11.

24. *See* Roy R. Silver, *Sit-Ins and Arrests Mark Suburbs' School Openings*, N.Y. Times, Sept. 5, 1963, at 1 (reporting the arrest of five demonstrators seeking enforcement of a New York plan to end racial imbalance in a local school district); Claude

Sitton, *Bombing Sets Off Birmingham Riot; One Dead, 18 Hurt*, N.Y. Times, Sept. 5, 1963, at 1 (describing rioting that followed the enrollment of two black children at an all-white elementary school); Claude Sitton, *Alabama Police Prevent Opening of Tuskegee High*, N.Y. Times, Sept. 3, 1963, at 1 (detailing the Alabama governor's defiance of a federal court desegregation order); *see also* Alabama NAACP v. Wallace, 269 F. Supp. 346, 349 (M.D. Ala. 1967) (striking down an Alabama statute banning desegregation); Lee v. Macon County Bd. of Educ., 231 F. Supp. 743, 754 (M.D. Ala. 1964) (enjoining state officials from interfering with local boards of education's compliance with the federal desegregation law); United States v. Wallace, 222 F. Supp. 485, 488 (M.D. Ala. 1963) (enjoining state officials from interfering with federal desegregation laws); United States v. Wallace, 218 F. Supp. 290, 291-92 (N.D. Ala. 1963) (enjoining the governor of Alabama from interfering with a federal court order providing for the desegregation of the University of Alabama).

25. *See* John Herbers, *Wallace Denies Yielding to U.S.*, N.Y. Times, Sept. 5, 1963, at 20.

26. Although racial discrimination has decreased in the last 30 years, societal norms favoring segregation of public schools may still have prevailed over legal attempts to end it. A recent study by the Harvard Graduate School of Education found that the 10 largest inner-city public school districts have become re-segregated in the 1990s. *See* Robert D. Kaplan, An Empire Wilderness: Travels into America's Future 74 n.2 (1998).

27. *See* Flight Concepts Ltd. Partnership v. Boeing Co., 819 F. Supp. 1535, 1553-54 (D. Kan. 1993), *aff'd*, 38 F.3d 1152 (10th Cir. 1994) (finding that consideration existed in an exclusive licensing agreement where the manufacturer invested money to perfect the plaintiff's design as required under the contract); Carlisle v. T & R Excavating, Inc., 704 N.E.2d 39, 43 (Ohio Ct. App. 1997) (holding that the promise to perform excavating work at no charge was unenforceable for lack of consideration because neither a benefit to the promisor in working for free nor a detriment to the promisee in receiving work for free occurred).

28. *See* Goss v. City of Little Rock, 151 F.3d 861, 864 (8th Cir. 1998) (citing the Arkansas statute of frauds which provides that oral agreements for sale of land are generally unenforceable); Midwest Mfg. Holding L.L.C. v. Donnelly Corp., 975 F. Supp. 1061, 1066-67 (N.D. Ill. 1997) (noting that leases exceeding one year must be in writing under the Illinois statute of frauds); U.C.C. § 2-201 (1987) (providing that a contract for the sale of goods for $500 or more must be in writing to be enforceable).

29. *See* Del. Code Ann. tit. 8, § 106 (Supp. 1998) (requiring that a certificate of incorporation be filed in order to bring a corporation into existence).

30. *See, e.g.*, Zukowski v. Dunton, 650 F.2d 30, 34 (4th Cir. 1981) (finding that partial performance of an oral contract to transfer realty was enforceable despite the statute of frauds); McWilliams v. American Med. Int'l, Inc., 960 F. Supp. 1547, 1560 (N.D. Ala. 1997) (recognizing that contracts made without consideration may be enforceable under promissory estoppel); Cranson v. IBM, 200 A.2d 33, 38 (Md. 1964) (allowing a business entity to obtain benefit of limited liability despite failure to file timely articles of incorporation).

31. *See* Moore v. University of Cal., 793 P.2d 479, 493-97 (Cal. 1990) (deciding not to extend conversion tort to excised human tissue by balancing the need for research materials against the patient's right to control the ultimate use of the cell samples); *see also* Johnson v. University Health Serv. Inc., 161 F.3d 1334, 1340 (11th Cir. 1998) (describing promissory estoppel as an equitable doctrine intended to ameliorate the "occasional harshness of common law rules"). *See generally* Wellington, *supra* note 10, at 225 (arguing that a rule of law, based on a policy that ceases to be valid, is an unstable rule that should not be utilized by courts).

32. Sometimes a rule of law is slow to change despite the demise of its underlying policy. Some of the intricate rules of future interest law have survived despite the fact that some of the underlying rationales have long since ceased to have relevance. For example, how logical is it that contingent remainders and executory interests are subject to the rule against perpetuities but a possibility of reverter and a right of reentry are immune from the rule? *See* Central Del. County Auth. v. Greyhound Corp., 588 A.2d 485, 488 (Pa. 1991) (noting that the right of reentry is exempt from the rule against perpetuities).

33. *Compare Cranson*, 200 A.2d at 38 (allowing a business entity to obtain the benefit of limited liability despite failure to timely file articles of incorporation) *with* Robertson v. Levy, 197 A.2d 443, 444 (D.C. Ct. App. 1964) (denying a business entity the benefits of limited liability because its articles of incorporation were filed late); *compare* Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel, 587 P.2d 191, 195 (Wash. Ct. App. 1978) (finding that a limited partnership was not created due to failure to comply in a timely manner with statutory formation requirements) *with* Fabry Partnership v. Christensen, 794 P.2d 719, 721 (Nev. 1990) (finding that a limited partnership was created despite failure to comply with statutory formation requirements in a timely fashion); *compare* Hocks v. Jeremiah, 759 P.2d 312, 315 (Or. Ct. App. 1988) (requiring actual delivery for valid inter vivos gift of securities) *with In re* Cohn, 176 N.Y.S. 225, 227 (N.Y. App. Div. 1919) (allowing symbolic delivery for inter vivos gift of securities). The balancing of competing underlying policies is also important with regard to statutory law. For example, it is a general rule of law (and common sense) that a person cannot transfer ownership of property to a third party if the person lacks title to the property transferred. *See* U.C.C. § 2-403(1) (Supp. 1999). Nevertheless, a merchant, under certain circumstances, can transfer good title for personal property to a customer even though the merchant lacks any ownership interest in the property. U.C.C. § 2-403(2) (1998).

34. 3 Cas. 175 (N.Y. Sup. Ct. 1805).

35. *See* Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1231 (1979).

36. 8 F. 159 (Mass. Dist. Ct. 1881).

37. *See id*. at 162; *see also* International News Serv. v. Associated Press, 248 U.S. 215, 236-42 (1918) (developing a new branch of unfair competition law to protect the commercial value of news and preserve news service business).

38. *See* Haw. Rev. Stat. Ann. § 509-2 (Michie Supp. 1998).

39. *See* Cornelius J. Moynihan, Introduction to the Law of Real Property §§ 6, 7 (2d ed. 1988).

40. *See* 1 U.S.C. § 7 (Supp. II 1996); 28 U.S.C. § 1738C (Supp. III 1997).

41. 1 U.S.C. § 7 (Supp. II 1996).

42. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (finding that the denial of same-sex marriage constitutes gender discrimination and is subject to strict scrutiny on remand to determine the constitutionality of such a denial). *But see* Elaine Herscher, *Same-Sex Marriage Suffers Setback; Alaska, Hawaii Voters Say No*, San Francisco Chron., Nov. 5, 1998, at A2 (reporting the results of a statewide election held on Nov. 3, 1998 where Hawaii voters approved a state constitutional amendment granting the state legislature power to prohibit same-sex marriages). *See also* 1999 Haw. H.B. 775 (introduced Jan. 26, 1999) & 1999 Haw. H.B. 717 (introduced Jan. 26, 1999) (bill's purpose is to bar same-sex marriages).

43. For example, Hawaii, unlike most of the United States, was not settled predominantly by Europeans. *See* 5 The New Encyclopedia Britannica 759 (15th ed. 1991) (describing the original Hawaiians as being of Polynesian origin and noting that today, the largest, single ethnic group there is comprised of people of Japanese ancestry). The influence of its ethnic history may explain the state's legal view of same-sex marriages. *See, e.g.*, Paul Kawai, *Should the Right to Die be Protected? Physician Assisted Suicide and its Potential Effect on Hawaii*, 19 U. Haw. L. Rev. 783, 810 n.242 (1997) (noting that Hawaii was the first state to consider the legality of same-sex marriage). In the area of property rights, Hawaiian courts have noted that traditional Hawaiian views on property are inconsistent with western property concepts of exclusivity. *See id.* at 810 nn.239-40 (describing Hawaii Supreme Court decisions that protected shorelines and water use as public assets, expressly distinguishing western concepts of property rights). Accordingly, the Hawaii Supreme Court has held on various occasions that the State is obligated to protect traditional and customary Hawaiian property rights. *See, e.g.*, Sawada v. Endo, 561 P.2d 1291, 1297 (Haw. 1977) (noting in dicta that a policy favoring the maintenance of the family unit outweighs a policy of protecting creditors of one spouse by making available to the creditor a house owned in tenancy-by-the-entirety).

44. *See, e.g.*, Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797 (N.Y. 1938) (upholding an annual association fee as a covenant running with the land and therefore enforceable against all future landowners).

45. *See* Western Land Co. v. Truskolaski, 495 P.2d 624, 627-28 (Nev. 1972) (holding that a covenant that is still of value to the landowner cannot be overridden by a new zoning law).

46. *See, e.g., id.* at 628.

47. *See* Wellington, *supra* note 10, at 237.

48. Originally, a slave was counted as 3/5 of a person for purposes of representation in Congress. *See* U.S. Const. art. I, § 2. It took an amendment of the Constitution to allow slaves to be counted the same as others. *See* U.S. Const. amend. XIV. The Thirteenth Amendment to the Constitution was required to outlaw slavery of African-Americans. *See* U.S. Const. amend. XIII. The Fifteenth Amendment gave African-Americans the right to vote. *See* U.S. Const. amend. XV. *See generally* John Nowak & Ronald Rotunda, Constitutional Law § 14.7 (5th ed. 1995) (discussing the effects of the Civil War Amendments).

49. *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (restricting the right of women to vote); Bradwell v. State, 83 U.S. (16 Wall.) 130, 139 (1872) (denying married women the right to obtain license to practice law); Johnson & Graham's Lesee v. McIntosh, 21 U.S. (8 Wheat.) 543, 589-90, 603-05 (1823) (restricting the property rights of Native Americans). At common law married women traditionally did not have the legal capacity to enter contracts or transfer property. *See* Nowak & Rotunda, *supra* note 48, § 14.20.

50. *See* Nowak and Rotunda, *supra* note 48, § 1(14.8)(d)(1).

51. During the 1900s individuals who contracted Hansen's disease (commonly called leprosy) were virtually kept as prisoners at a U.S. Public Health hospital facility--The Gillis W. Long Hansen's Disease Center in Carville, Louisiana, located about 20 miles from Baton Rouge. These persons, who had committed no crime, were incarcerated in response to horrific public fear of catching the disease. Public health laws, until the 1960s, mandated that individuals with this disease must stay at the facility as long as they tested positive for the disease. *See* National Public Radio story (broadcast on October 7, 1998), and available at *National Public Radio Archives* (visited Feb. 1, 1999) <http://iris.npr.org/plweb-cgi/fastweb?
getdoc npr npr 57171 0 wAAA hansen%27s%26disease>.

52. *See* U.S. Const. amends. XIII-XV.

53. *See* Shelley v. Kraemer, 334 U.S. 1, 20-22 (1948).

54. Additionally, the same term may have a different meaning in different contexts. *See, e.g.*, Statler Arms, Inc. v. APCOA, Inc., 700 N.E.2d 415, 425 (Ohio Ct. Comm. Pleas 1997) (stating that the wording of the language in a lease may be interpreted differently in residential leases and long term net leases).

55. *See* Giles Rich, *Are Letters Patent Grants of Monopoly?*, 15 W. New Eng. L. Rev. 239, 239-41 (1993). *See generally* 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 2:10 (4th ed. 1998) (suggesting that the use of the word "monopoly" implies bias with regard to viewing trademarks as anticompetitive).

56. For example, such a view of patents can explain Justice Jackson's comment that "the only patent that is valid is one which this Court has not been able to get its hands on." Jungersen v. Ostby & Barton Co., 335 U.S. 560, 572 (1949) (Jackson, J., dissenting). The basis for such a negative view of the patent system may stem from a strong dislike of anticompetitive commercial conduct which is subject to substantial civil penalties and, in some cases, criminal prosecution. *See, e.g.*, 15 U.S.C. §§ 1-7 (1994) (Sherman Antitrust Act); 15 U.S.C. §§ 12-27 (1994) (Clayton Act); 15 U.S.C. §§ 41-45 (1994) (Federal Trade Commission Act). Such strong opposition to patents resulted in poor judicial enforcement. Twenty years ago, two out of three patents reviewed by a court were held invalid despite a statutory presumption of validity that arises upon issuance of a patent by the U.S. Patent & Trademark Office. *See* Carey Ramos & David Berlin, *Three Ways to Protect Computer Software*, 16 Computer Law. 16, 17 (1999). Ultimately, Congress removed federal appellate jurisdiction over patent actions from the various U.S. Courts of Appeal and vested it exclusively in the Court of Appeals for the Federal Circuit in an effort to strengthen judicial enforcement of patents. *See* Federal Courts

Improvement Act of 1982, § 101, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended at 28 U.S.C. § 1295 (1994)). Subsequent to the creation of the U.S. Court of Appeals for the Federal Circuit, it is estimated that at least two out of every three patents are held valid today in litigation. *See* Ramos & Berlin, *supra*, at 17. *See generally*, E. Robert Yoches, *Potent Patents*, Corp. Couns., Mar. 1999, at 57 (discussing the strengthening of patents by the Federal Circuit).

57. *See* George M. Armstrong, Jr., *From the Fetishism of Commodities to the Regulated Market: The Rise and Decline of Property*, 82 Nw. U. L. Rev. 79, 99 (1987) (noting that the nature of a patent is grounded in property); Andrew Beckerman-Rodau, *Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis*, 47 Ark. L. Rev. 603, 641 (1994) (stating that patent rights are specialized property rights); J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. L. Rev. 711, 729 (1996) (stating that a patent right is viewed as a property right by lawyers).

58. The U.S. Patent & Trademark Office refused to issue a patent on a machine which they believed the patentee would withhold from the marketplace once the patent was granted. *See* Special Equip. Co. v. Coe, 324 U.S. 370, 374-75 (1945). A federal district court and federal court of appeals upheld the Office's decision. *See id.* at 373-74. The decisions view the potential patent as a monopoly that would be used to interfere with the competitive marketplace. *See id.* at 374. Subsequently, the Supreme Court reversed; the Court noted that it would be improper to deny the issuance of a patent on the grounds that the patentee planned to withhold the invention from the marketplace. *See id.* at 380. In its decision, the Court viewed a patent as a property interest rather than a monopoly. *See id*. *But see id*. at 382-84 (Douglas, J., dissenting) (rejecting the notion that a patent is property and, therefore, that suppression of a patent should be grounds to forfeit patent rights).

59. *See* Stanley v. CBS, 221 P.2d 73, 85-87 (Cal. 1950) (Traynor, J., dissenting) (using the freedom of contract rationale to support the premise that policy which "precludes protection of an abstract idea by copyright does not prevent its protection by contract").

60. *See id*. at 75 (Justice Carter utilizing property rationale); *see also* Downey v. General Foods Corp., 286 N.E.2d 257, 259 (N.Y. 1972) (stating that neither promises of payment nor asserted agreements will be enforced if the ideas lack the elements of novelty and originality).

61. *See* Masline v. New York, N.H. & H.R. Co., 112 A. 639, 641 (Conn. 1921).

62. *See International News Serv.*, 248 U.S. at 246 (Holmes, J., dissenting) ("Property depends upon exclusion by law from interference . . . ."); *id.* at 250 (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

63. *See Masline*, 112 A. at 641.

64. *See* Sellers v. American Broad. Co., 668 F.2d 1207, 1210 (11th Cir. 1982).

65. *See* Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines 44 (4th ed. 1999).

66. One commentator has suggested that the critical values of our legal system include impartiality, neutrality, certainty, equality, openness, flexibility, and growth. *See* Cappalli, *supra* note 5, at 395.

67. *See* Berg v. Wiley, 264 N.W.2d 145, 149-51 (Minn. 1978) (holding that lessors are prohibited from engaging in self-help to remove lessees wrongly in possession of leased property).

68. *See* David M. Becker, *Debunking the Sanctity of Precedent*, 76 Wash. U. L.Q. 853, 854-55 (1998) (discussing the importance of stability and certainty in law to ensure predictability).

69. *See, e.g.*, H.R. Rep. No. 94-1476, at 66, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680; *see also* Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-*Salinger *Decade Reconsidered*, 72 N.Y.U. L. Rev. 1376, 1377-78 (1997).

70. Administrative law is analogous to civil procedure. Administrative law regulates access to and behavior within the adjudication mechanisms provided by the executive branch of the government at both the state and federal levels.

71. For example, a contract to paint a house requires one party to paint the house and the other party to pay the painter for painting the house. An employee may also enter a contract which includes a covenant not to compete which obligates the employee to refrain from competing with her employer after leaving that employment.

72. Such punishments are limited constitutionally. They may not be "cruel and unusual." *See* U.S. Const. amend. VIII.

73. Such conduct could be the subject of the economic tort of interference with contractual relations. *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 129, at 978-79 (5th ed. 1984).

74. *See* Corbin, *supra* note 9, § 1 (stating that the underlying purpose of law is best achieved by a judicial system that acts with uniformity); *see also id*. § 19 (stating that considerations of equity and morality are relevant to finding promises legally enforceable). *But see* Becker, *supra* note 68, at 973 (arguing that precedent should not control judicial interpretation of words utilized in property conveyances).

75. *See* Koltis v. North Carolina Dep't of Human Resources, 480 S.E.2d 702, 704 (N.C. Ct. App. 1997).

76. *See* Restatement (Second) of Contracts § 90 (1981). *See generally* Corbin, *supra* note 9, § 19.

77. *See generally* James White & Robert Summers, Uniform Commercial Code § 1-3 (4th ed. 1995).

78. *See id*. § 1-3, at 5-7.

79. *See id*. § 1-3, at 7; *see also* U.C.C. § 2-207 (1989). *See generally* U.C.C. § 2-204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.").

80. *See* W. Edward Sell, Sell on Agency §§ 2, 4 (1975).

81. *See* Restatement (Second) of Agency § 329 (1958); *see also* Feinberg v. Great Atl. & Pac. Tea Co., 266 N.E.2d 401, 404 (Ill. App. Ct. 1971).

82. Ostensible authority (also called apparent authority) is the authority a third party reasonably believes an agent possesses and relies on due to the words or actions the principal communicates to the third party. *See* Walker v. Pacific Mobile Homes, Inc., 413 P.2d 3, 5 (Wash. 1966) (finding that a mobile home salesman had apparent authority to act for employer despite lack of actual authority); Zummach v. Polasek, 227 N.W. 33, 35 (Wis. 1929) (holding that an employee who fraudulently collected payments from employer's customers acted with apparent authority); Sell, *supra* note 80, §§ 5, 35.

83. *See* Del. Code Ann. tit. 6, § 17-201(a) (1993) (stating that the filing of a certificate of limited partnership is necessary for limited partnership to come into existence); Del. Code Ann. tit. 8, § 106 (Supp. 1998) (stating that the filing of a certificate of incorporation must be done before a corporation comes into existence).

84. *See, e.g.*, *Dwinell's Cent. Neon*, 587 P.2d at 194-95 (holding a hotel liable as a general partnership to third party with whom it contracted because statutory filing requirements to create limited partnership were not satisfied at time contract was executed, and reasoning that a third party's knowledge or belief that hotel intended to be a limited partnership was irrelevant); Robertson v. Levy, 197 A.2d 443, 447 (D.C. 1964) (holding that a business buyer, who signed a promissory note for business in the name of the corporation, was personally liable on the note because certificate of incorporation was filed shortly after note was signed).

85. *See* Harry Henn & John Alexander, Laws of Corporations § 140 (1983).

86. *See id*. § 141.

87. *See, e.g.*, Cranson v. IBM, 200 A.2d 33, 39 (Md. 1964) (holding third party creditor estopped from asserting failure of corporation to file a proper certificate of incorporation). Additionally, in some cases, it may be inequitable for a non-partner to avoid partnership liability. For example, if a person who is not a partner in a partnership represents herself as a partner, it may be equitable, in some cases, to hold her liable to a third party as if she was a partner. *See* Unif. Partnership Act § 16, 6 U.L.A. 501 (1994); Revised Unif. Partnership Act § 308, 6 U.L.A. 59 (Cum. Supp. 1996).

88. *See* Blue Bell, Inc. v. Farah Mfg. Co., Inc., 508 F.2d 1260, 1265 (5th Cir. 1975) (following the principle that exclusive right to trademark belongs to the party who first uses it on specified goods).

89. *See* Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 627 F.2d 628, 630-31 (2d Cir. 1980) (discussing the district court's decision).

90. *See id*.

91. *See id*. at 631.

92. O'Keeffe v. Snyder, 416 A.2d 862, 868-69 (N.J. 1980) (citations omitted).

93. *See* Becker, *supra* note 68, at 856 (noting that the common law system permits old rules of law to change and new rules to evolve over time).

94. In *Rooney v. Paul D. Osborne Desk Co.*, 645 N.E.2d 50, 53 (Mass. App. Ct. 1995), a corporation promised to issue shares to an employee in return for future services, although this practice was expressly prohibited by state statute. Despite the statute, the court allowed the employee to enforce his right to receive the shares. *See id.* The court examined the underlying policy for the statute and determined that the policy would not be furthered by application of the statute under the facts of this case. *See id.*

95. *See* Keeton et al., *supra* note 73, § 69.

96. *See id*. § 70; *see also* Trinity Lutheran Church, Inc. v. Miller, 451 N.E.2d 1099, 1102 (Ind. Ct. App. 1983) (quoting Gibbs v. Miller, 283 N.E.2d 529, 530 (Ind. Ct. App. 1972)).

97. *See* Restatement (Second) of Agency §§ 2(2), 220(1) (1958).

98. *See id*. § 220(2) (listing factors to be considered).

99. *See* John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 953 (Cal. 1989). Focusing on the risk allocation policy has enabled some courts to expand the application of vicarious liability beyond the employment context. *See, e.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (holding flea market owner vicariously liable for copyright infringement by vendors who leased space in flea market); *see also* Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1325-26 (D. Mass. 1994) (discussing expansion of vicarious liability beyond employment context).

100. The vicarious liability "right to control" test has been adopted in other areas of law in an effort to further the underlying policy of the law being predictable. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 508 U.S. 318, 327 (1992) (determining whether someone is an employee under federal Employment Retirement Income Security Act based on same law used to determine employee status under vicarious liability); Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (determining whether someone is an employee under "work-for-hire" copyright law doctrine is based on same law used to determine employee status under vicarious liability); Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1195 (9th Cir. 1996), *reh'g en banc*, 120 F.3d 1066 (9th Cir. 1997), *cert denied*,

118 S.Ct. 899 (1998) (relying on vicarious liability right to control test to determine classification of workers as employees or independent contractors for tax law purposes). Exceptions to the right to control test have also developed as part of the doctrine of vicarious liability in order to satisfy the underlying policy of equity, which competes with the policy of predictability in the law. These exceptions allow vicarious liability to apply in an employment situation even when the person employed fails to meet the right to control test and is therefore not an employee. *See* Peneschi v. National Steel Corp., 295 S.E.2d 1 (W. Va. 1982) (discussing exceptions generally); *see also* Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968) (discussing non-delegable duty exception); Fried v. United States, 579 F. Supp. 1212, 1216 (N.D. Ill. 1983) (describing inherently dangerous exception); Restatement (Second) of Torts § 427A (1965) (analyzing abnormally dangerous activity exception).

101. *See, e.g.*, Stockwell v. Morris, 22 P.2d 189, 189 (Wyo. 1933) (finding that commission salesman who drove his own car, paid his own expenses, and was not provided any company rules with regard to operating his car did not subject his employer to vicarious liability).

102. In *Herr v. Simplex Paper Box Corp.*, 198 A. 309, 310 (Pa. 1938), an employee of a paper box manufacturer was responsible for signing a receipt for his employer upon delivery of gasoline to the factory by a delivery company. In the course of signing the receipt, the employee lit a cigarette which ignited the gas fumes in the air and caused severe injury to the delivery company driver. *See id.* The court found vicarious liability inapplicable. *See id.* at 313. In *Trinity Lutheran Church*, 451 N.E.2d. at 1101, a church group volunteer delivered cookies to members of the congregation who were confined to hospitals or nursing homes. The church group provided the volunteer with the cookies, a delivery date, and a delivery address. *See id.* The court held that the church was subject to vicarious liability when the volunteer injured a third party in a car accident when he was on his way to deliver cookies for the church group. *See id.* at 1103. In *Burger Chef Systems, Inc. v. Govro*, 407 F.2d 921, 927 (8th Cir. 1969), an assistant manager of a fast food restaurant was involved in a car accident on his way to pick up lunch for himself. His employer was held vicariously liable for the car accident. *See id.* In *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 168 (2d Cir. 1968), a drunken sailor returning from shore opened a drydock valve and severely damaged both the ship to which he was assigned and the drydock. *See id.* The court held the United States vicariously liable for the damage caused by the sailor. *See id.* at 172-73. *See also*, Townsend v. State, 237 Cal. Rptr. 146, 150 (Cal. Ct. App. 1987) (holding student athlete not an employee of state university for purposes of vicarious liability); Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 175 (Dist. Ct. App. 1963) (finding that scholarship athlete could be an employee for purposes of workers' compensation benefits); Rensing v. Indiana State Univ. of Trustees, 444 N.E.2d 1170, 1175 (Ind. 1983) (stating that student athlete on scholarship was not employee of university for workers' compensation benefits); Hanson v. Kynast, 494 N.E.2d 1091, 1096 (Ohio 1986) (holding that student who was member of university lacrosse team was not employee of university for purposes of vicarious liability with regard to opposing player being injured during game).

103. Both the deep-pocket and risk spreading justifications support holding the United States vicariously liable for the intentional tort of a drunken sailor. *See Ira S. Bushey & Sons*, 398 F.2d at 172-73. This holding cannot be supported by the control exerted over the sailor or by the desire to spur accident prevention. *John R.*, 769 P.2d at 949, involved a teacher who had one of his public school students work at his home pursuant to a bona fide school sponsored work experience program. The teacher developed a close relationship with the student but later sexually molested him. *See id.* The court held that the school district was not vicariously liable for the teacher's tortious conduct. *See id.* at 956-57. The court denied vicarious liability despite the fact that the black letter rules of vicarious liability appeared to be satisfied. *See id.* This result is justifiable based on several of the underlying considerations supporting vicarious liability. The school district was not a deep pocket in light of the financial situation in California at the time of the case. *See id.* at 955. Additionally, the school district had a very limited ability to engage in risk spreading because it did not sell its services, because it had very limited capacity to raise capital due to limitations on raising revenue via taxes, and because the high cost of liability insurance made the purchase of insurance difficult. *See id.*

104. *See* Arthur Murray Dance Studios of Cleveland, Inc. v. Witter, 105 N.E.2d 685, 694 (Ohio C. P. Cuyahoga County Ct. 1952).

105. *See id*. at 691; *see also* Durapin, Inc. v. American Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989) (noting that covenants not-to-compete are enforceable only if reasonable and limited to protection of a legitimate employer interest).

106. *See, e.g.*, Larimer v. Dayton Hudson Corp., 137 F.3d 497, 502 (7th Cir. 1998); Echo, Inc. v. Whitson Co., 121 F.3d 1099, 1103 (7th Cir. 1998).

107. *See* Isaak v. Massachusetts Indem. Life Ins. Co, 623 P.2d 11, 14 (Ariz. 1981) (stating that a valid contract is enforceable even if the result is harsh); Hernandez v. Banco de las Americas, 570 P.2d 494, 498 (Ariz. 1977) (noting that modern business practice requires contracts to be enforceable absent fraud or duress); G & S Invs. v. Belman, 700 P.2d 1358, 1368 (Ariz. Ct. App. 1984) (holding that it is not within the power of a court to revise or modify a contract to avoid the harsh result of enforcement); Statler Arms, Inc. v. APCOA, Inc., 700 N.E.2d 415, 421 (Ohio C. P. Cuyahoga County Ct. 1997) (contending that court's function is not to rewrite contracts to make them more equitable).

108. This is important because it may not always be possible to explain marketplace valuation. For example, the current stock market valuation of internet stocks does not reflect underlying basics such as earnings. Many internet stocks are trading at very high prices despite not having turned a profit to date. Traditional valuation measurements do not explain their value. *See* Greg Ip, *Internet Valuations Explode, Sparking Debate*, Wall St. J., Dec. 28, 1998, at C1; *see also* Mark Veverka, *Some Analysts Watching Yahoo! See Little Reason for Excitement*, Wall St. J. Cal. Ed., Mar. 18, 1998, at CA2; Jonathan Weil, *Internet America is Overvalued Even Using Web Math*, *Some Say,* Wall St. J. Tex. Ed., Mar. 3, 1999, at T2.

109. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) (holding that unconscionability is a valid reason for judicial refusal to enforce an otherwise valid contract); *see also* U.C.C. § 2-302 (1987) (codifying unconscionability in context of sale of goods). The existence of this doctrine recognizes that "[t]here is no such thing as unlimited freedom of contract." *Arthur Murray Dance Studios*, 105 N.E.2d at 692. Moreover, if freedom of contract is pushed too far, it can be destroyed. *See id*. This is another example of the bi-polar nature of legal rules. *See generally* Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 267 (Sup. Ct. 1969) (noting conflict between protecting right of parties to deal freely with one another and protecting poorest members of society from exploitation).

110. Typically, courts have not been receptive to unconscionability arguments between contracting merchants. Additionally, most successful unconscionability arguments have involved consumers who are poor or otherwise disadvantaged. *See generally* White

and Summers, *supra* note 77, § 1-3.

111. *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. Chi. L. Rev. 1, 17 (1993); *see also* White and Summers, *supra* note 77, § 4-7.

112. *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (allowing employer injunction delaying employee from accepting new employment with competitor in order to prevent inevitable disclosure of confidential information).

113. Most professionals, for example, are highly trained for their particular fields. Rarely are individuals cross-trained in more than one field. Consequently, a highly skilled accountant, doctor, attorney or mathematician would have difficulty earning a comparable income in another field for which they are not trained.

114. *Cf. PepsiCo*, 54 F.3d at 1272.

115. *See generally* Clark v. Mt. Carmel Health, 706 N.E.2d 336, 341 (Ohio Ct. App. 1997) (holding that covenants-not-to-compete should be strictly construed because they are disfavored by law).

116. *Arthur Murray Dance Studios*, 105 N.E.2d at 692 (citations omitted).

117. *Id.* at 694-95.

118. *Id*. at 699.

119. *Id*. at 700.

120. *See PepsiCo*, 54 F.3d at 1272 (involving employer who was granted injunction, which delayed former employee from starting a new position, to protect employer's confidential marketing information).

121. *Compare Arthur Murray Dance Studios*, 105 N.E.2d at 711-12 (finding employee covenant-not-to-compete for two years in a 25 mile radius unenforceable), *and* Reed, Roberts Assocs., Inc. v. Strauman, 353 N.E.2d 590, 594 (N.Y. 1976) (finding three year covenant-not-to-compete in New York metropolitan area unenforceable), *with* Ditus v. Beahm, 232 P.2d 184, 186 (Colo. 1951) (finding valid a 50 year covenant-not-to-compete in the livestock business which was coupled with sale of business); Anderson v. Truitt, 148 A. 223, 225 (Md. 1930) (enforcing a 25 year covenant-not-to-compete in furniture business coupled with sale of business); Diamond Match Co. v. Roeber, 13 N.E. 419, 423 (N.Y. 1887) (finding 99 year covenant-not-to-compete in the friction match business not an unreasonably long covenant), *and* Valley Mortuary v. Fairbanks, 225 P.2d 739, 741-43 (Utah 1950) (holding valid a 25 year covenant-not-to-compete in mortuary business which was coupled with sale of business).

122. *See* Purchasing Assocs., Inc. v. Weitz, 196 N.E.2d 245, 247 (N.Y. 1963); *see also* Mattis v. Lally, 82 A.2d 155 (Conn. 1951).

123. *See* William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 401-07 (1960) (discussing the origins of the right of publicity which author refers to as appropriation of name or likeness); *see also* Pamela Edwards, *What's the Score?: Does the Right of Publicity Protect Professional Sports Leagues?*, 62 Alb. L. Rev. 579, 581-98 (1998) (containing a discussion of the right to publicity). Some states today continue to recognize the right to publicity as a common law action while others have enacted statutes codifying the action. *See id*. at 589. Currently, 25 states recognize the right of publicity via common law action or statute. *See* McCarthy, *supra* note 55, § 28:16.

124. *See* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (stating that the "right of publicity protects the celebrity's pecuniary interest in the commercial exploitation of his identity"); Hirsch v. S. C. Johnson & Son, Inc., 280 N.W.2d 129, 132 (Wis. 1979) (protecting property interest in publicity value of person's name).

125. *See, e.g.,* Marc Peyser et al., *No Heirs to Air Jordan*, Newsweek, Jan. 25, 1999, at 54-55 (revealing that in 1998 basketball star Michael Jordan earned $35 million playing basketball and $45 million as corporate spokesman); Sam Walker, *Michael Jordan Isn't Retiring from Hot Deals*, Wall St. J., Jan. 15, 1999, at B1 (noting that even after his retirement basketball star Michael Jordan will continue to earn significant money for commercial endorsements).

126. Factors typically considered in determining the likelihood of confusion with regard to a federal unfair competition action under § 43(a) of the Lanham Act are: strength of the mark; relatedness of good involved; similarity of marks; actual confusion; marketing channels used; degree of care exercised by purchasers; intent in selecting mark at issue; and likelihood of future expansion of product lines. *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1400 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993). Factors typically considered in determining the likelihood of confusion with regard to a trademark infringement action are: strength of the mark; degree of similarity between the two marks; proximity of the products; likelihood prior mark owner will bridge the gap; actual confusion; good faith in adopting mark at issue; quality of products at issue; and sophistication of buyers. *See* McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1130 (2d Cir. 1979); Scarves by Vera, Inc. v. Todo Imports Ltd., 544 F.2d 1167, 1173 (2d Cir. 1976).

127. *See Here's Johnny Portable Toilets*, 698 F.2d at 834, 836 (denying unfair competition claim because no likelihood of confusion but allowing right of publicity claim); *see also* McCarthy, *supra* note 55, § 28:14.

128. *See* Sample, Inc. v. Porrath, 341 N.Y.S.2d 683, 687 (App. Div. 1973) (stating that goal of trademark and unfair competition law is promoting and maintaining commercial fairness in marketplace).

129. *See* Goldstein, *supra* note 65, at 58; *see also* Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd., 627 F.2d 628, 631 (2d Cir. 1980) (noting that goal of federal trademark law--Lanham Act--is preventing public confusion about source of goods); McCarthy, *supra* note 55, § 2:14 at 2-30 to 2-31.

130. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995) (suggesting that trademark law facilitates producer to reap reputation-related financial gain associated with product); *see also Scarves by Vera*, 544 F.2d at 1172 (noting that trademark law

protects good reputation associated with trademark).

131. *See* Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 369 (2d Cir. 1959) (denying an injunction to an owner of mark used for doughnuts against a third party's use of same mark on doughnuts because likelihood of consumer confusion was absent).

132. *See* Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942); McCarthy, *supra* note 55, § 2:14; *see also In re* Application of Sun Oil, Co., 426 F.2d 401 (C.C.P.A. 1970).

133. *See, e.g.*, King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 581 (2d Cir. 1963).

134. *See* Tennessee *ex. rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 96-97 (Tenn. Ct. App. 1987); *see also* Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 132-34 (Wis. 1979); J. Joseph Bodine, Jr., *A Picture is Worth $775.00: The Right of Publicity, An Analysis and Proposed Test*, 17 Cap. U. L. Rev. 411, 411 (1988); Edwards, *supra* note 123, at 583-84.

135. *See Here's Johnny Portable Toilets*, 698 F.2d at 835.

136. Viewing something as property allows it to survive the death of its owner. Hence, most courts view the property interest protected by the right to publicity as descendible. *See* McCarthy, *supra* note 55, § 28:45. Reliance on a property theory even undermines First Amendment arguments when a celebrity is filmed for broadcast as news. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).

137. *See generally* Floyd A. Gibson & Rachel Healey, *The Right of Publicity Comes of Age*, 23 A.I.P.L.A. Q. J. 361, 363 (1995) (contending that the right of publicity is state created intellectual property); Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 Minn. L. Rev. 485 (1994) (criticizing right of publicity); William M. Heberer III, Comment, *The Overprotection of Celebrity: A Comment on* White v. Samsung Electronics America, Inc., 22 Hofstra L. Rev. 729 (1994) (criticizing right of publicity).

138. *See* Beckerman-Rodau, *supra* note 57, at 612-13; Andrew G. Rodau, *Protection of Intellectual Property: Patent, Copyright, and Trade Secret Law in the United States and Abroad*, 10 N.C. J. Int'l L. & Com. Reg. 537, 537 & n.2 (1985); *see also* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (arguing that the primary object of copyright law is to promote progress of science and useful arts, not to reward authors); Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980) (suggesting that patent law promotes progress of science and useful arts by giving inventors patents as an incentive to engage in research).

139. *See* 17 U.S.C.A. § 302(a) (West 1999) (stating that typical copyrights last for the life of the author plus 70 years); 35 U.S.C.A. § 154(a)(2) (West Supp. 1998) (noting that utility patent rights typically last for a maximum of 20 years); 35 U.S.C.A. § 173 (West Supp. 1998) (stating that design patent rights typically last for a maximum of 14 years).

140. *See supra* note 139.

141. *See supra* note 132 and accompanying text.

142. *See supra* note 126 and accompanying text.

143. *See* 35 U.S.C.A. § 154(a)(2) (West Supp. 1998).

144. *See Government, Industry Research Up*, Signal, Mar. 1999, at 8 (estimating that $236 billion will be spent on U.S. research and development in 1999); Bernard Wysocki, Jr., *The Outlook: As Innovation Revives, Some See Complacency*, Wall St. J., Mar. 23, 1998, at A1 (noting that U.S. research and development spending exceeded $200 billion in 1997).

145. *See* Clay, *supra* note 137, at 505-06.

146. Of course, it can be argued that unfair competition and trademark laws are moving in the direction of the underlying property theory relied on by the right of publicity. This is supported by the recent federalization of the dilution cause of action for trademarks, which to a large extent protects a trademark per se. *See* 15 U.S.C. § 1125(c) (Supp. 1999) (presenting dilution cause of action).