Legacies of Legal Realism: The Sociology of Criminal Law and Criminal Justice

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Abstract

In this article, I trace the history of the sociology of law from its roots at Yale Law School to the present. The legal realists, situated at Yale Law in the 1930s, saw the law as an instrument of policy. Building on this foundation, the Yale Law faculty pioneered the sociology of law in the 1950s, and the Russell Sage Foundation supported the then-emerging field's development in the 1960s. Philip Selznick was a major theorist and institution builder in the field, and my own writing has stressed how the sociology of law has challenged American ideology regarding economic, gender, and social equality. Nowhere is this more evident today than in the current racial distribution of the prison population. The legal realist vision first developed at Yale Law—of constitutional law as an instrument of social policy—was also confirmed by the most recent 2012 US Supreme Court decisions on immigration and health care.

LEGAL REALISM

"American constitutional scholars of my generation," writes Robert Post (1995, p. 1), "inhabit the aftermath of legal realism. No longer for us can the law glow with an innocence and pristine autonomy; no longer can it be seen to subsist in elegant and evolving patterns of doctrinal rules. Instead, we naturally and inevitably read legal standards as pragmatic instruments of policy. We seek to use the law as a tool to accomplish social ends, and the essence of our scholarly debate revolves around the question of what those ends ought to be."

The Yale Law School "legal realists" of the 1930s were the first to examine the law through social scientific lenses, setting the ground for what was later to be called the sociology of law. They were the forerunners, distrustful of the tenets of the "conceptualists," so-called black-letter lawyers, who dominated the Harvard Law School faculty. In what follows, I want to highlight and trace the developmental history of the sociology of law, beginning with the legal realists.

Yale Law School appointed a psychologist, Edward S. Robinson, as the first full-time, tenured social scientist on a major law faculty. Although lacking a law degree, Robinson was a well-regarded member of the law faculty—as Thurman Arnold's (1937) *Yale Law Journal* article memorializing Robinson's life and work attests.

Robinson and other legal realists, such as William O. Douglas, Thurman Arnold, and Jerome Frank, challenged the contention that judges simply applied the law but did not make it. Judicial decisions, in the view of the realists, were not based solely on precedent but reflected the philosophy and politics of the judge, especially appellate judges deciding constitutional law cases. That was a new and influential idea, but in retrospect, it should not have been that surprising. Today, of course, anyone reading US Supreme Court decisions appreciates that judicial opinions reflect the social, political, and philosophical visions of the justices.

One issue for the realists was the impact of law on ordinary people—and how we would recognize its impact on us—an issue that has never grown outdated. An article raising that issue (and which may have been the first empirical study in the sociology of law) was authored by William O. Douglas (1932) in the *Yale Law Journal*. Douglas, using empirical data, sought to understand the causes of bankruptcy following the 1929 stock market crash; he offered the scarcely radical conclusion that businesses benefitting from the provisions of bankruptcy law need to be minimally capable and efficient, if the purposes of the bankruptcy law are to be accomplished.

It is perhaps worth remarking that Douglas's expertise as a law professor was in commercial, not constitutional, law—his later detractors might say that he should have stuck with what he knew best. But, if being a legal realist meant anything, an attempt to document the causes and consequences of bankruptcy following the stock market crash of 1929—using empirical data and analysis—would qualify as a rare but glowing example.

Douglas was not schooled in empirical social science. He needed a collaborator and found one in the future first female president of the American Sociological Association, Dorothy Swaine Thomas. Dr. Thomas was clearly qualified to have been the first sociologist appointed to the Yale Law faculty, but she suffered from two limitations: She did not possess a law degree—yet neither did Edward Robinson, nor did I—and she was a woman. Although the former was not necessarily a disqualification, the latter, at the time, likely was.[1] But she certainly helped Douglas with gathering and interpreting data on bankruptcy, from which he made his sensible and scarcely counterintuitive conclusion:

> The proposed change in the Bankruptcy Act would offer but slight interference with

[1] It took two decades for Ellen Ash Peters, the first female member of the Yale Law faculty, to be appointed in 1956.

> that experimentation. It would, however, discriminate between controlled and uncontrolled experimentation. The conditions imposed would be slight and for the most part easily met. The insistence on a minimum of efficient management would tend to bring to industry more knowledge, foresight and intelligent planning. In addition it would serve as a preventive of many fraudulent practices difficult to detect if no records are kept. It seems clear that the difference between such controlled and uncontrolled enterprise is one measure of the difference between legitimate and illegitimate experiments. (Douglas 1932, p. 340)

Nevertheless, an empirical study of the causes and consequences of bankruptcy in the early years of the Great Depression seems to have been timely and appropriate.

Douglas makes no mention of Thomas as an advisor on the article, which is understandable because the article is an early sociological study. It might have been published in a sociological journal, if sociologists at the time had showed an interest in bankruptcy law. It surely qualifies as an early—or as the earliest—contribution to the then-undeveloped field of law and society and as a singular illustration of legal realism.

FROM LEGAL REALISM TO THE SOCIOLOGY OF LAW

What happened to the legal realists', and particularly Robinson's, legacy in social science at Yale Law School—especially because no other law school maintained such a legacy? Between 1941 and 1945, students, potential students, and faculty were drawn into the war effort. Ivy League schools trained officers and area specialists, especially in Far Eastern languages such as Japanese, Chinese and Burmese. Following World War II, the G.I. Bill paid veterans to attend college and advanced degree schools, and Ivy League schools such as Yale became open to students admitted on the basis of academic potential rather than family tradition, although children of alumni were nevertheless given prefernence.

Following the war, Harold Lasswell was the next social scientist appointed to the Yale Law faculty. Lasswell was then an extraordinarily influential social scientist, with a career dating back to the 1920s. He held a joint appointment in Law and Political Science. In addition to being a political scientist, Lasswell was a psychoanalyst who had been trained in Europe by Sándor Ferenczi, part of Freud's inner circle. Lasswell was one of the founders of the William Alanson White Institute of Psychiatry, Psychoanalysis & Psychology, where psychoanalysis could be practiced by lay (nonmedical) analysts. Lasswell's (1986 [1930]) most influential work might have been his book *Psychopathology and Politics*.

In 1956, under the deanship of Eugene Victor Rostow, Yale Law School hired ten young faculty—among whom were Alexander Bickel, Harry Wellington, Abraham and Joseph Goldstein, Boris Bittker, and several others, who were to become leaders in their respective fields. The school was also awarded a major five-year grant from the National Institute of Mental Health (NIMH) to develop a program in law and the behavioral sciences. The NIMH grant was proposed and negotiated by Lasswell, and it provided for the appointment to the Yale Law faculty of a psychoanalyst and a social scientist. Jay Katz was appointed to the psychoanalyst position, and I, a 25-year-old newly minted PhD, was appointed as the first sociologist, based on Lasswell's recommendation. (I had taken a seminar in political theory with Lasswell and Ithiel de Sola Pool.) Obviously, the law faculty did not want to commit to a leading social scientist to whom they might have to offer tenure.[2]

[2] During college and graduate school, I had been deferred, as a student, from military service. When I was offered the Yale Law School job, I had a difficult choice—accept the attractive position and risk being drafted or wait around with a student deferment until my degree was formally conferred, in which case I would be 26 years old and no longer draft eligible. My doctorate was accepted in the fall of 1956 but would not be formally awarded until the spring graduation of 1957. I chose the job and was drafted in March 1957, a time when the nation

Yet, aside from Richard D. (Red) Schwartz, who had written an important article in the *Yale Law Journal* and who later joined the Yale Law faculty, no sociologist could have qualified as a "sociologist of law." The field of law and society or of sociology of law did not yet exist.

Douglas's study of bankruptcy was the first quantitative study in the sociology of law, and Schwartz's research was the first social-anthropological one. Its publication—that is, a social anthropological study published in the *Yale Law Journal*—was groundbreaking. Based on a research study he had conducted in Israel, Schwartz wanted to understand how legal controls developed. He contrasted the effectiveness of the tighter informal control system of one type of collective, known as a *kvutza*, with the less restrictive controls found in the collectives known by the term *moshav*. Law, he concluded, develops in relation to the absence of effective informal social controls.

The *kvutza* was characterized by a number of conditions that, Schwartz's theory suggests, engender a more effective, informal control system. The presence of these factors, as well as the effective controls that they produced, was interpreted as a partial explanation for the *kvutza* having developed a legal control system. By contrast, the *moshav* did not possess these characteristics to the same degree as did the *kvutza* and, accordingly, failed to develop an effective informal control system. Schwartz's pioneering study did not lead quickly to the development of the sociology of law, but it established him as a founder of the field.

The Russell Sage Foundation

The development of the sociology of law as a field required institutional support, and it was given by the Russell Sage Foundation in the early 1960s. The Sage Foundation supported three centers—at the University of Wisconsin, Northwestern University, and the University of California, Berkeley. Wisconsin developed its program with Stewart Macaulay and Lawrence Friedman. Red Schwartz had moved from Yale to Northwestern and, with John Coons, developed a sociology of law program there.

I moved from Yale Law School to the UC Berkeley department of sociology in 1962, on the recommendation of Seymour Martin Lipset. Lipset had been at Yale in 1959–1960. He was, at the age of 38, the Ford Foundation Professor of Political Science and the author of his groundbreaking *Political Man* (Lipset 1960). He befriended me, and we organized a group of Yale sociologists who were not on the sociology faculty.[3] He encouraged the Berkeley sociology department to invite me to visit.[4]

Philip Selznick invited me to coteach a seminar in the sociology of law with him, the first seminar in the sociology of law at UC Berkeley. I had been teaching such a seminar at Yale Law School with Red Schwartz, for which we had to develop teaching materials. Red and I used those materials to produce a casebook in

was not at war. In those days, military service was a fact of life. I resumed teaching as an assistant professor in the fall of 1957. For my reserve duty, I joined a Yale-affiliated reserve unit, a strategic intelligence detachment (major universities had started to cooperate with the military in World War II and continued to do so in the years that followed). I eventually became an officer and, after five years, the unit's commanding officer. My service was completed just before the Vietnam War, when I left Yale to teach at UC Berkeley.

[3] Lipset was bewildered by the fact that the sociology department chair, August B. Hollingshead, had not invited him, one of the nation's leading sociologists, to give a talk sponsored by the sociology department. I attributed that failure to Hollingshead's view that there were too many "ethnics" in the field of sociology—a remark he made in a seminar that I attended as a graduate student. At the time, there was not a single Jewish faculty member on the Yale sociology faculty.

[4] Yale Law School was possibly the best law school in the country (it ranks first today), but Yale's sociology department lacked distinction. By contrast, Berkeley's sociology department was extraordinary, with such luminaries, in addition to Philip Selznick, as Lipset, Kingsley Davis, Reinhard Bendix, Leo Lowenthal, Martin Trow, Erving Goffman, Neil Smelser, William Kornblum, Robert Blauner, and David Matza, all of them, in one area or another, thinkers and innovators of distinction. Marty Lipset took me on a tour of the Berkeley campus and told me I would love it—"It combines the best of C.C.N.Y. and Harvard," he told me. He was right. But following the campus turmoil of the 1960s, Lipset and several other disaffected leading faculty left for Harvard, Yale, and the University of Chicago. Berkeley recovered, however, and its academic departments continued to rank at or near the top.

the sociology of law entitled *Society and the Legal Order* (Schwartz & Skolnick 1970).

THE SOCIOLOGY OF LAW IN AMERICA

While I was at UC Berkeley, I was invited to write the first article on the sociology of law in America (which I had originally written for the first international conference on the sociology of law). But the article did not appear in the *Law and Society Review*, as the *Review* did not yet exist (Skolnick 1965). My article was published in a "Law and Society" supplement to the summer issue of *Social Problems* rather than in the *Law and Society Review*, the first volume of which was officially published in November 1966.[5]

In what follows, I focus on the themes I developed in that early article: first, legal theory; second, fundamental contradictions between American society's beliefs about law and its reality; and third, what I see as the major challenge to law and society today—its system of criminal justice and imprisonment.

Legal Theory

When I discussed legal theory in 1965, I acknowledged the writings of such eminences as Alexis de Tocqueville (1945), James Bryce (1888, especially Vol. 1, ch. 22–24, 42; Vol. 2, ch. 105), Willard Hurst (1950), John R. Commons (1950), Roscoe Pound, and Samuel Warren and Louis D. Brandeis (Warren & Brandeis 1890). In the nearly half century between 1965 and the present, numerous books and hundreds of articles have been written by outstanding scholars and thinkers. I have neither the will nor the capacity to summarize these here. Instead, I shall concentrate on the writings and institutional influence of Philip Selznick. No theorist in the sociology of law, and no institution builder, has been more influential than Selznick, my mentor and friend of nearly five decades, who died in 2010 at the age of 90.

A renowned empirical researcher as well as a formidable theorist after the publication of his doctoral dissertation, *TVA and the Grass Roots* (Selznick 1949), Selznick's influence in sociology was considerable, not only from his research and theoretical writings but because, with Leonard Broom, he coauthored for a number of years the leading introductory text in sociology (Broom & Selznick 1963).

Selznick's most significant contributions in law and society were as an author and as an institutional founder and developer. His legacy includes being the originator of the UC Berkeley Center for the Study of Law and Society, with support from the Russell Sage Foundation, in 1961. And, with the UC Berkeley Law School dean Sanford Kadish, in 1976 he developed UC Berkeley's graduate program in jurisprudence and social policy, which has generated countless doctoral dissertations, books, and articles.

In his later years, Selznick's thinking came to be as much in law and philosophy as in conventional social science, although he certainly valued empirical studies in social science and law when done by others. Selznick was an advocate of "responsive law," by which he meant a legal order that reduced arbitrariness wherever possible "to demand a system of law that is capable of reaching beyond formal regularity and procedural fairness to substantive justice. That achievement, in turn, requires institutions that are competent as well as legitimate" (Selznick 1992, p. 336).

Selznick's (1992) magisterial *The Moral Commonwealth* combines his sociologically grounded insights into how institutions actually operate with his understanding of how difficult it is for principles of moral philosophy to penetrate them and to satisfy human needs. "Institutions embody values," he wrote, "but they can do so only as operative systems or going concerns. The trouble is that what is good for the operating system does not necessarily serve the standards or ideals the institution is supposed

[5]The special "Law and Society" issue of the journal *Social Problems* was edited by Stanton Wheeler, then of the Russell Sage Foundation and later a professor of law and sociology at Yale University. The idea for the volume came from Sheldon Messinger, then vice chairman of UC Berkeley's Center for the Study of Law and Society founded by Selznick.

to uphold. Therefore, institutional values are always at risk" (p. 336).

Selznick developed this insight into the political values of the larger community and argued that effective access to the legal system and responsiveness to new claims of right, outreach, and empowerment are the hallmarks of a legitimate and just legal system. He wrote, "Labor and civil rights legislation; legal services for the poor; environmental and consumer protection: all have greatly expanded the reach of justice" (Selznick 1992, p. 465), as indeed they have and should have. Selznick's analysis was inevitably balanced—and wise. The teenage revolutionary, schooled in the political arguments of the lunchroom of the City College of New York in the 1930s (who had adopted the revolutionary name "Sherman") aged into a paragon of community and civility—who made demands for rights and justice.

Law and America's Social Contradictions

I argued in my 1965 article that to understand the development of the sociology of law in America, it should be viewed in light of three fundamental contradictions in American beliefs and reality (Skolnick 1965). First, American society proffers an egalitarian value system yet displays considerable social stratification. The Occupy Wall Street protests that swept US cities in 2011 were scarcely revolutionary demonstrations. They were intended to bring attention to the income disparity that has arisen in the United States since my 1965 article was written. In 1968, the earnings ratio of the top to bottom was 7.69 to 1, whereas in 2010 it was 14.5 to 1, according to the Congressional Budget Office (Harris & Sammartino 2011, p. 4).

Second, even though income disparity was smaller in the 1960s, American society and law, I noted, still maintained something like a caste distinction between African Americans and whites. I could not envision that four decades later the United States would elect an African American president, a measure of the success of the Civil Rights movement of the 1960s and beyond.

I wrote "The Sociology of Law in America: Overview and Trends" in 1964, just as the Civil Rights movement was beginning to emerge and grow and become more militant. During the next few years, the nation experienced major turbulence as students protested against college and university restrictions, as students and others protested against the Vietnam War, and as the Civil Rights movement became increasingly militant.

In 1968, I was asked to head a so-called task force of the National Commission on the Causes and Prevention of Violence. Our assignment was to examine the causes and consequences of the protests—and the race riots—that were breaking out across America. Of course, it is not hard to understand the causes: a history of slavery plus Jim Crow segregation laws. This was coupled with a legal system in the South, from police to courts, that discriminated against African Americans.

Our report was republished in 2010 by New York University Press (Skolnick 2010). In a new introduction, I noted that the protests of the 1960s left several conflicting legacies in law, society, and institutions. One was the change in the control and concerns that colleges and universities had over the personal and, especially, the sexual behavior of students. The student movement of the 1960s largely achieved its goal of greater autonomy.

This marked not only a generational change in the regulation of student private lives by universities but also a more profound normative shift by which the baby boom generation of the white middle class "transformed itself quite deliberately, and from the inside out, changing its costumes, its sexual mores, its family arrangements and its religious patterns" (Fitzgerald 1986, p. 390). One can scarcely think of a more pronounced example of this shift than the remarkable life of Stanley Ann Dunham, the daughter of a World War II veteran, who gave birth to an interracial baby and future president, attained a PhD in anthropology, and raised her son in Indonesia (Scott 2011).

Third, another part of the shift was to offer educational and employment opportunities for those formerly excluded, especially women, through the feminist movement (Haslanger et al. 2011), and to a lesser degree, persons of color. But, as I noted then and above, American society proffers an egalitarian value system yet displays considerable social stratification. And despite the advances listed here, income disparity has increased in the United States since the original article was written.

Criminal Justice

To me, the hallmark of a just legal order is its criminal justice system, yet no mention of criminal justice appears in *The Moral Commonwealth*. Consequently, Selznick does not discuss which police practices are acceptable in a moral community, which criminal sanctions are appropriate, whether it is possible to have a moral community that sanctions capital punishment, or whether America's archipelago of confinement would be acceptable in a moral community. These are large philosophical issues, worthy of an article or a book, and I wish Selznick had addressed them.

I shall conclude with a much more modest, and necessarily brief, discussion of a significant sociolegal issue that has arisen since my 1965 article and should command our attention today—the growth of the apparatus of crime control over the past half century.

The rise of imprisonment. Even as the Civil Rights movement brought new laws and opportunities toward social and political equality—so that eventually a black man could be elected president—there was a persistent downside, especially for black males. This was the emergence of what Jonathan Simon (2007) has called *Governing Through Crime* and David Garland (2001) has called *The Culture of Control*—a vast expansion of law enforcers and prisons that house mostly black and brown males.

The American Gulag Archipelago. Simon's (2007) polemical—and scholarly—book *Governing Through Crime* argues that the dramatic increase in imprisonment since the 1980s represents more than a response to threats to personal safety. We now "govern through crime" in ways that have reconstituted America's democracy and fundamental values. The crime victim, Simon argues, has become a major issue in political campaigns, and "the technologies, discourses, and metaphors of crime and criminal justice" have enabled the government to intrude into American lives in unprecedented ways.

Governments generally seek to protect their subjects from random threats of violence and other forms of crime. But the phrase "governing through crime" suggests that the crime rubric has allowed government to reconstitute social problems into the criminal justice system. Domestic violence is surely a criminal justice issue, Simon argues, but it is also related to poverty and unemployment and the lack of social services, such as childcare.

Federal and state sentencing guidelines, he maintains, have become more punitive by shifting power in the courts away from judges and toward prosecutors. This, coupled with the increase of three-strikes laws and the decrease in the use of parole, has turned US prisons into "human toxic waste dumps" that have rejected the goal of rehabilitation (Simon 2007, p. 143).

Garland's (2001) *The Culture of Control* discusses the forces—social, economic, and political—that gave rise to the radical changes in crime control in the United States (and the United Kingdom) that Simon challenges. From the 1890s to the 1970s, what Garland calls "penal welfarism" was the dominant ideology of imprisonment. During this period, the rehabilitation of the criminal was the ideal for those who ran prisons. But the goal of rehabilitation declined as public sentiment—and politics—focused on the crime victim and demanded heavier punishment.

Politicians responded with tough-on-crime laws, most famously California's three-strikes law, which imposes a life sentence for those convicted of three felonies. The law was held to be constitutional by a 5-to-4 majority of the

US Supreme Court on March 5, 2003 (*Ewing v. California* 2003).

Garland's (2001) rich history of crime control concludes that the culture of imprisonment has shifted from penal welfarism and the rehabilitative ideal to a culture of control dominated by economic, cost-benefit calculations. These, ironically, are often both expensive and ineffective in reducing crime.

Mass imprisonment. A perceptive journalist, Adam Gopnik (2012), writes in a recent essay, "The scale and the brutality of our prisons are the moral scandal of American life." Fifty thousand or more men awaken every day in solitary confinement, often in supermax prisons. For those not confined alone, part of their punishment is endemic prison rape and other assaults.

Furthermore, crime and imprisonment correlate with race and poverty. "The criminal justice system has become so pervasive," Bruce Western (2006, p. 31) writes, "that we should count prisons and jails among the key institutions that shape the life course of recent birth cohorts of African American men." Those who have experienced imprisonment find themselves in a cycle of self-fulfilling impediments to socioeconomic advancement. Like Western, most leading criminologists are skeptical of the need for the expansive imprisonment the nation has experienced.

Michael Jacobson is the rare criminologist who holds a PhD in sociology and has also run a prison—Rikers Island in New York City, a pretrial detention facility that processes more than 110,000 men a year. The title of Jacobson's (2005) book, *Downsizing Prisons*, is his message, and it is a message upon which virtually all sociologists and criminologists who study crime agree. Prisons are expensive, and their costs compete with other state services, such as education and medical care. And they are not effective crime reducers.

So why is it difficult to downsize, considering, as Jacobson points out, most states have an economic interest in reducing prison expenditures? Two reasons dominate, he says. Most politicians, and especially conservative politicians, do not wish to appear soft on crime. And prisons provide an economic boost to the mostly rural communities where they tend to be located. But the most compelling justification given for imprisonment is its effectiveness in reducing crime. But does it?

The February 2011 issue of the journal *Criminology and Public Policy* brought together leading criminologists to address that question, and the answer they give is that we do not really know whether, or by how much, imprisonment reduces crime. A careful review of the literature by Daniel S. Nagin and his colleagues concludes, counter to the intuition of the general public, that imprisonment is *more* likely to induce criminality than to prevent it. Prisons are criminogenic (Durlauf & Nagin 2011). They are also likely to be hazardous to the health of inmates, and even to that of the families of those who have been incarcerated, as Christopher Wildeman and Christopher Muller suggest in the lead article in this volume. Moreover, imprisonment, so strongly concentrated among poor African American communities, might even affect racial disparity in health within those communities. Wildeman & Muller suggest that future research should study how epidemics generated in prison, such as the one that beset New York in the late 1980s, have impacted the health of populations within African American communities, especially with respect to their vulnerability to infectious disease.

How should we punish those who commit serious crimes? There is scarcely an alternative to imprisonment that would not be considered cruel and unusual. This is the criminal justice policy dilemma of our time—how to punish without generating other public health and safety side effects. It will not be easily resolved.

CONCLUSION

Post's (1995) observation that, since the era of the legal realists, we "naturally and inevitably read legal standards as pragmatic instruments of policy" was underscored by the two most recent and politically salient decisions of the present

term of the US Supreme Court, the first on immigration, the second on health care.

The Court, in *Arizona v. U.S.* (2012), unanimously upheld the Arizona immigration law's most controversial and important provision, its so-called "show me your papers" feature, requiring state law enforcement officers to ask motorists whom they stop or arrest and have reason to believe might be in the United States illegally, to provide documentation that they are lawfully in the country. The Court split on other provisions, most prominently the one subjecting illegal immigrants to criminal penalties for trying to find work. The ruling is expected to set the grounds for a debate in other states for supporters and opponents of the Arizona law. Justice Scalia summarized his dissent from the bench and criticized the President for a policy not before the Court: the President's policy to not deport illegal immigrants who entered the United States as children.

The Court's final, most controversial, and to many, most surprising, landmark decision upheld the key part of President Obama's health care law, mandating that individual Americans buy health insurance or pay a penalty (*Natl. Fed. Indep. Bus. v. Sebelius* 2012). In a 5-to-4 decision, Chief Justice John Roberts sided with the Court liberals, writing that "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax." As the imposition of such a tax is permitted, he reasoned, "it is not our role to forbid it, or to pass upon its wisdom or fairness." The Court's decisions on immigration and health care, handed down on the last days of the term, unquestionably support Post's contention that the Court uses constitutional law to accomplish social policy ends—here regarding two of the most controversial public policy issues of the present: immigration and health care.

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