Remarks of
William J. Brennan, Jr.
Harvard Law Review Banquet
April 11, 1959
Boston, Massachusetts

MR. JUSTICE JACKSON SAID OF THE SUPREME COURT, "WE ARE NOT FINAL BECAUSE WE ARE INFALLIBLE, BUT WE ARE INFALLIBLE ONLY BECAUSE WE ARE FINAL." HERE IN CAMBRIDGE, I GATHER, THIS CLAIM TO THE LAST WORD IS CONSIDERED MERE PRETENSION. IT DOESN'T RECKON WITH THE COURT OF LAW REVIEW EDITORS – THAT COURT WHICH REGULARLY ON TUESDAYS REVERSES MONDAYS SUPREME COURT DECISIONS. AND WHICH SPENDS, I AM TOLD, THREE MONTHS EACH SUMMER AND FALL ENERGETICALLY FINDING FAULT WITH LAST TERM'S DECISIONS AND COMPOSING COMPLEX CHARTS TO PROVE THAT ALL OF THE JUSTICES WERE WRONG. I HAVE NOT SAVORED THIS HEADY WINE FOR MY BIOGRAPHY DOESN'T LIST THIS COURT AMONG THOSE ON WHICH I HAVE SERVED. THE HIGH DISTINCTION OF LAW REVIEW EDITOR ELUDED ME IN LAW SCHOOL. HOWEVER, IN MY DAY AT THE SCHOOL, WE OF

LEGAL AID SHARED WITH LAW REVIEW THE SORT OF RABBIT HUTCH EXISTENCE IN GANNETT HOUSE. NOTHING COULD PERSUADE LEGAL AID THAT THE MARGIN BETWEEN US – TO US INDEED A VERY THIN ONE – WAS DUE AT ALL TO SUPERIOR INTELLECT BUT ONLY TO SUPERIOR LEGIBILITY IN WRITING THOSE BLUE BOOKS. I HAVE TO CONFESS THOUGH THAT I DIDN'T MASTER TOO WELL AT THAT THE VOCATIONAL SKILLS LEGAL AID WORK TAUGHT ME. A FEW MONTHS AFTER GRADUATION, A NEW JERSEY COURT ASSIGNED ME TO DEFEND A YOUNG MAN ACCUSED OF AUTOMOBILE MANSLAUGHTER. I DIDN'T TALK BEFOREHAND, AS I SHOULD HAVE, TO A RETIRED POLICEMAN WHO TESTIFIED AS A CHARACTER WITNESS. NOW OF COURSE THE BOOKS SAY THAT THE PROPER QUESTION TO A CHARACTER WITNESS IS: "DO YOU KNOW THE ACCUSED" REPUTATION IN HIS NEIGHBORHOOD FOR TRUTH AND VERACITY?" BUT PUT TO THE RETIRED POLICEMAN, THE PROMPT RESPONSE WAS, "HE'S A GOOD AUTOMOBILE DRIVER." THAT SHOULD HAVE PROMPTED ME TO REPHRASE THE QUESTION, BUT I DIDN'T AND PUT IT TWICE MORE TO THE WITNESS IN THE SAME WORDS. BACK CAME THE SAME ANSWER EACH TIME –

MORE LOUDLY AND WITH INCREASING IRRITATION. THEN THE JUDGE TOOK THE MATTER OUT OF MY HANDS. "MR. WITNESS, HE ASKED: IS THIS BOY IN THE HABIT OF TELLING THE TRUTH." OH YES, YOUR HONOR, I HAVE NEVER KNOWN HIM TO TELL A LIE", WAS THE REPLY. "WELL, YOU SEE," SAID THE JUDGE, "THAT'S WHAT MR. BRENNAN WAS ASKING. BUT HE'S A HARVARD GRADUATE AND DOESN'T SPEAK ENGLISH."

I SPENT THE MORNING VISITING AROUND THE LAW SCHOOL AND LOOKING IN ON SOME CLASSES. ONE MUST BE ENORMOUSLY IMPRESSED BY THE NEW BUILDINGS WHICH HAVE BEEN ADDED OVER THIRTY YEARS. I WAS IMPRESSED BUT THE NEW MAGNIFICANCE CAN'T MAKE YOU PROUDER OF THE LAW SCHOOL THAN ARE WE OLDER GRADUATES, OR MORE GRATEFUL FOR WHAT WE TOO RECEIVED HERE. MY BROTHER FRANKFURTER NEVER TIRES OF SAYING – WHAT LEARNED HAND'S ELOQUENT SENTIMENT LAST YEAR NOW INDELIBLY RECORDS – THAT THIS SCHOOL HAS NEVER LOST SIGHT OF THE ONLY TRUE AIM OF LAW TEACHING – TO DISCIPLINE RATHER THAN TO FURNISH THE MIND; TO TRAIN IT IN THE USE OF ITS OWN POWERS RATHER THAN TO FILL

IT WITH THE ACCUMULATIONS OF OTHERS. IT'S ONLY FAIR, THOUGH, TO TELL YOU THAT FELIX HAS MOMENTS WHEN HE WISHES HE HAD BEEN LESS SUCCESSFUL IN HIS ATTEMPTS TO INSTILL HABITS OF INDEPENDENT THOUGHT IN HIS STUDENTS. I WAS A STUDENT OF PROFESSOR FRANKFURTER AND WHEN WE DISAGREE ON THE COURT, THAT THAT HAPPENS NOT INFREQUENTLY, HE OBSERVES THAT HE HAS NO MEMORY OF ANY SIGNS IN ME OF BEING HIS PRIZE PUPIL.

I WAS UNCERTAIN WHAT, WITH PROPRIETY, I MIGHT TALK ABOUT TONIGHT. MR. JUSTICE SANFORD – A MEMBER, WAS HE NOT, OF THE FIRST LAW REVIEW BOARD? – SAID THAT BEFORE COMING TO THE COURT SPEECHMAKING WAS NO PROBLEM FOR HIM. HE'D SELECT A MAXIM – "ALL IS NOT GOLD THAT GLITTERS" – "A ROLLING STONE GATHERS NO MOSS" – "A PENNY SAVED IS A PENNY EARNED", OR THE LIKE. AND TALK AT LENGTH UPON IT. HE SAID THAT HE DISCOVERED, HOWEVER, THAT ON THE COURT IT WAS NOT BEFITTING A JUSTICE TO DISCUSS EVEN THESE SUBJECTS. IT IS A PART OF COURT TRADITION – ONE OF THE BETTER TRADITIONS, I THINK – THAT JUSTICES SHOULD BE

CIRCUMSPECT IN UTTERANCE PAST THE REVELATION OF THEIR VIEWS IN THEIR OPINIONS. BUT I FIND THAT PEOPLE HAVE AN INTEREST IN WHAT IT'S LIKE TO SERVE ON THE NATION'S HIGH COURT AFTER SERVICE ON THE HIGHEST COURT OF A STATE. I SUSPECT THIS INTEREST MAY BE DUE TO THE FACT THAT IT'S 27 YEARS SINCE A JUSTICE WAS LAST APPOINTED FROM A HIGH STATE COURT. SO I'LL TALK ABOUT THIS DESPITE SOME SELF DOUBTS WHETHER I WILL TO ANYONE'S SATISFACTION, INCLUDING MY OWN.

ONE DOES LEAVE THE STATE COURT WITH SOME MISGIVINGS AND PERHAPS FOREBODING. WHEN JUSTICE CARDOZO ACCEPTED THE PROMOTION HE SAID, YOU REMEMBER, "WHETHER THE NEW FIELD OF USEFULNESS IS GREATER, I DON'T KNOW. PERHAPS THE LARGER OPPORTUNITY WAS WHERE I HAVE BEEN." AND MR. JUSTICE HOLMES, AT THE MIDDLESEX BAR DINNER GIVEN WHEN HE LEFT THE SUPREME JUDICIAL COURT, WAS MOVED TO SAY, "I HAVE FELT VERY SAD AT THE THOUGHT OF ALL THAT I LEAVE. AND SAD WITH THE WONDER WHETHER THE WORK OF 20 YEARS ON WHICH I HAVE SPENT THE PASSION OF MY HEART WILL BE ADJUDGED TO HAVE BEEN NOBLY DONE. I

HAVE FELT SAD TOO WITH A DIFFERENT SADNESS IN THINKING OF THE FUTURE. IT IS AN ADVENTURE INTO THE UNKNOWN HE WAS SURE. HE WROTE POLLOCK, THAT, "THE WORK OF THE PAST IS A FINISHED BOOK – LOCKED UP FAR AWAY. A NEW AND SOLEMN VOLUME OPENS. THE VARIETY AND NOVELTY TO ME OF THE QUESTIONS, THE REMOTE SPACES FROM WHICH THEY COME, THE AMOUNT OF WORK THEY REQUIRE, ALL HELP THE EFFECT."

DEAN GRISWOLD WAS LARGELY RIGHT WHEN HE SAID: "THE TASK OF JUDGING IN THE SUPREME COURT IS NOT, FOR THE MOST PART, LIKE THAT IN OTHER COURTS IN THE COUNTRY." DIFFERENCES THERE CERTAINLY ARE, BUT THEIR IMPORTANT SIMILARITIES SHOULD BE MENTIONED. ONE DEALS, OF COURSE, ON BOTH COURTS WITH THE PROBLEMS OF HUMAN BEINGS; ON THE DECISION OF EITHER COURT IN ANY CASE MAY DEPEND SOMEONE'S LIFE, HIS LIBERTY, HIS RIGHTS, HIS ESTATE. IF THE SUPREME COURT OF THE UNITED STATES DEALS IN GREATER MEASURE WITH VITAL AFFAIRS THAT AFFECT THE WHOLE PATTERN OF HUMAN RELATIONSHIPS, STATE JUDGES EQUALLY WORK FOR THE PROTECTION AND ASSERTION OF RIGHTS OF HUMAN BEINGS, AND IN

SOME WAYS MORE DIRECTLY AND INTIMATELY SO. DISRAELI SAID THAT "THE LEGAL MIND CHIEFLY CONSISTS IN ILLUSTRATING THE OBVIOUS, EXPLAINING THE SELF-EVIDENT AND EXPATIATING ON THE COMMONPLACE." THIS CYNICISM WON'T WASH, OF COURSE, AS APPLIED TO JUDGING ON ANY COURT. NO JUDGE WORKS WITH THE IMPLEMENTS OF THE MECHANIC OR THE FORMULAS OF THE SCIENTISTS. IT'S TRITE PERHAPS TO SAY IN THIS COMPANY BUT LAW IS A PROCESS; DECISIONS AREN'T READY-MADE SUITS BUT CUSTOM TAILORED; JUDGES OF BOTH COURTS DECIDE EACH CASE AS IT COMES BEFORE THEM. DOING THE BEST, MOST THOUGHTFUL, AND CONSCIENTIOUS JOB THEY CAN.

SO WHILE THERE IS MUCH OF CONTRAST, THERE IS AN ESSENTIAL SAMENESS TOO. I'VE SHED SOME NOTIONS I HAD AS A STATE JUDGE AND I'VE CLUNG TO SOME OTHERS. MY CHANGE OF VIEW TOWARD A PROBLEM RAISED BY STATE v. DeVITA, DECIDED WHEN I WAS ON THE NEW JERSEY COURT, IS AN ILLUSTRATION IN CONTRAST. TWO YOUNG HOODLUMS, DeVITA AND GRILLO COMMITTED A PARTICULARLY BRUTAL AND CALLOUS ROBBERY MURDER ON NEWARK'S CROWDED MAIN STREET ON A BUSY SATURDAY AFTERNOON. THEIR

CONVICTION AND DEATH SENTENCE WERE UNANIMOUSLY AFFIRMED BY THE NEW JERSEY SUPREME COURT WHEN I WAS A MEMBER. SUBSEQUENTLY THEIR COUNSEL LEARNED THAT ONE OF THE JURORS HAD BEEN THE VICTIM OF AN ARMED ROBBERY ON THE SAME STREET ONLY A FEW MONTHS BEFORE THE MURDER, WHICH FACE THE JUROR HAD NOT DISCLOSED BEFORE BEING ACCEPTED ON THE JURY. A NEW TRIAL WAS SOUGHT ON THE GROUND THAT THE JUROR'S PARTICIPATION IN THE TRIAL AND VERDICT VIOLATED DUE PROCESS. THE MOTION WAS DENIED AND WE AFFIRMED IN AN OPINION WHICH EXHAUSTIVELY CONSIDERED THE FEDERAL CONSTITUTIONAL CLAIM AND HELD IT TO BE WITHOUT MERIT. THE PETITIONERS THEN SOUGHT FEDERAL HABEAS CORPUS WHICH, ALTHOUGH DENIED BY THE DISTRICT COURT, WAS DIRECTED TO BE ISSUED BY THE COURT OF APPEALS. CERTIORARI WAS DENIED. THERE WAS A RETRIAL WHICH THIS TIME RESULTED IN LIFE SENTENCES FOR DeVITA AND GRILLO.

I KNOW I DON'T HAVE TO REMIND YOU THAT THE FEDERAL HABEAS CORPUS STATUTE WAS ACOPTED BY CONGRESS ALMOST A CENTURY AGO TO

EXPAND THE FEDERAL HABEAS CORPUS JURISDICTION TO EMBRACE ALL CASES OF PERSONS ALLEGEDLY RESTRAINED OF THEIR LIBERTY IN VIOLATION OF THE FEDERAL CONSTITUTION. BUT THE STATUTE IN EFFECT ALLOWS A SINGLE FEDERAL DISTRICT JUDGE TO REVERSE A STATE CONVICTION SUSTAINED BY THE STATE'S HIGHEST COURT THESE REVERSALS BY LOWER FEDERAL COURTS OF HIGH STATE COURT DECISIONS RAISE STATE JUDICIAL TEMPERS TO THE BOILING POINT. I DON'T MEAN THAT STATE JUDGES SERIOUSLY PROTEST FEDERAL REVIEW OF THEIR DECISIONS AFFECTING FEDERAL CONSTITUTIONAL RIGHTS. THERE ARE NONE OF MY ACQUAINTANCES WHO DON'T ACCEPT THAT MARTIN v. HUNTER'S LESSEE AND COHENS v. VIRGINIA SETTLED THAT PROPOSITION ALMOST A CENTURY AND A HALF AGO. THEIR INSISTENCE IS THAT FEDERAL REVIEW SHOULD BE LIMITED TO REVIEW BY THE SUPREME COURT OF THE UNITED STATES. WHEN I WAS ON THE NEW JERSEY COURT I FELT THAT THIS WAS RIGHT. I KNEW THAT IN THE DEVITA CASE WE HAD GIVEN PAINSTAKING CONSIDERATION TO HIS CONSTITUTIONAL CLAIM BEFORE UNANIMOUSLY ARRIVING AT THE CONSIDERED CONCLUSION THAT IT HAD NO

MERIT. WE THOUGHT WE HAD CONSCIENTIOUSLY DISCHARGED THE OBLIGATION WHICH RESTS ON STATE COURTS EQUALLY WITH THE FEDERAL COURTS TO GUARD, ENFORCE AND PROTECT EVERY RIGHT SECURED THE ACCUSED BY THE FEDERAL CONSTITUTION. WE THEREFORE BELIEVED THAT REVIEW OF OUR ACTION BY A SINGLE FEDERAL DISTRICT COURT JUDGE WAS INAPPROPRIATE. WE THOUGHT THAT THE RESPECT DUE THE HIGHEST COURT OF A SOVEREIGN STATE REQUIRED THAT OUR JUDGMENT BE REVIEWED ONLY BY THE FEDERAL TRIBUNAL CHARGED WITH THE RESPONSIBILITY TO SPEAK THE FINAL WORD. THAT ORDERLY FEDERAL PROCEDURE UNDER OUR DUAL SYSTEM OF GOVERNMENT SHOULD REQUIRE THAT A FINAL JUDGMENT OF A STATE'S HIGHEST COURT SHOULD BE SUBJECT TO REVIEW OR REVERSAL ONLY BY THE SUPREME COURT OF THE UNITED STATES. WE STRONGLY SUPPORTED THE PROPOSAL FAMILIAR TO YOU MADE TO THE CONGRESS WHICH WOULD HAVE HAD THE EFFECT OF REQUIRING THAT SUBSTANTIALLY ALL APPLICATIONS FOR WRITS OF HABEAS CORPUS ON BEHALF OF STATE PRISONERS BE MADE DIRECTLY TO THE SUPREME COURT OF THE UNITED STATES.

LOOKING AT THE PROBLEM, HOWEVER, FROM THE PERSPECTIVE OF MY PRESENT ASSIGNMENT, I NOW KNOW, AS THEN I DID NOT, AND PERHAPS, COULD NOT APPRECIATE, THAT THIS PROPOSAL, IF ENACTED, WOULD UNDULY INCREASE THE WORK OF A COURT WHOSE BURDEN ALREADY IS A MATTER OF CONCERN TO STUDENTS OF ITS FUNCTION. INDEED, THE PROPOSAL MIGHT EVEN FAIL OF ITS PURPOSE. EVEN ONE WITH A PASSING ACQUAINTANCE WITH THE COURT'S WORK KNOWS THAT IT IS NOT CONSTITUTED TO HEAR AND DECIDE CONTESTED APPLICATIONS FOR HABEAS CORPUS AND WOULD HAVE TO REFER THEM TO SOME SPECIAL MASTER, PROBABLY A DISTRICT COURT JUDGE, TO REPORT HIS FINDINGS AND CONCLUSIONS TO THE SUPREME COURT. MOREOVER, TO INUNDATE US WITH THE GREAT VOLUME OF SUCH APPLICATIONS NOW BROUGHT IN THE DISTRICT COURTS WOULD SERIOUSLY THREATEN OUR CAPACITY TO HANDLE OTHER BUSINESS. I NOW SEE I WAS WRONG IN THE VIEW I SHARED WITH MY BRETHREN ON THE NEW JERSEY COURT. IF RESTRICTIONS ON EXISTING FEDERAL HABEAS CORPUS PRACTICE

ARE DESIRABLE AT ALL, THEY MUST NOT BE SUCH AS TO SADDLE AN IMPOSSIBLE BURDEN ON THE SUPREME COURT.

SO MUCH FOR A STRONGLY STATE-CENTERED VIEW WHICH I HAVE DISCARDED. NOW LET ME TELL YOU OF A VIEW FORMED ON THE NEW JERSEY COURT. AS TO THE STATE CONSTITUTION, WHICH I'M ON RECORD IN AN OPINION ON THE FEDERAL SUPREME COURT AS BELIEVING SHOULD APPLY UNDER THE FEDERAL CONSTITUTION.

STATE v. HOAG WAS THE CASE OF THE ROBBERY HOLD-UP OF FIVE PATRONS OF A TAVERN. NEW JERSEY INDICTED HOAG FOR ARMED ROBBERY OF THREE OF THE PATRONS. HOAG WAS ACQUITTED ON THE TRIAL OF THAT INDICTMENT. NEW JERSEY THEN SECURED HOAG'S INDICTMENT FOR THE ROBBERY OF A FOURTH VICTIM. HOAG PLEADED DOUBLE JEOPARDY IN VIOLATION OF THE NEW JERSEY CONSTITUTION BUT WAS TRIED AND CONVICTED. HE APPEALED TO THE NEW JERSEY SUPREME COURT.

NEW JERSEY PRECEDENTS IN OTHER CONTEXTS HAD HELD THAT THE TEST TO BE APPLIED TO DETERMINE WHETHER THERE ARE TWO OFFENSES OR

ONLY ONE, IS WHETHER EACH CHARGE REQUIRES PROOF OF A FACT WHICH THE OTHER DOES NOT, AND HOAG'S CASE PRESENTED THE NEW JERSEY COURT WITH THE QUESTION WHETHER THIS DIFFERENT EVIDENCE TEST APPLIED IN THE CASE OF SUCCESSIVE PROSECUTIONS. PROOFS WERE THE SAME AT BOTH TRIALS EXCEPT THAT THAT STATE AT THE FIRST PROSECUTION PROVED WHAT HOAG ALLEGEDLY ROBBED FROM A, B & C AND AT THE SECOND PROSECUTION WHAT HOAG ALLEGEDLY SIMULTANEOUSLY ROBBED FROM D. MY BRETHREN OF THE MAJORITY ON THE NEW JERSEY COURT HELD THAT THE DIFFERENT EVIDENCE TEST APPLIED AND THAT THE PROSECUTIONS WERE FOR SEPARATE OFFENSES. I THOUGHT THAT THE TEST OF DOUBLE JEOPARDY WAS NECESSARILY DIFFERENT IN LIGHT OF THE HISTORY AND PURPOSE OF THE GUARANTEE. I THOUGHT THAT THE PROHIBITION AGAINST DOUBLE JEOPARDY HAD IN VIEW PROTECTION AGAINST A PERSON'S BEING HARASSED BY SUCCESSIVE TRIALS; THAT IT MEANT THAT AN ACCUSED SHOULD NOT HAVE TO MARSHAL THE RESOURCES AND ENERGIES NECESSARY FOR HIS DEFENSE MORE THAN ONCE TO DEFEND ESSENTIALLY THE SAME ALLEGED CRIMINAL ACTS AND THAT THIS

PROTECTION WAS NOT TO BE THWARTED BY THE SO-CALLED DIFFERENT EVIDENCE TEST HOWEVER APPROPRIATE THAT TEST IN OTHER CONTEXTS. TWO OF MY NEW JERSEY COLLEAGUES JOINED ME IN DISSENTING IN THE HOAG CASE ON THAT GROUND, AMONG OTHERS.

I'VE HAD OCCASION IN THE RECENTLY DECIDED CASE OF ABBATE v. UNITED STATES TO SAY IN A SEPARATE OPINION THAT THE SAME REASONING WHICH PERSUADED ME AS A NEW JERSEY JUDGE IN HOAG PERSUADES ME AS A MEMBER OF THE FEDERAL HIGH COURT THAT SUCCESSIVE FEDERAL PROSECUTIONS IN LIKE CIRCUMSTANCES WOULD VIOLATE DOUBLE JEOPARDY. OF COURSE, I DIDN'T PARTICIPATE IN HOAG WHEN IT CAME TO THE SUPREME COURT FROM NEW JERSEY AFTER I WAS APPOINTED. AS YOU KNOW, THE NEW JERSEY COURT WAS AFFIRMED.

HOWEVER, I PARTICIPATED IN CIUCCI v. ILLING DECIDED THE SAME DAY AS HOAG, AND PRESENTING THE SAME QUESTION. THERE CIUCCI'S WIFE AND THREE CHILDREN WERE FOUND DEAD IN A BURNING BUILDING. CIUCCI WAS CHARGED WITH THEIR MURDERS. HE WAS FIRST TRIED FOR THE MURDER OF

HIS WIFE AND WAS CONVICTED BY THE JURY WHICH FIXED HIS PUNISHMENT AT 20 YEARS IMPRISONMENT. HE WAS NEXT TRIED FOR THE MURDER OF ONE OF THE CHILDREN, WAS AGAIN CONVICTED, AND WAS SENTENCED BY THE JURY TO 45 YEARS IMPRISONMENT. HE WAS TRIED A THIRD TIME, FOR THE MURDER OF ANOTHER OF THE CHILDREN, WAS AGAIN CONVICTED AND THIS TIME WAS GIVEN THE DEATH SENTENCE.

NOW, OF COURSE, I DON'T HAVE TO TELL THIS AUDIENCE THAT A JUSTICE'S JUDGMENT OF THE CORRECT RESULT IN CIUCCI INVOLVED VERY DIFFERENT CONSIDERATIONS FROM THOSE WHICH WERE PERTINENT TO THE JUDGMENT I REACHED IN HOAG AS A MEMBER OF THE NEW JERSEY COURT. IN HOAG I WAS CONCERNED WITH WHETHER THE NEW JERSEY PRECEDENTS DEALING WITH THE DIFFERENT EVIDENCE TEST GOVERNED THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE OF THE STATE CONSTITUTION. I APPROACHED THE PROBLEM IN ABBATE FROM THE SAME DIRECTION WHEN REVIEWING SUCCESSIVE PROSECUTIONS BY THE FEDERAL GOVERNMENT. BUT THE TASK IN CIUCCI, OF COURSE, WAS TO TEST STATE ACTION AGAINST THE

COMMANDS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. THIS INVOLVED NO CONCERN WITH THE CORRECTNESS OF THE ILLINOIS SUPREME COURT'S INTERPRETATION OF ILLINOIS LAW. THE QUESTION RATHER WAS: DID ILLINOIS' USE OF THE SAME EVIDENCE AT THREE SUCCESSIVE TRIALS UNTIL THE DEATH PENALTY WAS OBTAINED VIOLATE DUE PROCESS? ONE POSSIBLE ANSWER WAS THAT THE TRIALS WERE FOR THE SAME OFFENSE AND THAT THE FOURTEENTH AMENDMENT BARS A STATE FROM PLACING A DEFENDANT TWICE IN JEOPARDY FOR THE SAME OFFENSE. ANOTHER APPROACH WAS TO VIEW THE MULTIPLE PROSECUTIONS OF CIUCCI FROM THE STANDPOINT WHETHER THEY REACHED THE POINT OF CRUELTY OF HARASSMENT OFFENSIVE TO THE STANDARD IMPLICIT IN THE CONCEPT OF ORDERED LIABILITY, AND THUS VIOLATED DUE PROCESS. THIS LATTER APPROACH PARTICULARLY IMPLICATES, OF COURSE, THE FAMILIAR RESTRAINTS UPON THE COURT IN REVIEWING STATE ACTION UNDER THE FOURTEENTH AMENDMENT, WHICH OFTEN MUST RESULT IN AFFIRMING STATE ACTION WITH WHICH A JUSTICE IS OUT OF SYMPATHY. IN THE FINAL RESULT I

DISSENTED FROM THE COURT'S AFFIRMANCE OF THE ILLINOIS JUDGMENT, JOINING IN AN OPINION EXPRESSING THE VIEW THAT WHATEVER THE ULTIMATE SCOPE OF THE FOURTEENTH AMENDMENT IN THE AREA OF DOUBLE JEOPARDY, ILLINOIS HAD MADE AN UNSEEMLY AND OPPRESSIVE USE OF A CRIMINAL TRIAL THAT VIOLATES THE CONCEPT OF DUE PROCESS. THIS TASK OF JUDGING I FOUND MORE DIFFICULT THAN THE TASK I DISCHARGED ON THE NEW JERSEY COURT IN REACHING MY CONCLUSION IN HOAG. IN HOAG IT WAS ENOUGH FOR ME THAT THE MAJORITY WAS WRONG IN APPLYING THE DIFFERENT EVIDENCE TEST TO THE DOUBLE JEOPARDY PROVISION OF THE STATE CONSTITUTION. IN CIUCCI, ON THE APPROACH TAKEN BY THE DISSENT, I HAD TO SATISFY MYSELF THAT ILLINOIS WAS SO WRONG THAT ITS ACTION COULD NOT BE SUSTAINED AS A RATIONAL EXERCISE OF STATE POWER.

I SUPPOSE I MUST NOT STOP WITHOUT SAYING SOMETHING ABOUT THE BUSINESS THOUGHT BY SOME HERE IN CAMBRIDGE TO BE BUSINESS WHICH THE SUPREME COURT SHOULD LEAVE EXCLUSIVELY TO THE STATE AND LOWER FEDERAL COURTS. THESE ARE THE PERSONAL INJURY ACTIONS BROUGHT

UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT BY RAILROAD WORKERS AND UNDER THE JONES ACT BY SEAMEN WHO ARE HURT ON THE JOB. DEAN GRISWOLD HAS STRONGLY EXPRESSED THE VIEW THAT A COURT HAVING, IN HIS WORDS, "UNIQUE RESPONSIBILITIES", "DUTIES TRULY AWESOME", DOING "ONE OF THE WORLD'S TOUGHEST JOBS" "OUGHT NOT TO ALLOW THESE CASES TO BE BEFORE THE SUPREME COURT AT ALL." I'D LIKE TO CONTRIBUTE MY OWN EXPERIENCES AS A STATE TRIAL JUDGE TO THAT DEBATE. THESE ACTIONS MAY BE BROUGHT, AS YOU KNOW, IN EITHER FEDERAL OR STATE COURTS AND MANY ARE BROUGHT IN STATE COURTS ALL OVER THE COUNTRY. NOW STATE JUDGES RARELY HAVE ANY OTHER CONTACT WITH WORKERS' PERSONAL INJURY CLAIMS, SINCE EXCEPT FOR THESE TWO IMPORTANT GROUPS OF SEAMEN AND RAILROAD WORKERS, THOSE CLAIMS ARE ALMOST EVERYWHERE HANDLED BY COMMISSIONS ADMINISTERING WORKMEN'S COMPENSATION LAWS. THEREFORE SINCE ACTIONS UNDER THESE FEDERAL STATUTES ARE USUALLY NOVEL CASES FOR THE STATE JUDGE, THEY CONFRONT HIM WITH SOME SPECIAL PROBLEMS. FIRST OF ALL THERE'S THE DUTY TO APPLY

FEDERAL LAW. I NEED MAKE NO DEMONSTRATION THAT THERE IS DEMANDED UNIFORMITY OF THE GOVERNING PRINCIPLES, AND UNIFORMITY AS NEAR AS MAY BE IN THE APPLICATION OF THOSE PRINCIPLES, WITHOUT REGARD TO THE COURT, STATE OR FEDERAL, IN WHICH THESE FEDERAL RIGHTS ARE ASSERTED. NOW FEDERAL COURT JUDGES HAVE EXPERIENCE WITH THE APPLICATION OF STATE LAW BECAUSE IN DIVERSITY CASES THEY DO THAT EVERY DAY. BUT CASES IN THE STATE COURTS REQUIRING STATE JUDGES TO APPLY FEDERAL LAW ARISE ONLY INFREQUENTLY AND NOT VERY OFTEN EVEN UNDER THESE STATUTES. I DON'T STATE THE PROPOSITION ABSTRACTLY BUT FROM MY OWN EXPERIENCE, I SAT IN JERSEY CITY, A RAIL TERMINAL ON NEW YORK HARBOR AND, FOR THAT REASON, A STATE FORUM IN WHICH SEAMEN AND RAILROAD WORKERS BRING THESE ACTIONS. THE NUMBER, HOWEVER, IS ONLY A RELATIVE HANDFUL AMONG THE THOUSANDS OF NEGLIGENCE ACTIONS ARISING FROM AUTOMOBILE ACCIDENTS OR FROM FALLS ON SIDEWALKS OR IN BUILDINGS OR STORES AND THE LIKE.

THE DAILY GRIST OF THE STATE TRIAL JUDGE IS HEAVILY WEIGHTED WITH THESE ORDINARY NEGLIGENCE ACTIONS. THESE CASES PASS BEFORE HIM IN A CONTINUOUS STREAM AND HE APPLIES OVER AND OVER AGAIN THE COMMON LAW CONCEPTS OF NEGLIGENCE, ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSATION. FOR THE ORDINARY NEGLIGENCE ACTION HE REPEATS ALMOST AS ROTE THAT ASSUMPTION OF RISK OR CONTRIBUTORY NEGLIGENCE HOWEVER SLIGHT MUST DEFEAT THE PLAINTIFF AND THAT FAULT RESULTS IN LIABILITY ONLY IF IT IS THE SOLE, EFFICIENT, PRODUCING CAUSE OF THE PLAINTIFF'S INJURY. BUT IT IS PRECISELY THIS INGRAINED CONCEPT OF THE APPLICATION OF THESE PRINCIPLES THAT CREATES PITFALLS FOR THE STATE TRIAL JUDGE WHEN HE ENCOUNTERS ONE OF THESE FEDERAL STATUTORY ACTIONS. FOR THOSE CASES REQUIRE A DIFFERENT APPLICATION OF THE FAMILIAR PRINCIPLES. CONGRESS HAS ORDAINED THAT ASSUMPTION OF RISK SHALL NOT DEFEAT AN EMPLOYEE'S CLAIM AND THAT HIS CONTRIBUTORY NEGLIGENCE CAN ONLY REDUCE THE AMOUNT AND NOT DENY HIM A RECOVERY. AGAIN, THE

STANDARD OF CAUSATION IS NOT THE ORDINARY NEGLIGENCE CASE STANDARD OF THE SOLE, EFFICIENT, PRODUCING CAUSE OF INJURY. THESE STATUTES MAKE THE EMPLOYER LIABLE IF INJURY OF THE WORKER RESULTS "IN WHOLE OR IN PART" FROM HIS FAULT. THUS WHERE EMPLOYER NEGLIGENCE PLAYED ANY PART, EVEN THE SLIGHTEST IN PRODUCING THE INJURY THE EMPLOYEE MAKES OUT A CASE. THE MATTER OF EMPLOYER FAULT ITSELF PRESENTS PARTICULARLY NOVEL SITUATIONS FOR THE STATE TRIAL JUDGE, WHOSE STATE LEAVES WORKER'S CLAIMS AGAINST THEIR EMPLOYERS TO WORKMEN'S COMPENSATION TRIBUNALS. THE QUESTION WHETHER THE EMPLOYEE'S INJURY AROSE FROM A FAILURE OF THE EMPLOYER TO PROVIDE THE EMPLOYEE WITH A SAFE PLACE TO WORK IS OFTEN THE CRUCIAL QUESTION ON THE FAULT ISSUE. WHETHER THE FACTS JUSTIFY A FINDING OF THE VIOLATION OF THAT DUTY CAN BE PARTICULARLY TROUBLESOME. TEN OF THE TOTAL OF THIRTEEN CASES DECIDED ON THE MERITS BY THE SUPREME COURT DURING THE PAST THREE TERMS HAVE COME FROM STATE COURTS. THIS IS EVIDENCE THAT STATE JUDGES DO OVERLOOK THE DIFFERENCES

BETWEEN THE CUSTOMARY DAILY GRIST OF NEGLIGENCE ACTIONS AND THESE STATUTORY ACTIONS. I MIGHT SAY THAT MY FIRST EXPERIENCE WITH ONE OF THESE CASES WAS NOT ON THE UNITED STATES SUPREME COURT, BUT IN THE NEW JERSEY TRIAL COURT. I'VE KEPT AS A WELL GUARDED SECRET UNTIL NOW THAT I WAS REVERSED IN THAT CASE FOR TAKING THE CASE FROM THE JURY. A RAILROAD EMPLOYEE CARELESSLY CONTINUED TO WORK AT A BENCH ABOVE WHICH WAS A LARGE COFFEE URN ON A SHELF. A FELLOW EMPLOYEE HAD IMPROPERLY FILLED IT WITH TOO MUCH WATER. THE PLAINTIFF IGNORED THE DANGER SIGNALS OF SPITTING AND SPUTTERING FROM THE URN GOING ON FOR SEVERAL MINUTES ABOVE HER. THE URN FINALLY BOILED OVER AND SHE WAS SEVERELY SCALDED. NEW JERSEY STILL RECOGNIZES SOME LIFE IN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE AS JUSTIFYING A JUDGMENT AGAINST A PLAINTIFF AS A MATTER OF LAW. THIS CASE WAS TO ME ONE FOR APPLICATION OF THE PRINCIPLE AND I DISMISSED THE ACTION WITHOUT SUBMITTING IT TO THE JURY. TO PROVE THAT THE APPELLATE PRACTICE SOMETIMES USED IN THE SUPREME COURT IN FEDERAL EMPLOYER'S

LIABILITY ACT CASES IS MORE WIDELY PRACTICED THAN YOU MAY THINK. THE REVERSAL WAS A ONE LINE PER CURIAM. BUT WHEN THE STATE APPELLATE PRACTICE DOES NOT CORRECT THE ERROR, OR AS SOMETIMES HAPPENS, CREATES IT. MUST NOT THE INJURED EMPLOYEE PERFORCE TURN TO THE SUPREME COURT OF THE UNITED STATES FOR VINDICATION OF THE RIGHTS CREATED FOR HIM BY THE CONGRESS? THERE IS NO OTHER TRIBUNAL TO WHICH HE CAN GO. I DON'T SEE HOW THE COURT CAN ESCAPE IT'S OBLIGATION TO EFFECTUATE THE CONGRESSIONAL INTENTION BY GRANTING CERTIORARI TO CORRECT INSTANCES OF IMPROPER ADMINISTRATION OF THE ACT. AND I POINT OUT THAT 8 OF THE 10 STATE CASES I'VE REFERRED TO WERE FROM TWO STATES. FOUR CASES FROM EACH. SUCH PERSISTENCE CANNOT BE IGNORED. PERHAPS CONGRESS OUGHT RELIEVE THE COURT OF THESE CASES BY ENACTING A WORKMEN'S COMPENSATION SCHEME. THAT SENTIMENT HAS SUBSTANTIAL SUPPORT IN THE COURT ITSELF. BUT SO LONG AS CONGRESS RESTRICTS SEAMEN AND RAILROAD WORKERS TO THIS STATUTORY REMEDY, THE COURT'S DUTY SEEMS CLEAR AND INESCAPABLE.

LET ME CLOSE WITH SAYING THAT YOU SHOULD NOT INFER FROM ANYTHING I'VE SAID THAT I HAVE AN OPINION THAT PRIOR STATE JUDICIAL SERVICE IS THE PREFERRED PREPARATION FOR SERVICE ON THE SUPREME COURT. THE DEBATE OVER WHAT IS THE BEST PREPARATION MUST ALWAYS BE INCONCLUSIVE. THE ANSWER IS DIFFICULT. PERHAPS BECAUSE WE ASK THE WRONG QUESTION. THE POINT MAY NOT BE WHAT PARTICULAR PRIOR EXERIENCE IT WOULD BE WELL FOR ALL NINE JUSTICES TO HAVE. THE UNDERLYING PROBLEM MANIFESTED BY THE QUESTION COULD PERHAPS BE ANSWERED THAT AS AN INSTITUTION HAVING UNIQUE RESPONSIBILITIES, THE COURT IS BEST SERVED WHEN IT CAN DRAW ITS MEMBERS FROM AMONG ALL THE DIVERSE ROLES FOLLOWED BY THE LEGAL PROFESSION.

I'VE ENJOYED THIS VISIT THOROUGHLY. I THANK YOU FOR INVITING ME.