

Making Law Work: Robert F. Kennedy and the American Lawyer as an Agent of Reform

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**Introduction: Robert F. Kennedy, Esq.**

In the prologue of *Kennedy Justice*, Victor Navasky first defines his subject, Attorney General Robert Kennedy, not by his official role as the most powerful lawyer in the country, but by his former political status as “the President’s campaign manager.”<sup>1</sup> This fundamental characterization tracks Navasky’s preoccupation with “the tension between law and politics,” which he treated as the organizing principle for his account of the Kennedy Justice Department. From the outset of his study, Navasky made clear that, in his view, Kennedy resided firmly on the political end of the spectrum. He contrasted Kennedy, the President’s brother and an appointment made “in the political tradition” with the “elite corps of lawyer’s lawyers” that he chose to staff the Department, appointments that Navasky asserts were made “in the legal tradition.”<sup>2</sup> This stark contrast between Kennedy-the-politician and the “lawyer’s lawyers” who worked for him runs throughout Navasky’s account, which focused primarily on the political and personality clashes that defined the Justice Department during the Kennedy Administration.

Navasky wrote against critics who had focused too much on Kennedy’s “status as the President’s brother,” reminding us that the Kennedy was “also beset by the same conflicts and confrontations that greet any policymaker who tries to influence the bureaucracy, with its vested interest in the status quo.”<sup>3</sup> But in his effort to challenge critiques of Kennedy as merely his brother’s keeper by portraying the Attorney General as a politician and a bureaucrat in his own right, Navasky often overlooked or denied Kennedy’s identity as a *lawyer* in his own right. Navasky consistently defined Kennedy in opposition to more “lawyerly” members of his staff,

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<sup>1</sup> Victor Navasky, *KENNEDY JUSTICE* (1971), x.

<sup>2</sup> *Id.*

<sup>3</sup> Navasky, xxii.

asserting that Kennedy had “no formal jurisprudence” and giving little weight to the reality that Kennedy had also been trained as a lawyer and in fact expressed a distinctive legal philosophy as Attorney General.

To the extent that *Kennedy Justice* acknowledged the legal realist point that Kennedy's actions as Attorney General were shaped, for better and worse, by “extralegal” factors such as personality traits, moral beliefs, and political commitments, Navasky’s claims ring true. Many of his insights on this point remain valuable in understanding Kennedy’s style as Attorney General and in reconstructing the environment within the Department of Justice during his tenure. But to the extent that he ignored Kennedy’s distinctive vision of the law and its role in society, and dismissed the legal philosophy of one of the most powerful lawyers in the country as not sufficiently “formal” to qualify as a genuine jurisprudence, his account fell short. This thesis challenges this dismissive treatment of Kennedy's jurisprudence and aims to take Robert F. Kennedy seriously as a legal actor by exploring his unique approach to the law.

Throughout his speeches and writings as Attorney General, Robert F. Kennedy elucidated a specific vision of the role of lawyers in his time, arguing that they had a unique obligation to “make our legal system work” in the context of a modern urban industrial society.<sup>4</sup> Kennedy spoke with considerable urgency of the lawyer’s duty to make the legal system more “responsive to legitimate grievances,” particularly those that had previously been ignored.<sup>5</sup> His preoccupation with responsiveness manifested itself throughout his tenure as Attorney General, and it reflected not only his unique pragmatic style and his personal reputation as a man of action, but also his broader sense of moral obligation as a lawyer living in a uniquely challenging historical moment.

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<sup>4</sup> Robert F. Kennedy, U.S. Attorney General, Address at the University of Chicago Law School Law Day Exercises (May 1, 1964) (transcript available at <http://www.justice.gov/ag/rfkspeeches/1964/05-01-1964.pdf>).

<sup>5</sup> *Id.*

This thesis explores Robert F. Kennedy's instrumental jurisprudence through the lens of his conception of the role of the lawyer in American society. Section I reconstructs Kennedy's vision of the law, introducing Kennedy's conception of the lawyer as an agent of reform and describing the two main components of that conception: institutional reform and constitutional responsiveness. It explores a variety of "extralegal" factors that contributed to Kennedy's outlook, including his personality traits and moral commitments as well as the shifting national political discourse. Section I also locates Kennedy's jurisprudence in relation to the tenets of the legal realist movement, which had gained considerable traction within the mainstream legal culture during Kennedy's lifetime, and which often provided opportunities for Kennedy's instrumentalism to flourish. But while Kennedy's conception mirrored broader developments in legal and political thought, his moral absolutism set him apart from his colleagues and led him to push the boundaries of mainstream legal culture. This Section suggests that the intuitive, inconsistent, and sometimes radical elements of Kennedy's vision should be seen as jurisprudential tenets in their own right, and as important historical forces in the Kennedy Justice Department.

Understanding Kennedy's jurisprudence also requires understanding the nature of his particular initiations into the legal realm. To that end, Section II explores the origins and development of Kennedy's style throughout his legal education at the University of Virginia School of Law and his early legal career working for various Senate Committees on Investigation. As a law student, Kennedy remained detached from the traditional establishment of the legal academy, immersing himself in politically oriented extracurricular activities and treating law school as a prerequisite to a political career rather than a legal one. This approach allowed him to maintain his commitment to legal instrumentalism and did little to persuade him

of the importance of rule-of-law values that are often celebrated in the traditional law school experience. Likewise, his early legal career as Senate Counsel exempted him from the dilemmas through which many practicing litigators come to sing the praises of criminal procedure and due process. In his role as a factfinder and a policy advocate, he was authorized to pursue the public interest rather than representing interests of an individual client in an adversarial setting. In this sense, his pre-administration legal career exacerbated his existing preference for official discretion over procedural restraint.

The second half of the thesis explores Robert F. Kennedy's instrumentalism in action. Section III evaluates the strengths and weaknesses of Kennedy's aggressive approach to making legal institutions work, as it manifested itself in his war on organized crime, which he named his top priority upon being appointed and which he approached with a "puritanical zeal." Section IV analyzes his conception of making the Constitution work via the reapportionment cases, which are commonly considered one of his major achievements as Attorney General. Taken together, these examples illustrate the role of Kennedy's instrumentalism as an important contributing factor to the legal developments of his time. Furthermore, from a normative perspective, Kennedy's example offers important lessons for legal actors regarding the risks and rewards of legal instrumentalism. On the one hand, Kennedy's moral absolutism and dualistic conception of justice lead him to advocate for an expansive federal authority and a degree of official discretion that he may have found problematic had he lived to see Watergate. On the other hand, the sense of compassion and urgency at the heart of his jurisprudence enabled him to achieve important moral objectives in the face of seemingly immutable formal obstacles, and his willingness to challenge the status quo can serve as an inspiration to progressive lawyers today.

## **I. Making the Law Work: Lawyers as Agents of Reform**

Robert F. Kennedy's ideal lawyer had little in common with the celebrated lawyers of the past. In a speech at Fordham in November of 1961, Kennedy declared that the traditional legal education, with its emphasis on deliberation, technicality and precedent, would no longer enable lawyers to confront the challenges of the future.<sup>6</sup> He insisted that while the slow, deliberative strategy of the past had been "adequate to meet the more slowly developing crises of a simpler and steadier world," the complexity and breakneck speed of modern society would demand a more creative, efficient, and socially-conscious brand of lawyer. Kennedy's new lawyer would no longer merely "muddle through" new legal issues, bending the law just enough to keep pace with historical change, but would instead enact more systematic reforms to make the law and its institutions responsive to the "problems which beset an urban and industrial society."<sup>7</sup> The legal profession, he claimed, had "abdicated responsibility for dealing with major social problems to other professions," but now was the moment for lawyers to devote their intellectual resources to *making the law work* for modern American society.<sup>8</sup>

In his speeches to lawyers and law enforcement groups as Attorney General, Kennedy elaborated on the lawyer's duty to "make the law work," and two prevalent themes emerged from his conception of the new American lawyer. First, the lawyer of tomorrow had an obligation to *make legal institutions work*, not just by practicing advocacy within the institutions of the legal system but also by reforming and expanding those institutions, ensuring that they would respond effectively to the increasing complex challenges of the "New Frontier." Second, he called upon lawyers and Supreme Court Justices to *make the Constitution work* by recognizing new rights and adapting the document to the realities of social progress. As Attorney

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<sup>6</sup> Robert F. Kennedy, U.S. Attorney General, Address at the Dedication Ceremonies of New Fordham Law School Building (November 18, 1961) (transcript available at <http://www.justice.gov/ag/rfkspeeches/1961/11-18-1961.pdf>).

<sup>7</sup> *Id.*, at 3.

<sup>8</sup> *Id.*

General, Kennedy sought to fulfill both of these obligations, and his conception of the new American lawyer manifested itself throughout his career, particularly in his efforts to reform the institutions of the Department he ran. The ideal reflected Robert Kennedy's unique style as a lawyer and politician and also bore the mark of broader trends in American law and politics, such as the rise of legal realism and the "liberal hour" of politics.

#### **A. "Justice with a Little 'j'": Institutional Reform**

Robert F. Kennedy took for granted the principle that lawyers had an obligation (moral and professional) to act as zealous advocates for the underrepresented within the existing institutions of the legal system. He lamented the fact that the best lawyers and law firms "rarely work with the legal problems that beset the most deprived segments of our society," and he implored lawyers to "use [their] traditional skills -- precision, understanding of technicalities, adversary skills, negotiating skills, [and] understanding of procedural maneuvers -- on behalf of the poor."<sup>9</sup> He praised the work of legal aid societies and the Supreme Court's decision in *Gideon v. Wainwright*, which recognized the right of counsel for indigent defendants, but he viewed the provision of that counsel as a professional responsibility for lawyers, and he questioned whether a constitutional determination should have even been necessary to secure equal representation.<sup>10</sup> Beyond a *Gideon*-style duty to represent the indigent in criminal proceedings, Kennedy urged lawyers to advocate for the underrepresented in a wide variety of institutional settings outside the courtroom. He called for lawyers to represent the poor in dealing with "social welfare agencies, unemployment compensation review boards, school and welfare officials, finance companies, or slum landlords."<sup>11</sup> But while Kennedy set high expectations for

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<sup>9</sup> Robert F. Kennedy, U.S. Attorney General, Address at the University of Chicago Law School Law Day Exercises (May 1, 1964) (transcript available at <http://www.justice.gov/ag/rfkspeeches/1964/05-01-1964.pdf>).

<sup>10</sup> 372 U.S. 335 (1963); Kennedy, Chicago Speech, *supra* note 6, at 4.

<sup>11</sup> *Id.* at

lawyers as advocates in every sort of institutional setting, those expectations paled in comparison to the broader duties he imposed on lawyers as *reformers* of those institutions. To Kennedy, the problems of the New Frontier demanded not only better representation at the individual level, but also a greater degree of responsiveness at the institutional level. Kennedy's vision of a more responsive legal system included a wide variety of proposed reforms to adapt the law and its component institutions to the on-the-ground conditions of the era.

One of Kennedy's chief priorities in maximizing the responsiveness of the law itself was reducing the "subtleties and complexities" that too often served as obstacles to justice.<sup>12</sup> In his 1964 speech at the University of Chicago Law Day Ceremonies on the impact of poverty on justice, Kennedy was quite open about his distaste for legal intricacies, which he viewed as a partially responsible for the "growth and continuance of two sets of law—one for the rich and one for the poor." As part of their "special role" in addressing poverty, lawyers had an obligation to simplify the law and eliminate the very technicalities that had become their specialties. His remarks on the subject are worth quoting at length:

To the poor man, "legal" has become a synonym simply for technicalities and obstruction, not for that which is to be respected. The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.

It is time to recognize that lawyers have a very special role to play in dealing with this helplessness. And it is time we filled it...

First, we have to make the law less complex and more workable. Lawyers have been paid, and paid well, to proliferate subtleties and complexities. It is about time we brought our intellectual resources to bear on eliminating some of those intricacies.

A wealthy client can pay counsel to unravel—or to create—a complex tangle of questions concerning divorce, conflict of laws and full faith and credit in order to straighten out—or cast doubt upon—certain custody and support obligations. It makes no kind of sense to have to go through similarly complex legal mazes to determine whether Mrs. Jones

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<sup>12</sup> *Id.*, at 5.



should have been denied social security or Aid to Dependent Children benefits. To put a price tag on Justice may be to deny it.<sup>13</sup>

Kennedy viewed technicalities, at least in the administrative context, as bureaucratic red tape that prevented important institutions from responding effectively to pressing problems like poverty. He saw the lawyer's intimate knowledge of "complex legal mazes" as a powerful weapon to be deployed to eliminate "obstacles" and ensure the impoverished full access to institutional resources. In instances like this, Victor Navasky's description of Kennedy as "uninformed about legal technicality and irritated by procedural obstacles," rang true in important ways.<sup>14</sup> To Kennedy, simplifying the law was imperative, not only to ensure equal access at the individual level but also to enable institutions to respond aggressively and efficiently to the problems of the day.<sup>15</sup>

Kennedy also encouraged lawyers to develop new legal rights in order to hold government institutions accountable. He explained:

We live in a society that has a vast bureaucracy charged with many responsibilities. When those responsibilities are not properly discharged, it is the poor and the helpless who are most likely to be hurt and have no remedy whatsoever.

We need to define those responsibilities and convert them into legal obligations. We need to create new remedies to deal with the multitude of daily injuries that persons suffer in this complex society simply because it is complex.<sup>16</sup>

While the creation of legal protection for bureaucratic obligations wasn't a radical idea, Kennedy's assertions reflect a variety of political assumptions and personal convictions that were quite representative of Robert Kennedy and of his era.

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<sup>13</sup> *Id.*

<sup>14</sup> Navasky, *supra* note 1, at 318.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

First, his assumption that the federal government *should* be a “vast bureaucracy charged with many responsibilities” reflected a faith in government that was shared by an unprecedented number of Americans in the early 1960s. Most Americans approved of the continued growth of the federal government in the wake of the New Deal, and the two decades after World War II saw a resurgence of liberal ideas in politics, higher education, and public opinion. In their book *The Liberal Hour*, G. Calvin Mackenzie and Robert Weisbrot describe the emergence of a liberal consensus in the United States:

In the early years of the 1960s, national optimism reached epidemic levels. The unusual economic conditions of the postwar period began to erode American fears about scarcity and adherence to norms of frugality. As Americans individually were growing rich, America collectively began to think rich. Citizens and the groups they formed to advocate their interests came to expect that national wealth could provide a cure for many of society’s ancient ills. They began to demand that government channel its share of this new wealth into radical assaults on illness, poverty, ignorance and prejudice.<sup>17</sup>

The liberal accord of the 1960s assumed that the government should and could confront the social and economic problems of the mid-20th century, and it drew on the traditional liberal principles of the Progressive movement and the New Deal as well as incorporating new insights from the social sciences, which became increasingly influential as academics arrived in Washington *en masse* to enact policies based on their findings in academia. Thus, Kennedy’s insistence that the government’s new obligations should be legally enforced through the creation of new rights was in sync with the popular liberal principles of his time.

Second, and more specifically, Kennedy’s proposal that bureaucratic obligations should be legally enforceable closely mirrored (and may have been influenced by) the argument made by legal realist and Yale Law School Professor Charles Reich in his influential article *The New*

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<sup>17</sup> G. Calvin Mackenzie and Robert Weisbrot, *THE LIBERAL HOUR* (2008) 17.

*Property*.<sup>18</sup> In the article, published in the *Yale Law Journal* in April 1964, Reich had noted the “emergence of the government as a major source of wealth” and argued that the growth of government “largess” necessitated the development of new legal protections for its many forms. Though Reich had criticized Kennedy for violating civil liberties in his indictment of U.S. Steel, their apparent agreement on the need for new property protection points to the considerable synergy between the legal realism movement and Kennedy’s crusade for responsiveness.<sup>19</sup> Yale’s legal realist tradition proved to be both a powerful ally and an occasional source of opposition for Kennedy throughout his time as Attorney General, and thus the relationship between Kennedy’s aggressive brand of legal pragmatism and the somewhat more cautious legal realist approach of his Yale-trained contemporaries warrants further exploration.

The predecessor of the legal realism movement was the school of sociological jurisprudence, which arose at the turn of the 20th century in response to the “mechanical jurisprudence” of the late 19th century. Picking up on Justice Holmes’ critiques, such as his famous dissent in *Lochner v. New York*, scholars like Roscoe Pound and Joseph Bingham called for a new mode of jurisprudence that would respond to practical and empirical considerations rather than being developed through the “artificial process of legal reasoning.”<sup>20</sup> Sociological jurists like Pound sought the “adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles,” an approach that Progressive reformers found promising.<sup>21</sup> As Professor G. Edward White explains:

Pound and Bingham were at one with the Progressives in their faith that social planning could be made a “science” through expert interpretation of empirical phenomena, in their desire to make the authoritative institutions of American government more sensitive to

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<sup>18</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>19</sup> *Id.*

<sup>20</sup> G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004 (1972).

<sup>21</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909).

the complexities of twentieth-century life and more efficient in their response to those complexities, and in their perception that human life was governed not by fixed rules or principles but by change.<sup>22</sup>

As White points out, Pound and the Progressives “were both absolutists and relativists,” in that they believed that the law must evolve to respond to social change, but must do so in a way that advances and affirms “consensual moral values.”<sup>23</sup>

The legal realism movement arose in the 1930s as both a critique of and an heir to sociological jurisprudence.<sup>24</sup> The pioneers of the movement, Karl Llewelyn and Jerome Frank, echoed the sociological jurisprudes’ insistence that the law must break free of “the rules and precepts and principles which had hitherto tended to keep in the limelight,” and instead shift its focus to “the areas of contact...between official regulatory behavior and the behavior of those affecting or affected by [it].”<sup>25</sup> Frank, a professor at Yale Law School and later an influential judge, drew heavily from developments in the behavioral sciences to point out that most judges operated with subconscious psychological biases, and argued that abstract legal principles often functioned as “rationalizations of the conclusions at which they would otherwise arrive.”<sup>26</sup> He called on judges to recognize and confront the psychological biases that had been concealed by arbitrary legal distinctions and to employ experts to help them fully understand the practical implications of their legal decisions.

It was this emphasis on pragmatism and responsiveness that came to distinguish Yale Law School from its peers from the 1930s through the 1960s, and it is thus unsurprising that

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<sup>22</sup> White, *supra* note 10, at 1007.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* For an alternative historical account of the rise of legal realism, see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEXAS L. REV. 731, 782 (2009) (challenging the conventional view of Legal Realists as uniquely skeptical and arguing that their “views about judges were common to their generation”). Professor Tamanaha also points out that Karl Llewelyn himself denied the existence of a “school of realists,” and that many historians have also disagreed over whether there was a true “movement” or “group” of realists. *Id.* at 737.

<sup>25</sup> Karl Llewelyn, *A Realistic Jurisprudence- The Next Step*, 30 COLUM. L. REV. 431, 449 (1930).

<sup>26</sup> *Id.*

Robert Kennedy enlisted Yale graduates like Byron White, Nicholas Katzenbach, Lou Oberdorfer, and Burke Marshall to help him realize his vision of a more flexible, modernist legal system. However, while Kennedy's handpicked team of Yale lawyers was a major asset throughout his time at the Department of Justice, these "cautious Ivy league lawyers" tended to act as a "restraining influence on the naturally activist Kennedy impulse."<sup>27</sup> As legal historian Laura Kalman observed in her study of the legal realism movement at Yale, "the realists pointed to the role of idiosyncrasy in law, but they believed in a rule of law -- hence they attempted to make it more efficient and more certain."<sup>28</sup> Because Kennedy was more focused on making the law more moral than making it more efficient or certain, he sometimes encountered resistance from otherwise like-minded colleagues who questioned the legal propriety of his proposed means even while agreeing to the validity of his desired ends.

While agreeing with the pragmatic legal realist school of thought that the law should be responsive to experience, Kennedy also believed that the law must be responsive to morality, and his comparatively high comfort level with an activist legal system was intimately related to his tendency toward moral absolutism. Kennedy's conception of the law was imbued with a sense of moral urgency and a binary conception of good and evil that was in keeping with his reputation as the most devoutly Catholic among the Kennedy brothers. This deep sense of moral obligation often set Robert Kennedy apart not only from the "cautious Ivy League lawyers" to whom Navasky refers but also from the "knee-jerk" liberals with whom he often clashed over civil liberties issues. Navasky's incisive analysis of the role Kennedy's morality played in his conception of the law merits repeating here:

Kennedy's image of justice, of the role of law, had elements of a morality play. Although he had no systematic jurisprudence, his public and private observations showed him

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<sup>27</sup> Navasky, 503.

<sup>28</sup> Laura Kalman, *LEGAL REALISM AT YALE, 1927-1940*, at 231 (1986).

sympathetic to St. Thomas Aquinas' idea of natural law, which meted out justice in accordance with Aristotelian principles of retribution and reciprocity. That Robert Kennedy simultaneously entertained protection of the personality, freedom, and equality, proved no barrier at the time, since in a rather naive way he felt that these were the prerogative of the pure, the young, the poor, the disadvantaged. Robert Kennedy in the early Sixties had little difficulty accommodating the notion that there were two kinds of justice: one for society's enemies, another for its victims.<sup>29</sup>

Navasky makes this observation in the context of his discussion of Kennedy's war on organized crime, which this thesis will explore in greater detail in Section III. But his assertion that Kennedy's vision of the law and the lawyer depended on a distinction between society's enemies and its victims perfectly encapsulates what made Kennedy's conception so unique and at times problematic. While his conviction that lawyers had an obligation to make the law work for society's victims often resonated with the ideals of "knee-jerk liberals" and legal realists, his attempts to mobilize the law against those he viewed as society's enemies raised serious concerns even among would-be allies.

The tension between Kennedy's morality-driven activism and his colleagues' sense of lawyerly restraint is a recurring theme evident throughout Kennedy's career, and it points to a deeper clash between Kennedy's explicitly moral conception of the law and the dominant norms of the legal culture around him. In his quest to hone the law's utility as an instrument of morality, Kennedy often encountered resistance from those who shared his political and moral sensibilities but saw themselves as constrained in important ways by their obligations as lawyers. This dynamic, highly visible in oral interviews with Kennedy's colleagues and staff, reveals a sort of radicalism in Kennedy's perspective, which sometimes rejected legal exceptionalism to an extent that conflicted with his allies' identities as lawyers. While Kennedy most frequently expressed his goals in absolute moral terms, others conceptualized themselves as lawyers bound by a

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<sup>29</sup> *Id.*, at 460.

unique set of obligations that was distinct from, and often in tension with, their ultimate political or moral objectives.

Nowhere is this dynamic better articulated than in the oral recollection of Ramsey Clark, who served as Assistant Attorney General of the Lands Division under Kennedy and went on to serve as Attorney General himself during the second Johnson Administration. In discussing Kennedy's approach to a dispute over an Indian land claims settlement, Clark recalls that Kennedy "didn't have much patience" with respect to some Senator's objections to the size of a settlement because his "primary instincts were not legal, but humanitarian."<sup>30</sup> Clark continues:

We spent an hour and a half with the delegation on a Saturday in the fall of '61 – and finally he settled at twelve and a half, as I recall. But all of his instincts were with them, "For God's sake, we owe it to the Cherokee and don't worry about the niceties." Not that he would... This wasn't his attitude generally, but in the Indian cases he tended to think that – as I did, too – but I had a responsibility to maintain a line, a legal position. First we couldn't get them settled. The Congress had to enact the appropriations for each one of these and you'd get some static up there when they'd go up. All the Indian Claims Commission could do was fix the amount of money.<sup>31</sup>

Though Clark was quick to argue that Kennedy's "humanitarian" approach, with its dismissive treatment of legal "niceties," was not the norm, he also acknowledged a tension between his own sense of "responsibility to maintain ... a legal position" and Kennedy's moral intuition towards compensating Native Americans. When prompted further regarding Kennedy's approach to the treatment of Native Americans by the Justice Department, Clark elaborated:

He may have had some specific experience with Indians that I don't know about, but he just had this burning passion to help people who had been denied justice. He felt that the Indians had been denied justice and, by God, he wanted to do something about it. It was a big thing with him, there's no question about it, it was a big thing. **It didn't have anything to do with the law, it had to do with justice with a small "j," with doing**

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<sup>30</sup> Interview by Larry J. Hackman with Nicholas Katzenbach, Robert F. Kennedy Oral History Project, in Washington, D.C., at 14-15 (June 29, 1979) *available at* <http://archive2.jfklibrary.org/RFKOH/Clark,%20Ramsey/RFKOH-RC-01/RFKOH-RC-01-TR.pdf>

<sup>31</sup> *Id.*, at 14.

**right and being fair by these people that we had pushed around for so long.** He felt we pushed them around and said so.<sup>32</sup>

Though Clark's testimony was clearly intended to laud Kennedy's approach, he repeatedly expressed a distinction between his obligations as a lawyer and his moral or political preferences, whereas Kennedy tended to view his moral and legal obligations as coextensive. He described the awkward legal positioning of the Indian Claims Division under Kennedy:

[Kennedy] had this great concern about the American Indian, and he wanted us to find some ways he could help there. It was unnatural from the standpoint of our role, unhappily, because the major thing we were doing in Indian affairs was defending their suits in the Indian Claims Division, which meant that the law had put the government in the unhappy posture of being their antagonist in litigation. I thought this was theoretically, absolutely wrong, but our obligation as lawyers was to defend these cases. We initiated a settlement policy, and Bob favored it. We got some criticism for it, but we started settling cases.<sup>33</sup>

In his resigned references to the "unhappy" standpoint of the government and to the clash between his obligation as lawyer and his sense of moral or "theoretical" right and wrong, Clark expresses a view of the law as functionally distinct from morality, and a degree of skepticism about the law's ability of the law to correct moral injustices. Kennedy, on the other hand, had a tendency to view the law as just another tool in the government's toolbox. Throughout his career, Kennedy's moral absolutism and rejection of legal exceptionalism created tension with allies and colleagues who adhered to more traditional conceptions of the law. Notwithstanding Clark's suggestion to the contrary, the "burning moral passion" which Clark described admiringly was not limited to the context of Native American policy, but instead infused many facets of Kennedy's legal work throughout his career.

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<sup>32</sup> *Id.*, at 15.

<sup>33</sup> *Id.*, at 11.



When it came to equal justice and juvenile delinquency, for example, Robert Kennedy viewed poverty as an “evil” and saw the impoverished as victims of that evil, even when, or especially when, they violated the law. He believed that “as long as there is plenty, poverty is evil,” and that “government belongs wherever evil needs an adversary and there are people in distress who cannot help themselves.”<sup>34</sup> In his 1964 speech, Kennedy pleaded with law students at the University of Chicago to live up to the moral challenge presented by poverty in America:

I am deeply concerned over whether, as a profession, dedicated to the rule of law, we are meeting—or even seeing—the challenge which the peculiar character of our urban society is daily making. We concentrate too much on the traditional stuff of the law—on lawsuits, courts, and formal legal learning—too little upon the fundamental changes in our society which may, in the final analysis, do much more to determine the fate of law and the rule of law as we understand it.<sup>35</sup>

Particularly illustrative of Kennedy’s effort to respond to the challenges which “urban society” was “daily making” was his program on juvenile delinquency.

Robert Kennedy insisted that the Department of Justice’s traditional conception of law enforcement, which emphasized “law violations and violators,” was a relic of simpler times and was inadequate to address the problems of his day. Instead, he encouraged a broader approach that would focus on the structural causes of crime, particularly of juvenile delinquency. He claimed that youth offenses were “not the illnesses to be dealt with,” but “merely symptoms of an illness that goes far deeper in our society.” He continued:

To arrive at this conclusion one need not be a sociologist, or a social worker or a planner. One simply needs walk the slums of Washington, or New York, or Chicago, or through the communities of Appalachia, and talk with the young people.

For many of these young people law violation is not the isolated outburst of a social misfit. It is part of a way of life where all conventional routes to success are blocked and where law abidingness has lost all meaning and appeal.<sup>36</sup>

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<sup>34</sup> Robert F. Kennedy, *THE PURSUIT OF JUSTICE* (1964), at 11.

<sup>35</sup> Kennedy, University of Chicago speech, *supra* note 1, at 2.

<sup>36</sup> *Id.*, at 2.

Kennedy's proposal for a "social action program" to respond to the structural causes of juvenile delinquency was very much in line with his party's political views and with the pragmatic tenets of legal realism. His program, while ultimately limited in its success, did not initially encounter resistance from within his party or within his Department. Nonetheless, Kennedy's moral passion for the issue went beyond the approving or even "excited" reaction of his peers.

In a sense, Kennedy had more in common with Pound and the Progressives, who viewed the law as a "repository for moral values," than with the efficiency-oriented legal realists who had abandoned their predecessors' "tendency toward moral or ethical absolutism."<sup>37</sup> He spoke eloquently and with grave concern of the impoverished youth who so often ended up violating the law:

You cannot look into their eyes or look up and down the asphalt jungle or the desolate hollows in which they live without sensing the despair, the frustration, the futility and the alienation they feel. One is strongly impelled to do something to make some gesture that say, "People do care, don't give up."<sup>38</sup>

The depth of Kennedy's concern for the impoverished youth of America's cities demonstrated both the compassion for which he would later be revered and the moralistic perspective that was so often problematic in other areas of institutional reform, particularly the war on crime.

### **B. Making the Constitution Work**

The second major obligation that Robert Kennedy imposed on his ideal lawyer was a duty to *make the Constitution work*, which he believed required the legal profession to let go of its preoccupation with *stare decisis*. The clearest illustration of Kennedy's approach to making the Constitution work appeared in his 1962 speech at the Law Day Ceremonies of the Virginia

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<sup>37</sup> White, *supra* note 15, at 1004.

<sup>38</sup> Kennedy, University of Chicago speech, at 2.

State Bar.<sup>39</sup> He began by briefly paying homage to the Founding Fathers as lawyers, observing that their generation was “acutely aware that liberty and law are inseparable and that liberty under law, freedom with justice, is the highest goal of society.”<sup>40</sup> He invoked a narrative of continuity through change, noting that the revolutionary insight of the Framers had been “tested and strengthened in the cruel history of our own century.”<sup>41</sup> He continued:

The struggles and the passions of the first half century have left their mark; but they are behind us. A new society has taken form, developed and shaped by the leaders of both of our major political parties. It is a society loyal to the Revolutionary concepts of Jefferson, Madison, and Washington- concepts based on the importance of the individual- and it is a society which believes that government has positive responsibility to make individual freedom more than a legal fiction. It is a society which has an inherent belief in justice.<sup>42</sup>

To Kennedy, making the Constitution work required more than blind obedience to the legal forms that the Framers wrote in to the document itself. It required continuous reaffirmation of the principles inherent in the document through constitutional interpretation and government action. Without affirmative action by the government and lawyers to breathe life into the Constitution’s provisions in the face of new challenges, he warned, the freedoms guaranteed by the Founders would become hollow legal fictions. Merely preserving the law’s forms without allowing its substance to evolve would do violence to our society’s “inherent belief in justice.”

In Kennedy’s view, the Supreme Court had an active role in ensuring that the Constitution responded to the challenges of a new society. He praised the Court’s historic decision in *Brown v. Board of Education*, addressing the subsequent protest “aimed at the role of the Supreme Court itself as the final arbiter of our constitutional system.” He conceded that “this was a powerful role,” but continued:

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<sup>39</sup> Robert F. Kennedy, U.S. Attorney General, Address at the Virginia State Bar Law Day Exercises (May 1, 1962) (transcript available at <http://www.justice.gov/ag/rfkspeeches/1962/05-01-1962.pdf>).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1-2.

Let no one suppose that it came about lightly or by accident. It was a role foreseen by the authors of the Constitution, and this role was established by one of the greatest of all Virginians, John Marshall.

Because no Constitution is self-expounding, there must be some agency to expound it. And the job of exposition is not that of citing a rigid and unchanging set of theorems, like repeating a mathematical table.<sup>43</sup>

Kennedy went on to quote Chief Justice Marshall's famous reminder in *McCulloch v. Maryland* that "it is a constitution we are expounding....intended to endure for ages to come and consequently to be adapted to the various crises of human affairs."<sup>44</sup>

While his vision of judicial review as an adaptive mechanism was neither new nor radical, Kennedy infused the concept with his characteristic sense of moral urgency, praising the Court for acting as the "conscience of the nation" and referring to the Court as a "great means by which our constitutional framework has responded to the ethical imperatives of our people."<sup>45</sup> The fact that the Court so often aroused vehement protest in fulfilling that obligation was unproblematic to Robert Kennedy, for he viewed struggle and sacrifice as necessary prerequisites to progress. Drawing on strong Irish Catholic themes, he proclaimed:

The travail of freedom and justice is not easy; but nothing serious and important in life is easy. The history of humanity has been a continuing struggle against temptation and tyranny- and very little worthwhile has ever been achieved without pain.<sup>46</sup>

In Kennedy's vision, judges played a heroic role in making the Constitution live up to its promises even in the face of massive resistance and even "in an atmosphere of perplexity, pressure, and sometimes panic."<sup>47</sup>

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<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, at 5.

<sup>47</sup> *Id.*, at 3.

Besides envisioning an active role for the Supreme Court in making the Constitution respond to historical demands and ethical obligations, Kennedy believed that meeting this challenge required a flexible jurisprudential approach, one that moved beyond “rigid exposition.” Furthermore, he raised the stakes by framing constitutional interpretation in terms of the Cold War “struggle for the minds of the leaders of tomorrow.”<sup>48</sup> Drawing on his recent travels to Soviet Asia, he argued that a responsive constitutional jurisprudence was necessary for the United States to prevail in the worldwide ideological battle against Communism. He warned:

Some people in the world today do not see law as an instrument of freedom and justice. Too frequently the whole tradition of *stare decisis* appears to tie the law to the status quo; and a written constitution means little to a man who cannot remember his last meal and does not know where his next one is coming from...Emphasis on the law as such, and constitutionalism as such, often seem the self-righteous excuse used by those who have to justify the exploitation of those who have not.<sup>49</sup>

Here Kennedy evoked the legal realist critique of mechanistic jurisprudence as a “cover” for judges to reinforce their own biases, which tended to favor the status quo. Not only did such rigid jurisprudence endanger the spirit of the Constitution by failing to adequately give substance to its form, but it also endangered the United States’ world leadership and undermined the ideal of American democracy. The status quo contained “weaknesses” and “inconsistencies” that served as powerful ammunition for Communist propaganda, “with the result that great misconceptions go virtually unanswered,” and adherence to *stare decisis* perpetuated those misconceptions by failing to correct injustices in the law.<sup>50</sup>

Kennedy spoke with his characteristic urgency of the need to convince the world that “freedom is the way of the future,” by making clear that the American people “will not accept the status quo; that we are not a selfish people interested only in ourselves and our pocketbooks;

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<sup>48</sup> *Id.*, at 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

but that we are a tough, industrious people who are interested in our fellow citizens and advancing the cause of freedom.”<sup>51</sup> Kennedy’s Manichean view was in keeping with Cold War-era political thought and also mirrored his personal tendency toward moral absolutism. Just as he viewed institutional responsiveness as a means of caring for society’s victims and combating its enemies, so too did he view responsive constitutional interpretation as part of a broader moral obligation to help our democracy live up to its own values at home and defend those values against the threat of Communism abroad.

Robert Kennedy’s approach to making the Constitution work was generally less controversial than his aggressive approach to making legal institutions work. His belief that *stare decisis* often reinforced an unjust status quo was borne out by many of the Warren Court’s decisions on important issues of his day, and thus Kennedy often found himself positioned on the right side of history, so to speak, as his emphasis on responsiveness and social progress resonated and coincided with intellectual and political currents on the Court, within the legal academy, and even among the public. In this way, the constitutional context provided greater opportunities for Kennedy to implement his ideals, whereas the dominant legal norms at play in other contexts tended to constrain his activism. All along, however, Kennedy’s jurisprudence was primarily driven by his “humanitarian instincts” and his passion for “justice with a small ‘j’”, rather than being shaped by any particular intellectual forces within the legal academy. The next section explores the origins and development of Kennedy’s conception, beginning with his legal education at the University of Virginia School of Law and progressing through his early legal career as Senate Counsel.

## **II. Origins: Legal Education and Early Legal Career**

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<sup>51</sup> *Id.*, at 5.

Although Kennedy arrived at the Department of Justice with jurisprudential intuitions that resonated fairly well with the Yale-trained legal realists on his staff, his own legal education appears to have had a relatively minor impact on his ideas about the law. An examination of Kennedy's time at the University of Virginia School of Law from 1948 to 1951 reveals that his emphasis on pragmatism and his sense of moral urgency had been central to his outlook since his first exposure to the law, and suggests that his conception of the law was more a product of his own moral and political instincts than of his formal legal training. By his own account, Kennedy was drawn to law school not by any innate interest in the law itself but simply by a lack of other interests. Of his decision to enter law school, he explained, "I just didn't know anything when I got out of college. I wanted to do graduate work, but I didn't know whether to go to law school or business school. I had no attraction to business, so I entered law school."<sup>52</sup> Virginia Law initially told him he was unlikely to be admitted on the basis of his undergraduate record, which he told his sister Patricia "rather insulted" him and his "whole family."<sup>53</sup> Ultimately, Virginia admitted him, but only with the cautionary caveat that "unless he does better work than he did at Harvard, he is most unlikely to succeed in this Law School."<sup>54</sup>

Throughout his years in Charlottesville, Kennedy kept one foot firmly planted in the political realm, as if he viewed his legal education as a way station to his future political career. Rather than immersing himself in the legal academic world of doctrine and procedure, he sought to integrate his legal education with his ongoing involvement in politics through his active participation in the Student Legal Forum, through which he and his fellow students looked beyond the confines of the law school casebook and engaged with broader political questions, particularly issues of global affairs and foreign policy in the post-war context.

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<sup>52</sup> Arthur M. Schlesinger, Jr., *ROBERT KENNEDY AND HIS TIMES* (1978), at 81.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Though Kennedy's academic record is incomplete, the material that is available suggests that he received a fairly traditional legal education at UVa, and there is no evidence of any in-depth exposure to legal realism or other jurisprudential philosophies that may have contributed significantly to his unique conception of the law. Kennedy's courses were eminently practical and tended to steer clear of the philosophical; the available records indicate the standard first year courses of Criminal Law, Contracts, Property, Constitutional Law, Torts and Civil Procedure as well as electives in Trusts and Estates, Evidence, Labor Law, Insurance Law and International Law.<sup>55</sup> Review of his class notes reveals pages of standard case briefings with the occasional policy-based explanation of a doctrinal change. His Contracts notes, for example, explain the move away from a focus on subjective intent in contract law with reference to the demand for certainty and predictability in the modern business context.<sup>56</sup> Neither the legal curriculum Kennedy was exposed to nor the academic papers he produced during his period give any indication of the unique jurisprudential conception that would later become his hallmark, but his pragmatism and moral certainty were nonetheless on display throughout Kennedy's extracurricular activities in Charlottesville, particularly in his role as a leader of the Student Legal Forum.

Kennedy's involvement in the Student Legal Forum was in keeping with his broader view of law as intimately connected with politics, both domestic and international. The Forum was founded in 1947 by Ridley Whitaker, a third year student and veteran of World War II.<sup>57</sup>

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<sup>55</sup> Many of Robert F. Kennedy's law school notebooks are available in the Robert F. Kennedy Pre-Administration Papers at the JFK Library in Boston, Massachusetts.

<sup>56</sup> Robert F. Kennedy Law School Notes: Contracts, at 10. Located in Robert F. Kennedy's Pre-Administration Personal Files under Scholastic Miscellany, at the JFK Library. In discussing the declining legal significance of the "meeting of the minds," he wrote "thing to look for was intention. Businessmen must look to what is actually said. If we allow persons to change contracts by asserting 'intention' was different to what was written we would be in a hell of a mess. Nothing could be depended upon. We introduce uncertainty where certainty has highest value."

<sup>57</sup> Robert Andrew Bassford, *THE STUDENT LEGAL FORUM AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW: THE FIRST FIFTY YEARS*, (2000), at 4.



According to the history of the Forum, Whitaker had grown dissatisfied with the insular nature of the Law School experience, and was concerned that “he and his fellow students had little exposure to the ideas and concepts outside the classroom walls, and he worried that they would graduate with a limited knowledge of what was happening in the world at large, which he saw as a disservice both to themselves and the community.”<sup>58</sup> Whitaker, who was also a member of the *Virginia Law Review*, founded the Forum in order to give students greater real-world exposure by attracting speakers to address topics of national importance.

In 1950, Kennedy assumed the presidency of the Forum and broadened its mission to include topics of both national and international significance, many of which had little direct relevance to legal subjects. Kennedy drew on his family’s political connections to attract major national and international speakers, and in doing so cultivated his own relationships in both the legal and political worlds. The Forum’s programming under Kennedy’s presidency reads like a who’s who of American law, business, and politics. Supreme Court Justice William O. Douglas, with whom Kennedy would later travel to Soviet Asia, spoke on “The Supreme Court, Its Work, and Some of Its Problems,” and also shared tales from a recent trip to the Middle East.<sup>59</sup> Frank W. Folsom, president of Radio Corporation of America (RCA), delivered a speech on “Business and the Defense Effort,” which praised competition and free enterprise as essential in the national effort to preserve individual freedom and resist the spread of totalitarianism.<sup>60</sup>

The Forum’s new emphasis on issues of foreign affairs continued throughout Kennedy’s leadership. One Forum featured a three person panel on “Vital Issues in the Middle East and Their Relationship to World Peace,” a topic that was “chosen...because of its increasing importance in the world today,” with the speakers discussing “strategic geographic location of

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<sup>58</sup> *Id.*, at 8.

<sup>59</sup> *Id.*, at 10.

<sup>60</sup> *Id.*

the middle eastern countries, their vital raw material, and the complex political and diplomatic problems.”<sup>61</sup> Kennedy drew on his own family members to contribute insights and foster debate on global affairs and United States foreign policy. In a controversial and widely reported speech, Kennedy’s father Joseph, former SEC Chairman and Ambassador to Great Britain, spoke out against the United States’ entrance into Korean war and even criticized its involvement in the post-war reconstruction of Europe.<sup>62</sup> Two months later, Congressional Representative John F. Kennedy addressed the Forum after spending five months in Europe on a fact-finding tour, rejecting his father’s critique of the United States’ involvement in Europe and advocating even greater commitment to European security and reconstruction.<sup>63</sup>

Perhaps the most revealing example of Kennedy’s leadership style as Forum President is the role he played in the controversy surrounding Dr. Ralph Bunche’s visit to the Law School. Dr. Bunche, a Nobel Peace Prize-winning diplomat who had helped negotiate an Arab-Israeli truce in 1949 and had also helped establish the United Nations after World War II, agreed to speak on the topic of “The U.N. and Prospects for Peace,” but only on the condition that the audience be racially integrated. In a politely worded letter, Dr. Bunche informed the Forum leadership of his position: “As a matter of firm principle, I will never appear before a segregated audience.”<sup>64</sup> At the time, however, the University of Virginia was segregated, and in fact Virginia law prohibited racial integration in meeting halls. These legal obstacles, combined with the widespread opposition to Bunche’s appearance on grounds, enraged Kennedy, who approached the student government to call for an integrated audience. One of Kennedy’s classmates, Endicott Peabody Davison, described the events as follows:

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<sup>61</sup> *Three Man Panel to Discuss Middle East on April 11*, VA. LAW WEEKLY, Apr. 5, 1951, at 1.

<sup>62</sup> Bassford, *supra* note 31, at 9. The speech was widely reported throughout Europe and the USSR.

<sup>63</sup> *Id.*, at 9-10.

<sup>64</sup> Letter from Ralph J. Bunche to Robert F. Kennedy (March 16, 1951), Barrett Prettyman Papers, *quoted in* Schlesinger, *supra* note 28, at 86.

There was a meeting with about ten people from all the classes. Bobby said we must adopt a resolution. Everyone agreed until he asked them to sign it. Then the Southern boys began to say, "I've got to go home to Alabama later – I can't sign it. I'm for it, but I can't put my name on it." Bobby blew his stack. He was so mad he could hardly talk. He had a lack of understanding of the problems these people faced; to him it seemed illogical to support something but be unwilling to sign for it. It's his black-and white view of things. The resolution failed.<sup>65</sup>

The "black-and-white view of things," that Davison described reveals the moral absolutism that was so often evident during Kennedy's time as Attorney General. In the case of the Bunche incident, his moral outrage drove him to successfully challenge both law and custom. Although the resolution to integrate the audience failed in student government, the Student Legal Forum adopted the measure. Kennedy, as president, drafted and signed a morally indignant statement to university president Colgate Darden, which read in part:

We would like to register the strong conviction, reinforced by our belief in the issues presented by the last war in which most of us fought, and by our belief in the principles to which this country is committed in the Bill of Rights and the United Nations Charter, that action would result in the cancellation of Dr. Bunche's lecture appears to us to be morally indefensible.<sup>66</sup>

When Kennedy's advisor Hardy Cross Dillard suggested evading the law by posting a section for blacks but in fact permitting an integrated audience, Kennedy's rejected the compromise as a matter of principle, appealing to the Board of Visitors and ultimately meeting directly with President Darden. Kennedy was accompanied by Professor Dillard and Professor Charles Gregory, who cited the recent Supreme Court case of *Sweatt v. Painter*, in which the Court required the University of Texas Law School to admit a black student.<sup>67</sup> Darden, who was

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<sup>66</sup> Letter from Robert F. Kennedy to Colgate W. Darden (March 7, 1951), University of Virginia Archives.

<sup>67</sup> Schlesinger, *supra* note 28, at 86.

opposed to segregation, deemed the Forum an “educational meeting” under *Sweatt* and called for the audience to be integrated.<sup>68</sup>

That Kennedy’s campaign on behalf of Bunche is the takeaway episode of most accounts of his time in Charlottesville speaks to the extent to which his education at the University of Virginia was political and moral as well as legal, and therefore provided a foundation for his integrated, interdisciplinary conception of the law. Though Kennedy did not emerge from the University of Virginia with any sort of formal jurisprudence, he had combined his instincts of moral absolutism with an awareness and understanding of the law, thus sowing the seeds for his future philosophy as Attorney General. The fervent moral instinct that he displayed in the Bunche episode would reappear and play an integral role in his approach to the law, not only during his tenure as Attorney General but also in his early legal career.

Kennedy’s early career experiences shaped his conception of his role as a lawyer in important ways, heightening his perception that the nation was in a state of moral crisis and strengthening his conviction the lawyer must deploy every resource at his disposal to protect the country from moral decline. In his capacity as a government lawyer working on the Senate Investigating Committee prior to becoming Attorney General, Kennedy continued to develop his distinctive legal style, as he blended pragmatic, fact-intensive investigation with moral outrage in his pursuit of perceived enemies, particularly Communists and labor racketeers. Throughout this period, Kennedy viewed his obligations as a lawyer as basically coextensive with his moral obligations, and he exhibited extreme frustration when legal obstacles impeded his pursuit of moral imperatives.

One of Kennedy’s first projects as assistant counsel for the Senate Permanent Committee on Investigation under Senator Joseph McCarthy was an inquiry into American allies trading

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<sup>68</sup> *Id.*

with Communist China. Kennedy's role was primarily investigatory, poring over shipping indices and British and American intelligence and uncovering that 75% of all ships carrying goods to China sailed under western flags, a particularly problematic state of affairs given the United States' involvement in Korea at the time.<sup>69</sup> The *New York Journal-American* expressed gratitude to the committee "and to its hard-digging assistant counsel Kennedy (brother of Sen. John F. Kennedy, D.-Mass.) for bringing it to light."<sup>70</sup> Kennedy's statistic-heavy investigation and analysis demonstrated an empiricism that coexisted with his moral sensibilities. Although he had uncovered plenty of statistics proving the prevalence of Allied trade with China, the interim report he helped draft called for cessation of this trade on the basis of "moral grounds" regardless of the practical effect that such trade had on the Korean war effort.<sup>71</sup> The moral outrage of our allies doing business with our enemies was offered as sufficient legal justification for Congressional action.

Although Kennedy was concerned with getting the facts right, he nonetheless expressed an urgency early in his career, and he sometimes displayed an extreme frustration when he encountered impediments to his investigations, particularly those he viewed as procedural "technicalities." He was notoriously indignant when witnesses lied or took the 5th Amendment during hearings, and he admitted that his quick temper was his "biggest problem as counsel."<sup>72</sup> Of his role as counsel on the labor racketeering committee, he wrote that "I think we all feel that when a witness comes before the United State Senate he has an obligation to speak frankly and

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<sup>69</sup> Schlesinger, *supra* note 28, at 101.

<sup>70</sup> *New York Journal-American*, May 6, 1953.

<sup>71</sup> Permanent Subcommittee on Investigations, *Control of Trade: Interim Report*, 83 Cong. 1 Sess. (1953), 13, 18.

<sup>72</sup> Letter from RFK to Mrs. Richard Metz, February 15, 1955, RFK Pre-Administration Papers.

tell the truth. To see people sit in front of us and lie and evade **makes me boil inside**. But you can't lose your temper -- and if you do, the witness has gotten the best of you."<sup>73</sup>

Kennedy expressed a similar visceral reaction against procedural or bureaucratic obstacles that impeded aggressive action to solve the problems he had exposed through investigation. After spending two years uncovering the depths of labor racketeering on the McClellan committee, Kennedy butted heads with William G. Hundley, then the head of the Organized Crime Section at the Department of Justice, over the Department's lackluster conviction record with respect to the racketeering cases.<sup>74</sup> Hundley explained the government's failure to prosecute with respect to the higher evidentiary standards of the courts, arguing that the cases needed further investigation to obtain admissible evidence and that many of the acts exposed in the investigations were not technically illegal despite their moral reprehensibility.<sup>75</sup> According to Hundley, this justification did not satisfy Kennedy, who told him: "When you admit to me that there's obvious wrongdoing here and you tell me on top of that you can't make a case out of it, it makes me sick to my stomach."<sup>76</sup> Hundley replied, "I can't be responsible for your gastric juices."<sup>77</sup> Though the two quickly recovered and Kennedy later brought Hundley back in to replace Edwyn Silberling as the head of OCS during his own tenure as Attorney General, the heated exchange illustrates the depth of Kennedy's activist impulses and the long history of his frustration with those procedural or bureaucratic obstacles he dismissed as "technicalities."

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<sup>73</sup> *Id.*

<sup>74</sup> Interview by J.A. Oesterle, with William G. Hundley, Robert F. Kennedy Oral History Project, 7-8. (December 9, 1970).

<sup>75</sup> William G. Hundley, *quoted in* Donald R. Larrabee, "Crooks Exposed, Not Prosecuted," *New Bedford Standard-Times*, October 4, 1959, *cited in* Schlesinger, *supra* note 28, at 183.

<sup>76</sup> Hundley interview, *supra* note 69.

<sup>77</sup> *Id.*

Kennedy's urgency was also evident in his relatively sympathetic view towards Senator Joe McCarthy, under whom he worked as assistant counsel for the Permanent Subcommittee on Investigations. Arthur Schlesinger, Jr. described Kennedy as having "retained a fondness for McCarthy," even after his fall from grace, and Kennedy's history with McCarthy made many of his colleagues uncomfortable.<sup>78</sup> Ronald Goldfarb, for example, who later joined Kennedy's Organized Crime Section, recalled "having a lot of hang-ups and reservations about taking the job" because he "thought so little of Kennedy" from his days working with McCarthy.<sup>79</sup> When offered the job, Goldfarb said, "I had to go home and wrestle with it because I thought that Bobby Kennedy was a little fascist from the days working with McCarthy."<sup>80</sup>

When asked about his perspective on McCarthy ten years after resigning from the Committee, Kennedy explained, "Well, at that time, I thought there was a serious internal security threat to the United States; I felt that there was a serious internal security threat to the United States; I felt at that time that Joe McCarthy seemed to be the only one who was doing anything about it. I was wrong."<sup>81</sup> Ultimately, the crux of Kennedy's critique of McCarthy was that he was not driven by reality or morality but by a thirst for publicity. Kennedy wrote that McCarthy "destroyed himself for... publicity. He had to get his name in the paper... He was on a toboggan. It was so exciting and exhilarating as he went downhill that it didn't matter to him if he hit a tree at the bottom."<sup>82</sup> Kennedy had at first respected McCarthy's aggressiveness in dealing with what he viewed as a real problem initially, but he could not stand behind the campaign once it lost its factual basis. He lamented that "no real research was ever done. Most of

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<sup>78</sup> Schlesinger, *supra* note 28, at 106.

<sup>79</sup> Interview by Sheldon Stern with Ronald L. Goldfarb, Robert F. Kennedy Oral History Project, Washington, D.C., at 1. (November 2, 1981), *available at* <http://archive1.jfklibrary.org/RFKOH/Goldfarb,%20Ronald%20L/RFKOH-RLG-01/RFKOH-RLG-01-TR.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> Schlesinger, *supra* note 28, at 106.

<sup>82</sup> *Id.*, at 105.

the investigations were instituted on the basis of some preconceived notion by the chief counsel or his staff members and not on the basis of any information that had been developed. Cohn and Schine claimed they knew from the outset what was wrong; and they were not going to allow the facts to interfere.”<sup>83</sup> Kennedy may not have been particularly perturbed by the Committee’s aggressive style had its actions been based on solid factual investigation, which Kennedy called “spade work,” rather than “pet theories.”<sup>84</sup>

As Kennedy gained notoriety throughout his work on the various Senate Investigation Committees, he also began to develop his public persona and began to express various facets of his moral and legal philosophy in public speeches. In 1958, he gave several law school speeches that introduced his signature moralistic tone and his obsession with the threat of organized crime. He spoke of the threat of organized crime as a threat to America’s moral and economic order as well as its security in the Cold War international order.<sup>85</sup> One speech at the University of Notre Dame reached such a puritanical fervor that the founders of Plimoth Plantation, a historical attraction which recreates the Pilgrims way of life in Plymouth, wrote to congratulate Kennedy and ask for permission to quote from his speech.<sup>86</sup> The speech described the threats of enemy collaboration in Korea and labor racketeering at home as “very disturbing signs” indicating the country’s moral decline.<sup>87</sup> Kennedy warned of the false sense of security brought on by the material advancement of the modern era:

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<sup>83</sup> *Id.*, at 106.

<sup>84</sup> *Id.*

<sup>85</sup> Robert F. Kennedy, Speech at University of Alabama Law Day Banquet, April 11, 1958, in Robert F. Kennedy Pre-Administration Papers, JFK Library.

<sup>86</sup> Letter from David B. Freeman, Acting Director of Plimoth Plantation, to RFK, March 11 1958, in Pre-Administration Papers, JFK Library. (“Some of your principal points are exactly the ones we are trying to bring home to people in recreating the Plymouth of the Pilgrims. The qualities that enabled the 1620 colonists to plant a way of life on these shores are essentially the same ones Americans today must exercise to preserve it.”).

<sup>87</sup> Robert F. Kennedy, Speech at University of Notre Dame, February 22, 1958, in Robert F. Kennedy Pre-Administration Papers, JFK Library.



In the intervening years since Valley Forge, we have progressed materially and financially until now we are the most powerful nation in the world...But are the material advancements that we have made and the expressions of mutual and self-admiration sufficient? Let us take an accurate assessment in this year of crisis, 1958. Have the speeches that we have been making to one another, the comforts that we have bought, so lulled our strength of character and moral fibre that we are now completely unprepared for the problems that are facing us? Are we prepared to face another Valley Forge? There are some very disturbing signs that we are not.<sup>88</sup>

These “disturbing signs” included statistics on enemy collaboration in Korea and an in-depth explanation of the structure of labor racketeering in the United States, with Kennedy portraying the country in a state of moral crisis and decline, brought on by the loss of communitarian ideals and a siege of materialism. He warned that the future security of the country depended on morality:

Before we master Communism, the Russians or outer space, our own house must certainly be in order... Dangerous changes in American Life are indicated by what is going on in America today. Disaster is our destiny unless we reinstill the toughness, the moral idealism which guided George Washington and his associates some 160 years ago. The paramount interest in oneself, for money, for material goods, for security, must be replaced by an interest in one another- an actual, not just a vocal, interest in our country; a search for adventure, a willingness to fight, and a will to win; a desire to serve our community, our schools, our nation.<sup>89</sup>

The speech was unique for Kennedy in its emphasis on the lessons of the past, but the fiery moralism on display continued throughout his career and played a major role in his conception of the law. By the time he arrived at the Department of Justice, Kennedy had developed a unique identity as a lawyer, emphasizing factual inquiry and institutional responsiveness and infusing his legal perspectives with a fierce moralism that left little room for procedural and bureaucratic constraints. Despite his fairly traditional legal education, Kennedy did not appear to have “bought in” to the idea of the law as an autonomous and determinate sphere to the extent that many of his peers did, and his early legal experiences tended to reinforce his activist impulses

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*, at 16.

and his belief that legal obligations should, and most often did, mirror moral obligations. He responded to procedural obstacles with an instinctive moral outrage that he frequently expressed in physical terms, with obstructionist witnesses making his “blood boil,” and evidentiary barriers making him “sick to his stomach.” Finally, Kennedy arrived at the Department with an acute sense that the country was in a state of moral crisis, threatened not only by the foreign enemy of Communism but by our own hypocrisy and corruption at home. The more exposure Kennedy gained to the myriad problems facing the United States during this period, the more fervent he became in his desire to use any means necessary to combat these challenges, and the less patience he had for the constraints of doctrine, procedure, and legal culture. These unique characteristics would define Kennedy’s style as a lawyer and thus play a major role in his work as Attorney General.

### **III. Making Legal Institutions Work: The War on Organized Crime**

Perhaps the strongest demonstration of both the strengths and weaknesses of Kennedy’s legal freewheeling was his aggressive attack on organized crime syndicates in the United States, which was widely known to be his “pet project.” Robert Kennedy named the war on organized crime his top priority at the outset of his tenure at the Department of Justice, and it would retain its priority status until being surpassed by Civil Rights in 1963.<sup>90</sup> As William Shannon observed, “his zeal to break up the syndicates was reminiscent of a sixteenth-century Jesuit on the hunt for heresy.”<sup>91</sup> Indeed, Kennedy had developed a somewhat puritanical zeal for stamping out organized crime after his time investigating labor racketeering as part of the McClennan Committee, and he shared the details of the investigation in his popular book, *The Enemy Within*.

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<sup>90</sup> Navasky, at 53.

<sup>91</sup> Navasky, at 52.

<sup>92</sup> He described the criminal underworld as a “private government of organized crime, resting on a base of human suffering and moral corrosion,” and his preoccupation with racketeering sometimes resembled Senator McCarthy’s obsession with Communism.<sup>93</sup> Upon his arrival at the Department in 1961, Kennedy immediately directed his energy to the war on organized crime, and in doing so he put his characteristic pragmatism on full display. But while his creativity and his sense of urgency proved invaluable in overcoming institutional resistance and mobilizing the Department’s resources against the underworld, his victim-oriented approach also caused him to put civil liberties at risk by undermining important procedural safeguards.

Robert Kennedy’s first objective was to implement a massive bureaucratic reorganization in order to adequately confront the “big business” of organized crime. He brought together twenty-seven different government agencies in a highly functional organization dedicated to handling every phase of the war against criminal syndicates, from investigation and indictment to trials and appeals. His four part strategy, as described by Victor Navasky, is indicative of his energetic and pragmatic approach:

(1) to mobilize the country and Congress through speeches, articles, testimony, legislation, publicity stunts- al designed to educate the nation to the dimensions and urgency of the threat posed by the Cosa Nostra, membership estimated at 5,000; (2) to motivate and give new status, manpower, money, and priority to the Justice Department’s own Organized Crime Section... (3) to win the cooperation of other government agencies through visits, telephone calls, meetings, lunches, the threat, promise and actuality of Presidential intervention, and general behind-the scenes pressures and promises; (4) to send out a group of centrally based prosecutors who would investigate, indict and try cases against the key rackets figures.<sup>94</sup>

Kennedy’s strengths as an administrator and politician (and his status as the President’s brother) were crucial to his success in enlisting a wide variety of government organizations in his war on

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<sup>92</sup> Robert F. Kennedy, *THE ENEMY WITHIN: THE MCCLENNAN COMMITTEE’S CRUSADE AGAINST JIMMY HOFFA AND CORRUPT LABOR UNIONS* (1960).

<sup>93</sup> *Id.*

<sup>94</sup> Navasky, at 55-56.

organized crime, and his private meetings and lunches with the heads of various departments and agencies proved indispensable. His organizational successes were perhaps the most impressive and least controversial elements of his war on crime, and they reflected his focus on institutional reform as a key to achieving greater responsiveness in the law.

Also indicative of his unique approach were his personnel decisions. As Victor Navasky observed, “the doers -- the men more likely to short cut procedural obstacles than to discover them -- were enlisted in the organized crime chase. In the organized crime area he wanted enthusiasts, not restrainers.”<sup>95</sup> Thus, to head the Criminal Division Kennedy chose Jack Miller, a Republican with whom he had worked to displace Jimmy Hoffa as the head of Teamsters and a lawyer who, according to one colleague, “would not hesitate to indict a man for spitting on the sidewalk if he thought that was the best he could get.”<sup>96</sup> As head of the Organized Crime Section, Kennedy named Edwyn Silberling, who had aggressively pursued racketeers as prosecutor under District Attorney Frank Hogan in New York City.<sup>97</sup> And as head of the Labor and Racketeering branch of the Organized Crime Section, also known as the “Get-Hoffa squad,” Kennedy chose Walter Sheridan, who had formerly worked for the FBI and the McClellan committee and of whom Kennedy once remarked, “In any fight I would always want Walter Sheridan on my side.”<sup>98</sup> The aggressive, ends-oriented leaders of the war on organized crime stood in stark contrast to the careful proceduralists that Kennedy appointed to deal with civil rights issues, and that distinction reflected his differing approaches to the two issues.<sup>99</sup>

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<sup>95</sup> Navasky, at 60.

<sup>96</sup> *Id.* at 59.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> For an in-depth analysis of the differences between Kennedy’s aggressive approach to organized crime and his more cautious civil rights strategy, see Victor Navasky, *KENNEDY JUSTICE* 179 (1971).

Kennedy's aggressive approach to organized crime also necessitated abrasive relations with state and local authorities, and he showed no hesitation in relocating power to the federal government when it came to matters of organized crime. This indelicate strategy stood in sharp contrast to his respect for Federalism in Civil Rights matters, in which he professed to be legally obligated to defer initially to state governments and local police.<sup>100</sup> His relative openness in trampling state and local authority reflected his frank assessment that organized crime syndicates had "outgrown the authorities," becoming "too widespread, too well-organized and too rich" for them to handle.<sup>101</sup> In Kennedy's view, the unique nature of organized crime demanded strong, centralized federal authority, and so the Justice Department did not hesitate to take over cases where the local authorities were viewed as "unreliable."<sup>102</sup> This approach frequently caused political friction, to which Kennedy yielded in several instances, taking a hands-off approach to certain "messy political cases."<sup>103</sup>

Another controversial tactic Kennedy used in the relentless war on crime was enlisting the Internal Revenue Service and prosecuting racketeers for tax code violations. The Attorney General joined forces with his former law professor, Mortimer Caplin, who had just been appointed as Commissioner of the IRS, and instructed the IRS to "give top priority to the investigation of the tax affairs of major racketeers."<sup>104</sup> As a result of this policy, known as the Organized Crime Drive, 60 percent of all organized crime cases from 1961-1965 were revenue cases.<sup>105</sup> But although tax prosecutions were an integral part of Kennedy's strategy, they raised

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<sup>100</sup> See, e.g., Burke Marshall, *FEDERALISM AND CIVIL RIGHTS* (1964) (describing the Kennedy administration's approach to civil rights issues).

<sup>101</sup> Navasky, at 61.

<sup>102</sup> *Id.*, at 60.

<sup>103</sup> *Id.*, at 62.

<sup>104</sup> *Id.*, at 169.

<sup>105</sup> Navasky, at 63.

significant questions about the limits of prosecutorial discretion and the propriety of using tax law as a means of punishing racketeers.

Robert Kennedy himself had no qualms about using tax laws to ferret out members of the criminal underworld. In his first interview as Attorney General, he announced the strategy and dismissed the criticism:

I have been criticized on the ground that tax laws are there to raise money for the government and should not be used to punish the underworld. I think the argument is specious. I do believe that tax returns must remain confidential. But I also recognize that we must deal with corruption, crime and dishonesty.<sup>106</sup>

Kennedy's casual justification was typical of his preference for ends over means, particularly when it came to organized crime. Nonetheless, his supporters within the IRS and the Tax Division did put forth slightly more sophisticated legal arguments in defense of the policy. When Kennedy had consulted Mortimer Caplin on the issue prior to his appointment, Caplin had in turn discussed it with F.D.G. Ribble, then the Dean of the University of Virginia School of Law, and responded with a five to six page letter expressing his approval of a close relationship between the IRS and Justice on the issue. Caplin concluded, "after much thought, that as long as we were making real tax investigations –not sham ones – there was nothing objectionable."<sup>107</sup>

Although Caplin has since defended his legal judgment on the collaboration between the IRS and the Department of Justice, he has also reiterated the fact that he gave his consent only after serious deliberation. In a 1995 interview, Caplin recalled that the potential for abuse inherent in enlisting the IRS in DOJ investigations was a "major concern," in light of the Truman scandals that the IRS had gone through in the 1950s, and that he wanted to make sure such

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

impropriety didn't happen again.<sup>108</sup> He remembered being "very mindful of the fact that the role of the IRS is to collect revenue" and that he refused to just "assign our people to the Department of Justice and let them run off willy nilly on wild goose chases."<sup>109</sup> Caplin's insistence on maintaining supervisory control reveals the tension between his cautious proceduralism and Robert Kennedy's urgent, ends-oriented brand of pragmatism, a dynamic that would recur frequently in Kennedy's interactions with other "lawyerly" lawyers. The fact that Kennedy was able to obtain both the cooperation and the "legal blessing" of such a respected legal figure certainly lent the IRS collaboration an air of legitimacy, and is ultimately went down as one of the less controversial elements of his war on organized crime.

In contrast, Robert Kennedy's views on electronic surveillance proved to be a source of great controversy and serve as a good illustration of the weaknesses of his urgent style. Kennedy had become convinced of the value of electronic surveillance during his time on the Senate Labor Rackets committee, particularly during his famous interrogation of Jimmy Hoffa. His experience investigating organized crime lead him to conclude that:

The need to be able to intercept or overhear these otherwise inaccessible communications, if criminal sanctions are to be brought into play, is clear, for the leaders perform no criminal overt acts that can be witnessed by the police or citizens, who are not involved themselves. Live insider testimony is rarely obtained an incriminating documents are either seldom kept or always kept inaccessible. Therefore, some substitute, such as the product of electronic surveillance, is crucial.<sup>110</sup>

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<sup>108</sup> District of Columbia Bar Ass'n, *Legends in the Law: A Conversation With Mortimer Caplin*, BAR REPORT (June/July 1995), available at [http://www.dcbar.org/for\\_lawyers/resources/legends\\_in\\_the\\_law/caplin.cfm](http://www.dcbar.org/for_lawyers/resources/legends_in_the_law/caplin.cfm).

<sup>109</sup> *Id.* Caplin also noted that he was particularly concerned about the IRS being subject to "political abuse." He recounted a time early in the administration when he received a call from the White House seeking the removal of one of an IRS agent in Boston on the grounds that he had been investigating a Democratic official who happened to be a political ally of the Kennedys. Caplin refused, citing a commitment to keeping the IRS nonpolitical, and President Kennedy later told him that he agreed with his decision "100 percent."

<sup>110</sup> Navasky, *supra* note 10, at 83.

Kennedy viewed electronic surveillance as an indispensable weapon in the war on organized crime, and to deny law enforcement that weapon was to inhibit its ability to respond to what he viewed as the most pressing threat to society at that time.

While he acknowledged the need to strike “a proper balance between the right of privacy and the needs of modern law enforcement,” his moral absolutism almost always tipped the scales in favor of law enforcement.<sup>111</sup> In 1961, he summoned his staff to his home, Hickory Hill, to discuss proposed wiretapping legislation, and demonstrated his incredulity at the idea of preserving the privacy of the mafia over the needs of law enforcement. When Bill Orrick, Ramsey Clark and Joe Dolan expressed the view that wiretapping should be strictly limited to national security cases, Kennedy turned to Orrick in disbelief and said, “Do you mean to tell me that if your little girl were kidnapped and a tap might help her get home safely you still wouldn’t approve?” Orrick responded that “hard cases make bad law,” later recalling that Kennedy simply “couldn’t understand my attitude” toward wiretapping.<sup>112</sup> Victor Navasky described Kennedy’s sense of urgency regarding the need for wiretapping as in keeping with his overall outlook:

[Wiretapping] was more than a counter-crime strategy. It was an expression of his social vision, his order of priorities, his victim-oriented compassion. By 1962 Kennedy was in constant conversation with proceduralists like Solicitor General Archibald Cox, Burke Marshall, Nicholas Katzenbach and Byron White on how to legitimize tapping and at the same time bring it under control. He had a growing sophistication about the possibilities of abuse, but it was tempered by the assumption that *he was going to be in charge and he was no abuser*.<sup>113</sup>

Kennedy viewed organized crime as a grave moral problem and was extremely frustrated with the idea of legal “technicalities” inhibiting law enforcement’s efforts to respond to such a serious threat. Kennedy argued that “modern means of communication” had given racketeers dangerous

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, at 84.



advantages over law enforcement officers and that “the racketeer knows that under present law his telephone conversations are protected from interference.”<sup>114</sup>

In 1962, Kennedy instructed Nicholas Katzenbach to draft wiretapping legislation, after Katzenbach criticized him for supporting the “lousy” Keating wiretapping bill of 1961.<sup>115</sup> While the new bill purported to restrict wiretapping, in practice it would have allowed the FBI and the Attorney General considerable discretion in conducting wiretaps. The bill would have prohibited warrantless wiretapping except in the “limited areas” of national security, kidnapping, interstate racketeering, and narcotics, relatively broad categories that could be manipulated or expanded fairly easily by the FBI or the Attorney General.<sup>116</sup> Though Katzenbach’s iteration gained some support as a reasonable attempt to balance concerns for privacy with the needs of law enforcement, critics viewed the legislation as inherently dangerous to civil liberties, and it ultimately failed in Congress in 1962.<sup>117</sup>

As for the existing wiretap procedures in place at the Department of Justice, Nicholas Katzenbach described them as “awful,” explaining that wiretap requests simply “came up... with a brief description, which was totally inadequate, and rarely got turned down.”<sup>118</sup> When asked whether there was ever a push for a reform of these procedures, Katzenbach’s response was in keeping with Navasky’s observation that Kennedy’s staff often acted as a “restraining influence” on him:

HACKMAN: Did anyone during that period ever urge that [wiretap request procedures] be tightened up?

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<sup>114</sup> Kennedy, *THE PURSUIT OF JUSTICE*, *supra* note at 52-53.

<sup>115</sup> Interview by Larry J. Hackman with Nicholas Katzenbach, Robert F. Kennedy Oral History Project, in N.Y., N.Y., at 53-56 (October 8, 1979) *available at* <http://archive2.jfklibrary.org/RFKOH/Katzenbach,%20Nicholas%20deB/RFKOH-NDK-01/RFKOH-NDK-01-TR.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> Schlesinger, *supra* note 28, at 271.

<sup>118</sup> Katzenbach interview, *supra* note 43, at 56.

KATZENBACH: No, they did not. And I think basically the reason they did not was that nobody ever got involved in it except the Attorney General. The problem, you know, the staff may get in the way sometimes but they also save your neck an awful lot of times. And somebody else sitting in that other office had been looking at these things, I'm sure there would have been a suggestion at the time.<sup>119</sup>

Kennedy's permissive attitude toward wiretapping became particularly problematic when he approved the FBI's request for authorization to wiretap Martin Luther King, Jr., on the grounds that he had contacts with a "secret and active and important member of the Communist party."<sup>120</sup> Katzenbach claimed Kennedy felt obligated to approve the request given the potential political fallout that could result if he denied the request and the memos regarding King's alleged Communist associations were leaked. The King wiretap was an example not only of the dangerously permissive environment Kennedy created with regard to electronic surveillance, but also of his problematic use of political calculations in making legal judgments.

Even more controversial than wiretapping was the FBI's use of illegal "bugging" during Kennedy's term. The practice involved the use of hidden microphones to capture conversations among suspected criminals. The FBI had experimented with bugging in the mid 1950s, but intensified its use of the practice under Kennedy as part of its strategy to "catch up" to organized crime.<sup>121</sup> First, the FBI planned to use bugs to ascertain the basic workings of a crime syndicate, and then it would use that information to infiltrate the syndicate or establish a network of informants.<sup>122</sup> When these illegal bugging practices were revealed in 1966, J. Edgar Hoover claimed that all bugs and taps had been authorized by Kennedy, that he was "briefed frequently...regarding such matters," and that electronic surveillance "was obviously increased

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<sup>119</sup> *Id.*, at 57-58.

<sup>120</sup> *Id.* at 59.

<sup>121</sup> Navasky, at 75.

<sup>122</sup> *Id.*

at Mr. Kennedy's insistence while he was in office."<sup>123</sup> Whether Kennedy in fact knew of or authorized the bugging remains in dispute. Kennedy denied having any knowledge, but Victor Navasky points out that he "did not particularly want to know about the FBI's bugging practices," and that he exhibited an "uncharacteristic lack of curiosity" regarding the matter.

Setting aside the specifics of the debate over Kennedy's knowledge or lack thereof, we can at the very least accept Navasky's conclusion that "the bugging was in part a response to the Kennedy-created environment of urgency (the war on crime had been generated by his Puritanism, propelled by his expertise, accelerated by his nonstop energy...[and] implemented by his muscle)."<sup>124</sup> Indeed, the war on organized crime put Kennedy's most salient characteristics on full display, and its successes and failures demonstrate the strengths and weaknesses inherent in his unique conception of his role as a lawyer and as Attorney General. His energy and creativity enabled him to overcome the institutional resistance of the excessively bureaucratic FBI and effectively mobilize the resources of a wide variety of government organizations. But the fierce moral urgency with which he attacked organized crime, a problem he knew intimately and viewed as a grave threat, caused him to endanger important safeguards of civil liberties. Ultimately, as a result of his excessive zeal, Kennedy made the Department of Justice and the FBI *too responsive* to the needs of law enforcement and *not responsive enough* to civil liberties issues, allowing his passion for the issue and frustration with procedure to drown out valid criticism from outside of the DOJ and override concerns raised by his trusted staff within the Department.

#### **IV. Making the Constitution Work: The Reapportionment Cases**

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<sup>123</sup> Letter from J. Edgar Hoover, Director, Federal Bureau of Investigation, to Representative H.R. Gross (Dec. 30, 1966), *cited in* Navasky, *supra* note 10, at 77. *See also Rep. Gross Assails Kennedy Handling Of Otepka Wiretap*, N.Y. TIMES, Dec. 31, 1966, at 39.

<sup>124</sup> Navasky, at 78.

The following section will take an in-depth look at the salience of Kennedy's ideal of constitutional responsiveness through the reapportionment cases, *Baker v. Carr*,<sup>125</sup> *Gray v. Sanders*,<sup>126</sup> and *Reynolds v. Sims*,<sup>127</sup> which were considered major successes for Kennedy as Attorney General and which can generally be read to support his approach to constitutional interpretation. Kennedy's preference for judicial activism did, however, encounter resistance from Solicitor General Archibald Cox, whose Frankfurterian approach emphasized judicial restraint and *stare decisis*. Although Kennedy's approach prevailed over Cox's in the reapportionment cases, many of Cox's concerns about judicial activism would later reemerge in critiques of the Warren Court's jurisprudence.

In his 1962 speech on the role of the Supreme Court, Robert Kennedy held out *Baker v. Carr* as an example of the Court fulfilling its obligation to give substance to the Constitution's legal form and to ensure that the "constitutional framework responds to the ethical imperatives of our people."<sup>128</sup> The case involved the Tennessee apportionment system, which had left urban areas severely underrepresented in the state legislature. The Supreme Court had refused to touch malapportionment cases since the landmark case of *Colegrove v. Green* in 1946, in which Justice Frankfurter famously wrote that "courts ought not to enter the political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress."<sup>129</sup> *Colegrove* exemplified the Frankfurterian commitment to judicial restraint that had so disappointed liberals who had hoped to find in him an activist champion of important liberal causes. Federal judges throughout the country cited Frankfurter's decision for almost twenty years, refusing to assert jurisdiction over legislative apportionment

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<sup>125</sup> 369 U.S. 186 (1962).

<sup>126</sup> 372 U.S. 368 (1963).

<sup>127</sup> 377 U.S. 522 (1964).

<sup>128</sup> Kennedy, Address at Virginia State Bar, *supra* note 60, at 1, 3.

<sup>129</sup> Navasky, *supra* note 11, at 340.

issues, which resulted in a Catch-22 whereby malapportioned legislatures could not correct themselves and no other branch of government was willing to do it for them.

In 1960, however, Solicitor General Lee Rankin (who served under President Eisenhower) notified the Court that the government intended to file as amicus curiae in *Baker v. Carr*, which was then inherited by Robert Kennedy's Solicitor General, Archibald Cox.<sup>130</sup> Cox, according to one colleague, "was very lukewarm and leery" about the propriety of the case in light of the political question doctrine as expressed in *Colegrove*, a decision which aligned with his own "Frankfurterian" views.<sup>131</sup>

Cox's restrained approach stood in stark contrast to Robert Kennedy's emphasis on judicial activism and disenchantment with *stare decisis*. While Kennedy sought to adapt the Constitution to confront the pressing policy issues of the day, Cox "was not interested in contemporary trends." Instead, Victor Navasky writes, "he was concerned about his obligation to the Court, to history, to the future, to the course of Constitutional law."<sup>132</sup> The jurisprudential tension between Cox and Kennedy went beyond generational differences and can be traced back to the significant difference between the two men's formative legal experiences. Cox graduated from Harvard Law in 1937, where his primary extracurricular was the Phi Delta Phi legal fraternity, a world away from Kennedy's political engagements with the Student Legal Forum in Charlottesville in the later 1940s. After graduation, Cox continued to accumulate the trappings of a pristine legal pedigree, first clerking for the esteemed Judge Learned Hand on the Second Circuit and then joining the prestigious white-shoe Boston law firm of Ropes & Gray.<sup>133</sup> But

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<sup>130</sup> *Id.*, at 341.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*, at 338.

<sup>133</sup> Bart Barnes, *Watergate Prosecutor Faced Down the President*, Washington Post, May 30, 2004, available at [http://www.washingtonpost.com/politics/watergate-prosecutor-faced-down-the-president/2012/05/31/gJQAoxBQGV\\_story\\_2.html](http://www.washingtonpost.com/politics/watergate-prosecutor-faced-down-the-president/2012/05/31/gJQAoxBQGV_story_2.html).

although Cox was hesitant to ask the court to enter the political thicket, he was eventually “brought around, slowly and tortuously, to the true-blue view on reapportionment.”<sup>134</sup>

To Robert Kennedy, *Baker* was a golden opportunity to “see the democratic process work right,” a view which Burke Marshall describes as “instinctive” to Kennedy and which epitomizes his crusade for responsiveness.<sup>135</sup> According to Marshall, Kennedy “thought Congress wasn’t working right and state legislatures weren’t working right...If you set up a political structure dependent on the vote and rig it so that the vote doesn’t count, that’s no good.”<sup>136</sup> After some coaxing from Kennedy and his right-hand men, Cox was persuaded to ask the court to overturn *Colegrove* and enter the political thicket, in spite of his “difficult and proper doubts about the proper role for the court.”<sup>137</sup> As a matter of litigation strategy, both Kennedy and Cox agreed to postpone the issue of reading a substantive apportionment standard into the Fourteenth Amendment, instead asking only that the Court declare the matter justiciable. The Court agreed, setting aside the political question doctrine and declaring legislative apportionment a justiciable issue. Frankfurter’s dissent called the majority’s decision an assertion of a “destructively novel judicial power.”<sup>138</sup>

The next reapportionment case was *Gray v. Sanders*, involving the Georgia County Unit system, which Kennedy argued himself. Although Kennedy told the Court that the system was a “gross and arbitrary discrimination” that violated the Fourteenth Amendment’s equal protection clause, he took a conservative approach by once again declining to ask the court to announce a substantive, “one man one vote” standard. Again, the Court agreed with the government, striking

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<sup>134</sup> *Id.*, at 342.

<sup>135</sup> *Id.*, at 343.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., concurring).

down the Georgia County Unit System as violative of the Fourteenth Amendment's equal protection clause.<sup>139</sup>

By the time the third apportionment case, *Reynolds v. Sims*, came up to the Supreme Court, Kennedy and his kindred spirits in the Attorney General's office were becoming increasingly eager to go for the gold and ask the Court to adopt a substantive standard of strict proportionality. Having witnessed the influential role that the government's briefs had played in *Baker* and *Gray*, many saw *Reynolds* as a unique opportunity to determine the direction of the Court's jurisprudence in favor of the ever-important value of responsiveness. In a memorandum dated July 3, 1963, Bruce Terris argued that the Department should support a strict population standard, writing that "it would be a tragedy if the great victory in *Baker v. Carr* were thrown away by our persuading the Supreme Court to accept a weak substantive standard."<sup>140</sup>

Despite significant support for this position in the Department of Justice and recent indications that the Court would consider adopting such a standard, Solicitor General Cox remained unconvinced that the government should support a strict proportional standard.

Although he agreed with a one man one vote principle as a policy matter, he wrote:

I cannot agree that the Supreme Court should be advised to impose that rule upon all 50 states by judicial decree. In my opinion, any such decree would be too revolutionary to be a proper exercise of the judicial function and too rigid to comport with the principle of federalism.<sup>141</sup>

Kennedy viewed the "real issue" as "whether some people's vote should count more than other people's vote," and had difficulty fully understanding Cox's qualms, but he took a relatively hands-off approach, declining to push Cox any farther outside his legal comfort zone.<sup>142</sup>

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<sup>139</sup> Navasky, *supra* note 11, at 344.

<sup>140</sup> *Id.*, 348-349.

<sup>141</sup> *Id.*, at 354.

<sup>142</sup> *Id.*, at 356.

Ultimately, in light of his concern that the adoption of a rigid proportional standard would “precipitate a major constitutional crisis, causing an enormous drop in public support for the Court,” Cox adopted the intermediate approach.<sup>143</sup> But although Cox argued for a middle way, the Court went beyond the government’s proposal and announced a one man one vote standard on its own. When the decision was announced, Cox was asked, “How does it feel to be present at the second American Constitutional Convention?” He responded, “It feels awful.”<sup>144</sup>

The Court’s opinion in *Reynolds* demonstrated the growing salience of Kennedy’s activist approach to constitutional interpretation in contrast to Cox’s restrained Frankfurterian approach. But while Cox would later refer to the reapportionment cases as his proudest achievement as Solicitor General, critics of the Warren Court’s “activist” jurisprudence would later reiterate many of the concerns he expressed regarding the proper role of the Court and the proper mode of Constitutional interpretation. Many of the Court’s decisions during the 1960s were in keeping with Kennedy’s ideal of a more responsive Constitution and a more active Supreme Court, but that very responsiveness has come under fire from originalist critics like Justice Scalia, Justice Thomas and Professor Robert Bork. Kennedy’s ideal of the Court as the nation’s conscience presupposed a sort of moral and ethical absolutism that may have been difficult to reconcile with many of the more divisive issues the Court has faced since his death, such as reproductive privacy and gay rights.

## **V. Conclusion**

Arthur Schlesinger wrote that Robert Kennedy arrived at the Department of Justice “determined to transform [it] from a citadel of *stare decisis* into an agency of reform.”<sup>145</sup> Kennedy viewed the lawyer of his generation as having a unique obligation to make the law

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<sup>143</sup> *Id.*, at 354.

<sup>144</sup> *Id.*

<sup>145</sup> Schlesinger, *supra* note 28, at 243.



work in the New Frontier by reforming legal institutions and by adapting the Constitution to the challenges of the modern era. The central theme of Kennedy's conception of the lawyer was the idea of responsiveness, which was in keeping with the "liberal accord" of the 1960s as well as the increasingly popular principles of the legal realism movement, but Kennedy's pragmatic style was also distinguished by his unique sense of moral urgency. His detached and instrumental approach to law school and distinctive role as Senate counsel strengthened and legitimated his existing instincts toward legal instrumentalism and encouraged him to view his legal obligations as essentially coextensive with his moral and political intuitions. This conception in turn proved to be the animating force in his career as Attorney General, and contributed to both his greatest successes and his more questionable failures.

On the one hand, Kennedy's black-and-white moralism was at times overly simplistic and short-sighted, leading him to focus almost exclusively on implementing his political objectives, often at the expense of important rule-of-law values. In this sense, Kennedy can be seen as a cautionary tale, reminding us of the dangers of pure instrumentalism and the values of restraint and procedure. On the other hand, Kennedy's outspoken, activist example should inspire lawyers to strive for a more creative, compassionate, and morally engaged practice. Kennedy's confidence in the ability of the law to achieve social justice reminds us that we need not check our political or moral intuitions at the door when we enter law school, as Duncan Kennedy fears we are so often forced to do.<sup>146</sup> As a privileged white male in the 1950s and early 1960s, Kennedy was willing to speak against injustice and oppression in frank, passionate, and confidently moral terms that would seem radical in mainstream legal discourse today. In this way, his commitment to "justice with a little j" serves as a call to action for progressive lawyers to resist the pressure to dismiss our moral and political convictions as "childish things" which

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<sup>146</sup> Duncan Kennedy, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983).

must be “put away” in order for us to be respected as lawyers, and to instead build practices which accommodate and advance those objectives in meaningful ways.<sup>147</sup>

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<sup>147</sup> *Id.*