

**CASES IN CONTEXT: LAKE CHAMPLAIN WARS,  
GENTRIFICATION AND *PLOOF V. PUTNAM***

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My first year of law school more than twenty years ago was a disturbing experience. Coming from graduate training in another discipline, legal anthropology, I was appalled by what often happened in my classes. Despite the reputation law training had for rigorous analysis, many of my professors made statements about human behavior with little or no empirical foundation, failed to examine many of their assumptions that underlay doctrinal statements and provided little or no social context for many of the cases we read or studied in class. Needless to say, they almost never talked about issues of race, gender, and especially social class, even when those issues literally “jumped out” of the cases.<sup>1</sup>

Although legal pedagogy has changed significantly in the last twenty years, many of the first-year casebooks, especially in tort law, which I teach, still tend to present “acontextual” discussions<sup>2</sup> of cases with little or no historical or social background information. Often, the casebook authors will reserve the most interesting information about the cases for the teacher’s manual, which the law professor can use or ignore.<sup>3</sup> Fortunately, in recent years, a number of law professors have researched the social and historical

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\* Professor of Law, Vermont Law School. Many Vermont historians and Vermont Law School students helped me research this paper. I would especially like to thank Peter Gilles, Robert Weiss, Kay Teetor, Kevin Dann, Susan Brande Price and Nancy Gallagher for their invaluable assistance. I am especially grateful to Kevin Dann, a local Vermont historian, for providing me with his original source material on the case and on the Ploofs.

1. One of the most vivid memories I have is from Criminal Procedure in my first year of law school. The professor was discussing a case, *Davis v. Mississippi*, 394 U.S. 721 (1969), in which the local police rounded up many of the young black men in town when a rape victim identified her attacker simply as a young black man. The professor only discussed the case in terms of the Fourth Amendment issue of whether the police could take fingerprints and didn’t even mention the police round-up. When I raised my hand to ask about the round-up, he seemed surprised by the question. If I had not raised the issue, he would not have discussed it at all.

2. See Elizabeth Mertz, *Linguistic Constructions of Difference and History in the U.S. Law School Classroom*, in *DEMOCRACY AND ETHNOGRAPHY: CONSTRUCTING IDENTITIES IN MULTICULTURAL LIBERAL STATES* 218, 218-32 (Carol Greenhouse ed., 1998). See also JOHN M. CONLEY & WILLIAM M. O’BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 134 (1998).

3. Taunya Lovell Banks, *Teaching Laws With Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443, 447 (1992).

context of some of the classic tort law cases,<sup>4</sup> unearthing invaluable information about the parties, the lawyers and the judges. The cases look very different when the reader knows more than the selective presentation of facts in appellate opinions.<sup>5</sup>

As a resident of Vermont and as a torts teacher, I thought it might be enlightening to research the historical background of one of the few Vermont cases that law students read, *Ploof v. Putnam*.<sup>6</sup> I wondered if, as with some other classic tort cases,<sup>7</sup> there were some facts and issues left out of the Vermont Supreme Court's opinion that might cast light on social tensions and prejudices of life in a Lake Champlain community around the turn of the century. This Article will explore the background information I was able to acquire, albeit in piecemeal fashion, about the parties, the lawyers and the Vermont Supreme Court of that era. The first section will look at why social and historical context matters in understanding torts or any other kind of law. The next section will describe some of the data I was able to locate. Much of Vermont legal history exists only in fragments, often fortuitously preserved by avid local historians who take an interest in preserving the histories of their communities. Even so, *Ploof v. Putnam* has become an important part of the local lore of Charlotte, Vermont and neighboring communities. The last section will examine the implications of the data on our understanding of the case.

### I. CASES IN CONTEXT: WHY IT MATTERS

Exploring the social and historical background of the cases we use in first-year Torts makes sense for a variety of reasons. Having been trained in legal anthropology before law school, I consider it second nature to look at cases and law this way. But apart from personal inclination, an interdisciplinary approach to law provides students with the knowledge to critically examine how tort law affects the lives of real people. Empirical data and social scientific analysis are crucial to sensitizing students as to how inequality, specifically with regard to race, gender, class and sexual orientation, affects what occurs throughout the cases they study. Finally, good lawyering requires an appreciation of the social factors that affect what happens to the clients in the legal system.

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4. See Symposium, *Five Approaches to Legal Reasoning in the Classroom: Contrasting Perspectives on O'Brien v. Cunard S.S. Co.*, 57 MO. L. REV. 346 (1992) [hereinafter *Five Approaches to Legal Reasoning*]; Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 WIS. L. REV. 877; JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976).

5. See, e.g., *infra* notes 23-33.

6. 71 A. 188 (Vt. 1908).

7. See *supra* note 4.

### A. *Legal Anthropology and Dispute Processing*<sup>8</sup>

The empirical study of disputes<sup>9</sup> has been at the center of American legal anthropology since its inception around seventy or more years ago.<sup>10</sup> Empirical studies of disputes have particular relevance to legal pedagogy in the first year of law school. We know that disputes go through an extensive transformation process before they come into the court system.<sup>11</sup> Most disputes never come to the attention of a lawyer.<sup>12</sup> Before they bring their disputes to the attention of a lawyer, individuals have to recognize that they have suffered an injury that requires or deserves legal attention.<sup>13</sup> The lawyer then decides if the client has a case. If so, the lawyer will frame the dispute into something the court system will recognize. This process often alters or transforms the dispute significantly from the client's understanding of the dispute. The transformation may narrow or broaden the dispute, and, in the process, social issues of race, gender, class and sexual orientation may be accentuated, ignored or downplayed.

When the other parties to a dispute decide to hire lawyers, their lawyers will also transform the dispute in ways they perceive promote their clients' interest. Of course, if the case goes to trial, the lawyers from both sides, the judge and the jury will further transform the dispute. The end result may bear only a tangential relationship to the original dispute.<sup>14</sup> Because lawyers play a central role in the transformation of disputes, law students need to appreciate how social and political biases affect the ways they and other actors in the

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8. While I am using the term "legal anthropology," I do not mean to exclude legal sociology or political science. All those who look at law and society read each other's work regardless of our particular disciplines. Major periodicals like *Law and Society Review* and the *Journal of Law and Society* publish social scientific articles on law from anthropologists, sociologists and political scientists.

9. Using the term "case" is too narrow. Parties to a dispute may or may not bring a dispute to the attention of a lawyer. Even if they go to see a lawyer, the disputes may not be something that the legal system will consider. If the lawyer determines that the disputes can be brought into court, only then does it become a "case." What we study in most law classes is something far removed from the initial dispute. See notes 8-36.

10. See, e.g., K. N. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); *LAW IN CULTURE AND SOCIETY* (Laura Nader ed., 1969); E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* (1954).

11. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980).

12. See *id.* at 636.

13. See *id.* at 633-37; see also CONLEY & O'BARR, *supra* note 2, at 78-79.

14. See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990), for a detailed examination of the reasons many litigants feel disappointed in the ways courts handled their cases in small claims court. See also SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

legal system frame legal issues and how the decisions on framing the issues affect what happens to their clients. To appreciate aspects of the dispute the lawyers, judges and juries consider, students need far more data about cases than they typically receive in most law course textbooks. They read edited versions of appellate opinions with comments and questions afterward to focus their minds primarily on the doctrinal issues the casebook authors consider worthy of discussion.<sup>15</sup>

Anthropological understanding has practical, as well as scholarly implications.<sup>16</sup> Good lawyering requires that lawyers know their clients and the situations of their lives. To accomplish this, law students need to develop a skill not often emphasized in legal education; the skill of reading and understanding a social map. As Professor John Conley explains:

Social science's first contribution to my professional life is instrumental: it improves my understanding of human behavior in legal settings. The tactical advantages of such understanding are obvious. But on a more significant level, social science contributes to a fuller appreciation of the goals, motivations, and strategies of clients, judges, and adversaries. This understanding makes me, I hope, a better educated and more discerning lawyer than I would otherwise be.<sup>17</sup>

To teach students how to develop an understanding of human behavior in conflict situations, law professors need to include more background information about at least some of the cases they utilize in their courses. We should include excerpts from the appellate briefs, trial transcripts or other trial documents, news stories about the cases, scholarly articles on the cases or even interviews with the parties and their lawyers, if the cases are relatively recent.<sup>18</sup>

Another reason to consider the broader social context is its importance to individual clients. Clients care about the social context of the disputes they bring to the lawyer's office,<sup>19</sup> and students need to understand that social context is important in deciding how to proceed. Clients often see disputes in ways different from lawyers. Students need to be sensitive to these differences

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15. Even if the torts casebook presents interdisciplinary work, this material is rarely integrated with the doctrine. The major exception is law and economics. Torts casebooks present conservative law and economic theories because these theories have been influential and appeal to the casebook authors. James A. Henderson, Jr., Richard N. Pearson and John A. Siciliano made ineffective attempts to incorporate other social science. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* (5th ed. 1999). This bias may reflect the limited social experience of most tort casebook authors. Most are upper-middle class, white men.

I am not arguing that students should not learn doctrine. The legal system obviously does use this formal legal discourse. See CONLEY & O'BARR, *supra* note 2, at 133-35.

16. See John M. Conley, *The Social Science of Ideology and the Ideology of Social Science*, 72 N.C. L. REV. 1249, 1257-58 (1994).

17. *Id.*

18. See, e.g., *Five Approaches to Legal Reasoning*, *supra* note 4, at 469-99.

19. See generally Mertz, *supra* note 2; CONLEY & O'BARR, *supra* note 2, at 134.

in order to understand what their clients want from them and the legal system. Failure to consider the broader context of disputes may result in lawyers missing important legal positions or downplaying issues critical to their clients. Unfortunately, law professors tend to de-emphasize the social context by constructing characters in our hypotheticals that have no social context.<sup>20</sup> The characters in our little narratives are often disembodied individuals who have no social relationships, and to illustrate this reality, they are often represented by letters instead of names.

### *B. Social Context and the Outsider Perspective*

Understanding the social context is especially important to authenticate the social experiences of outsiders to the legal system, that is, those who experience oppression or disadvantage. Many of our students come from white, middle-class backgrounds, having little or no personal experience with people from different classes and cultures. In my own teaching experience, my students often have a hard time relating to or empathizing with people from different social backgrounds unless they have experienced inequality themselves. Those students who have had these experiences are not always certain that their observations are welcome in class. Law students cannot learn to empathize with different social experiences if these experiences are not emphasized in their classes. Many students from disadvantaged groups often feel alienated in their first year of law school, because issues of race, class, gender and sexual orientation are downplayed or ignored in the cases they read. They also feel pressured to be the spokespersons for these issues in class. While more law professors are teaching these issues in class, the professors who concentrate on them tend to be women and minorities.<sup>21</sup> To have a meaningful discussion of social issues and to encourage students to raise them on their own, the teaching materials must present a fuller social picture of the cases they read,<sup>22</sup> and the teacher has to be willing to spend time for such discussion in class. In depth discussion must have priority over coverage.<sup>23</sup> Thinking like a lawyer has to mean more than extracting rules out of cases and learning to apply them without regard to the consequences to people's lives.

While it may be heretical to mention in the context of professional education, teaching cases in context is also fun for the teacher and the students. I have found that classes come alive when students are exposed to facts and

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20. See CONLEY & O'BARR, *supra* note 2, at 134.

21. See generally Mertz, *supra* note 2.

22. The books they use must have these social issues as integral parts of the book. Just handing out supplements, while important, often tells students that the conventional wisdom is that issues of inequality and power are tangential.

23. Over the years, I have worried less about coverage and more about how and what I cover.

issues courts have chosen to downplay or ignore altogether. When students explore the reasons for the omissions or lack of emphasis, the discussion immediately proceeds to a discussion of the social positions and biases of the judges, the lawyers and the parties. For example, *O'Brien v. Cunard S. S. Co.*<sup>24</sup> is normally used in tort casebooks to illustrate that people need not expressly give consent if their actions would indicate to a reasonable person that they were consenting. In this case, the court emphasized that the plaintiff freely stood in line to have an inspection and a smallpox vaccination if the ship's doctor did not find the appropriate scar.<sup>25</sup> Although she informed the doctor she had been vaccinated, the doctor told her she did not have any indication of a vaccination and that he could not provide her with the medical card she would need when the ship docked in Boston.<sup>26</sup> According to the court, she continued to hold her arm up when so informed. By holding up her arm, she indicated she wanted a vaccination, and therefore the doctor was reasonable in assuming she had consented to the vaccination.<sup>27</sup>

The case looks very different when you read the briefs and look at the trial record. The facts not mentioned in the court's opinion could well lead to a different conclusion. The plaintiff, an Irish immigrant in steerage, was seventeen years old at the time of the vaccination.<sup>28</sup> Signs announcing the vaccinations were posted around the ship, but contained language the plaintiff did not understand.<sup>29</sup> The passengers in steerage were rounded up, divided into lines by gender, and herded down the steps to the doctor. No one was allowed to leave without the doctor's permission.<sup>30</sup> Students reading this opinion do not have the benefit of these facts in evaluating the court's analysis unless they are given the appellate briefs.<sup>31</sup> When they read these with the court's opinion, then they can raise crucial issues about how class, gender and ethnicity affected the way the plaintiff's case was treated by the court.<sup>32</sup> Students can see from the briefs that the court chose to believe the defendant's version of the facts. The bodily integrity of a poor Irish immigrant girl was simply not worthy of significant consideration by the upper-class yankees on the Massachusetts Supreme Court.<sup>33</sup>

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24. 28 N.E. 266 (Mass. 1891).

25. *See id.* at 274.

26. *See id.*

27. *See id.* at 274-75.

28. *See* Plaintiff's Exceptions, *O'Brien v. Cunard*, 28 N.E. 266 (Mass. 1891), reprinted in *Five Approaches to Legal Reasoning*, *supra* note 4, at 469.

29. *See id.* at 471-72.

30. *See id.*

31. *See id.* at 469-99.

32. As illustrations of how rich that discussion can be, see the five articles published in *Five Approaches to Legal Reasoning*, *supra* note 4.

33. *See* Banks, *supra* note 3, at 448-54; Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371, 376 (1992).

From my own teaching experience, the information in the *O'Brien* briefs contributes to an engaging discussion of prejudice against women, immigrants and the Irish in the nineteenth century. The case comes alive for the students. They learn to be skeptical about accepting without question a court's version of what happened, and they learn that people are treated differently if they happen to be members of an oppressed group. Because courts rarely state their prejudices openly these days, readers might not know these social factors are at work unless they have a more complete picture of the historical period, the locale and the parties involved.<sup>34</sup>

As I will show in the next section,<sup>35</sup> *Ploof v. Putnam*<sup>36</sup> also has an interesting history and social background that is not evident in the Vermont Supreme Court opinion most students read. The case illustrates the social tensions in the late nineteenth and early twentieth centuries between wealthy owners of vacation property on Lake Champlain and the poorer local residents who worked and lived on the lake long before Lake Champlain coastal property became a vacation spot for the wealthy. Finding additional information on the parties, lawyers and judges beyond what is available in the briefs was a challenge, but this historical material provides a window into a society quite different from the tolerant image that modern Vermont likes to present.

## II. BEYOND THE OFFICIAL STORY

Generations of law students who have read *Ploof* are familiar with the simple rendition of the facts. Sylvester Ploof and his family were traveling in a fully loaded sloop across Lake Champlain in November 1904 when they were caught in a severe storm.<sup>37</sup> To ride out the storm in safety, Sylvester Ploof tied the sloop to Henry Putnam's dock. Putnam's caretaker, Albert Williams, untied the line and the boat was subsequently wrecked when the storm drove it on the rocks at the lakeshore.<sup>38</sup> As a result, the sloop and its contents were destroyed and its passengers injured.<sup>39</sup> With this presentation of the facts, the Vermont Supreme Court held that if necessity occasioned by the storm were proven, the plaintiff should have been allowed to moor at the defendant's dock

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34. There are, of course, notable exceptions. For example, in *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986), the Supreme Court went out of its way to attack a gay man's constitutional claim of a right of intimate association by characterizing the claim solely as a right to commit consensual sodomy, a sexual practice the majority indicated it abhorred. In the concurrence, Chief Justice Burger even invoked Judeo-Christian ethics to justify criminalizing consensual sodomy. *Id.* at 196-97.

35. See discussion *infra* notes 37-51.

36. 71 A. 188 (Vt. 1908).

37. *Id.* at 188-89.

38. *Id.*

39. *Id.*

for the duration of the storm.<sup>40</sup> The defendant could be held liable for refusing to allow the plaintiff to stay tied to his dock.<sup>41</sup>

But there is so much more to this story. Why did Putnam's caretaker untie Ploof's boat in a terrible storm? The official presentation of the facts conveys the impression that Sylvester Ploof was a complete stranger who happened to be traveling on the lake when he was caught in the storm and then just happened to sail to the defendant's island and dock. The local lore about this case is quite different. The Ploofs were a poor, landless family who lived and worked on their boat. They earned their living transporting firewood and other goods on the lake and were well known and disliked by the lakeshore inhabitants. Known as the "pirates" of Lake Champlain, they were often accused of raiding and stealing from vacation homes on the lake.<sup>42</sup> When they were seen in the area, homeowners generally went on the alert and even chased them off with guns.<sup>43</sup> Henry Putnam's caretaker untied the Ploofs' boat because he knew them and he was aware of their reputation as thieves, not simply because the Ploofs were using the dock without the owner's permission.<sup>44</sup>

Investigating this case turned out to be quite a challenge. The famous opinion in *Ploof* was the 1908 decision of the Vermont Supreme Court.<sup>45</sup> The case actually had a much longer life. The case was ultimately tried in 1909 and the plaintiff was awarded \$650.<sup>46</sup> The legal archives had most of the appellate briefs, but the trial transcript is missing and may have been destroyed in a 1970s fire at the Chittenden County Courthouse, the location of the trial court. I discovered much of the information about the case and the parties from the many local historians who are deeply committed to researching and preserving Vermont's rich past.<sup>47</sup> The case is a legend among longtime Vermont lawyers and residents of the lakeshore communities around Charlotte, Vermont. I was able to find out more about the defendant, Henry Putnam, than

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40. *Id.*

41. *Ploof*, 71 A. at 189.

42. Kevin Dann, *The "Pirates" of Lake Champlain*, Presentation to the Robert Hull Fleming Museum 4 (Oct. 1995) (transcript on file with author); see also NANCY L. GALLAGHER, BREEDING BETTER VERMONTERS: THE EUGENICS PROJECT IN THE GREEN MOUNTAIN STATE 43-47 (1999).

43. Interview with L. Kinvin Wroth, Dean, Vermont Law School, in South Royalton, Vt. (May 1998).

44. For a more complete discussion of the facts, see *infra* text accompanying notes 62-67.

45. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

46. See *Ploof v. Putnam*, 75 A. 277 (Vt. 1910). See also Brief of Petitioner, *Ploof v. Putnam* (brief to the Supreme Court of Vermont on appeal from May Term 1910 Chittenden County Court) (on file with author) [hereinafter 1910 Petitioner Brief].

47. I am especially grateful to the Charlotte Historical Society, Kay Teetor, Paul Gilles, Kevin Dann and Nancy Gallagher for their assistance. Most of Vermont's historical legal records are scattered and unresearched.

the Ploofs. Generally the wealthy in this society leave a larger record of their life. Putnam was a millionaire from a prominent Bennington, Vermont family that endowed a local hospital.<sup>48</sup> Tracking down information on the Ploofs was far more difficult. Given their notoriety, few of their descendants have written about or claimed them. During the 1920s, the Ploofs were the subject of a famous Vermont Eugenics survey that was designed to illustrate the social costs of allowing “degenerate families” to reproduce.<sup>49</sup> Articles and books written about the survey and its victims supplied additional information about the Ploofs.<sup>50</sup> Fortunately the lawyers and some of the judges were prominent enough to warrant some written biographical treatment. Despite the prominence of the defendant and his lawyers, the case did not generate much attention from Vermont newspapers whose records still survive.

The dispute that gave rise to *Ploof v. Putnam* can be only fully understood by first examining the growth of tourism and vacation homes on Lake Champlain in the late nineteenth and early twentieth centuries and then, the prevailing bigotry against French Canadians in Vermont and elsewhere in the northeast where they immigrated in the nineteenth and twentieth centuries. Gentrification of lakeshore properties made poorer Vermonters unwelcome in places where they may have worked for centuries. The case is a story about gentrification of local communities that often resulted in driving out or marginalizing local people whose lifestyles were often at odds with their new and wealthier neighbors. The class and other social tensions caused by gentrification are still a vibrant part of Vermont’s social and political life today as much as it was when the case was decided. Even if lifestyles do not clash, recreational communities may increase the property values beyond what the original inhabitants can afford. Local people may be even more despised if they happened to be both poor and of French Canadian ancestry.<sup>51</sup>

#### A. *Gentrification on Lake Champlain*

Lake Champlain was an important commercial waterway for native peoples for thousands of years and for European settlers from the beginning of colonization in New England and Canada.<sup>52</sup> France and Great Britain vied for control of the lake until the French and Indian War dispossessed France of its colonial empire in what was to become Canada and parts of Northern New

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48. The Southwest Community Hospital, once called Putnam Hospital, published a book on the Putnam family. TYLER RESCH, DEED OF GIFT: THE PUTNAM HOSPITAL STORY (1991).

49. Dann, *supra* note 42; GALLAGHER, *supra* note 42, at 1-8.

50. See Dann, *supra* note 42; GALLAGHER, *supra* note 42, at 1-8.

51. I use “ancestry” because, as far as is known, the Ploofs were born in Vermont but were descended from French Canadian immigrants who originally spoke French and were Catholic.

52. See RALPH NADING HILL, LAKE CHAMPLAIN: KEY TO LIBERTY (1977); Gordon M. Day, *Abenakis in the Lake Champlain Valley*, in LAKE CHAMPLAIN: REFLECTIONS ON OUR PAST 277 (Jennie G. Versteeg ed., 1987) [hereinafter REFLECTIONS ON OUR PAST].

England.<sup>53</sup> Lake Champlain was the site of wars between Great Britain and the newly formed United States in the Revolutionary War and the War of 1812.<sup>54</sup> At the end of these hostilities, Vermont and western New York depended on the lake to transport goods and people at a time when local roads were few and unreliable. After the invention of steamboats and the construction of the Champlain Canal to the Hudson River in 1823, commercial travel increased exponentially in lumber, food crops, manufactured goods and iron ore.<sup>55</sup> Communities on both sides of the lake grew into prosperous towns and cities, especially Burlington and Plattsburgh.<sup>56</sup> With the advent of the railroad in the 1840s, steamboats became less important for transporting goods and Lake Champlain gradually diminished as an important commercial transportation waterway.<sup>57</sup>

The railroads and the industrial revolution helped to create a new industry, tourism, that became integral to the lakeshore communities starting during the last quarter of the nineteenth century.<sup>58</sup> Entrepreneurs began to market the scenery and quiet to upper-middle and upper class city residents in the Northeast.<sup>59</sup> In 1891, the State of Vermont even created its own office to promote tourism.<sup>60</sup> By the early twentieth century at the time of *Ploof*, many communities and resorts on Lake Champlain attracted wealthy families from Burlington and other cities in the Northeast. The defendant, Henry Putnam, owned an island, called Birch Island then, off the coast of Charlotte.

[I]n Charlotte, Ferrisburg, Shelburne, indeed all along the portion of the Vermont shore of Lake Champlain that had been colonized in the late nineteenth century by wealthy Burlingtonians, Bostonians, New Yorkers and others . . . elegant summer “camps” [were built] . . .

The Charlotte “gold coast” from Cedar Beach all the way round Thompson Point was one of the earliest and most exclusive summer resort communities to develop on Lake Champlain, becoming by 1900 the summer home to Secretary of the Treasury Leslie Shaw, U.S. Supreme Court Justice David Brewer, and Columbia University Professor C.E. Colby. In 1902, President Theodore

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53. HILL, *supra* note 52.

54. *Id.* at 72-131, 160-94.

55. *Id.* at 207-15.

56. *Id.*

57. Norbert A. Kuntz, *The Impact of the American Civil War*, in REFLECTIONS ON OUR PAST, *supra* note 52, at 77. The railroads did bring increased prosperity to a number of Vermont communities, such as St. Albans and Burlington. The railroads were crucial to the industrialization that occurred in various parts of the state. *Id.* at 77-80. See also Marshall True, *Booms and Busts: Change in the Champlain Valley, 1850-1920*, in REFLECTIONS ON OUR PAST, *supra* note 52, at 63-74.

58. Kuntz, *supra*, note 57, at 80.

59. *Id.*

60. *Id.*

Roosevelt arrived on the steamer Ticonderoga to be feted at the Point. . . . Henry Putnam, whose comfortable camp lay just across the bay from some of the most palatial Point camps, was a millionaire New York hardware merchant who could easily afford a caretaker to watch over his rarely-visited property.<sup>61</sup>

The Ploofs descended from lakeshore communities that continued to make their living from the lake even after Lake Champlain had declined as a commercial waterway.<sup>62</sup> The Ploofs may have taken over an abandoned canal boat<sup>63</sup> and made their living from moving firewood and other small goods across the lake. These old boats were not welcome in the summer resort communities.<sup>64</sup> The Ploofs were victims of what Kevin Dann, a local Vermont historian, refers to as “a perennial class war . . . between a landless, poor, uneducated community that frequented the lakeshore for over half a century, and moneyed newcomers who did not want their precious lake views spoiled by the site of decrepit canal boats sporting tarpaper shacks and laundry lines above the deck.”<sup>65</sup> The Ploofs were regarded as a threat to all owners of summer homes on Lake Champlain. A member of Thompson’s Point Country Club even composed a poem depicting the alleged thievery of the Ploofs:

But if you must require further proof,  
Let me recall the mariners, named Ploof.  
Or if not them, at least their gallant ship  
On which you’d see your storm door take a trip  
As super structure and your draperies  
Would, as Ploof sails, luff in the summer breeze.  
A gala day, what’s more, a gala week  
When these gay rovers swooped from Lewis Creek.  
Dick Irving always kept a gun at cock  
To stymie them from landing at his dock.  
Less formidable, unarmed, I didn’t linger,  
When told by one small Ploof he’d shoot my finger,  
If I rowed any closer to his schooner:  
I rowed away immediately or sooner.<sup>66</sup>

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61. Dann, *supra* note 42, at 3-4.

62. *Id.*

63. Interview with Maurice Glenn, Essex County, New York summer resident (Aug. 1999).

64. Dann, *supra* note 42.

65. *Id.*

66. Five Minutes’ Worth of Memories: Some Thoughts on the 50th Anniversary of Thompson’s Point Country Club, August 21, 1971, at 2 (manuscript on file with author). Elliott Merrick expressed similar sentiments:

The relative of a certain Burlington shopkeeper lives aboard an evil old motor barge that crawls the lake. And with the sharp and darksome relative is an equally sharp and darksome wife. They fish, they gather driftwood. They sell stuff second hand—a boat they found adrift, but the painter rope was cut with a sharp knife; a mattress that was drifting, but it shows no mark of water; a bed they found, but where? Many a lakeside

The hatred that existed towards the Ploofs helps to explain why the caretaker untied their boat in the storm, but this animosity was not evident in the Vermont Supreme Court's opinions or in the parties' briefs.<sup>67</sup>

### B. *French Canadians in Vermont*

French settlers have been in Vermont since the beginning of European exploration in North America. Lake Champlain is named after the French explorer, Samuel de Champlain, who, with the help of Native American guides, explored the lake in 1609.<sup>68</sup> The northern part of Vermont was occupied by French settlers until France lost the French and Indian War and ceded what is now Canada, the Midwest and northern Vermont to Great Britain in 1763.<sup>69</sup> French territory became part of the State of Vermont after the Revolutionary War.<sup>70</sup> Nonetheless some French settlers remained in Vermont

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cottage has missed a lamp, a few blankets, some chairs and hammocks. The bargeman and his wife know where they went, for the bargeman and his wife are the last of a long line of lake pirates. Though he comes ashore and works sometime in winter, the bargeman gets restless in the early spring. After the ice goes out, before the summer visitors come, he takes to his roving life on the lake again, collecting old brass, rugs, baby carriages, occasionally an outboard motor, maybe.

ELLIOTT MERRICK, *GREEN MOUNTAIN FARM* 178-79 (1948). Kevin Dann claims that the bargeman described in this excerpt was Harold Holloway, the son-in-law of Sylvester and Ellen Ploof. See Dann, *supra* note 42. The Ploofs' descendants continued working on the lake after the elder Ploofs died. *Id.*

67. See *Ploof v. Putnam*, 76 A. 145 (Vt. 1910); *Ploof v. Putnam*, 75 A. 277 (Vt. 1910); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); Brief on Behalf of Plaintiff, *Ploof v. Putnam* (brief to the Supreme Court of Vermont on appeal from March Term 1908 Chittenden County Court) (on file with author) [hereinafter 1908 Plaintiff Brief]; Defendants' Brief on Demurrer, *Ploof v. Putnam* (brief to the Supreme Court of Vermont on appeal from March Term 1908 Chittenden County Court) (on file with author) [hereinafter 1908 Defendant Brief]; Brief on Behalf of Plaintiff, *Ploof v. Putnam* (brief to the Supreme Court of Vermont on appeal from March Term 1909 Chittenden County Court) (on file with author) [hereinafter 1909 Plaintiff Brief]; Defendant's Brief, *Ploof v. Putnam* (brief to the Supreme Court of Vermont on appeal from March Term 1909 Chittenden County Court) (on file with author) [hereinafter 1909 Defendant Brief].

68. Michael Sherman, *New France: Empire by Design?*, in *REFLECTIONS ON OUR PAST*, *supra* note 52, at 231.

69. *Id.* at 244.

70. Actually, Vermont's admission to the union was severely contested by three states that claimed this territory: New York, New Hampshire and Massachusetts. For many years, the Continental and Confederation Congress rejected Vermont's admission. From 1778 to 1791, Vermont was an independent republic. Certain high-level Vermont officials, including Revolutionary War heroes Ira and Ethan Allen, even negotiated a potential return to British rule, possibly in order to pressure Congress into admitting Vermont. Vermont was finally admitted to the union in 1791 when the other states dropped their land claims. See WILLIAM DOYLE, *THE VERMONT POLITICAL TRADITION AND THOSE WHO HELPED MAKE IT* 1-61 (1984).

from its earliest time.<sup>71</sup> The major migration of French Canadian settlers came from Canada in the mid-nineteenth century to escape political persecution and in search of greater opportunities in New England.<sup>72</sup> Many came to work as agricultural and textile workers in Vermont or bought farms. Like many immigrants in the nineteenth century, they were perceived as a threat to the Protestant, English-speaking majority.<sup>73</sup> Nativism, culminating in the “Know-Nothing” movement, became a major political force in New England in the mid-nineteenth century.<sup>74</sup> Because of the language and religious differences, French Canadians were a common social target of this movement.<sup>75</sup> Although the Know-Nothing movement died out, the anti-immigrant and anti-Catholic prejudice remained a significant fact of social and political life in Vermont for the rest of the nineteenth and a good portion of the twentieth centuries.<sup>76</sup> After World War I, there were national movements to restrict the use of any language other than English in public education.<sup>77</sup> In the New England states of New Hampshire, Maine and Rhode Island, nativism took the form of laws restricting the use of French in the public schools.<sup>78</sup> Stereotyping of French Canadians can be found in literature<sup>79</sup> and official reports such as the following:

With some exceptions, the Canadian French are the Chinese of the Eastern States. They care nothing for our institutions, civil, political, or educational. They do not care to make a home among us, to dwell with us as citizens and so become part of us; but their purpose is merely to sojourn a few years as aliens, touching us only at a single point, that of work, and when they have gathered out of us what will satisfy their ends to get them away whence they came and bestow it there.

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71. VT. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, FRANCO-AMERICANS IN VERMONT: A CIVIL RIGHTS PERSPECTIVE 1-2 (1983) [hereinafter FRANCO-AMERICANS IN VERMONT].

72. *Id.* at 2-7.

73. *Id.* at 7-10.

74. *Id.* The term “Know Nothing” comes from secret anti-Catholic societies that told members to respond to any questions about the organization with the statement, “I know nothing.” The phrase attached to the entire nativist movement in the 1850s. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 134-35 (1988).

75. FRANCO-AMERICANS IN VERMONT, *supra* note 71, at 7-10.

76. *Id.*

77. *Id.* at 9-10.

78. *Id.* Legislation was proposed in Vermont and Connecticut, but the bills did not pass.

79. *Id.* at 24. *See, e.g.*, HOWARD FRANK MOSHER, A STRANGER IN THE KINGDOM (1989). One of the main characters, a young French Canadian immigrant, was treated as a prostitute by many of the citizens in the Northeast Kingdom. She was murdered by one of the local people. While Mosher presents a trenchant depiction of racism in Vermont, he is far less sensitive to other forms of stereotyping. Many of his poor and “lowlife” characters were of French Canadian ancestry. Even the murderer’s character was attributed to his “gypsy” mother. *Id.*

They are a horde of industrial invaders, not a stream of stable settlers. . . . They will not send their children to school if they can help it, but endeavor to crowd [them] into the mills at the earliest possible age. . . .

These people have one good trait. They are indefatigable workers and docile. . . . To earn all they can and by no matter how many hours of toil, to live in the most beggardly ways so that out of their earnings they may spend as little for living as possible, and to carry out of our country what they save: this is the aim of the Canadian French in our factory districts. Incidentally, they must have their amusements; and so far as the males are concerned, drinking, smoking, and lounging constitute the sum of these.<sup>80</sup>

Vermonters expressed similar views:

Differences of opinion among employers in regard to the French-Canadians are marked. On the one hand, one employer of some 100 French-Canadians said "I never saw a more hard-working group of people. They are willing to work long for very little pay, and they are as thrifty as any Yankee." On the other hand, the foreman in another factory explained: "The French are just happy, easy-going; they are glad to earn enough for today and don't worry much about tomorrow. They never think about getting a better job. They take it for granted that they are going to do this kind of laboring work all the time." A banker justified his unfavorable estimate of the race with the explanation that "they intermarried with Indians in early days and so became irresponsible."<sup>81</sup>

As with many immigrant groups, these stereotypes were used to justify keeping Vermonters of French Canadian ancestry (Franco-Vermonters) in the lowest paying jobs and the lowest social strata of Vermont and New England society.<sup>82</sup> This prejudice against French Canadians has not received the attention that the prejudice against other immigrant groups has received in the academic literature,<sup>83</sup> but it is critical to understanding the attitude toward the Ploofs in the Champlain Valley. The crowning expression of this prejudice in Vermont was the inclusion of a number of Franco-Vermonters in the infamous Eugenics Survey conducted in Vermont from 1926 to 1931.<sup>84</sup> This survey, the

80. FRANCO-AMERICANS IN VERMONT, *supra* note 71, at 25-26 (quoting Florence Marie Chevalier, *The Role of French National Societies in the Socio-Cultural Evaluation of the Franco-Americans of New England from 1860 to the Present* 93-94 (1972) (Ph.D. dissertation, Catholic University)).

81. ELIN L. ANDERSON, *WE AMERICANS: A STUDY OF CLEAVAGE IN AN AMERICAN CITY* 64 (1937), *quoted in* FRANCO-AMERICANS IN VERMONT, *supra* note 71, at 27.

82. FRANCO-AMERICANS IN VERMONT, *supra* note 71, at 26-30.

83. Unless you have lived in New England, the prejudice against French Canadians, or those of French-Canadian ancestry, may be unknown. Franco-Americans have not organized politically as have other oppressed ethnic or racial groups to directly challenge their oppression in New England society.

84. See GALLAGHER, *supra* note 42, at 6-8. For a brief history of the Eugenics movement, see Joan Vogel, *Biological Theories of Human Behavior: Admonitions of a Skeptic*, 22 VT. L. REV. 425 (1997).

brainchild of University of Vermont Zoologist, Henry Perkins, was designed to show that all of Vermont's, or indeed the nation's, social problems can be attributed to heredity.<sup>85</sup> Inferior people "breed" and continue to create social misfits. Not surprising, those labeled misfits or inferiors corresponded with poor and ethnically distinct groups in Vermont: French Canadians, Abernaki Indians, Gypsies and other poor people.<sup>86</sup> The poor families subject to the survey came disproportionately from these groups.<sup>87</sup> The Ploofs and other lake dwelling families did not escape this scrutiny.<sup>88</sup> The public acceptance of this kind of work indicated the depth of prejudice against anyone who was not middle class, white and Protestant in the United States as well as Vermont. Eugenics and Eugenic Surveys were not peculiar to Vermont in the early twentieth century.<sup>89</sup>

As a poor and itinerant family, less is known about Sylvester Ploof and his family than the defendant.<sup>90</sup> We do know that Sylvester Ploof was of French-Canadian ancestry and was born sometime in the 1870s.<sup>91</sup> The Ploofs lived most of the year on an old canal boat and made a living transporting and selling firewood and moving small cargo between various towns on the lake.<sup>92</sup> According to local and summer homeowners, the Ploofs also earned a living stealing from lakeshore properties.<sup>93</sup> On November 12, 1904, the Ploof family—Sylvester, his wife and two of his children—were transporting George Root's family and goods from Thompson's Point to Willsboro Point, New York.<sup>94</sup> During this trip, the Ploofs got caught in a severe storm and sailed

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85. GALLAGHER, *supra* note 42, at 1-8.

86. *Id.* Perkins even proposed doing a specific Eugenics study of Vermonters of French-Canadian ancestry. He believed that the decline in the health of Vermonters was due to inbreeding with French Canadian immigrants. Fortunately, nothing came of this proposal. *Id.* at 95-98.

87. *Id.* at 1-8, 73-85. For a discussion of the inclusion of the Ploofs in the survey, see *infra* notes 112-13 and accompanying text. See also Dann, *supra* note 42, at 6.

88. The Ploof family figured prominently in the Eugenics survey of the Jerome and other lake dwelling families.

89. GALLAGHER, *supra* note 42, at 1-8.

90. For a discussion of Henry Putnam, see text accompanying *infra* notes 120-46.

91. According to some of the marriage certificates for Sylvester A. Ploof's children, he was probably born in the 1870s. There is no birth certificate for him in Vermont. Not all births in the nineteenth century were recorded.

I use the term "French-Canadian ancestry" to mean that this person is a member of that ethnic group. The term does not mean the individual was born in Canada. Other reports call French Canadians in the United States, "Franco-Americans." See FRANCO-AMERICANS IN VERMONT, *supra* note 71, at 13. The only problem with this term is that it could also apply to immigrants from France.

92. See Dann, *supra* note 42, at 6; GALLAGHER, *supra* note 42, at 82.

93. See *supra* text accompanying notes 64-67; Dann, *supra* note 42, at 4.

94. See Dann, *supra* note 42, at 1.

their boat to Birch Island,<sup>95</sup> which was owned by Henry Putnam, an absentee owner who lived in New York City at the time of the incident.<sup>96</sup> This storm was no ordinary storm common on the lake this time of year. This storm, a "Nor'easter," caused considerable damage in New England and Vermont, taking down telegraph and electric lines all over the area.<sup>97</sup> As the storm worsened, the Ploofs tied their boat to Putnam's dock only to have the caretaker, Albert Williams, untie it over Sylvester Ploof's protests.<sup>98</sup> After Williams untied the Ploofs' boat, it was driven by the storm onto the rocky shore and wrecked, injuring the family and destroying many of the Ploof family's belongings and goods.<sup>99</sup> The Ploofs claimed \$3000 in damages to cover the costs of repairing the boat, to replace the lost household property and other cargo, and to recover the costs of the family's physical injuries when they were cast into the cold lake after the boat wrecked.<sup>100</sup> In the opinion familiar to generations of law students, the Vermont Supreme Court affirmed the trial court's decision to deny the defendant's demurrer and allowed the case to come to trial on the grounds that the plaintiff did have a cause of action against the defendant under the doctrine of necessity.<sup>101</sup> The defendant, acting through his employee, denied plaintiffs the right to tie the boat to the defendant's dock in order to save themselves and their boat from destruction during a severe storm.<sup>102</sup> In the subsequent trial in 1909, Ploof won the case and was awarded \$650 in damages.<sup>103</sup> Unfortunately, Ploof had to endure two more appeals to the Vermont Supreme Court before he could collect the award.<sup>104</sup>

Despite the victory in court, the case did nothing to improve the Ploofs' reputation in the lakeshore communities. Apparently, the Ploofs purchased another boat and continued to live and work on Lake Champlain as before.<sup>105</sup> Along with other lake dwellers, they would go ashore and live in shanties in

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95. This island has had several names in the last two centuries. There is another smaller island nearby in Converse Bay that was also called Birch Island. The island that was the site of this case is now called Garden Island. *Id.*

96. *See* Dann, *supra* note 42, at 2.

97. *Id.* at 1; *Storm Passing Away*, BURLINGTON FREE PRESS, Nov. 15, 1904, at 1.

98. Ploof v. Putnam, 75 A. 277, 278 (Vt. 1910).

99. Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908).

100. *See* Defendant's Exceptions, Ploof v. Putnam (presented to the Supreme Court of Vermont before final judgment entered in the 1908 March Term Chittenden County Court) (on file with author).

101. Ploof, 71 A. at 189.

102. *Id.* at 189-90.

103. *See* 1910 Petitioner Brief, *supra* note 46; Dann, *supra* note 42, at 2.

104. Ploof v. Putnam, 75 A. 277 (Vt. 1910); Ploof v. Putnam, 76 A. 145 (Vt. 1910). Unlike many states, Vermont did not have and still does not have an intermediate appellate court. All appeals go from the trial court to the state supreme court.

105. Dann, *supra* note 42, at 10.

lakeshore communities like Burlington and Ferrisburgh.<sup>106</sup> One of these communities was even nicknamed “Shappyville” after Sylvester Ploof’s wife, Ellen Shappy Ploof.<sup>107</sup> As with many who live in poor communities, the Ploofs were often in trouble with local officials because of allegations of truancy, child neglect, and unhealthy or squalid living conditions.<sup>108</sup>

Their public notoriety also brought them to the attention of eugenicists like Henry Perkins who organized and conducted the infamous Eugenics Survey of so-called degenerate families in Vermont.<sup>109</sup> This survey was designed to establish the need to legally regulate who should be allowed to procreate. The lake dwelling families, called “Pirates,”<sup>110</sup> in the survey, were a popular target:

The Pirate family, however, had no real counterpart in the broader eugenics literature but was very well known locally. The Pirates, really an extended lake-dwelling family, had lived for generations in houseboats, earning their living by transporting goods up and down Lake Champlain. During winter months they docked in the Burlington harbor and other ports on the Vermont and New York side of Lake Champlain. Like the American Gypsies, they lived close to but not within the conventional boundaries of American culture. Since Harry Perkins’s childhood, these families had been scorned by Burlington’s civic-minded elites. After the turn of the century, intolerance mounted as the houseboat culture became increasingly viewed as detrimental to the interests of owners of lakeshore properties. Perkins’s generation nicknamed them Pirates; they were frequently accused of theft, extortion, and “loose living,” and their houseboats and shanties near the lake shore were portrayed as breeding grounds for disease. Perkins’s eugenics lesson on the Pirates portrayed them as a threat to public health and safety. They lived “in utmost squalor and destitution. . . . Disease and feeble-mindedness are always conspicuous in the children.” They were “the terror” of property owners and boat owners because of their “thieving habits” and were suspected of turning a profit on the food and clothing they received from sympathetic, charitable people. Moreover, Perkins’s Pirates were elusive and out of control: “As soon as things got too hot for them in one locality they pull up stakes and move to the next town or port. . . . They manage pretty successfully to keep out of prison, although frequently arrested for petty larceny and various other minor offenses.”<sup>111</sup>

Although the Eugenics Survey focused mainly on another lake dwelling family, the Jeromes, Sylvester and Ellen Shappy Ploof, his wife, and much of

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106. *Id.* at 7.

107. *Id.*

108. *Id.* at 8.

109. *Id.* For a detailed discussion of the Eugenics Project in Vermont, see GALLAGHER, *supra* note 42.

110. GALLAGHER, *supra* note 42, at 82.

111. *Id.* at 82-83 (footnotes omitted).

his family were included in the Jerome Pedigree folder<sup>112</sup> and were the subject of a more limited study.<sup>113</sup> Little is known about what happened to the Ploof family after the 1930s. Sylvester Ploof died in 1922.<sup>114</sup> According to Kevin Dann, a local historian who studied the Ploofs, Ellen Shappy Ploof had nine children and it is uncertain what happened to most of them.<sup>115</sup> Her daughter, Alfreda, married Harold Holloway who originally came from Alabama and worked on the lake with the Ploofs.<sup>116</sup> He ultimately inherited the Ploofs' houseboat and continued the Ploof family tradition of working and living on the lake until certain well-known civic leaders in Burlington, Vermont forced Holloway to move the boat from the Burlington waterfront.<sup>117</sup> He set up "his bait and tackle business"<sup>118</sup> on Battery Street and wound up owning extremely valuable real estate on Battery Street at the time of his death in 1977.<sup>119</sup>

C. *Henry W. Putnam, Jr.*

More is known about the defendant, Henry W. Putnam, Jr., because he was a millionaire from a wealthy and prominent family. Generally, the lives of the wealthy receive more attention than the lives of others. The Putnam family was one of the most prominent in Bennington. The Putnam family, originally from Essex County, lived in Bennington, Vermont and endowed the local hospital, Putnam's Hospital, now called Southwestern Vermont Medical Center. To commemorate the founding of the hospital, the hospital commissioned a biography of the Putnam family and much of what is known

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112. Dann, *supra* note 42, at 10. According to Dann, the Pirates' survey included a 1935 BURLINGTON FREE PRESS article on Ellen Shappy Ploof, whom the article dubbed "Captain Ellen." See 'Capt. Ellen' Has Lived on Water 45 Years, and Has Given Birth to 9 Children on Boats, BURLINGTON FREE PRESS & TIMES, Dec. 28, 1935, at 10 [hereinafter *Capt. Ellen*].

113. The Eugenics survey included Sylvester and Ellen Shappy Ploof among the "pirate families." See GALLAGHER, *supra* note 42; Dann, *supra* note 42, at 9-10.

114. Dann, *supra* note 42, at 7. Sylvester Ploof died in Fort Edward in 1922. *Capt. Ellen*, *supra* note 112, at 10.

115. Dann, *supra* note 42, at 10.

116. *Id.* Harold Holloway was also an African-American, and an interracial marriage was uncommon in those days. See Birth Certificates of Herbena Rosanne Holloway (Nov. 22, 1940) and Elaine Blanche Holloway (Oct. 21, 1934) (Herbena and Elaine Holloway were Harold Holloway's children from a prior marriage. Their birth certificates record his "color" as "Negro.") (on file with author). The interracial marriage undoubtedly contributed to their and their family's marginalization in Vermont society. Racism was a fact of life in Vermont as elsewhere.

117. Ernest Gibson, then a federal judge, and the local district attorney, Joseph McNamara, did the honors. See *Old Houseboat Must Leave Mooring Occupied Many Years*, BURLINGTON FREE PRESS, Apr. 13, 1951, at 20; Dann, *supra* note 42, at 10.

118. Dann, *supra* note 42, at 10. See also *Obituary, Harold H. Holloway*, BURLINGTON FREE PRESS, Jan. 7, 1977, at 2B; Rob Eley, *Valuable Waterfront Property Tied Up in Court: Holloway Family Squabbling Over Estate*, BURLINGTON FREE PRESS, Feb. 25, 1979, at 3B.

119. *Id.*

about Henry Putnam comes from this book.<sup>120</sup> Henry Putnam's father, Henry Putnam, Sr., started making his fortune selling clean drinking water throughout the city of San Francisco during and after the Gold Rush.<sup>121</sup> On his return east, he invested in several hardware and other manufacturing enterprises ultimately moving to Bennington, Vermont in 1864 to pursue business opportunities and to raise his family.<sup>122</sup> He later became extremely wealthy as he bought into railroads and transit systems in New York City.<sup>123</sup> He owned many of the factories in Bennington, and he served in local government in Bennington.<sup>124</sup> He donated his privately owned water system to the town of Bennington.<sup>125</sup> He died in San Diego, California in 1915.<sup>126</sup>

Henry "Will" Putnam, Jr., born in Bennington, Vermont in 1864,<sup>127</sup> never enjoyed being in the limelight. Will Putnam is described by his biographer as the "enigmatic bachelor."<sup>128</sup> He was educated in private schools, but for unknown reasons he never attended college. After his childhood, he lived in New York City, coming back to Bennington to visit in the summer and fall. Most of the year, he lived in "a suite at the New York Athletic Club and after that building burned he moved to the Savoy Plaza Hotel."<sup>129</sup> His principal hobby was yachting.<sup>130</sup> He owned and sailed several luxurious yachts in New York and Lake Champlain. He purchased Birch Island for \$2000 in 1887 to build a vacation home and to pursue his favorite hobby on Lake Champlain.<sup>131</sup> What press attention he received usually covered his vacation activities on his island or on his many yachts.<sup>132</sup>

On the last Saturday evening excursion on the steamer "Chateaugay" a part of the display credited to Cedar Beach came from the very attractive camp owned by Mr. Putnam of New York and situated in the bay just south of the Beach. . . .

Mr. Putnam purchased a number of years ago the island called Garden or Birch Island and has made extensive improvements since that time. His camp is situated on the east side of the island facing toward the shore so that parties

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120. RESCH, *supra* note 48.

121. *Id.* at 2-3.

122. *Id.* at 13.

123. *Id.* at 20.

124. *Id.* at 14-15, 23.

125. RESCH, *supra* note 48, at 34.

126. *Id.* at 67.

127. *Id.* at 53.

128. *Id.* He did apparently have a long-term relationship with Ms. Jesse Foot, but they never married. After his death, he left her \$500,000 in his will. *Id.* at 56-57.

129. *Id.* at 54.

130. RESCH, *supra* note 48, at 54.

131. *Id.*

132. *Id.* at 57.

from the lake cannot see it. He has one of the finest boat houses on the lake and owns, besides, several row boats and yachts, a neat naphtha launch. Mr. Putnam hires a man and his wife to take charge of the camp and they stay on the island all year round. Much of the land of the island is capable of cultivation and quite a number of domestic animals now kept give a rural air to the surroundings.<sup>133</sup>

Whatever attracted him to Birch Island changed at the time of this case because he had not visited the island for seven years.<sup>134</sup> At the time of the trial in 1909, Will Putnam was in California visiting his father who wintered in San Diego after his retirement.<sup>135</sup> His yachting activities took place out of New York and other eastern ports.<sup>136</sup>

Several individuals associated with the defendant's case came from long business and social ties to the Putnam family in Bennington. These individuals were very prominent in Bennington and in Vermont.<sup>137</sup> Many were involved with Putnam in the creation of Putnam Hospital.<sup>138</sup> One of the lawyers, James Batchelder, of Batchelder and Bates, was a prominent attorney in Bennington with significant ties to the Putnam family.<sup>139</sup> Aldebert W. Braisted, a close friend and business associate of Will Putnam,<sup>140</sup> was a major part of Putnam's attempt to petition for a new trial after Putnam lost the March 1909 trial. Braisted claimed to have discovered new witnesses to dispute Ploof's version of what occurred in 1904.<sup>141</sup> The affidavits from these witnesses were introduced in a vain attempt to convince the Vermont Supreme Court to order a new trial.<sup>142</sup>

While the case was a major incident in Ploof's life, it was essentially just a local annoyance to Henry W. Putnam, Jr. Nothing is mentioned in the

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133. *Id.* at 57, 59 (quoting BURLINGTON FREE PRESS & TIMES, Aug. 21, 1891). The island still has many of the features described in this newspaper article although four Boston families now own it.

134. 1909 Plaintiff Brief, *supra* note 67, at 9; 1909 Defendant Brief, *supra* note 67, at 2.

135. RESCH, *supra* note 48, at 33-34.

136. *Id.* at 60-61. A 1907 newspaper article in the NEW YORK TRIBUNE describes Putnam's new luxury yacht that was to be kept at the New York Yacht Club. *Id.* at 60-61.

137. Several of these individuals were part of the establishment of Putnam's Hospital. See RESCH, *supra* note 48, at 55-56, 62, 70.

138. *Id.* at 62. For more on the lawyers, see discussion *infra* notes 147-68. The following individuals who were involved in the case on the defendant's side were also on the first board of directors for Putnam Hospital: James Batchelder, Edward Bates, Adelbert Braisted and Charles H. Dewey. RESCH, *supra* note 48, at 70 n.2.

139. RESCH, *supra* note 48, at 62.

140. *Id.* Alfred Braisted grew up with Will Putnam, and he managed "all Putnam's manufacturing operations" in Bennington. *Id.*

141. See Ploof v. Putnam, 76 A. 145 (Vt. 1910). Kevin Dann claims that Peter St. Clair swore that representatives of Batchelder and Bates bribed the new witnesses. I have the deposition, but I don't see any direct reference to a bribe. Interview with Kevin Dann (August 1998).

142. Ploof v. Putnam, 76 A. 145 (Vt. 1910).

hospital's biography of him. The hospital he and his family endowed was built after his father's death and was dedicated in 1916.<sup>143</sup> He remained active on the hospital board until his death in Miami, Florida in 1938.<sup>144</sup> At the time of his death, his estate was worth around \$16,500,000.<sup>145</sup> William Putnam left \$2,000,000 to the hospital.<sup>146</sup>

#### D. *The Lawyers*

The plaintiff's attorney, Martin S. Vilas, was born in Colchester, Vermont in 1870 and was admitted to the Vermont Bar in 1902 after studying law in Burlington with a local practitioner, Henry Ballard.<sup>147</sup> He was a member of the law firm of Cowles and Mouton in Burlington when he handled the *Ploof* case.<sup>148</sup> He went on to have a significant legal and political career after the case. "He was City Attorney in Burlington for two terms,"<sup>149</sup> and he represented Burlington in the Vermont Senate from 1917 to 1923.<sup>150</sup> He also ran unsuccessfully for statewide office in the Republican primaries during the 1920s and 1930s.<sup>151</sup> One of the mysteries of the *Ploof* case is how the Ploofs could have afforded to bring the case and the many appeals they endured before collecting the judgment. Vilas probably received his fees from the \$650 judgment the Ploofs ultimately received.<sup>152</sup> That amount was a large sum of money in those days. Vilas was successful enough in his law practice to invest

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143. *Id.*

144. *Id.* at 67.

145. *Id.* at 68.

146. *Id.*

147. 5 WALTER HILL CROCKETT, VERMONT: THE GREEN MOUNTAIN STATE 289 (1923). Crockett's book is a gossipy history of Vermont, but it is one of the only sources for biographical information on major Vermont lawyers and judges around the turn of the century.

148. *See id.* at 290.

149. *Id.*

150. *Id.*

151. Office of the Vermont Secretary of State, *Primary Election Results: 1938 Republican Party*, at <http://Vermont-archives.org/govinfo/elect/p1938.htm> (last visited Mar. 7, 2001) (in the U.S. Senator race, Ernest W. Gibson received 81.8% of the vote and Martin S. Vilas received 18.2% of the vote); Office of the Vermont Secretary of State, *Primary Election Results: 1932 Republican Party*, at <http://Vermont-archives.org/govinfo/elect/p1932.htm> (last visited Mar. 7, 2001) (in the Lieutenant Governor race, Charles M. Smith received 42.1% of the vote; Martin S. Vilas received 17.7% of the vote; and William H. Wills received 40.2% of the vote); Office of the Vermont Secretary of State, *Primary Election Results: 1930 Republican Party*, at <http://Vermont-archives.org/govinfo/elect/p1930.htm> (last visited Mar. 7, 2001) (in the First District, U.S. Representative race, H.M. Drennan received 36.8% of the vote; Martin S. Vilas received 10.7% of the vote; and John E. Weeks received 52.5% of the vote); Office of the Vermont Secretary of State, *Primary Election Results: 1926 Republican Party*, at <http://Vermont-archives.org/govinfo/elect/p1926.htm> (last visited Mar. 7, 2001) (in the First District, U.S. Representative race, Elbert S. Brigham received 63.5% of the vote and Martin S. Vilas received 36.5% of the vote).

152. *See* 1910 Petitionee Brief, *supra* note 103, at 1.

heavily in real estate and to become known as a notorious slumlord in the Charlotte area.<sup>153</sup>

Given Henry W. Putnam's wealthy social position, he was able to hire lawyers who were very prestigious political and legal figures in Vermont in the early years of the twentieth century. As a result, more is known about them. The law firm of Batchelder and Bates was a distinguished Bennington law firm with extensive ties with Putnam's business interests in Bennington.<sup>154</sup> James Batchelder and Edward Bates were both on the first board of directors for Putnam Hospital.<sup>155</sup> James Batchelder was born in 1843 in Peru, Vermont.<sup>156</sup> After studying law with local practitioners and after attending Albany Law School, Batchelder was admitted to the bar in 1866.<sup>157</sup> He moved to Bennington in 1884 and "formed a partnership with Edward L. Bates."<sup>158</sup> He had an active political career before and after the establishment of his partnership with Bates.<sup>159</sup> He was a state representative and senator in the Vermont legislature in the 1870s, 1880s, and in the early years of the twentieth century.<sup>160</sup> He was president of the Vermont Bar Association in 1908 to 1909.<sup>161</sup> Edward Bates was born in Bennington, Vermont in 1859.<sup>162</sup> After studying law with several Bennington lawyers, he was admitted to the Vermont Bar in 1882.<sup>163</sup> Like Batchelder, Bates held a number of political positions in Bennington. He was a municipal judge in Bennington from 1902 to 1908.<sup>164</sup>

One of the defendant's lawyers, Charles Darling, was an important national political figure. Before working on the *Ploof* case, Charles Darling was Assistant Secretary of the Navy under President Theodore Roosevelt.<sup>165</sup> He was a major political figure in the invasion of Panama.<sup>166</sup> Before and after his time in Washington, he practiced law in Bennington and was a municipal judge in Bennington until he left for Washington, D.C. He returned to

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153. Interview with Mary Lighthall, Charlotte Historical Society (June 1998).

154. RESCH, *supra* note 48, at 70 n.2.

155. *Id.*

156. 5 CROCKETT, *supra* note 147, at 221.

157. *Id.*

158. *Id.*

159. *Id.* at 221-22.

160. *Id.* at 222. Of course, he was a Republican. Vermont was a one-party, Republican state until the 1960s. See DOYLE, *supra* note 70, at 141.

161. 5 CROCKETT, *supra* note 147, at 221.

162. *Id.* at 231.

163. *Id.* at 232.

164. *Id.*

165. 4 WALTER HILL CROCKETT, VERMONT: THE GREEN MOUNTAIN STATE 353-56 (1921).

166. *Id.* at 354.

Vermont in 1905 as Collector of Customs, a position he held until 1914.<sup>167</sup> He remained active in Vermont's political and legal life until his death.<sup>168</sup>

### E. *The Judges*

Of the five Vermont Supreme Court Justices that decided *Ploof*, the two most interesting and renowned justices were Loveland Munson and Seneca Haselton. Of these, Loveland Munson was on the Vermont Supreme Court for all three appeals, although he only wrote the 1908 decision that most of us have read.<sup>169</sup> Justice Haselton was a superior court judge who refused to grant the defendant's demurrer. He did, however, sit on the appeals in the Vermont Supreme Court after it was tried.<sup>170</sup> Justice Munson was born in Manchester, Vermont in 1843.<sup>171</sup> After studying law with a lawyer in Manchester, he was admitted to the bar in 1866.<sup>172</sup> He had served in a variety of local political offices and also served in the Vermont House and Senate before his appointment to the Vermont Supreme Court in 1889.<sup>173</sup> He was regarded as something of a character who refused to wear judicial robes.<sup>174</sup> He retired from the Vermont Supreme Court in 1917.<sup>175</sup>

Justice Munson was conspicuously a commoner and so intense was his regard for the common and accustomed things and so averse to new things that he opposed wearing a robe while on the bench, and the innovation in this regard was delayed because of his prejudice against this form of dress, and not until after his retirement were the robes adopted by the Supreme Court.<sup>176</sup>

Justice Seneca Haselton was born in 1848 in Westford, Vermont and studied law with Burlington lawyers, completing his legal education at the University of Michigan where he also served as a mathematics instructor.<sup>177</sup> He was admitted to the bar in 1875.<sup>178</sup> Haselton served as City Judge and Mayor of Burlington and also represented Burlington in the Vermont House.<sup>179</sup>

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167. *Id.* at 355.

168. Martin Vilas died on November 19, 1953; James Batchelder died on November 29, 1925; Edward Bates died on September 25, 1929; and Charles Darling died on October 31, 1944.

169. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908).

170. Apparently, judges who heard the case below were not required to recuse themselves if they were elevated to the supreme court. In an old Vermont case, *Williams v. Bass*, 22 Vt. 352 (1850), Justice Kellogg overturned his own trial court decision after he was elevated to the Vermont Supreme Court.

171. 5 CROCKETT, *supra* note 147, at 161.

172. *Id.*

173. *Id.* at 161-62.

174. *Id.* at 161.

175. *Id.* at 162.

176. 5 CROCKETT, *supra* note 147, at 161.

177. *Id.* at 172.

178. *Id.*

179. *Id.*

President Grover Cleveland also appointed Haselton ambassador to Venezuela from 1894 to 1895.<sup>180</sup> What was distinctive about Haselton was his political affiliation. In a strongly Republican state, he was a Democrat. He was appointed to the Vermont Supreme Court in 1902 where he served until 1906 when he became the Chief Superior Judge.<sup>181</sup> He was again on the Vermont Supreme Court from 1908 until his retirement in 1919.<sup>182</sup>

Perhaps the “common touch” explains the sympathy Justice Munson displayed toward the plaintiff in the 1908 decision when he held that necessity allowed the Ploofs the right to tie their boat to Putnam’s dock during a storm.<sup>183</sup> Justices Munson’s and Haselton’s perceived “liberal views” might have angered Governor Fletcher Allen who decided not to reappoint Munson and Haselton in 1914.<sup>184</sup> This decision, which violated a longstanding practice of appointing judges and justices on seniority barring any allegations of incompetence, precipitated a political crisis.<sup>185</sup> Although Governor Fletcher claimed he refused to reappoint them because of their age, other newspaper accounts speculated that Governor Fletcher was displeased with their liberal ruling upholding the Vermont Public Service Commission’s regulation of the railroads and other similar rulings.<sup>186</sup> Because of the uproar in the Vermont legislature, Governor Allen had to reappoint Haselton and Munson in that same year.<sup>187</sup> The rest of their service on the court was uneventful. Both justices were highly regarded by the bench and the bar.<sup>188</sup> Haselton and Munson both died in 1921.<sup>189</sup>

### III. CONCLUSION

The social circumstances of *Ploof v. Putnam* are far more interesting than the doctrinal issues of the necessity defense that are often explored when the case is studied in torts classes. This case illustrates the realities of class and ethnicity that still resonate in Vermont today. Gentrification remains a salient social and economic issue in modern Vermont where long-term residents become strangers in their own communities when their communities become attractive tourist attractions and first- and second-home destinations for

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180. *Id.*

181. 5 CROCKETT, *supra* note 147, at 171-72. Court reorganization in 1906 reduced the number of Vermont Supreme Court Justices to four. As the fifth justice, Haselton then became Chief Superior Court Judge. *Id.* at 172.

182. *Id.*

183. *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

184. William C. Hill, *Vermont’s Judicial Crisis of 1914-1915*, 38 VT. HIST. 124, 126 (1970).

185. *Id.* at 124-26.

186. Hill, *supra* note 52, at 131-35.

187. *Id.* at 137.

188. *Id.* at 131; 5 CROCKETT, *supra* note 147, at 163, 174.

189. 5 CROCKETT, *supra* note 147, at 161, 174.

wealthy city dwellers. Suddenly, local and poorer residents are no longer welcome to those who want their vacation locales to be free of homes and individuals of a different class. The hostility is even greater if the residents are also people of another ethnic group generally despised and perceived to be inferior.

Of course, gentrification is not peculiar to Vermont. Similar class and ethnic or racial tensions can be seen in urban communities undergoing gentrification of what were once working-class and poorer neighborhoods. Understanding the social realities of gentrification and ethnic prejudice make the *Ploof* case more explicable. Putnam's caretaker untied the Ploofs' canal boat from Putnam's dock because of their reputation for thievery. What is interesting is that Putnam never argued that the Ploofs endangered his property. Perhaps the defendant's lawyers believed their other arguments about Putnam's lack of responsibility for the caretaker's actions were sufficient.

The popular understanding or lore about the case in the lakeside community of Charlotte, Vermont does see this case in terms of the Ploofs' reputation. Others in the community also had similar incidents with the Ploofs.<sup>190</sup> The Ploofs do not have a community who can present an alternative version of what happened. At least, on this occasion, the Vermont courts did not reinforce local prejudice. If students only read the 1908 court decision, they would learn only the most rudimentary facts. The case is far more interesting when students can read the appellate briefs and other original and secondary sources. Only then would they realize why the incident that precipitated the lawsuit occurred. This Article illustrates that cases are far more meaningful if students can explore the broader context of the cases they study in law school.

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190. See *supra* notes 64-67.