



British Journal of American Legal Studies

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Judge Joseph A. Greenaway Jr. Lecture Series on Law and Justice

Hon Joseph A Greenaway, Jr

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JOSEPH A. GREENAWAY JR. LECTURE SERIES ON LAW
AND JUSTICE*
SPEAK AT YOUR OWN PERIL

Hon. Joseph A. Greenaway, Jr.**

ABSTRACT

This lecture given at Birmingham City University School of Law, March 21, 2019 considers the origins of the right to silence in the jurisprudence of the Supreme Court of the United States and compares the constitutional protections against self-incrimination with those of the United Kingdom. It notes that the effect of the changes introduced by the Police and Criminal Evidence Act 1984 and the Criminal Justice and Public Order Act of 1994 is that there is now a fundamental divergence in approach between the two jurisdictions and concludes that as the twenty first century progresses, defendants on both sides of the Atlantic will be less likely to exercise their rights without consequence and then when they do choose to speak it will be at their peril.

KEYWORDS

Right to Silence, The Warren Court, Miranda v. Arizona, Police and Criminal Evidence Act 1984, Criminal Justice and Public Order Act 1994

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* Inaugural Lecture delivered at Birmingham City University School of Law, March 21, 2019

** Circuit Judge, U.S. Court of Appeals for the Third Circuit.

I. INTRODUCTION

I would be remiss if I did not begin my remarks with both acknowledging and thanking the many distinguished persons kind enough to attend this inaugural lecture.

From BCU/School of Law:

Professor Philip Plowden (Vice Chancellor of Birmingham City University)

Professor Keith Horton (Pro Vice Chancellor and Executive Dean of Birmingham City University's Faculty of Business, Law, and Social Sciences)

Dr. Anne Richardson Oakes (Director, Centre for American Legal Studies)

Dr. Sarah L. Cooper (Reader in Law)

Panel members:

Mr. Mark George, QC (Head of Chambers, Garden Court North Chambers)

Ms. Ada Bosque (Senior Litigation Counsel, United States Department of Justice, United States Embassy London)

Mr. Justice Julian B. Knowles, QC (High Court Judge)

From Birmingham Law Society:

Mr. James Turner (President, Birmingham Law Society)

Mr. Regan Peggs (Birmingham Law Society)

Ms. Becky Lynch (Birmingham Law Society)

Last but not least, my law clerk, Jeanine Alvarez.

Members of the Birmingham Law Society, administration and faculty of Birmingham City University School of Law, distinguished guests, and students: thank you all for the warm welcome you have extended to me and my wife, Dr. Valerie Purdie Greenaway. We have thoroughly enjoyed our stay and hope to meet more of you to thank you personally for your graciousness.

Having a lecture established in one's name is an honor that frankly is unfathomable. Who could have foretold that, after leaving London before developing my proper British accent, I could go to the States, achieve some modicum of success, and have such an honor bestowed upon me here in my home country? Amazing. I am blessed. Thank you.

There are a great number of topics that could be worthy of this august group of lawyers, intellectuals, and students. Intellectual property, procedure, and diplomacy, to name a few. I chose the right to silence because of the ubiquity of the topic. For over fifty years, the *Miranda* Warnings have been commonplace in film, literature, television, and the news.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have a right to an attorney and have him (or her) present while you are being questioned.

If you cannot afford an attorney, one will be appointed to you at government expense.

You can decide at any time to exercise these rights and not answer any questions or make any statements.

Do you understand these rights?

These warnings are as well known in America as any legal principle. The opportunity of giving this lecture piqued my interest greatly. What did this right look like in the United Kingdom?

I have an admission to make to you today. I am somewhat sheepish about mentioning it. My interest in the right to silence was not piqued initially in a Supreme Court history class or a constitutional law seminar. No, it was the movies. It was in college that I saw the movie “Dial M for Murder,”¹ starring the well-known character actor John Williams. In the movie, Mr. Williams, playing Chief Inspector Hubbard, said to Grace Kelly: “I shall warn you first that anything you say will be taken down and may be used in evidence.”² This recitation was different from contemporary police shows in the United States. It seemed shorter and somehow cleaner. Through the research that I conducted for this lecture, I learned that the simplicity of Chief Inspector Hubbard’s Caution did not reflect reality. The Caution, as it is known in the United Kingdom, could not have had a more different genesis than the *Miranda* Warnings, but the question of the day is why? My objective today is to speak to how the different approaches came about and how our respective systems of justice affect the right to silence.

II. ORIGINS OF THE RIGHT TO SILENCE

The Latin phrase—*nemo tenetur se ipsum accusare* (no one is bound to incriminate or accuse oneself)—speaks to a concept that in one form or another has origins centuries old. Some historians claim that it originated in biblical times, others claim medieval times. Undoubtedly, we could trace the historical parallels into antiquity. A common starting point for the right to silence analysis is the inquisitorial Court of Star Chamber. Many commentators, jurists, and legislators have at times harkened back to the Star Chamber as the starkest example of the consequences of compelled testimony. Indeed, Justice Stewart of the Supreme Court of the United States described the circumstance quite succinctly in his dissent in *Griffin v. State of California*:

When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment.³

¹ DIAL M FOR MURDER (Warner Bros. Entertainment Inc. 1954).

² *Id.*

³ *Griffin v. California*, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

Unfortunately, I cannot explore the nuanced development of the accusatorial system and the inquisitorial system. Suffice it to say that the accusatorial system reflected the inclusion of the community in the truth-seeking process, but did not compel the defendant to testify; the inquisitorial system, emanating from the Star Chamber, which had developed in the ecclesiastical courts, required an oath to tell the truth as to all matters on which the defendant was questioned. Given the historical breadth of the right to silence in both the United States and the United Kingdom, I will limit myself to roughly the last century.

The Fifth Amendment is part of the ten amendments to the Constitution of the United States making up the Bill of Rights. The Bill of Rights includes the right to free speech, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to counsel, the right to a trial by jury, and the right to not be subject to cruel and unusual punishment. Although not a comprehensive list of those amendments, these are most of the key ones. For our purposes, the Fifth Amendment is most critical. Its text, as it relates to self-incrimination, states: “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”⁴ Although not part of the initial drafting and framing of the Constitution, the Bill of Rights has proven over time to have had the most profound effect on the operation of our democracy.

These ten amendments have shaped the societal conversation over our country’s modest life span of nearly 243 years. In the United States, our discussion of constitutional rights is ubiquitous. The conversation occurs in the halls of Congress, the media, the White House, our courts, schools, churches, and shops. Although the Fifth Amendment is multifaceted, historically, it did not draw the same attention as other constitutional amendments until the middle of the twentieth century. The major impetus behind our discussion of the Fifth Amendment came about through what I argue was a confluence of events having a profound impact on the Supreme Court. As a result, the Supreme Court took the laboring oar in addressing the constitutional protections regarding self-incrimination that, for decades, had laid relatively dormant in both Fifth Amendment jurisprudence and in our legislative considerations.

III. THE IMPETUS BEHIND *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966)

Some commentators assert that the crux of *Miranda*—the marrying of the Fifth and Sixth Amendments resulting in the *Miranda* Warnings— came onto the legal scene like a nova, out of nowhere. I would assert that *Miranda* resulted from a confluence of two factors: leadership and incrementalism, including the case of *Brown v. Board of Education*⁵. The leader of whom I speak is Supreme Court Chief Justice Earl Warren. During his time as Chief Justice, we refer to the Supreme Court colloquially as the “Warren Court.”

In the history of the Supreme Court, there have not been many great Chief Justices. What makes a great Chief Justice? It is beyond peradventure that Chief

⁴ U.S. CONST. amend. V.

⁵ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

Justice John Marshall was a great Chief Justice, perhaps the best. He, literally, put the Supreme Court on the map. He became Chief Justice in 1801. At a time when the Court held no prestige and was frankly an unknown entity with no past, he, through force of will and erudition, commanded respect and penned opinions that framed what the Court was and was not. He commanded the Court with camaraderie and respect. Many of his early opinions were unanimous and left an indelible impression on American law.

Earl Warren followed in that tradition. Although many Chief Justices between John Marshall and Earl Warren were incredibly accomplished, few drew both the accolades and ire of Warren because the Courts they led did not achieve and distinguish themselves as Warren's did.

Earl Warren, as many of you know, became the Chief Justice of the Supreme Court in 1953. Warren was not known as a legal scholar, but rather as an accomplished politician. You see, Warren had spent a lifetime in politics and public service. He had enough political heft to run for President of the United States in both 1948 and 1952, after having served as both Attorney General and Governor of California. Indeed, in 1952, he garnered a significant number of delegates on the first ballot at the Republican National Convention. Through savvy negotiations, he agreed to encourage and deliver his delegates to join General Eisenhower's delegates, all but assuring the presidency to Eisenhower. In return, Eisenhower agreed that Warren would receive the first available nomination to the Supreme Court. The rest, as they say, is history.

At the time Warren joined the Court, the docket famously included *Brown v. Board of Education*,⁶ the school desegregation case forcing America to look itself in the mirror regarding the issue of race. Many have said, including Justice David Souter and Justice Thurgood Marshall, that *Brown* was the most important case of the twentieth century. The case specifically addressed the separate schooling by law of black and white students. The desegregation of schools was certainly not popular. In fact, the Court was torn. Warren inherited a Court deeply divided. Warren's leadership, it can be argued, almost singlehandedly brought his colleagues to a unanimous decision outlawing segregation based on race. *Brown* was pivotal in setting the tone of the Warren Court as a court focusing on civil rights, administration of criminal justice, protection of individual liberty, and extension of political democracy. Essentially, *Brown* provided the impetus for the highest court in the land to review the law through the lens, some would say the aggressive lens, of equity, fairness, and equality.

Archibald Cox, the noted legal scholar and Harvard Law School professor, encapsulated the conundrum the Warren Court faced: "Should the Court play an active, creative role in shaping our destiny, equally with the executive and legislative branches? Or should it be characterized by self-restraint, deferring to the legislative branch whenever there is room for policy judgment and leaving new departures to the initiative of others?"⁷

Needless to say, the Warren Court followed the former theory as its focus. As a result of this choice, the Warren Court had many critics. Primarily, critics argued that the Warren Court engaged in result-oriented jurisprudence in which

⁶ *Id.*

⁷ ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 2* (1968).

the text of the Constitution was not the primary source of interpretation. Indeed, many argued that Warren was no scholar and, rather than provide well-reasoned analysis, the Court provided reasoning not befitting of legal giants such as Justices Marshall, Holmes, Brandeis, and others. Warren wrote plainly and with vision. The jurisprudence he propounded attempted to shape laws to be adherent to the Constitution. Warren's response to this critique is apparent in his non-judicial writings concerning his theory of judging and the Constitution. One of Warren's biographers, G. Edward White, noted:

The pursuit of justice, as Warren defined it, was thus a "continuing direction for our daily conduct." The Bill of Rights needed revision with time. "We will pass on," Warren said, a "document [that] will not have exactly the same meaning it had when we received it from our fathers." For the Bill of Rights protections to be real, Warren argued, they needed constant application by the judiciary. A "better" Bill of Rights was "burnished by growing use"; a "worse" one was "tarnished by neglect."⁸

Mr. White, in paraphrasing Warren's theory of judging and his ideas on the Bill of Rights as reflected in an essay Warren wrote for *Fortune Magazine* in 1955, stated:

He assumed that the meaning of the Bill of Rights necessarily changed with time; the interpretations of the framers would necessarily differ from those of him and his contemporaries. He assumed that continued and active application of the Bill of Rights was necessary to make its protections "real" and that active application would necessarily alter the meaning of the words in the Bill of Rights.⁹

The focus on Chief Justice Warren's view concerning the Bill of Rights is both prescient and a portent of things to come. At the time the Warren Court's tenure began, there was a particular conundrum that the law faced. How do federal pronouncements about the scope and breadth of federal constitutional law affect state law? Federalism is a concept at the heart of our form of government. Federal and state law operate in parallel universes, except for those specific instances where intersection occurs. In other words, if the Supreme Court makes a pronouncement through a case that a particular constitutional provision has application in a certain circumstance, how can that ruling apply to a similar factual circumstance occurring in the states?

The answer was the Fourteenth Amendment, which essentially stated that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States. In other words, states could not pass or enforce laws inconsistent with the Constitution.

The problem was that no case or federal statute had made clear that all of the basic rights set forth in the Bill of Rights were protected under state law. This was the genius of the Warren Court.

Accolades and critiques aside, in the criminal area, many cases foretold the Warren Court's focus on expanding constitutional rights in the name of justice.

⁸ G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 223 (1982).

⁹ *Id.* at 224.

There were significant and substantial changes made in criminal law and procedure. Two such notable cases are *Mapp v. Ohio*.¹⁰ and *Gideon v. Wainwright*.¹¹ In *Mapp v. Ohio*,¹² the Supreme Court established the exclusionary rule, as applicable to the states through the incorporation doctrine of the Fourteenth Amendment, in which evidence obtained in violation of the Fourth Amendment prohibition against unconstitutional searches and seizures meant any evidence illegally seized was inadmissible at trial. *Gideon v. Wainwright*,¹³ established that, in a criminal case charging a felony under state law, a defendant had a right to counsel, regardless of financial station, as required by the Sixth Amendment.

IV. COMING OF MIRANDA

One area of jurisprudence that remained less than clear until the Warren Court was the Fifth Amendment right against self-incrimination. The lead up to *Miranda* included four cases: *Bram v. United States*,¹⁴ *Brown v. Mississippi*,¹⁵ (not to be confused with *Brown v. Board of Education*,¹⁶) *Escobedo v. Illinois*,¹⁷ and *Griffin v. California*.¹⁸ Each of these cases led to the incremental incorporation of the right to silence so that it applies to the states.

In *Bram v. United States*,¹⁹ the notion of voluntariness arose for the first time in the context of the Fifth Amendment. That is, if there is evidence that a confession was not voluntary, its admission could be challenged and suppressed. Forty years later in *Brown v. Mississippi*,²⁰ the Supreme Court spoke more plainly when it stated that coercion and brutality vitiate any notion of voluntariness and a confession in that circumstance cannot stand. In that case, police took several Black men out of their homes and horse-whipped them until they confessed to crimes they did not commit.²¹ Although the constitutional underpinning there was the Due Process Clause of the Fourteenth Amendment, it signaled the Court's willingness to enliven the debate regarding self-incrimination.²² The question is in keeping with Warren's view of the Constitution. What actions may the state take that are not violative of the Constitution?

*Escobedo*²³ was next in the line of Supreme Court cases that set the framework for *Miranda*. Danny Escobedo was a suspect in a murder investigation.²⁴ Upon the

¹⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴ *Bram v. United States*, 168 U.S. 532 (1897).

¹⁵ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁶ *Brown v. Bd of Educ. of Topeka*, 347 U.S. 483 (1954).

¹⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁸ *Griffin v. California*, 380 U.S. 609 (1965).

¹⁹ *Bram v. United States*, 168 U.S. 532 (1897).

²⁰ *Brown v. Mississippi*, 297 U.S. 278 (1936).

²¹ *Id.* at 281-82.

²² *Id.* at 285-87.

²³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁴ *Escobedo*, 378 U.S. at 479-81.

inception of interrogation, he requested that he be permitted to see his attorney.²⁵ His request was denied.²⁶ Interestingly, his attorney was literally on the other side of the door requesting an opportunity to see Escobedo, but he too was denied entry by the police.²⁷ Eventually, after hours of grilling, Escobedo confessed, based on an entreaty from an officer promising that he would be able to go home that night, if he promptly confessed.²⁸

The Supreme Court reversed the conviction. Justice Goldberg, in writing the majority opinion, focused on both the Fifth Amendment constitutional right against self-incrimination and on the Sixth Amendment right to counsel.²⁹ Specifically, the Supreme Court stated that “[w]e hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.”³⁰

Escobedo also held that these constitutional rights applied to the states through the incorporation doctrine.

Justice Stewart’s dissent in *Escobedo* is noteworthy because it stands as a portent of things to come. He noted “[t]his Court has never held that the Constitution requires the police to give any ‘advice’ under circumstances such as these.”³¹

A fourth case which came down pre-*Miranda* but shone the path to *Miranda* was *Griffin v. California*.³² In *Griffin*, the Supreme Court held that the Fifth Amendment prohibited a prosecutor or judge from commenting on a defendant’s failure to testify.³³

In *Griffin*, the jury instruction the opinion overturned, which was lawful under California state law, stated:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.³⁴

The trial court added as part of its instruction that the adverse inference did not affect the presumption of innocence nor shift the burden of proof to the defendant. I know that this instruction sounds quite familiar to many of you as it is similar to the instructions given in a criminal case in the U.K.

In *Griffin*, the prosecutor stated in his closing that there were many open questions about the victim’s murder and the only thing keeping the jury from learning that

²⁵ *Id.* at 481-82.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Escobedo v. Illinois*, 378 U.S. 478, 482 (1964).

²⁹ *Id.* at 488-92.

³⁰ *Id.* at 492.

³¹ *Escobedo*, 378 U.S. at 494.

³² *Griffin v. California*, 380 U.S. 609 (1965).

³³ *Griffin*, 380 U.S. at 614.

³⁴ *Id.* at 610.

information was the defendant's silence.³⁵ The Supreme Court reasoned that such comments, and any adverse inferences drawn from them, are a "penalty" imposed on the defendant's exercise of his Fifth Amendment privilege, and thus, unconstitutional.³⁶ This was another case where, although addressing state law, the Fifth Amendment, through the incorporation doctrine, was applicable to the states nonetheless.

And now we reach *Miranda*. It is not an overstatement to say that *Miranda* is one of, if not the, most important criminal case in the history of the Supreme Court. *Bram*, *Brown*, *Escobedo*, and *Griffin* reflect the normal progress of cases through the federal and state courts—principles are established and discussed at length over time. Each is tested, critiqued and judged. Expanded in some instances; contracted in others. *Miranda* is an example of expansion.

What is striking about *Miranda* is that the facts are not extraordinary. Like so many cases that gain notoriety, its facts are straightforward.

Warren sets the stage for the opinion at the very start. He noted:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.³⁷

Ernesto Miranda was arrested at his home.³⁸ He was taken into custody and brought to a Phoenix police station.³⁹ He was identified by a witness, then brought to an interrogation room.⁴⁰ He was not advised of his right to have an attorney present.⁴¹ Two hours later, police emerged with a signed confession, labelled voluntary.⁴² However, no mention was made of the right to remain silent or the right to counsel.⁴³

The Court concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.⁴⁴

The purpose of *Miranda* was clear—remove the aura and reality of compelled testimony in custodial settings. The rules of *Miranda* are plain. The consequences of

³⁵ *Id.* at 610-11.

³⁶ *Id.* at 614-15.

³⁷ *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

³⁸ *Id.* at 491.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Miranda*, 384 U.S. at 491-92.

⁴² *Miranda*, 384 U.S. at 492.

⁴³ *Id.*

⁴⁴ *Miranda*, 384 U.S. at 467.

violation are stern—suppression of evidence. Here, the confession was suppressed and the conviction vacated. However, *Miranda*, in most senses, is the beginning and not the end of the story. The Supreme Court's role in a constitutional democracy means that it and the lower courts constantly re-examine the rules it sets down.

Miranda is an example of a fundamental difference in the perspective of scholars, jurists, and practitioners regarding the work of the Supreme Court. It is also a precursor to how many Americans view the dichotomy in constitutional interpretation in American jurisprudence. There are many theories of constitutional interpretation in American jurisprudence today. At the time of the Warren Court, the theoretical landscape was less cluttered. On the one hand, those adhering strictly to the text of the Constitution—textualists—believed that such examination was the beginning and end of the analysis. On the other hand, many, Chief Justice Warren among them, believed in a living Constitution, which required interpretation consonant with changes and advances in society. The *Miranda* decision is an example of the latter view.

Two key legal components of *Miranda* were the announcement of a new constitutional rule and, through the incorporation doctrine, the application of the Fifth Amendment rule of *Miranda* to the states.

In writing *Miranda*, Chief Justice Warren took into account many factors, data and information that were anathema to certain members of the Court because he ventured outside of the realm of the text. Indeed, much of the criticism of the majority opinion is of the view that the Constitution did not require or call for the safeguards or protections that the majority had deemed to be essential to the practical functioning of the right against self-incrimination. Of course, this view of the Constitution supports Warren's democratic view of our Constitution; i.e., to avoid the concentration of power in the hands of the few.

Miranda was undeniably a response to the inconvenient truth that police forces did not operate in a perfect world in which questioning occurred in a non-coercive, controlled, and safe environment. Actually, the cases are legion that police forces around the country resorted at times to brutality, torture, and other, more drastic means, to induce, force, and coerce confessions with nary a care about constitutional rights. Thus, the *Miranda* Warnings were instituted with one principle objective: to ensure that no accused would be compelled to incriminate himself. Was it a panacea then? No, particularly given the turbulence of the times. The Constitution was being argued and interpreted in new and expansive ways to bring more of our nation's constituents into the constitutional dialogue.

V. U.K. RIGHT TO SILENCE

Miranda crystallizes the stark contrast between the legal systems our respective countries adhere to today. A constitutional form of government in which the judiciary is empowered to decide the ambit and parameters of the Constitution is fundamentally different than parliamentary sovereignty. In our system, the Supreme Court, with the Constitution in mind, determines whether certain laws and actions operate within the world of the permissible. In the United Kingdom, Parliament and its laws reign supreme.

In contrast to our Supreme Court's role in the right to remain silent, there are three Parliamentary Acts that have principally controlled the vantage regarding the

right to silence in the United Kingdom. The Criminal Evidence Act of 1898,⁴⁵ the Police and Criminal Evidence Act of 1984,⁴⁶ and the Criminal Justice and Public Order Act of 1994,⁴⁷ are the most important laws on the right to silence over the last century or so.

The Criminal Evidence Act of 1898 provided a resounding rejection to any notion of compulsion. The Act reversed the practice of prohibiting a defendant from offering sworn testimony. More important, it established that a defendant could not be compelled to give evidence and a defendant's failure to do so could not be commented upon by the prosecution; however, if a defendant offered any evidence, the privilege would be waived. This Act is similar in many ways to the current law in the United States. Interestingly, in the United States, even if a defendant chooses to put on a defense, no comment may be made about his or her failure to testify, but a prosecutor is free to comment upon and criticize the quantum and quality of the evidence presented.

All assembled here today will no doubt be proud to know that Birmingham played a role in the public discussion of the right to silence. Apparently, the "Caution," as it is referred to now in legislation, came about in 1912. The Caution was instituted because the Chief Constable in Birmingham had asked for clarification as to when to use it. Of course, this earlier version of the Caution informed an accused of his right to silence. In what was known then as the Judges' Rules, the requirement that police formally give a caution to suspects upon arrest was introduced.

The key difficulty in the application of the Caution was that the Judges' Rules were administrative in nature and there was no uniformity. Hence, violating the Judges' Rules did not come with the sanction of suppression of statements from evidence or an altering of the criminal case at all. The conceptualization of the Judges' Rules is best described in the 1918 case *Rex v. Voisin*:

In 1912, the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.⁴⁸

In the intervening years, the courts addressed the Caution in various ways, but it was not until the 1984 Police and Criminal Evidence Act that the Caution became law.

The Police and Criminal Evidence Act of 1984 sets forth what under English law is the Caution: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."⁴⁹

⁴⁵ Criminal Evidence Act 1898, 61 & 62 Vict. c. 36 (Eng.).

⁴⁶ Police and Criminal Evidence Act 1984, c. 60 (Eng.).

⁴⁷ Criminal Justice and Public Order Act 1994, c. 33 (Eng.).

⁴⁸ *R. v. Voisin* [1918] 1. K.B. 531 at 539-40 (Eng.).

⁴⁹ Police and Criminal Evidence Act 1984, App. A, § 10.4, Code of Practice C (Eng.).

The Caution presents several challenges seemingly without providing a resolution. First, how may exercising your right to silence harm your defense? Remember, this is before the advent of the adverse inference. The court may comment, but it is certainly not clear how the court may comment. Presumably, it is evident in the jury instructions, but it appears uncertain. Second, is there any notion of materiality or relevance in the consideration of evidence? Specifically, does the Caution apply to anything and everything you could possibly say to the authorities? Suppose an innocent omission occurs. Is that now an instance that could be harmful to the defense? Third, the Act alludes to a detriment by omission. Is there a negative inference to be drawn or is there a shift in burden?

The Criminal Justice and Public Order Act of 1994 addresses some of the open questions presented by the Police and Criminal Evidence Act of 1984. The 1994 Statute, in relevant part, states:

- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused
 - (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, . . .[The Jury] may draw such inferences from the failure as appear proper.⁵⁰

The most important change in the statutory language is the fact that a judge or jury “may draw such inferences from the failure as appear proper.”⁵¹

The negative inference, in whatever form, creates a legal dynamic diametrically opposed to the system in the United States. In the United Kingdom, the accused is required to shoulder a substantial additional burden with multiple potential effects. Indeed, one could plausibly argue that the Caution turns the burden of proof on its head, affecting any consideration of guilt in several ways. First, the presumption of innocence is affected. Even when a judge instructs a jury that, despite the effect of the Caution and the adverse inference to be drawn from silence, the presumption persists, that admonition does not leave an accused untarnished. What is the purpose of the presumption if the adverse inference negates the dynamic of the presumption? Second, the Caution upsets the burden of proof. Notwithstanding the fact that the Crown carries the burden of proof throughout the trial, the adverse inference creates two issues: 1) an expectation by the jury that the accused will explain himself or herself and answer any open questions and 2) whatever quantum of proof the Crown gathers, the accused, through his or her testimony, will be expected to likewise come forth with an explanation professing innocence of the charges. The burden is no longer non-existent, as the defendant never takes on a burden of proof, and instead requires the accused to actually show innocence.

⁵⁰ Criminal Justice and Public Order Act 1994, c. 33, § 34 (Eng.).

⁵¹ *Id.*

VI. COMPARISON OF U.S. AND U.K.

My fascination in comparing and contrasting our respective systems' views on the right to silence continues well past *Miranda*. Indeed, it is ironic that both systems sought a legislative solution to the right to silence, but the results were quite different.

Within two years after the *Miranda* decision—1968, to be exact—the United States Congress, spearheaded by the Southern contingent, still upset by the meddling of the Supreme Court in their way of life, as evidenced in *Brown v. Board of Education*,⁵² the school desegregation case I alluded to earlier, passed what became known as the Crime Bill of 1968.⁵³ The key provision for our purposes was Section 3501.⁵⁴ This statute was a rebuke of *Miranda*. It was specifically passed to undermine the effectiveness of the *Miranda* Warnings and take, so to speak, the handcuffs off of law enforcement in federal prosecutions. It was thought by legislators, with no proof or empirical data to support them, that if the *Miranda* Warnings were given to those accused in custody, no confessions would come about.

Congress, in taking on the Supreme Court, attacked the notion that *Miranda* was a new constitutional rule. Passage of the Act meant Congress thought that the Court acted pursuant to its supervisory authority which Congress can challenge with legislation, essentially undoing a decision. Such was not the case. Because of its constitutional breadth, *Miranda* was a rule affecting both state and federal prosecutions. You will recall I mentioned the incorporation doctrine earlier. This concept required the application of federal law—the rule against self-incrimination and the right to counsel—to the states. Specifically, the statute listed all of the factors taken into account in *Miranda*: (1) time between arrest and arraignment; (2) knowledge of charges; (3) admonition of silence and statement's use against the defendant; (4) the right to an attorney; and (5) provision of an attorney if one could not afford an attorney. The statute tried to effect change allowing for a looser application of *Miranda*.

Here is the key. The statute said the presence or absence of any one factor is not conclusive (or dispositive) on voluntariness. In other words, it is okay if you forget one or two or three of the warnings; it would be permissible for a judge to find any confession voluntary. Great statute for law enforcement but one slight problem—Section 3501 only applied to federal prosecutions.

No Supreme Court case at the time of the statute squarely took on *Miranda* in this way. To be sure, the incrementalist approach eventually resulted in a chipping away of the absolutism of *Miranda*. Little by little, more ways were introduced for evidence to be garnered despite silence. As a consequence, *Miranda* remained the law of the land, but not in the same form as it began.

Fast forward thirty-two years later. Opponents of *Miranda* thought that when the Supreme Court agreed to hear *Dickerson v. United States*,⁵⁵ vindication and evisceration of *Miranda* was imminent.

⁵² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁵³ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

⁵⁴ 18 U.S.C. § 3501 (1968).

⁵⁵ *Dickerson v. United States*, 530 U.S. 428 (2000).

Dickerson came down in 2000. Chief Justice Rehnquist took the opinion. More reason for *Miranda* opponents to feel enthused, at first blush, because his view of constitutional interpretation was the exact opposite of Warren's. *Dickerson* was an interesting case. The Court had to address when should a precedent be re-examined and, if necessary, overturned. Stare decisis, the examination of and adherence to precedent, carried the day. Indeed, Chief Justice Rehnquist noted that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁵⁶

The notion that law enforcement would be irrevocably impeded from doing its investigative work as a basis for overturning *Miranda* had long been laid to rest. Indeed, very few cases present viable claims of compelled confessions when *Miranda* Warnings are given.

In *Dickerson*, the defendant was arrested and indicted for bank robbery.⁵⁷ He made a statement to the FBI (Federal Bureau of Investigation) without the benefit of the *Miranda* Warnings.⁵⁸ The lower court noted that, using the test under Section 3501, the statement was voluntary and, despite the absence of *Miranda* Warnings, was admissible. Chief Justice Rehnquist reversed the lower court.⁵⁹ The sole holding was that *Miranda*'s warnings and its approach to admissibility of statements by an accused during custodial interrogation was constitutionally based and could not be, in effect, overruled by legislative act.⁶⁰ Congress could not replace a voluntariness test for the *Miranda* Warnings.

Lastly, the case presented, and the Chief Justice dispatched, any notion that Congress could encroach upon the Court's province. As the great Chief Justice John Marshall said in the seminal case of *Marbury v. Madison*,⁶¹ in 1803, the Supreme Court states what the law is. Congress may not supersede the Supreme Court's authority in interpreting and applying the Constitution. *Miranda* is a constitutional rule. Section 3501 cannot seek to overturn or supersede that precedent. *Miranda* survived *Dickerson*.

VII. THE RIGHT TO SILENCE TODAY

What can we say about the right to remain silent today? First, the right is not absolute. An accused cannot merely stay silent during in-custody interrogation, at trial or at sentencing without any consequences. How has that state of affairs been achieved in the American system? Constant re-examination. The right to be read the *Miranda* Warnings remains. But seemingly endless permutations, aimed at achieving a journey towards the truth, persist.

The ultimate goal of *Miranda* was to extract coercion from the custodial interrogation process, which was then and continues to be today, infected by issues of class, race, and ethnicity. That concern has only intensified when we consider the number of confessions obtained through questionable means, which later are

⁵⁶ *Id.* at 443.

⁵⁷ *Id.* at 432.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 444.

⁶¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

proved by DNA evidence or otherwise to be false or coerced. Second, the concern regarding the shifting burden of proof does not fall solely within consideration of the adverse inference. In the States, citizens are bombarded with television, film, and literature where the defense in a criminal case presents a theory of the case. Jurors, now more than ever, come to court with an expectation that they will hear from both sides. The right to remain silent be damned.

In reviewing the effect of the 1994 Act, I seriously grappled with whether there is a way to apply the adverse inference without a detriment to the defense. For instance, an instruction, as occurs now in U.K. courts, which states 1) that the presumption of innocence of the accused persists despite the adverse inference and 2) that the burden of proof remains with the Crown to prove the guilt of the accused is beneficial but hardly enough. After all, how can a lay person, after grasping the import of the adverse inference, say never mind? Every piece of evidence reviewed, every bit of testimony heard, would be filtered through the fulcrum of why is he just sitting there? Why isn't he talking up? The answer to the next question settles the matter—would he be silent if he were innocent? When, as we know, innocence is not the issue.

What is keenly apparent is that as you examine the different ways of addressing both the right to remain silent and the right to silence, neither carries the day. Each is the result of a fundamental divergence in approach with vastly different aims. Is either better suited to obtain the truth or protect the right of the accused? Arguments abound on either side. What is clear is that as we move further into the twenty-first century, defendants will be less likely to cloak themselves in silence without consequence, and when they do speak, it will indeed be at their peril.

FEAR AND LOATHING IN LEGAL ACADEMIA: LEGAL ACADEMICS' PERCEPTIONS OF THEIR FIELD AND THEIR CURIOUS IMAGINARIES OF HOW 'OUTSIDERS' PERCEIVE IT

Nicolette Prialx, Martin Weinel,
Willow Leonard-Clarke & Thomas Hayes

ABSTRACT

This article concerns the question of how legal academics imagine 'outsiders' perceive legal academia. Centralising our empirical work undertaken at a UK research intensive University which explored the attitudes, beliefs and knowledges of non-legal academics about the field of legal academia, we focus on the findings flowing from benchmarking surveys with legal academics which invited self-evaluations of the field of legal academia as well as imagining how non-legal academics ('outsiders') might evaluate the field of legal academia. Of particular interest, we note the presence of a curious divergence between self-perceptions of legal academia and their 'imaginaries' as to how 'outsiders' will perceive the field. Supported by a review of the legal scholarly literature, our study reveals a persistently bleak 'folklore' surrounding the question of how 'outsiders' will regard legal academia – though critically, one which on the basis of our empirical work, finds little root in reality. Providing the first study of its kind, and offering a range of novel analytical techniques, we highlight the significant purchase of empirical meta-disciplinary work of this nature for better understanding legal academia and its relationship with other fields. While undertaken as a scoping study, we identify potential opportunities for raising the profile of legal academia in wider spheres, as well as enhancing opportunities for cross-disciplinary collaboration. As we argue by reference to our findings, part of that work may simply involve legal academics projecting their more positive self-perceptions of their field and the value of their work to the outside world.

KEYWORDS

Empirical study, Meta-disciplinary Analysis, Legal Academics, Cross-disciplinary Attitudes, Insider Imaginaries

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FEAR AND LOATHING IN LEGAL ACADEMIA: LEGAL ACADEMICS' PERCEPTIONS OF THEIR FIELD AND THEIR CURIOUS IMAGINARIES OF HOW 'OUTSIDERS' PERCEIVE IT

Nicky Priaulx, Martin Weinel, Willow Leonard-Clarke and Thomas Hayes¹

Law as a discipline is not simply about knowing what the law is, but can extend to questions about what the law should be. It can range from knowing how the law really works in practice, what type of law will achieve a particular goal, how law has evolved (and failed), to the importance and role of law to achieve political, economic and social goals (Legal Academic, Survey Respondent).

I. INTRODUCTION

The novel concern at the centre of this article is how legal academics *imagine* non-legal academics think about legal academia. Forming part of a broader study funded by the British Academy exploring how non-legal academics standing as 'outsiders' perceive the field of legal academia,² a major aspect of our research possessed an 'insider' focus. We sought to capture how legal academics typify their own field, as well as their 'imaginaries' as to how they anticipated academics employed in other schools and fields would come to portray them and their discipline. These 'insider imaginaries' and the comparison between these and the actual perceptions of 'outsiders', provide illuminating insights into an understudied area. While a growing and valuable body of research about legal academia and legal scholars by legal academics exists, ranging from Fiona Cownie's landmark work *Legal Academics*,³ to a broader scholarship about the research behaviours, patterns and trends within

¹ Nicky Priaulx, Cardiff School of Law and Politics; Martin Weinel, Cardiff School of Social Sciences; Willow Leonard-Clarke, Cardiff School of Social Sciences; Thomas Hayes, Cardiff School of Law and Politics. Our thanks to the British Academy for funding this project, to Richard Collier, Fiona Cownie and Tony Bradney for their generous support and guidance, and to colleagues at Cardiff Law School and across Cardiff University for their kind engagement with this project. Thanks to those involved in crash-testing earlier pilot versions of the survey, including Bernadette Richards at the University of Adelaide, who provided such useful feedback. We also owe a large debt of gratitude to Harry Collins, Rob Evans, Dave Caudill, Luke Sloan, broader members of the Centre for the Study of Knowledge, Expertise, Science at Cardiff University and the international SEESHOP community as a whole for their extensive and invaluable support across the duration of this project as a whole. Last, but not least, our thanks to the anonymous reviewers of this piece for very helpful and illuminating comments, and to the editor and editorial team at the *British Journal of American Legal Studies* for all of their excellent work and support.

² This project, 'Multidisciplinary Understandings of Legal Academia' was supported by a British Academy Small Grant (Grant number 509225).

³ FIONA COWNIE, *LEGAL ACADEMICS: CULTURES AND IDENTITIES* (2004).

the discipline,⁴ limited empirical attention has been given to the questions of how legal academics believe their field (and the field's constituents) is perceived by those standing externally to it, and how 'outsiders' do in fact perceive it. As our research has uncovered, other than Tony Becher's exploration of disciplinary cultures in the 1980s,⁵ and Paul Trowler's subsequent work with Becher,⁶ much of the literature around how 'outsiders' perceive legal academia comes from scholarly literature generated by the legal academic community itself. This becomes a significant and fascinating source of literature in its own right. While close attention to this body of work demonstrates the extent to which legal academics' ideas of how 'outsiders' think about the legal field rests upon speculation (albeit, often represented as fact), these accounts are nevertheless revealing. What we discovered within that literature was the curious presence of a series of insider imaginaries which consistently highlight the expectation that 'outsiders' will perceive the field of legal academia in a largely negative way.

The insider imaginaries appearing within legal scholarship formed the starting point for our research as a means of investigating whether they possess a broader life within the minds of legal academics, as well as in the minds of 'outsiders'. Undertaken as a scoping study, our investigation explored such questions in the context of the higher education community of academics. We sought to evaluate whether these negative insider imaginaries might be more prevalent within the legal academic community, and to explore the extent to which these aligned with legal academics' self-perceptions of their field, and indeed, importantly, the actual beliefs of non-legal academics ('outsiders'). We conducted our empirical research using online surveys to gather data from non-legal academics across different departments in one higher education institution in the U.K., Cardiff University, with the aim of empirically exploring what non-legal academics ('outsiders') know or believe about legal academics and legal academia. As an analytical benchmark to evaluate these responses, and a mechanism for eliciting legal academics' imaginaries, we conducted similar surveys with legal academics ('benchmarking survey'). At points in this article we pause to consider issues around how non-legal academic 'outsiders' come to view the legal academic field,⁷ but with the aim of evaluating the extent

⁴ Susan Bartie, *Histories of Legal Scholars: The Power of Possibility*, 34 LEG. STUD. 305 (2014); Susan Bartie, *The Lingering Core of Legal Scholarship*, 30 LEG. STUD. 345–69 (2010); HAZEL GENN, MARTIN PARTINGTON & SALLY WHEELER, *LAW IN THE REAL WORLD: IMPROVING OUR UNDERSTANDING OF HOW LAW WORKS* (2006); Paddy Hillyard, *Law's Empire: Socio-legal Empirical Research in the Twenty-first Century*, 34 J.L. SOC'Y. 266 (2007); Mathias M. Siems & Daithí Mac Síthigh, *Mapping Legal Research*, 71 C.A.M.B. L. J. 651 (2012); J. M. SMITS, *THE MIND AND METHOD OF THE LEGAL ACADEMIC* (2012).

⁵ TONY BECHER, *ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES* (1st ed. 1989).

⁶ TONY BECHER & PAUL TROWLER, *ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURE OF DISCIPLINES* (2d ed. 2001); Paul Trowler, *Depicting and Researching Disciplines: Strong and Moderate Essentialist Approaches*, 39 STUD. HIGH. EDUC. 1720 (2014).

⁷ Our findings in relation to the wider study, and in particular around the question of how 'outsiders' regard the field of legal academia, are discussed extensively elsewhere. See further, Nicky Priaulx et al., *How "Outsiders" See Us: Multidisciplinary Understandings of Legal Academia and Legal Academics*, CARDIFF UNIV. L. LAB WORK. PAP. 1–60 (2018).

to which these align with the imaginaries and self-perceptions of legal academics. Discussion of the results from our benchmarking survey and the connected legal scholarly literature form the central focal points of the current article.

Providing the first study of its kind, this article positions itself in the context of literature aimed at identifying the kinds of conditions that will enhance opportunities for legal academics and others within the academy to work in a more collaborative fashion across traditional disciplinary and sectoral divides.⁸ While a strong focus has been on the cognitive and structural barriers that need to be overcome to enhance the potential of cross-disciplinary collaborative work,⁹ an emerging literature is highlighting the critical role that socio-attitudinal, relational and emotional factors can play in both facilitating and hindering integrative collaborative practice.¹⁰ While inviting an enquiry of how actors external to a field actually perceive it, and the extent to which inaccurate perceptions and stereotyping of other fields might act as a barrier to cross-disciplinary collaboration,¹¹ our study also underpins the importance of attending to a field's internal constituents in terms of their 'imagined' beliefs about how their own field might be regarded by 'outsiders'. While our analysis of the literature and the responses of our legal academic participants suggest that imagination, rather than empirical reality, plays a significant role in shaping these bleak ideas, these imaginaries can help us to uncover aspects of disciplinary life. Imaginaries can prove illuminating for gaining insight into how actors make sense of their field and mark out its boundaries, just as they can point towards a performative dimension.¹² While the faculty of imagination can be prized 'as an attribute of the creative individual', enabling 'the extraordinary person to see beyond the limits of constraining reality', in

⁸ See, e.g., Arild Buanes & Svein Jentoft, *Building Bridges: Institutional Perspectives on Interdisciplinarity*, 41 FUTURES 446–54 (2009); Catherine Lyall, Laura Meagher & Ann Bruce, *A Rose by Any Other Name? Transdisciplinarity in the Context of UK Research Policy*, 65 FUTURES 150 (2015); HELGA NOWOTNY, INVESTIGATING INTERDISCIPLINARY COLLABORATION: THEORY AND PRACTICE ACROSS DISCIPLINES (Scott Frickel, Mathieu Albert, & Barbara Prainsack eds., 2016); Nicky Priaulx & Martin Weinel, *Connective Knowledge: What We Need to Know About Other Fields to 'Envision' Cross-Disciplinary Collaboration*, 6 EUR. J. FUTURES RES. 21 (2018).

⁹ For a summary of that work, see further Priaulx and Weinel, *supra* note 8.

¹⁰ See Gabriele Griffin, Pam Medhurst & Trish Green, *Interdisciplinarity in Interdisciplinary Research Programmes in the UK* (2006), https://www.york.ac.uk/res/researchintegration/Interdisciplinarity_UK.pdf; Veronica Boix Mansilla, Michele Lamont & Kyoto Sato, *Successful Interdisciplinary Collaborations: The Contributions of Shared Socio-Emotional-Cognitive Platforms to Interdisciplinary Synthesis* (2012), <https://dash.harvard.edu/handle/1/10496300> (last visited Dec. 21, 2017); Deana Pennington, *Collaborative, Cross-Disciplinary Learning and Co-Emergent Innovation in eScience Teams*, SpringerLink, 4 EARTH SCI. INFORM. 55 (2011).

¹¹ Christine A. Ateah et al., *Stereotyping as a Barrier to Collaboration: Does Interprofessional Education Make a Difference?*, 31 NURSE EDUC. TODAY 208 (2011); B. Mallaband et al., *The Reality of Cross-Disciplinary Energy Research in the United Kingdom: A Social Science Perspective*, 25 ENERGY RES. SOC. SCI. 9–18 (2017); Priaulx & Weinel, *supra* note 8.

¹² Sheila Jasanoff, *Future Imperfect: Science, Technology, and the Imaginations of Modernity*, in DREAMSCAPES OF MODERNITY: SOCIOTECHNICAL IMAGINARIES AND THE FABRICATION OF POWER 20 (Sheila Jasanoff & Sang-Hyun Kim eds., 2015).

'visionary' or potentially 'transformative' ways,¹³ so too can the role of imagination implicate 'shared perceptions of futures that should or should not be realized', or of the blurring between 'real and imagined realities'.¹⁴ In turn, underpinning their operative potential, imaginaries can 'frame and represent alternative futures, link past and future times, enable or restrict actions in space, and naturalize ways of thinking about possible worlds'.¹⁵ In these latter respects, our study reveals the presence of insider imaginaries that appear to run counter to aspirations for cross-disciplinary collaboration with *others*. The harboring of *expectations* that 'outsiders' will perceive one's field in a negative, confused and inaccurate light, summons up a range of perceived challenges that could limit the appetite of legal academics to engage in cross-disciplinary collaborative work. Undoubtedly, where those kinds of cross-disciplinary confusions and misunderstandings do exist, these can present significant challenges and frustrations for researchers engaged in collaborative work;¹⁶ but what is at issue in the present article is the extent to which those confusions and misunderstandings on the part of 'outsiders' are generated by *imagination* rather than being based on empirical reality. Imagination then, is far from benign in its effect—instead, for some it may present a barrier to collaboration in limiting, ruling out, and foreclosing a range of otherwise potentially valuable collaborative partnerships. This is particularly so where investigation of the attitudes and beliefs of 'outsiders' reveals the presence of more favourable and insightful views of legal academia than is commonly imagined by its 'insiders'.

Emerging from the scholarly literature, as well as our empirical investigation, is a fairly undisrupted pattern of imaginaries about how 'outsiders' perceive the legal academic field and its constituents—one that is consistently bleak. As we highlight in our review of the literature, and as is supported by our survey results, underpinning these negative imaginaries is a persistent concern that 'outsiders' are often operating on the basis of flawed stereotypes of legal academia which fail to align with what legal scholars actually do. While this cognitive deficit on the part of 'outsiders' is often assumed to exist, it is also an experience reported as real by some legal academics in two key empirical studies.¹⁷ That 'outsiders' will come to miscast the legal academic field is also treated as phenomenologically real by authors who have highlighted that such misunderstandings and lack of insight arise by virtue of a failure of communication on the part of the legal academy. Murphy and Roberts,¹⁸ for example, highlight that the legal academy has 'failed to provide any significant explanation or justification of what academic lawyers do (as is normally demanded of the theoretical component of a discipline) and thus of what academic law is or

¹³ *Id.* at 5–6.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 24.

¹⁶ David Budtz Pedersen, *Integrating Social Sciences and Humanities in Interdisciplinary Research*, 2 PALGRAVE COMMUN. 1 (2016); Vanesa Castán Broto, Maya Gislason & Melf-Hinrich Ehlers, *Practising Interdisciplinarity in the Interplay Between Disciplines: Experiences of Established Researchers*, 12 ENVIRON. SCI. POLICY 922 (2009); Andrew Bartlett et al., *The Locus of Legitimate Interpretation in Big Data Sciences: Lessons for Computational Social Science from -omic Biology and High-Energy Physics*, 5 BIG DATA SOC. 2053951718768831 (2018); Mallaband et al., *supra* note 11.

¹⁷ COWNIE, *supra* note 3; Dave Owen & Caroline Noblet, *Interdisciplinary Research and Environmental Law*, 41 ECOL. LAW Q. 887 (2015).

¹⁸ *Introduction*, 50 MOD. L. REV. 677, 682 (1987).

might be'. In similar force, Chynoweth¹⁹ notes that the failure of the legal research community to 'adequately explain itself to its peers in other disciplines' means that 'it can hardly complain if those peers then judge it by standards other than its own'. For other legal scholars, the failure to communicate what legal academics do is not the concern. Pointing towards more attitudinal factors, some have highlighted that 'outsiders' will regard legal scholarship in a negative light or regard it as 'irrelevant' by virtue of the inherent weaknesses and methodological problems in legal research and the paradigm orientation of legal scholarship. As we discuss later in this article, such views are often accompanied by a call for the close evaluation of the future of legal academia, its core business, and its 'identity' as an academic discipline. In this respect then, while these imaginaries highlight a sense of pessimism about how 'outsiders' perceive the field of legal academia, they may also be fairly revealing of some 'insider' tensions and uncertainties about the identity of the field itself. A number of authors have noted the self-deprecating tendency of legal academics and the harbouring of insecurities and uncertainties about the field as a whole;²⁰ while these raise questions as to the transmission and communicability of negative assessments of the legal academy externally—they also raise questions about the extent to which this 'talking-down' of the field might impact on the attitudes of legal academics to their own discipline.²¹

Importantly, our survey findings provide us with an opportunity to critically revisit the assumptions about how legal academia is perceived—and imagined. While insider imaginaries emerging from the literature find their expression in the imaginaries of legal academics from our surveys at Cardiff, there are nevertheless two critical and fascinating points of divergence across the survey results that disrupt this persistently bleak characterisation of the legal academic terrain. The first point of divergence is how legal academics think about their own field—as 'insiders'—as contrasted with how they imagine that those external to their field, will regard it. The second point of divergence is how legal academics imagine outsiders will perceive legal academia, and how in fact non-legal academics come to portray the field. In respect of the first, while one might not be surprised to learn that many constituents of legal academia might find value and derive pleasure from the field in which they are actively engaged, what is fascinating is how the more positive messages we see here about legal academia are rarely, if ever, projected onto the imagined 'outsider'. In respect of the second point of divergence, we find

¹⁹ Paul Chynoweth, *Advanced Research Methods in the Built Environment*, in *ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT* 28, 37 (Andrew Knight & Les Ruddock eds., 2009).

²⁰ Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J.L. & SOC'Y 163 (2004); BECHER, *supra* note 5.

²¹ We note, for example, that the fairly persistent 'negative imaginaries' of legal academia highlighted in the literature (i.e. those who venture views on how others might regard legal academia) points to remarkably few sources; moreover, our study highlights the same persistent negative pattern. While far from attempting to explain this phenomena, which may relate to a far wider range of sources about how 'lawyers' as a whole are portrayed, there is nevertheless a growing body of work that highlights within organizations a phenomena called 'emotional contagion', and the role that (positive and negative) emotions can have in shaping others' behaviors and attitudes. See Stéphane Côté, *Positive Emotions in Organizations*, in *HANDBOOK OF POSITIVE EMOTIONS* 448–61 (Michele M. Tugade, Michelle N. Shiota, & Leslie D. Kirby eds., 2014).

a pronounced divergence between the negative imaginaries of legal academics, and what non-legal academics report in our survey. While this aspect of our survey is more fully reported elsewhere,²² as this article highlights, the assumption that outsiders will generally hold legal academia in a dim light is not borne out in practice.

Both points of divergence appear to stem from a problematic conception of the 'outsider': one that is based on assertion, rather than inquiry. As we come to argue, this highlights the potential importance of a rethink for the legal academy in terms of how the field is both internally and externally perceived. Given the points of divergence we identify here, there is certainly a pressing need for broader empirical work around how 'outsiders' *do* think about legal academia. More fundamentally, however, we suggest that there may also be a need to interrogate in far more depth how legal academics 'think' about and 'portray' their field—to themselves, and the outside world. To make strides in raising the reputational standing of legal academia as an academic field, as some have urged is now needed,²³ and to enhance legal academia's capacity to engage in cross-disciplinary work, greater gains might be made by thinking harder about why law as an academic specialism and pursuit is interesting and exciting to be part of and valuable in the insights it can offer others external to the field. As we argue, it may be time for legal academics to be prepared to project *this* message to the outside world.

II. LITERATURE

The aim of this section, presented in two parts, is to outline the critical literature which underpins the present article, and has served to shape our empirical work and analytical priorities for this study in important ways.

The first part of this section (Part A) engages literature which highlights the importance of legal academics' imaginaries to our study. That a study aimed principally at evaluating how 'outsiders' perceive legal academia should end up becoming fascinating on account of how legal academics *imagine* their field is regarded by outsiders, might seem surprising. When we embarked upon the overarching study, our main purpose was to investigate the beliefs, attitudes and knowledge of non-legal academic 'outsiders'—yet this still implicated 'insiders'. From the outset, it was clear that to be meaningful, a study aimed at eliciting responses from non-legal academics about the field of legal academia, also needed to centralise the perspectives of legal academics. Our ability to assess the responses of non-legal academics and to judge the extent to which they aligned with 'legal academia', correspondingly required us to investigate 'insider' norms from within the legal academic community via benchmarking surveys.

That the *imaginaries* of legal academics constituted an important theme, became apparent at the point of undertaking an extensive literature review designed to identify the presence of other work that might reveal how non-legal academics portrayed the field of legal academia. On investigating the non-legal academic literature, as we highlight below, we found remarkably little of substance on this

²² Priaux et al., *supra* note 7.

²³ C. J. J. M. Stolker, *Legal Journals: In Pursuit of a More Scientific Approach*, 2 EUR. J. LEG. EDUC. 77 (2005).

topic. While an oblique finding, what we identified was a body of *legal scholarship* which commented on how 'outsiders' perceived legal academia. In this respect, two things stood out; the extent to which these accounts were driven by speculation and 'imagination', and the extent to which it was asserted that those outside of legal academia hold the field in very low regard. This interesting finding led us to more deeply centralize in our study the insider imaginaries produced by legal academics themselves, and to include this aspect as a specific query at a range of junctures in the benchmarking surveys. By virtue of this, our subsequent survey sought to capture three different perspectives: legal academic self-perceptions (insiders), legal academic imaginaries of how 'outsiders' will perceive the field of legal academia, and the perspectives of outsiders themselves.

In the second part of this section (Part B), we turn our attention to the literature that informed our broader survey design. A study aimed at evaluating how the field of legal academia is perceived by multiple audiences, consisting of those internal to it (which for our purposes also included two sub-populations—vocational legal scholars and academic legal scholars), those external to it (non-legal academic 'outsiders'), and indeed, how its insiders imagine 'outsiders' are likely to portray it, poses some interesting and unique challenges in terms of survey design. These included quite fundamental issues, ranging from what kinds of questions and queries one should pose in order to elicit meaningful portrayals of 'legal academia', to how one designs a robust survey aimed at eliciting and comparing responses from quite distinctive audiences. As we highlight in the second part of the section, we greatly profited from engaging strongly with earlier empirical approaches in legal studies, which while narrower in scope and aimed at eliciting 'insider' perspectives, provided us with important cues as to how we design a survey that would meet our multiple objectives.

Before we introduce the literature, which forms a critical base for the remainder of the article as a whole, a note on language is required. Throughout the article, subtly different terms are deployed to describe the identity of the individual or individuals that stand external to the legal academic field. This is particularly apparent within the literature, where some authors refer to 'Other(s)' or 'Outsider(s)' or broader terms. The lack of stable language used to refer to this external (non-legal academic) population is also attended by some ambiguity around which 'external' populations that such authors point to, with some centralizing non-legal academics, 'non-lawyers', specific sub-populations within higher education, or more hazily-cast populations still which could refer to a range of publics or the world-at-large. While imperfect, and our engagement with the literature throughout much of this article results in some interchangeable use of terminology, our preferred term for signalling all those external to the legal academic field, is 'Outsider' or 'Outsiders',²⁴ although we also have recourse to the terms 'Others' or 'Others'/'Outsiders'. In the

²⁴ We are aware of course that this creates a stark dichotomy between 'insiders'/'outsiders' that is far from uncontentious. In our broader work, particularly focused on how 'outsiders' do perceive legal academia the boundaries between 'Insider'/'Outsider' is problematized (for instance, amongst the so-called 'Outsider' population, actors demonstrated very different levels of interaction *with* legal academics, with some frequently and intensely engaged in cross-disciplinary collaborative work that should make it hard to conceptualize these individuals as 'Outsiders'). See *further*, Prialux et al., *supra* note 7.

context of our survey, the question of the identity of the 'Other'/'Outsider' is clear and far narrower, relating exclusively to non-legal academics employed at Cardiff University.

A. PERCEPTIONS OF LEGAL ACADEMIA AND THE IMPORTANCE OF 'INSIDER
IMAGINARIES'

As noted above, the overarching aim of our main study was to focus on how *non-legal academics* perceive legal academia and legal academics. However, the question of how legal academics perceive themselves and their field and how they imagine others within the academy would perceive the legal academy became a fascinating topic in its own right. This is not only by virtue of the results from the benchmarking survey, but also arises by virtue of our analysis of legal scholarship and those moments when legal scholars have ventured views on how 'outsiders' regard the field.

In exploring the literature on how *non-legal* academics view legal academics, and searching for instances where legal academics strongly featured within non-legal scholarship by which to assess 'how others see us', it became apparent that there is remarkably little work available.²⁵ That is not to say that legal scholarship does not emerge within the corpus of other disciplines, nor that law is not interesting to other disciplines, but in terms of *legal academia* being the focus—whether for empirical evaluation or even as the subjects of speculation—for non-legal academics, such accounts were far and few between. Legal academics, where they emerge, are such marginal characters, so that these cameo appearances told us virtually nothing about how others might regard legal academia.²⁶ In terms of work

²⁵ The paucity of interest by non-legal academics in the academic field of law may be due to the fact that, in England and Wales at least, law as a discipline of study is a relatively recent entrant to the academy. While the confines of space preclude a thoroughgoing historical exegesis of law's place within the academy in England and Wales, some aspects of its emergence warrant attention. Although Roman Law was taught at Oxbridge from the C12th, Twining reports the first LLB degrees in England as having been awarded as late as 1839 by University College London (WILLIAM TWINING, *BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL: DISCIPLINE OF LAW* (1994)). And it was arguably only following the scathing report of a House of Commons Select Committee in 1846 that Universities in the UK began to take up the mantle of legal education in earnest. See Roy Stuckey, *The Evolution of Legal Education in the United States and the United Kingdom: How One System Became More Faculty-Oriented While the Other Became More Consumer-Oriented*, 6 INT. J. CLIN. LEG. EDUC. 101 (2014). Consequently, law's place within Universities in England and Wales is comparatively novel relative to other disciplines (sometimes described as 'pure' academic disciplines) such as philosophy, theology and mathematics. Indeed, for some, law 'has remained rather aloof from the academy'. See TWINING, *supra* note 25.

²⁶ We do not assume that the absence of interest suggests that legal academia or academics are perceived as *irrelevant*, albeit some might arrive at that conclusion. See Mark Tushnet, *Legal Scholarship: Its Causes and Cure Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L. J. 1205 (1980). In many respects the absence of attention given to legal academia as an object of study for other disciplinary actors might not be at all surprising. As most of us are aware, there are strong research incentives (and disincentives) that operate so that our own discipline remains our primary focus. In this regard, those outside of the discipline of law that centralize legal academics in their work

that enables us to capture the views and attitudes of a wider population of non-legal academics about legal academia and its constituents, Tony Becher's²⁷ empirical study undertaken in the 1980s constitutes a noteworthy exception.²⁸ But beyond Becher, we were surprised to find that our main sources on this topic came from *within* legal academia itself. Here we find that a variety of authors have ventured views about how the external world and/or legal academics do or might regard the field.

So, we start with Becher. While not the sole focus, Becher's²⁹ small-scale study of the nature of academic disciplines included law—alongside chemistry, physics, biology, mechanical engineering, pharmacy, economics, sociology, history, modern languages, geography and mathematics.³⁰ Undertaking interviews with practising academics from these fields in institutions in the U.K. and the U.S., Becher sought to investigate the characteristics of these disciplines, epistemological and methodological issues, as well as concerns around career patterns, reputations and rewards, and practitioners' 'value systems'. Embedded within this latter category, and of interest here, Becher also explored practitioners' characterisations of other disciplines and disciplinary actors. Noting that academics' perceptions of other disciplines and disciplinary practitioners seemed to be 'surprisingly hazy', 'neither particularly perceptive nor particularly illuminating',³¹ and on the whole 'rather crude and hostile', Becher nevertheless found that the 'gallery of stereotypes'³² produced discernibly different profiles of the academic subjects in question. To those outside the field, Becher notes that the predominant view of academic lawyers,

constitute quite a special population indeed; the small number of non-legal theorists that have done so, are better rationalized as empirical theorists of higher education, or the study of academic disciplines – so that law, rather than constituting the *specific* object is part of a broader enquiry about disciplines or specialisms. See BECHER, *supra* note 5; J. Douglas Toma, *Alternative Inquiry Paradigms, Faculty Cultures, and the Definition of Academic Lives*, 68 J. HIGH. EDUC. 679 (1997). While we had expected to find more discussion about law as an academic discipline, given the heightened interest in cross-disciplinary collaboration, the work around cross-disciplinarity is still fairly novel.

²⁷ BECHER, *supra* note 5.

²⁸ Beyond those instances where legal academics make marginal appearances in non-legal scholarship (see e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2009); BRUNO LATOUR, *THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ETAT* (2013); KYLE MCGEE, *LATOUR AND THE PASSAGE OF LAW* (2015)), the only work we could find where legal academics centrally feature (albeit a range of authors whose work belongs to sub-specialisms of law and economics, and law and literature) was Kellert's monograph which centralized scholarly works from law, economics and literature in their 'technical applications and metaphorical speculations' of 'chaos theory'. See STEPHEN KELLERT, *BORROWED KNOWLEDGE: CHAOS THEORY AND THE CHALLENGE OF LEARNING ACROSS DISCIPLINES* (2008)

²⁹ BECHER, *supra* note 5.

³⁰ *Id.* at 174–6, Becher undertook a total of 221 interviews lasting between half an hour and two hours with actors from these 12 disciplines from a variety of locations in the UK (Bristol, Reading, Southampton, Cambridge, Exeter, UCL, Kent, LSE, Birmingham, Brighton, Imperial and Essex) and the US (Berkeley, Santa Barbara, Los Angeles, Stanford, San Francisco).

³¹ Tony Becher, *Towards a Definition of Disciplinary Cultures*, 6 STUD. HIGH. EDUC. 109, 110 (1981).

³² BECHER, *supra* note 5, at 28.

[I]s that they are not really academic—"arcane, distant and alien: an appendage to the academic world". Their personal qualities are dubious: vociferous, untrustworthy, immoral, narrow, and arrogant: though kinder eyes see them as impressive and intelligent. The discipline is variously described as unexciting, uncreative, and comprising a series of intellectual puzzles scattered among "large areas of description".³³

This negative view, Becher found, also seemed 'to be shared by its victims'.³⁴ This speaks not only to a self-confessed tendency of legal academics 'towards self-denigration', or 'a sense of doubt about one's intellectual quality', but also the views of different legal academic communities towards each other, expressing greater or lesser levels of esteem.³⁵ While U.S. academic lawyers expressed concerns that their 'techniques and methodologies' might not be sufficiently probing or fundamental, some cast their British counterparts as 'narrow and uninteresting', 'atheoretical, *ad hoc*, case-orientated and not much interested in categories and concepts'.³⁶ In contrast, while English legal scholars themselves downplayed the 'scholarly' status of English academic law, suggesting it shared the 'anti-intellectual ethos of practising lawyers', was 'insular', standing separate to other fields, and 'based on a narrow and isolated education',³⁷ the view of legal academia across the Atlantic was far more favorable, presented (in contrast to English legal academia), as a 'higher tradition of worthwhile academic thought'.

Unsurprisingly, given the novelty of Becher's work and the broad ranging enquiry about the 'cultures' inhabiting higher education, *Tribes and Territories* and his subsequent edition of the text with Paul Trowler,³⁸ have become heavily-cited classics. Moreover, his approach has also inspired others to investigate the 'cultures' and everyday practices within their own fields, including law.³⁹ Nevertheless, in terms of investigating how different disciplinary actors perceive other disciplines, including law, Becher and Trowler's work continues to stand apart. For broader commentary which attempts to capture how 'others'/'outsiders' view the discipline as a whole then, our main sources on this topic come from legal scholarship produced by the legal academic community itself.

Although often arising as a marginal theme, various legal academics have ventured views about how 'others'/'outsiders' regard academic law and its constituents. These views consist of three main kinds: anecdotal reports, 'thought experiments', or assertions presented as 'fact'. Importantly, none of these accounts claim to be based upon an empirical evaluation of what non-legal academics think. Nor do these accounts point to broader evidence from the field to substantiate how legal academics are regarded. While we highlight the strong possibility that the 'other' stands as a rhetorical vehicle, what is particularly striking is the extent to which the view that non-legal academics will regard legal academics in a negative light arises as a persistent and fairly undisrupted theme within the literature.

³³ BECHER, *supra* note 31, at 111.

³⁴ BECHER, *supra* note 5, at 30.

³⁵ *Id.* at 30.

³⁶ *Id.* at 30.

³⁷ *Id.* at 31.

³⁸ BECHER & TROWLER, *supra* note 6.

³⁹ *See* in particular COWNIE, *supra* note 3.

1. Anecdotal Reports

No doubt many legal academics can point to social exchanges which suggest that some ‘others’/‘outsiders’, whether within the academy or among the lay public, have a fairly limited insight into what legal academics do or the kind of concerns which drive legal academic research. Based on her interviews conducted during 2002 and 2003 with 54 U.K. legal academics, Cownie notes how outsiders, even within the academy, ‘frequently characterise law as vocational’.⁴⁰ While all her interviewees worked in academic, rather than vocational law departments, a few of them reported a lack of understanding of what a ‘legal academic’ is or does. Some complained of being confused ‘with practicing lawyers’,⁴¹ while another commented that ‘[e]ven in universities, there are people who think we’re all in practice’.⁴² Cownie comments that because the discipline of law is not ‘merely vocational or staffed exclusively by practitioners’ it would seem that legal academics have ‘failed to communicate themselves even to closer observers of academic life’.⁴³ In fact, only around 35% of legal academics in Russell Group institutions are qualified to practice law.⁴⁴ Cownie’s comment might find its basis not only in what her interviews revealed, but also her analysis of Becher,⁴⁵ and Becher and Trowler’s⁴⁶ representations of the legal academic terrain.⁴⁷ The mischaracterization of the legal field by ‘others’ within the wider academy was also a theme arising from Owens and Noblet’s study with U.S. environmental law professors engaged in environmental legal research and related cross-disciplinary work.⁴⁸ Highlighting the frequency by which ‘people outside of the legal academy often misunderstand the kinds of questions that interest law professors’, the authors note that,

Ironically, for the most commonly cited problem was that nonlawyers tend to ask for help with narrow legal issues—in other words, for the kinds of focused legal analyses that critics sometimes allege is the antithesis of interdisciplinary work—rather than on the more systemic questions that tend to interest legal academics.⁴⁹

The accounts presented, of course, do not present empirical insights about how non-legal academics do in fact perceive the discipline of law. That is not the aim of either study. Cownie’s work was aimed at gaining insights into the (wider) lived experiences of those legal academics, and Owen and Noblet sought to explore environmental legal professors’ attitudes towards, and experiences of, cross-disciplinary work. Nevertheless, while not their aim, there is a risk of being left with the impression that

⁴⁰ *Id.* at 78.

⁴¹ *Id.* at 100.

⁴² *Id.* at 78.

⁴³ *Id.* at 78.

⁴⁴ Mark Davies, *Educational Background and Access to Legal Academia*, 38 LEG. STUD. 120, 132 (2018).

⁴⁵ BECHER, *supra* note 5.

⁴⁶ COWNIE, *supra* note 3.

⁴⁷ *Supra* note 3, at 78.

⁴⁸ *Supra* note 10.

⁴⁹ *Id.* at 909.

non-legal academics *do in fact* commonly or frequently miscast the legal discipline and the work of legal academics. While Cownie's research and Owen and Noblet's study reveals the experiences of some legal academics finding themselves being mischaracterized by 'others'/'outsiders', and presents a fascinating hypothesis for empirical evaluation, those accounts constitute an unreliable proxy for identifying what 'others' do in fact know or believe about legal academics.

2. The Thought Experiment

Stolker's work provides the source of the 'thought experiment'.⁵⁰ Noting how the discipline of law has fallen behind other fields which have become far more dominant in respect of qualitative evaluations of academic research and the contest for 'research funds', Stolker asks why this should be the case by adopting 'the perspective of other disciplines'. He surmises that other disciplines would view legal scholarship in the following way,

[T]o have a strong national focus, an individualistic nature and a rather peculiar publishing culture; it is normative, commentative, a discipline lacking an explicitly-defined scholarly method, and one with little interest in empirical research. As a result, it *is* a remarkable discipline in terms of both form and content. ...[I]t is difficult to obtain a clear picture of what we do... .⁵¹

Stolker's imaginary of 'others', of course, strongly intersects with accounts based on anecdotal reports. Rather than offering a description based on external evidence (and perhaps also falling short of a genuine 'thought-experiment'), how the 'other'/'outsider' thinks stands as pure assertion. The 'other', he imagines, encounters difficulties in understanding what legal academics do, but also curiously s/he appears to possess a sophisticated level of insight in picking up some key ingredients of the internal norms of the field. Further elements of Stolker's 'other'/'outsider' depiction are contestable. First, his portrayal of how 'other' disciplines will view legal scholarship looks suspiciously like an 'insider' perspective, given that the concerns raised can be detected in many legal scholars' evaluations of legal academia in Anglo-American literature. Secondly, while Stolker is concerned that 'others' will find it hard to get a clear picture of what legal academics do, this seems every bit as applicable to the 'insider'. It might be noted that even for *legal scholars* it is quite a tall order to 'presume broad knowledge' of the research practices which inhabit the field, given the volume of work produced and the wide variety of sub-specialisms within it.⁵² As such, Stolker's account perhaps more ably portrays an 'insider' view—or more specifically *his* insider view (rather than an external view). And arguably, sharing much in common with our final category—assertion—the portrayal of 'other(s)'/outsider(s)' may well simply operate as a rhetorical device by which to prompt the broader evaluation of concerns about the discipline from an insider perspective.

⁵⁰ *Supra* note 12.

⁵¹ *Id.* at 78.

⁵² Owen & Noblet, *supra* note 17, at 890.

3. Pure Assertion

The largest category in terms of ‘how others/outsideers regard us’ as a theme arising in legal scholarship, is far trickier to classify. In general, it is often unclear *who* the other/outsideer is, and such work frequently slips and slides between others/outsideers who are out there in ‘the world’ or (non-legal) others/outsideers within the academic community. Either way, the emphasis is upon the ‘other’ as an outsideer, standing external to the legal academy. While evidently not based upon empirical research, nor offered explicitly as ‘thought experiments’ or highlighted as based on anecdotal experience, in the work we analyzed, the views expressed take the form of pure assertions, albeit ones which often appear to operate as rhetorical devices. Take for example, Smits who notes that ‘not only do outsideers accuse legal science of being unacademic, but also legal scholars themselves no longer seem to know which discipline they practice’.⁵³ Within the confines of the University, he notes that ‘legal scholars often have a hard time convincing colleagues from other disciplines about their methodology’ and ‘too often, the study of law is considered the odd one out in the modern university’.⁵⁴ Critically, no support for any of these propositions is offered. Positioning this as a moment of crisis for the field, albeit a surprising one, he offers a speedy review of the fall of the field from a position of being held in high esteem, to its subsequent demise in the eyes of others. Providing the foundation for the development of empirical science, he argues that in the nineteenth century, ‘legal science was seen as one of the most important achievements of human civilization and even superior to many other academic disciplines’, but by the twenty-first century, that view had shifted:

The image that the outside world has of legal academics is apparently no longer based on these (or other) merits. The general tendency is to say that ‘real’ knowledge cannot be based upon conceptual constructions, the findings of coherence, or the development of abstract theories (all important parts of the ‘internal’ approach to law) but should rest on empirical work instead.⁵⁵

Of course, the call for more engagement with empirical approaches in legal scholarship has been a strong feature of debate within legal academia over the past few decades,⁵⁶ and Smits’ himself notes the increasing influence of empiricism on legal studies. In part, this is his concern—or at least the pivot for his later arguments: that law is increasingly under pressure to become like other disciplines to make it more ‘scientific’. This marks out Smits’ next move. Arguing that a wholesale shift in that direction would be problematic, Smits concentrates his efforts on providing a strong defence of conceptual work, one that recasts legal science, teases out and elevates the importance of its normative core. It is an account that is highly engaging and thought-provoking. But his portrayal of how the ‘outside world’ regards legal

⁵³ SMITS, *supra* note 4, at 4.

⁵⁴ Jan Smits, “What Do Legal Academics Do?”, ELGAR BLOG FROM EDWARD ELGAR PUBLISHING (2012b), <https://elgar.blog/2012/08/15/what-do-legal-academics-do/> (last visited Jan. 15, 2018).

⁵⁵ SMITS, *supra* note 4, at 4.

⁵⁶ GENN, PARTINGTON, & WHEELER, *supra* note 4; HILLYARD, *supra* note 4.

academia stands as assertion. It is rendered immediately suspect by virtue of the asserted homogeneity of others'/outsiders' views in respect of legal academia. In respect of these claims, it takes little effort to displace them. He paints an unbelievable characterization of the 'other'/'outsider' who exclusively deifies the empirical and ignores the value of other kinds of work. In doing so, Smits' account ignores debates in other fields,⁵⁷ including the social sciences, which promote the value of, and assert the inescapable place for conceptual and normative work—every bit as strongly as Smits goes on to do.⁵⁸ Moreover, Smits' paradigm of science, which he then projects on the “outside world” (and then reflects back on “legal science”) is fatally one-dimensional; it is a paradigm of science that is strongly contested within the sciences themselves.⁵⁹ As such, it is hard to escape the sense of irony that flows from an account that cautions against moving towards empiricism, when it is so strongly driven by speculation about the 'outside world'. That is not to say that the 'other'/'outsider' that Smits presents might not exist in some form, but that the actual existence of this 'other' is fairly irrelevant. Instead this caricature of the 'outside world' is a pure literary construction. The 'other'/'outsider' standing in this outside world constitutes an external threat ('traditional legal scholarship has been under attack for quite some time now'⁶⁰) which has driven a debate over the future of the field. Smits' aim is to respond to this threat, engage in this (self-constructed) “debate”, by reconceptualising the terrain of legal scholarship—a field which he argues possesses its distinctiveness and strength by virtue of its normative orientation and its 'ability to reflect upon what people and organizations legally ought to do'.⁶¹

The use of the 'other'/'outsider' trope as a rhetorical device by which to contemplate the discipline and provoke contemplation of the tensions and shifts within it, also emerges within Vick's work around legal academia and interdisciplinarity.⁶² While embracing aspects of Weinstein's work, which itself draws on a number of empirical studies,⁶³ albeit in respect of mixed populations of law students and lawyers, Vick highlights a potential barrier to collaboration by virtue of there being 'a strong perception, in some, that lawyers are bad collaborators because they tend to be pushy know-it-alls'.⁶⁴ Nevertheless, the other/outsider in

⁵⁷ Richard Dawid, *The Significance of Non-Empirical Confirmation in Fundamental Physics*, ARXIV170201133 PHYS. (2017), <http://arxiv.org/abs/1702.01133>, (last visited Jan 12, 2018); Stephen Toulmin & David Leary, *The Cult of Empiricism in Psychology, and Beyond*, CENTURY PSYCHOL. SCI. 594–617 (1985).

⁵⁸ Andrew Abbott, *XXXVIIe conférence Marc Bloch. Andrew Abbott: The Future of the Social Sciences* (2015), <http://home.uchicago.edu/aabbott/Papers/Marc%20Bloch%20Lecture%20Pre%20Trans.pdf>.

⁵⁹ BENT FLYVBERG, *MAKING SOCIAL SCIENCE MATTER: WHY SOCIAL INQUIRY FAILS AND HOW IT CAN SUCCEED AGAIN* (2011).

⁶⁰ SMITS, *supra* note 54.

⁶¹ SMITS, *supra* note 4, at 151.

⁶² VICK, *supra* note 20.

⁶³ Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319–66 (1999).

⁶⁴ VICK, *Supra* note 20, at 192. Such a view, finds its roots in the work of Weinstein, *supra* note 63, which we return to later in this paper—but we should note that this work is not without its difficulties, by virtue of combining and erratically moving between a range of populations that we would wish to keep distinct – law students, legal academics and legal practitioners—even if the work proves refreshing for drawing upon empirical studies evaluating personality traits.

Vick's account is mainly based on assertion, albeit one that strongly resonates with attitudes emerging from Becher's and Cownie's interviews. He notes (as Smits had), how the uncertainties legal scholars harbor about their own discipline might deleteriously impact on others' perceptions of the field, so that,

To this day, many within universities harbour a palpable scepticism about the academic rigour of legal scholarship which is often a reaction to the close association of the discipline of law within the legal profession—a skills-orientated profession at that. In fact, the self-doubt engendered by perceptions that law is as much a professional discipline as an academic one may partly explain why some legal scholars turn to interdisciplinary research. Moreover the same disciplinary inferiority complex might also partly explain the tenor of criticism some academics have directed at such research.⁶⁵

Still sitting within the category of 'assertion' about how 'others'/'outsiders' regard legal academics, is the complaint that legal scholars are not regarded at all. In the early 80s, Mark Tushnet famously highlighted the 'intellectual marginality of legal scholarship'.⁶⁶ Tracing the rise and fall of the influence of legal scholarship in the broader social sphere he noted that while 'in the past, legal thought has been a component of important intellectual movements...', now 'few of the various strands of contemporary thought are informed by legal scholarship'⁶⁷—a position all the more surprising given the 'immense role that law plays in American society'.⁶⁸ Tushnet's diagnosis rested on the extent to which legal scholarship is strongly tied to professional legal education, 'the desire to support the rule of law, and the attempt to escape the implications of Realism'.⁶⁹ For this reason he noted, many of the 'main currents of twentieth-century intellectual life' prove irrelevant for lawyers with this professional legal orientation.⁷⁰ His broader analysis as to the future relevancy of the discipline makes for fairly depressing reading. He noted that while one area of legal scholarship, in particular, social theory, has the capacity to address epistemological problems of social knowledge, it occupies little more than a toehold in law schools. Moreover, such an approach arguably poses a fundamental challenge to law as a field; as Tushnet argued, abandoning the 'liberal theory of law' and turning away from its traditional professional orientation 'might deny law its privileged status as a device'.⁷¹

While much time has elapsed since Tushnet's contribution, it might be thought such concerns have diminished over time in light of increased cross-

⁶⁵ VICK, *supra* note 20, at 187.

⁶⁶ TUSHNET, *supra* note 26.

⁶⁷ *Id.* at 1205.

⁶⁸ Echoing Tushnet's concern with the 'marginality' of legal scholarship, is Matthew W. Finkin, *Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog Essay*, 46 UNIV. MIAMI L. REV. 1101 (1991). Finkin argues that this is not an isolated view (citing the largely negative assessments given of academic lawyers from Becher's study). He comments that it seems 'that a great intellectual feast is being held, a veritable Banquet of Ideas, to which law professors have not been invited' *Id.* at 1151.

⁶⁹ Tushnet, *supra* note 26, at 1216.

⁷⁰ *Id.* at 1260.

⁷¹ *Id.* at 1222.

disciplinary and cross-sectoral collaborative activity—the kind of step-change that grant funders, governments and higher education institutions have been strongly pushing for.⁷² Nevertheless, the apparent rise in such collaborative work, for some, has made the absence of engagement with law seem that much more obvious. Even in contemporary fields noted for their high levels of cross-disciplinary collaboration, such as environmental research, legal researchers have complained about the degree to which the field of environmental legal research is passed over.⁷³

That 'others'/'outsiders' exclude, ignore or perceive as wholly irrelevant the body of legal scholarly work has also troubled a range of U.K. authors. Echoing the U.S. literature, a recurring complaint is the lack of cross-disciplinary *mutuality*. While legal academics frequently turn to a multitude of other disciplines for inspiration, it is claimed that scholars from other disciplines are disinterested in legal academia.⁷⁴ In common with Tushnet's more substantive concerns about the marginality of law as a discipline in the eyes of others, is the critique offered by Geoffrey Samuel. Noting the deliberate exclusion of law from social scientific work, Samuel highlights that while regrettable, 'it is understandable in some ways why social science theorists might not wish to take lawyers seriously'.⁷⁵ He argues that 'it would seem to some outside the discipline to be a subject that has little to contribute to social science epistemology'.⁷⁶ The root of his argument is based on much of legal scholarship being tied to an 'authority paradigm' rather than one of 'enquiry', so that law 'is not really a discipline whose validity is confirmed by correspondence with reality (although the success or failure of a particular law can be judged by its social effects)'.⁷⁷ While disciplines like the social sciences attempt to investigate and model aspects of the external world, Samuel claims that legal scholarly work within the 'authority paradigm' in contrast, 'is not really telling us much about the world. It is, like astrology or numerology, telling us about formalism, coherence, and philosophy in a world constructed by consenting insiders'.⁷⁸ Strongly resonating with Tushnet, Samuel's concern of course, is why legal scholarship might prove irrelevant to other fields (rather than evidencing how and if it is). In this respect the putative 'irrelevancy' of legal scholarship (in the eyes of these imagined 'others'), constitutes a powerful vehicle for evaluating the terrain—one that invites deeper exploration of what Samuel regards as a fundamental (and perhaps insurmountable) challenge to the discipline the moment that its paradigm orientation shifts from 'authority' to a realist one driven by enquiry.

⁷² GENN ET AL., *supra* note 4; MICHAEL ADLER, *RECOGNISING THE PROBLEM: SOCIO-LEGAL RESEARCH TRAINING IN THE UK* (2007).

⁷³ Owen & Noblet, *supra* note 17.

⁷⁴ Gerhard Anders, *Law at Its Limits: Interdisciplinarity between Law and Anthropology*, 47 J. LEG. PLURALISM & UNOFFICIAL L. 411 (2015); Stephen Feldman, *Can Law Be a Source of Insight for Other Academic Disciplines?*, 8 WASH. U. JURIS. REV. 151 (2016); GENN ET AL., *supra* note 4.

⁷⁵ Geoffrey Samuel, *Is Legal Knowledge Cumulative?*, 32 LEG. STUD. 448, 449 (2012).

⁷⁶ Geoffrey Samuel, *Interdisciplinarity and the Authority Paradigm: Should Lawyers Be Taken Seriously by Scientists and Social Scientists?*, 36 J. L. & SOC'Y 431, 432 (2009).

⁷⁷ *Id.* at 453.

⁷⁸ *Id.* at 459.

In contrast with these accounts, Roger Cotterrell's evaluation is focused on the question of how legal scholarship (and at points, 'law' more generally), has come to be neglected by the social sciences.⁷⁹ Highlighting that 'the sociological study of law has been marginalized in the image of sociology-as-discipline',⁸⁰ Cotterrell traces what happens to 'legal sociology' when it moves within the field of mainstream sociology. The process he describes is one where the 'legal' dissipates, and is transformed into 'something more amenable to observational methods of research or, at least, not requiring engagement with the object "law" constructed in legal discourse'.⁸¹ He notes that while one of the founders of modern sociology, Max Weber regarded his 'studies of law as the most complete part of his work', these aspects have proved to be peripheral to sociology-as-discipline which has 'tended to focus on behaviour and avoid entanglement with the mysteries of jurisprudence'.⁸² The same process of filtering out the legal, he notes, can be said of Emile Durkheim whose work has proved highly influential to contemporary sociology. While Durkheim centralized the sociological study of law and legal institutions, 'the works which most strongly reflect this concern are neglected in Anglo-American sociology and in many cases have remained untranslated into English'.⁸³ Cotterrell highlights a similar concern in respect of Talcott Parsons' work. He notes that despite Parsons making frequent incursions into the world of law and regarding law as significant for sociological analysis,

[N]o confrontation with legal discourse takes place. Parsons betrays no recognition of the questions which are raised in so much legal literature ... about the nature of transformations occurring in Western legal doctrine in recent decades. Yet these matters demand sociological analysis.⁸⁴

The aim here is not to take issue with any of the substantive claims as to spaces and bodies of work where law and legal scholarship is suspiciously absent. Instead, our interest is in how the 'other' emerges in such accounts, and the extent to which these 'others', who purportedly disregard or neglect legal scholarship, are grounded in reality. The 'other' as s/he (or indeed they) emerges, seems to be exclusively based on assertion rather than based on empirical investigation. Whether invoked as thought experiment, assertion or narrated through anecdotal experience, none of these accounts aim to unravel or explore the truth of their assertions about how 'others' regard legal academia. Perhaps the constant repetition of these claims, through a range of literatures (often by individuals of high standing within legal studies) in the absence of competing accounts, helps to reinforce the idea that legal academia *does indeed* maintain a low standing in the eyes of others. Nevertheless, as noted above, the manner by which this putative 'other' is invoked, requires us to critically stand back from these claims. The first point to be made here is that the majority of these accounts present a homogenous external 'other'—an actor, actors,

⁷⁹ Roger B. M. Cotterrell, *Law and Sociology: Notes on the Constitution and Confrontations of Disciplines*, 13 J. L. Soc'y 9 (1986).

⁸⁰ *Id.* at 28.

⁸¹ *Id.*

⁸² *Id.* at 27.

⁸³ *Id.*

⁸⁴ *Id.* at 28.

a discipline, or perhaps the entire world, that comes to miscast, misrepresent, regard as irrelevant, or present in a negative light or one-dimensional way, legal academia. And while a number of authors point towards more specific populations (i.e. some 'others' rather than the entire 'world'), there is still no consideration of how 'others'/'outsiders' are likely, based on differing levels of interaction with the field, to regard it in different ways. It seems, we think, fairly implausible that *all* 'others' will come to view the field of legal academia through the same negative lens—even if one might suppose that *some* others might perceive legal scholarship in the way that these authors describe.

A second concern relates to the internal-facing nature of the accounts offered and the fleeting emergence of the 'other' in that context. There is no contemplation given as to how the very same concerns—being passed over or misunderstood by other disciplines,⁸⁵ or even 'crises' about the characterization of one's own field and its relevancy⁸⁶—populate most, if not all, disciplines.⁸⁷ The complaint that law proves irrelevant to 'others', whilst then retreating back within the field of legal scholarship to contemplate its internal dynamics, seems fairly hollow in substance. Instead, a more valuable critique might emerge from evaluating how many aspects of the 'crisis' some have highlighted as occurring within the field of legal academia are shared in common with other disciplines. Such an enquiry can better interrogate what 'relevancy' means in this context, evaluate who are the winners and losers in the game of 'relevancy', and why. But of course, the aim of these works, as noted above, does not appear to be directed towards a genuine evaluation of how non-legal academics really perceive the field of legal academia nor to contemplate the challenges of gaining insight into other fields; rather, in the main, the 'other' appears to stand as a strategic trope, a rhetorical vehicle for reflecting upon the field of legal academia itself.

Overall, our evaluation of the literature suggests a strongly negative set of imaginaries held by legal academics, in terms of how they portray the 'outsiders'/'other' view of the field of legal academia. Yet insofar as the literature presents a fairly small population of legal thinkers, many of whom came to write

⁸⁵ Mallaband et al., *supra* note 11.

⁸⁶ See e.g., ANDREW ABBOTT, CHAOS OF DISCIPLINES (2001); Angus Dawson, *The Future of Bioethics: Three Dogmas and a Cup of Hemlock*, 24 *BIOETHICS* 218 (2010); Jason R. Goertzen, *On the Possibility of Unification: The Reality and Nature of the Crisis in Psychology*, 18 *THEORY & PSYCHOL.* 829 (2008); ALVIN W. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY (1980); Nicky Priaulx, *Vorsprung Durch Technik: On Biotechnology, Bioethics, and Its Beneficiaries*, 20 *CAMBRIDGE Q. HEALTHCARE ETHICS* 174 (2011); Cormac Shine, *Our World Is Changing. It's Time for Historians to Explain Why*, *THE GUARDIAN* <https://www.theguardian.com/higher-education-network/2018/jan/18/our-world-is-changing-its-time-for-historians-to-explain-why> (Jan. 18, 2018, 07:30 AM GMT); George Steinmetz & Ou-Byung Chae, *Sociology in an Era of Fragmentation: From the Sociology of Knowledge to the Philosophy of Science, and Back Again*, 43 *SOC. Q.* 111 (2002); JOSEPH STIGLITZ, *FREEFALL: FREE MARKETS AND THE SINKING OF THE GLOBAL ECONOMY* (Penguin Books 2015) (2010).

⁸⁷ Furthermore, those characterizations, for example of '(ir)relevancy' to the outside world are open to contestation – that is so in law, as with other fields. For a recent example, see the below the line comments and broader engagements on social media in response to Shine's recent piece which laments the 'irrelevancy' of history on the wider social stage (See Shine, *supra* note 86).

on the topic decades ago, our benchmarking survey with legal academics at Cardiff University gives us the opportunity to identify whether these negative depictions continue to emerge in the legal academic community, and whether they are widely held amongst that population. So too are we able to investigate, even if only in a small way, how ‘outsiders’ within the university context *do think* about legal academia, and to explore the extent to which these might converge or diverge from the imaginaries emerging within the legal scholarship, and by legal scholars in our survey.

B. PORTRAYALS OF LEGAL ACADEMIA: CHARACTERISING APPROACHES TO LEGAL RESEARCH

We turn then, from portrayals of legal academia in the literature, to the question of how one designs a survey that meaningfully captures comparative data that can highlight how multiple audiences come to portray legal academia in practice. As we discuss later in this article, our survey involved posing a wide range of questions to survey participants, some of which invited respondents to provide broad field wide depictions—but here we focus on the literature that provided us with critical cues as to how we might elicit more specific portrayals around *legal academic research*. Insofar as the imaginaries emerging in legal scholarship anticipated that ‘others’/‘outsiders’ would regard the field of law as strongly vocational in orientation, as individualistic, insular, descriptive, normative, disinterested in empirical research, and distant from other disciplines, we sought to explore the extent to which these kinds of characterizations emerged within the responses of non-legal academics, and within the imaginaries of our legal academic survey respondents.

Our aim was to elicit fairly specific insights into how these different populations portrayed legal research, consisting of questions ranging from the nature of, and kinds of approaches legal academics (might) take to legal research. Such questions would be posed to non-legal academics, whilst in the benchmark survey, we sought to ask legal academics to map out their actual approaches to legal research (and in the case of those on teaching and scholarship contracts, their approaches to legal scholarship) and as is particularly central to this article, we also asked legal academics to imagine how non-legal academics would respond to the same questions.

Nevertheless, while our work is novel in attempting a systematic analysis of how the views of ‘insiders’, ‘insider imaginaries of others’ and ‘others’ align, we are not the first to empirically investigate the research approaches that legal academics adopt in practice. As such, the aim here is to highlight intersecting scholarship, and how it connects to two overarching concerns that were particularly pressing for us at the point of survey design: *how* one investigates academics’ views around research approaches that will capture something valuable, and how one does so in a way that will make sense for an external (‘other’) audience that may have varying levels of insight into the field of legal academia and legal research. While many of the authors we have pointed to earlier have attempted field-wide description, our focus here is on some of the methodological challenges inherent in empirical attempts to ‘capture’ the field, and research approaches within it.

1. 'Black-Letter Law' and 'Socio-Legal' Approaches

Perhaps the most obvious way of categorizing legal research approaches is to draw upon the traditional 'black-letter law'⁸⁸ versus 'socio-legal studies' dichotomy, or sub-variants of this.⁸⁹ The imaginaries emerging within the legal scholarship, of course, play completely into this division, and serve to overwhelmingly reflect the view that others will perceive the field in a way that mirrors a 'purely doctrinal' conception of legal scholarship. While these terms might baffle some those external to legal academia, within the legal scholarly community, these terms tacitly express a lot. As Bartie notes, historically, the dominant conception of law in terms of legal scholarship was largely wedded to legal education, with scholarship directed at an audience comprised mainly of legal professionals or students.⁹⁰ Captured by the concepts of 'doctrinalism' or 'black-letter law', scholarship falling into this tradition is focused primarily on,

[L]egal principle (largely that generated by courts but also the legislature); basing argument and prescription on a normative premise which is not unpacked or explained; reacting to events comprising of changes to the law by judges or legislatures; and looking for deficiencies in legal principles, suggesting ways to improve them or clarifying the law so that judges or legislatures can better understand their development. The methodology adopted is likened to that of the courts with primary focus resting on the internal logic of judgments or statute.⁹¹

Not all, however, would agree with such a definition. Smits for example claims that 'the days of a purely doctrinal approach ... if those times ever existed at all—are now far behind us'.⁹² From this position, he goes on to advocate a form of legal scholarship—one which elevates the normative core of the field—in a way that still fits squarely within Bartie's description. Whether real or apparent, most accept that the concept of 'black-letter law' summons up an approach within legal studies that whether rightly or wrongly, has been subject to sustained criticism. The concern, as expressed by some, has been of the tight coupling with the needs of the legal profession, which has encouraged 'the production of textbooks and other items of utility to practitioners, such as case notes and commentaries on statutes, while inhibiting the production of the kind of original theoretical research which the academy in general would value'.⁹³ As Cownie notes, this remained the dominant

⁸⁸ See Shane Kilcommins, *Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings*, in LEGAL RESEARCH METHODS: PRINCIPLES AND PRACTICALITIES (Laura Cahillane & Jennifer Scheppe eds., 2016).

⁸⁹ We use these terms in a broad sense. We take 'black-letter law' to include what is sometimes referred to as doctrinal research (See e.g., Allan C. Hutchinson, *Beyond Black-Letterism: Ethics in Law and Legal Education*, 33 LAW TCHR. 301 (1999)). We also take 'socio-legal studies' to include research that falls under the banner of 'Law and Society' research.

⁹⁰ Bartie, *supra* note 4.

⁹¹ *Id.* at 350.

⁹² SMITS, *supra* note 4, at 29.

⁹³ Fiona Cownie, *Law, Research and the Academy*, in TRIBES AND TERRITORIES IN THE 21ST-CENTURY: RETHINKING THE SIGNIFICANCE OF DISCIPLINES IN HIGHER EDUCATION 57, 59 (Paul Trowler et al. eds., 2012).

model of teaching and research until part way through the twentieth century when a number of alternative approaches emerged offering alternative paradigms—critical legal studies, feminist legal theory, socio-legal studies and ‘law in context’.⁹⁴ While Cownie comments that there was little evidence to support the extent to which these alternative approaches had become entrenched within the field of legal studies, leading some to assume that ‘doctrinal analysis retained its dominance over legal education and legal research’,⁹⁵ Cownie’s empirical study of English legal academics⁹⁶ led her to revise her views.

The findings which led Cownie to depict the discipline as one that was in ‘transition’, as well as her findings in respect of how legal academics understood the labels of ‘black-letter law’ and ‘socio-legal studies’, prove particularly germane here. Asking interviewees to position their research and teaching according to a range of paradigm orientations on a scale—‘from doctrinal [generally referred to by academic lawyers as ‘black-letter’], through socio-legal studies to critical legal studies (CLS) and feminist’⁹⁷—Cownie reported that 10 per cent described themselves as taking a socio-legal/CLS approach, 40 per cent as adopting a socio-legal approach, with the remaining half describing their approach as black-letter.⁹⁸ Noting that while a range of alternative approaches to doctrinal law appeared to have become firmly established in academic law, socio-legal studies had emerged as the ‘major challenger’. Critically, however, her work also revealed that the categories of ‘black-letter law’ and ‘socio-legal’ were ill-understood in terms of what kinds of research either actually accommodated. While just under a fifth of her respondents depicted their approach ‘without qualification’ as black-letter law, about a third of the total offered a qualified answer, noting that this ‘did not mean that they concentrated solely on legal rules’ but that it was also important ‘to introduce contextual issues (social, political, economic and so forth)’.⁹⁹ While socio-legal studies is a broad church, embracing a wide range of topics, subject-matter and a large array of research methodologies and methods, Cownie noted that some of her legal academic respondents held a belief that socio-legal studies referred ‘exclusively to empirical investigation of the law, using standard quantitative social science methodology’.¹⁰⁰ As such, she highlighted the need for caution with these terms, given their interpretive ambiguity:

Some of those describing themselves as ‘black-letter’ appeared to be adopting a very similar, not to say, identical, approach to others who described themselves as ‘socio-legal’, so that the line between legal academics adopting a doctrinal perspective and those adopting a socio-legal perspective is not always clear.¹⁰¹

⁹⁴ *Id.* at 61.

⁹⁵ *Id.*

⁹⁶ See generally COWNIE, *supra* note 3.

⁹⁷ Cownie, *supra* note 93, at 63.

⁹⁸ COWNIE, *supra* note 3, at 54.

⁹⁹ *Id.* at 55.

¹⁰⁰ *Id.* at 56.

¹⁰¹ *Id.*

Cownie observed that the fluidity of these research descriptors, in particular the conflation of 'socio-legal' with 'empirical', had ramifications for her impression of the field; conceivably, she noted, the community of socio-legal lawyers might well be larger than appeared on her data.¹⁰² Notwithstanding these concerns, Cownie's overall findings led her to assert that purely doctrinal law no longer 'dominates the legal academy in the way it used to'. Highlighting a range of changes of research orientation and approach, Cownie described a field in transition,

Looking at the culture of the discipline as a whole, it becomes clear that, whatever they call themselves, the majority of academic lawyers occupy the middle ground between the two extremes of pure doctrinal analysis and a highly theoretical approach to the study of law. Arguably, law is a discipline in transition, with a culture where a small group still clings to a purely doctrinal approach, but a very large group (whether they describe themselves as socio-legal or not) are mixing traditional methods of analysis with analysis drawn from a range of other disciplines among the social sciences and humanities, while other small but significant groups are mainly concerned with the application of feminist ideas to law or in analysis of law which, like socio-legal studies, is interdisciplinary in nature but tends to be more overtly concerned with critical theory.¹⁰³

Of course, not all have quickly accepted these claims. Pointing to critique around this aspect of Cownie's methods and findings, in particular by virtue of the (nearly) catch-all definition afforded to 'socio-legal studies', Bartie argues that Cownie's assessment of the field can 'be viewed as either an accurate reflection of movements in legal scholarship or as a form of advocacy'.¹⁰⁴ Whether an 'accurate reflection' or not, the specific point under debate—and Cownie's words of caution—are instructive in themselves and further underline the contested (and political) nature of the terms 'black-letter law' or 'socio-legal studies'.¹⁰⁵ This consideration, coupled with our main survey audience, consisting of non-legal academics, for whom the terms 'black-letter law' or 'socio-legal studies' might have little purchase, pointed towards the need to explore different and perhaps more granular descriptors for categorizing research approaches in law.

¹⁰² *Id.* at 58.

¹⁰³ *Id.*

¹⁰⁴ Bartie, *supra* note 4, at 356.

¹⁰⁵ This is also the case in respect of slippery terms such as 'interdisciplinarity'. As Vick notes, it is often applied loosely in practice, and 'has a tendency to be all things to all people' (Vick, *supra* note 20, at 164). While some see the drawing or borrowing from other fields as a form of 'interdisciplinary' engagement which is highlighted as highly prevalent (*see* Hillyard, *supra* note 4) others have their focus on genuinely integrative collaborative cross-disciplinary work (*see* Anders, *supra* note 74; Gavin Little, *Developing Environmental Law Scholarship: Going Beyond the Legal Space*, 36 *LEGAL STUD.* 48 (2016)), which is regarded, at least, by some within specialist pockets, as far less typical. Nevertheless, these differential understandings lead to assessments of quite different things and a quite confused picture as to what style of 'interdisciplinarity' engagement is prevalent.

2. Between and Across Categories - Mixed Approaches

A range of alternative approaches can be identified for attempting to capture the different methodologies and methods deployed by legal academics in ways that move beyond the potentially troubled dichotomy of ‘black-letter law’ and ‘socio-legal studies’ in favour of a more granular approach. While there are some who rely on the ‘published discourse’ of the field,¹⁰⁶ we sought out empirical approaches which centralized academics’ own representations of their research approaches. Our aim was not to sum up or capture a field in its entirety but rather to gain more detailed impressions about a particular population of legal academics and their research practice and approaches. In fact, there are few examples of such work attempting meta-disciplinary analysis of this kind in a way that builds upon Cownie’s study. One of the rare exceptions to this has been more recently provided by Siems and Síthigh.¹⁰⁷ Their method and overarching framework provides a source of fresh inspiration for thinking about different ways of mapping research orientations in legal academia. Moving away from the more conventional labels of ‘doctrinal’/ ‘black-letter law’ and ‘socio-legal’, the authors organize research orientations through the conceptual framework of “law as a practical discipline”, “law as humanities” and “law as social sciences”.¹⁰⁸ While the authors set out to explore the interplay between “macro-level” (the position of law schools within university structures) and “micro-level” factors, it is the latter that is of particular interest here. Mapping the orientation of legal academics using “ternary plots”, the overall results are plotted onto a triangle with each of the three research orientations located at a corner. An academic whose work is strongly concentrated on practically and vocationally orientated work, for example, will appear in the “law as a practical discipline” corner. Importantly, however, the approach can also show the “balance” between these three approaches, and their overall orientation. Within the triangle sits an inverted triangle that distinguishes where academics’ research profiles become mixed between approaches, with points falling within the central area when this is the case.

There are numerous merits to this approach, and it elegantly builds on previous attempts to map legal research. It provides a method that is capable of capturing the more dynamic and complex features of research profiles where scholars move between or across the categories of ‘black-letter law’ or ‘socio-legal’. In avoiding these terms explicitly, the approach squarely addresses Cownie’s concern as to the “fluidity” that these terms could invite. Siems and Síthigh’s approach can be commended for broader reasons. While others have attempted to identify patterns relating to different intellectual traditions (e.g. doctrinal, feminist, empirical etc.)

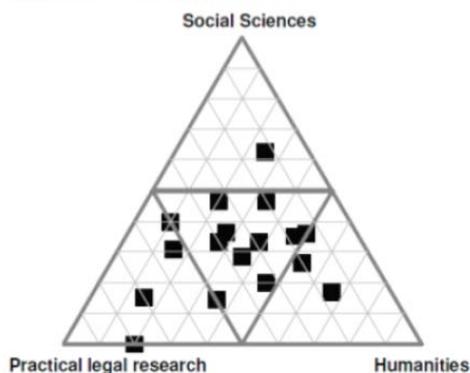
¹⁰⁶ See, e.g., Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000). Ellickson’s work in which is focused on achieving scope of capture (even if not depth) by deploying ‘words and phrases’ as proxies for different intellectual traditions. These proxies were used to search a Westlaw database to statistically map the rise and fall of different intellectual traditions in U.S. legal scholarship, including doctrinal approaches, law and economics, critical legal studies, postmodernism, feminist jurisprudence, empirical work, sociological approaches and a range of “law and ...” approaches (history, psychology, philosophy and civic republicanism).

¹⁰⁷ See generally Siems & Síthigh, *supra* note 4.

¹⁰⁸ *Id.* at 652.

Figure 1. Mapping Legal Research¹⁰⁹

Display of results: ternary plot



using words and phrases as proxies to search across large databases of published legal scholarship,¹¹⁰ a key weakness is that such analyses point to very general trends across the legal scholarly terrain. What they cannot tell us is about research orientations of specific legal academics, or the extent to which the work of different researchers might demonstrate methodological plurality. In similar force, the choice of 'black-letter law' or 'socio-legal' either demands a stark choice, or a qualified one, leaving us unclear quite where researchers actually 'fit'. In contrast, this is where Siems and Sithigh's contribution is particularly valuable. Noting that legal academics 'often tend to mix approaches', the authors comment that it is 'not uncommon that a legal researcher starts with a historical introduction, then turns to an analysis of the relevant case law and finally engages with socio-political considerations'.¹¹¹ Such a researcher might depict herself as being split between all three or two particular orientations, rather than falling 100% into a single orientation. Using a written survey, Siems and Sithigh undertook a pilot survey with research active staff at the University of East Anglia in 2010. They invited survey respondents to highlight how frequently on a scale of 0 – 10 (not at all to always) they used one of the three approaches, described in the following way,

- Practical legal research, i.e. research aimed at understanding the law using similar approaches to the ones used by practicing lawyers (judges, solicitors etc.);
- Legal research as part of humanities, i.e. analysis of legal texts (cases, statutes etc.) using approaches similar to research in humanities (history, philosophy, literature, religion etc.)
- Legal research as part of social sciences, i.e. analysis of law in its socio-economic context, similar to research in social sciences (sociology, economics, psychology etc.).¹¹²

¹⁰⁹ Mathias M. Siems & Daithi Mac Sithigh, *Mapping Legal Research - Online Supplement* 8 (2012), <https://papers.ssrn.com/abstract=2097698> (last visited Jan. 26, 2018).

¹¹⁰ See Ellickson, *supra* note 106.

¹¹¹ Siems & Sithigh, *supra* note 4, at 668.

¹¹² Siems & Sithigh, *supra* note 109.

While the authors note that the sample size is small ($n = 17$), overall it nevertheless lends further support for Cownie's finding¹¹³ that there is a strong prevalence of 'mixed approaches' in legal studies, rather than any single orientation (law as practical discipline, as social sciences, or as humanities) being dominant (the results of their pilot survey is shown above in Figure 1).

Given the aims of our survey, Siems and Síthigh's contribution struck us as particularly valuable for a further reason. As we have already highlighted, we sought to address quite distinct audiences, consisting not only of non-legal academics and legal academics, but also two specific legal academic sub-populations consisting of vocational legal scholars and academic legal scholars. The centralization of more generic typifications of *how* one goes about research or scholarly practice, which could then be translated into particular paradigm orientations (e.g. for Siems and Síthigh's purposes, 'practical legal research, legal research as part of humanities, legal research as part of social sciences) would enable us to speak in a comprehensible way to all of our audiences but also elicit granular data around legal research and scholarly orientations.

While Siems and Síthigh's approach provides particular inspiration for the survey design and analytical approach we adopted in enquiring about legal research, we have also benefited from combining aspects of the approaches adopted by Cownie and Ellickson. For our survey design we embraced some of the categorizations offered by Ellickson as well as Siems and Síthigh in order to gain a more granular approach to research approaches which will make sense to 'insiders' and 'others'/'outsiders'. In addition, rather than asking survey respondents to pick between research orientations in binary fashion, we have used the 'scaling' approach that Siems and Síthigh introduce. Our aim has been to build overall individual research profiles, ones which can be subsequently analyzed to assess their key constituent elements and whether they are strongly orientated in one direction or another. The combination of these approaches served to provide a useful and accessible framework for online survey design that could be presented to different audiences, including those which might not be familiar with the concepts of 'black-letter law' or 'socio-legal studies'. Nonetheless, as we detail in section three below, we reintroduce these concepts at a later stage, using these as crude analytical tools for evaluating the results in assessing the overall research orientations our respondents offer. Even if these concepts are ambiguous and political, they nevertheless connote meaning within the legal academic community and can give us a sense of the general orientation of the field.¹¹⁴

¹¹³ COWNIE, *supra* note 3, at 58.

¹¹⁴ We should note that we also introduced further categories for evaluating the legal academic terrain that supplemented these approaches. While Cownie found in her study that interdisciplinarity and cross-disciplinary collaborative work were not prevalent features of legal academia at that time, this is an aspect of the field that has been somewhat neglected since in terms of mapping exercises. Given that the 'collaborative' cross-disciplinary behaviors of legal academics, and perceptions others hold about legal academics constitute strong drivers for our overarching study, we included some soft measures around individualistic/collaborative approaches. Given space constraints, the results of this aspect of our study are reported elsewhere (*See* Prialux et al., *supra* note 7).

III. THE STUDY

The aim of this third part of the article is to focus on the study we undertook at Cardiff University across 2016 and 2017. Following an introduction of our methods and research approach, we then turn to set out our findings in respect of the two key queries surrounding how legal academics imagine non-legal academics ('outsiders') perceive legal academia. Separate consideration is given to two queries that were central in our study, notably (1) field wide depictions of legal academia, and (2) more specific depictions of the research approaches that legal academics adopt in respect of legal research. While we separate out these queries, as we shall see, analysis of both highlights strikingly consistent themes.

A. METHODS AND RESEARCH APPROACH

We used online surveys as our method for investigating beliefs, attitudes and knowledge around legal academia at Cardiff University. We consulted with scholars with expertise in survey design in the social sciences, screened our initial survey through a social science focus group, and gained ethical approval for our study in early 2016. We also ran small pilots with legal and non-legal academics to inform the design of the survey we eventually launched. Across the course of 2016 and early 2017, we ran a total of four surveys, in two survey releases. The first survey release occurred in 2016, involving a 'main' survey with non-legal academics and a 'benchmarking' survey with legal academics. In 2017, we also ran a shorter second survey release, consisting of a main and benchmark survey. The survey questions are presented in Tables 1 to 4 in the Appendix.

The first survey release, which forms the basis of the findings we centralize in this article, required an extensive commitment for survey participants given a large number of questions designed to investigate typifications and perceptions of legal academia. While our broader findings are discussed extensively elsewhere,¹¹⁵ a brief overview of the main components of the surveys provides useful context for what follows. In the main survey aimed at non-legal academics, we sought to elicit detailed insights around how non-legal academics characterize the field of legal academia. Question sets addressed a range of themes including the personality traits of legal academics, the relative prestige of a variety of research outputs/activities, beliefs/knowledge about approaches taken to and nature of legal academic research, non-legal academics' sources of understanding (e.g. contact with legal academics, films, television etc.) and general (inter)disciplinary disposition. We also asked non-legal academics about their interaction with legal academics, the context of those interactions and about their engagement with legal scholarship. Such factors enabled us to gain some insight into the extent to which non-legal academics venture into the field of law and/or collaborate with legal academics, and whether those factors had any discernible impact upon their responses to questions about the field of legal academia. We also posed a series of broader demographic questions by which to further contextualize responses. Our benchmark survey posed similar questions to legal academics, albeit with the aim of eliciting 'insider' knowledge and 'imaginaries' about how 'outsiders' might regard their field. Gaining

¹¹⁵ *Id.*

a spread of legal academics' perspectives on their own individual approaches to legal research and scholarship provided, in our view, a promising benchmark for evaluating and comparing the responses of non-legal academics, as well as a useful source of information about the kinds of approaches legal academics purport to take and differences in attitude. The second survey release, consisting of a main survey and benchmarking survey, was aimed at the same general audiences but targeted a smaller number of non-legal academics. The second survey consisted of a small number of questions aimed at testing out slightly different survey techniques (e.g. affording options to 'rank' rather than using sliding scales) and eliciting wider data around interactional behaviors and contexts. Across these surveys, all of the three Colleges at Cardiff University were well represented in the sample, with a strong distribution of disciplinary backgrounds, position (e.g. research associates, lecturers, senior lecturers, readers and professors), gender, age and time in service.

The findings presented in this article draw exclusively on the first set of surveys in which a total of 102 non-legal academics (estimated minimum of 3.72% participation rate from non-legal academic population)¹¹⁶ those sections of the survey which sought to elicit, 'insider views' of legal academia, 'insider imaginaries' of outsiders' views and 'outsider views' themselves on the same questions. These reveal distinct sources of data about the same phenomena which can be evaluated to assess the extent to which they converge or diverge. In this respect two question sets fall into this category, notably "Beliefs and Knowledge about legal academia as a discipline", and "Nature of and approaches to legal research and scholarship". These were the only areas of the survey where we asked legal academics to imagine how non-legal academics at Cardiff University would be likely to respond to those specific questions.¹¹⁷

In our discussion of these findings, we also draw upon broader supportive data from wider aspects of our survey where it is useful and relevant to do so. In thinking about the alignment between legal academic and non-legal academic responses, we refer to some of our analytical work around frequency of interaction between actors within the non-legal academic population with legal academics. In addition, we fleetingly refer to data emerging from a further question which was presented to legal academics as optional, notably how legal academics would describe the discipline of law to the hypothetical non-legal academic. In this latter respect, such narratives add life to and are wholly consistent with other findings which flow from legal academics' self-portrayals of legal academia: notably of a field that is rich, stimulating and one that legal academics appear to be proud to belong to. Significantly, these upbeat 'insider' views stand in stark contrast to how legal academics anticipate outsiders will envisage their field.

Using survey as a method also allowed us to explore demographic differences

¹¹⁶ For Survey 1, we experienced some technical obstacles in our attempt to communicate the presence of the survey to academics outside of the school of law/across the University. This was intensified owing to freshly rolled out policies concerning email communication (a measure taken to reduce high volumes of email across campus), including access restrictions to use of other departmental/school email lists, and a lack of alternative modes of easily reaching (or gaining the attention of) academics across campus at that time. Using social media was not an option for us given that we restricted this survey to Cardiff University academics.

¹¹⁷ See Table 2, Questions 8 and 12, in the Appendices.

within the population of legal academics as a whole.¹¹⁸ A broad range of legal research is conducted by legal academics at Cardiff University in the School of Law and Politics. Within this range of study, a variety of approaches to legal research are taken. These can be plotted on a continuum of 'doctrinal legal studies' to 'socio-legal studies'.¹¹⁹ Cardiff is renowned as an important hub for socio-legal scholarship, which is reflected in the fact that the highly-respected *Journal of Law and Society* was founded in Cardiff in 1974 in the early days of the socio-legal studies movement in the UK.¹²⁰ More recently, following Adler's *cri de coeur*,¹²¹ the School of Law and Politics has been recognised by the Economic and Social Research Council's Doctoral Training Partnership as being fit to offer an MSc Master's degree in Social Science Research Methods on a Socio-Legal pathway. But Cardiff also has a strong reputation for doctrinal scholarship and is the only Russell Group institution in the U.K. to offer vocational legal training. At Cardiff University, law is taught in two Departments within the same School—the Law Department and the Centre for Professional Legal Studies—collectively known as Cardiff Law. These departments form separate centres of legal activity and as such, we see clear points of distinction between them on the basis of typical contract type, and potentially paradigm orientation to law. Out of the 26 legal academic respondents, 6 came from Professional Legal Studies. Holding a strong vocational orientation, the majority of these staff are employed on teaching and scholarship contracts and are engaged in delivery of the Bar Professional Training Course, the Legal Practice Course and the Graduate Diploma in Law. The remaining 20 survey respondents were academic lawyers, most of whom are employed on teaching and research contracts and engaged in the delivery of the LLB and a wide range of postgraduate programmes. When we discuss these legal scholarly populations separately, we describe them as VLS (vocational legal scholars) and ALS (academic legal scholars); where we discuss the law department as a whole, we use the term 'legal academics'.

B. INSIDER PERSPECTIVES OF LEGAL ACADEMIA, OUTSIDERS' PORTRAYALS OF LEGAL ACADEMIA AND INSIDER IMAGINARIES: POINTS OF CONVERGENCE AND DIVERGENCE

In the main survey, we asked non-legal academics to highlight their beliefs and/or knowledge about legal academia as a discipline *as a whole*. We provided 21 pre-set key attributes to arrive at a range of descriptors which in principle could apply to a range of fields/specialisms. We identified 'disciplinary' descriptors emerging from Cownie's interviews with legal academics,¹²² as well as those arising from Becher's interviews across 12 disciplines.¹²³ We then reviewed the range of overall key terms

¹¹⁸ Note that Cownie's study on legal academics focused exclusively on legal academics that were located in academic rather than vocational departments. (See COWNIE, *supra* note 3, at 19).

¹¹⁹ See generally Hutchinson, *supra* note 89.

¹²⁰ See further, Phil Thomas et al., *The Journal of Law and Society at 40: History, Work, and Prospects*, 2015 J. L. & Soc'y 390.

¹²¹ ADLER, *supra* note 72.

¹²² COWNIE, *supra* note 3.

¹²³ BECHER, *supra* note 5.

and added to these where necessary attribute ‘opposites’ (e.g. ‘interesting’ versus ‘boring’), excluded terms that were overly specific, either in a disciplinary sense or in terms of overall description (e.g. ‘dusty’, ‘white coats’, ‘very left’, ‘Boffins’, ‘fuddy-duddy’, ‘dubious in methodology’) or transformed them in order to achieve more generalizable concepts (e.g. ‘scientific’, ‘methodological’).¹²⁴

Non-legal academic survey participants could select as many of the attributes as they wished but were asked to select those that they considered best described the discipline. In the benchmarking survey, legal academics were also invited to select from these pre-set attributes on the same terms. We also followed up this question by presenting legal academics with the same list, asking respondents to indicate which attributes they imagined academics from other disciplines would select. The sample of non-legal academics was 102, and the number of legal academics was 26. We report our key findings below highlighting percentages which indicate the frequency by which different participant groups selected particular attributes in each survey. In addition we highlight key contrasts in the overall depictions each population provides, as well as points of convergence and divergence between the self-reports of legal academics (‘insider’), the reports of non-legal academics (‘outsider’), and the reports of legal academics in terms of how they anticipate that non-legal academics will portray the field (‘imaginaries’). In respect of legal academics, we also split this community into two distinctive parts where there are striking differences between the accounts provided by those belonging to the vocational part (VLS) and academic part (ALS).

1. Insider Perspectives: How Legal Academics Portray Legal Academia

Across the community of surveyed legal academics our findings reveal some commonalities in response around the attributes that ‘insider’ participants considered to best describe their own discipline. Of note, however, we also see some interesting points of contrast between the two populations inhabiting the Law Department. Potentially reflecting different paradigm orientations and distinctive everyday ‘business’, the most frequently selected descriptors for legal academia among VLS were *Theoretical*, *Vocational*, *Academic*, *Practical* and *Reliant on Documents*, with 66.7% selecting each of these attributes. Some convergence in view between VLS and ALSs can be identified on a number of these attributes (ALS: *Theoretical* (80%), *Academic* (80%) and *Practical* (75%). Nevertheless, on aggregate the ALS population, while selecting options across all of the descriptors, very strongly emphasised *Interesting* (90%), as well as *Creative* (70%), in contrast with VLS, of whom 16.7% and 33% selected those options. A majority of VLS selected *Vocational* and *Reliant on Documents* as attributes (66.7%), but while still featuring prominently, a comparatively smaller proportion of ALS selected these (45%). In addition, 55% of ALS typified the field as *Empirical* (in contrast with VLS: 16.7%) and 50% of ALS considered the discipline of law to be *Innovative* (in contrast with VLSs: 33.3%). In terms of the negative descriptors highlighted

¹²⁴ Pre-set attributes given to survey respondents were: *Innovative*, *Interesting*, *Applied*, *Unapplied*, *Coherent*, *Uncreative*, *Arcane*, *Modern*, *Fragmented*, *Creative*, *Empirical*, *Unscientific*, *Methodological*, *Boring*, *Practical*, *Theoretical*, *Vocational*, *Reliant on Documents*, *Dealing in Pure Ideas*, *Scientific*, and *Academic*. These attributes were randomized as they appeared to survey participants.

above, few selected these across the population of 26 legal academics: *Arcane* (VLS: 0%; ALS: 15%), *Boring* (VLS: 0%; ALS: 5%).¹²⁵ Across the population of legal academics as a whole, the mean number of attributes selected per survey respondent stood at 7.57, with none selecting above 14.

These depictions of the field also emerge within the narrative section of the survey. We included an optional question which invited legal academics to attempt to 'describe law as an academic discipline to a non-legal academic interested in what kinds of research, scholarship and enquiries populate the discipline as a whole'. 18 of the 26 legal academics provided substantive responses to this.¹²⁶ A number of VLS respondents emphasised the vocational or transactional-orientation of law, and its importance, for example, emphasising that "*Legal academia has most impact when it is combined with the practical/vocational aspects of law to deliver 'real world' solutions to problems*", or "*Explaining, demonstrating and applying the law in a transactional context*".

In contrast, another VLS respondent noted how the discipline as a whole "*is hugely varied*", encompassing the "*practical and the theoretical, the empirical and the procedural and more besides*". Nevertheless, the same respondent also noted some tension between different depictions of law as an academic discipline,

If I was being honest I would also tell the hypothetical non-legal academic that it's full of lack of understanding and distrust between those who view academic law as primarily a social science and those who view it as in part vocational (VLS Respondent).

From the ALS respondents, one expressed uncertainty about the vocational orientation of the discipline, "*I'm not sure that law as an academic discipline is 'vocational' (although it may be a vocation, and may be on vocational questions)...*" while another considered that the traditional vocational focus of the field "*has had an impact on the kinds of research that have traditionally been pursued... often around analysing law... with a practical focus*". Nevertheless, the same respondent, akin to many other ALS contributors, did not see a tension between paradigm orientations, instead emphasising that the role of 'socio-legal enquiry' "*broaden[s] the focus, by using social research methods and by looking at different aspects of 'law in society'*". On these accounts, enquiry within the discipline of law, can embrace "*both doctrinal and socio-legal scholarship*", be both "*problem and solution orientated, with a deep concern for society and social relations*", with a strong orientation towards questions of "*what the law should be*" or "*knowing how the law really works in practice*". One respondent highlighted that while the field appeared to be "*increasingly fragmented*", it was perhaps held together by "*a shared knowledge of the principles by which legal norms are (traditionally) created, identified and interpreted*".

¹²⁵ We note however, that in contrast with the ALS population, the VLS population sample size was small (6 survey respondents) and as such greater participation by this community in the survey may have led to very different results.

¹²⁶ With a further two providing text highlighting that they would either not attempt such a task, or that their response would depend on "who was asking".

Across the ALS population, the portrayal of law as an academic discipline was highly positive, and the sheer breadth and diversity of the work and approaches the field captures often underpinned this depiction, “*An exciting set of varied engagements with law: some doctrinal, some philosophical, some critical, and characterized by a very high number of law-and subjects: law and geography; law and literature; law and anthropology etc.*”, with another describing law as,

[A] muscular, interactive field full of surprising angles and unexpected convergences. It is a highly stimulating world to work in” (ALS respondent).

One respondent noted that “*it would be sad to consider [the field of law] unscientific, but a broad definition of science is required!*” and also added that “[*c*]learly it cannot be uncreative and boring...!”

2. Outsiders’ Portrayals: How Non-Legal Academics Perceive Legal Academia

Those ‘insider’ portrayals offer an interesting benchmark for evaluating non-legal academics’ responses. In respect of non-legal academics, while the population as a whole provided responses that span the full range of attributes, the most frequently selected were *Academic* (60.8%), *Applied* (54.9%), *Reliant on Documents* (46.1%), *Interesting* (45.1%) and *Theoretical* (43.1%). We see points of convergence between legal academics’ own description of the field and the selections made by non-legal academics (“non-law”) in respect of the frequency of selection of *Theoretical*, *Academic* and *Reliant on Documents*. We also see convergence between the ALS and non-legal academics, with both populations highlighting *Interesting* as a key attribute (non-law: 45.1%; ALS: 90%). Attributes attracting the lowest selection frequency by non-legal academics included *Uncreative*, *Unscientific*, *Dealing in Pure Ideas*, and *Boring*. Nevertheless, 54.9% of non-legal academics also selected *Applied* which was more strongly emphasised by ALSs (45%) than VLSs (33.3%). Across the population of non-legal academics as a whole, the mean number of attributes selected per survey respondent stood at 5.08, with none selecting above 16.

We also cross-referenced the responses of non-legal academics (‘outsiders’) with their self-reported frequency of interaction with legal academics to assess whether this factor might present different findings within that population. While this aspect of our study extends beyond the remit of the present article, and is discussed elsewhere,¹²⁷ it merits some mention here. Interactional frequency fell into four categories: Frequently, Occasionally, Rarely and Never. We found that level of interaction did appear to make a difference to characterisations of the field of legal academia. Non-legal academics who frequently interacted with legal academics were more likely to characterize legal academia as *Theoretical* (50%) than those that never interact (23.9%). Significant differences also appeared in relation to other attributes: *Methodological* (Frequently: 62.5%; Never: 41.3%) and *Empirical* (Frequently: 50%; Never: 17.4%). While none of those reporting higher levels of

¹²⁷ See Prialux et al., *supra* note 7.

interaction with legal academics (Occasional and Frequent) selected *Uncreative*, *Dealing in Pure Ideas* or *Boring*, a small percentage of those falling into 'Never' or 'Rarely' selected these (<10% in each category, with the exception of *Boring* which 11.1% of those Rarely interacting selected).

3. Insider Imaginaries: How Legal Academics Imagine Non-Legal Academics Perceive Legal Academia

As we discussed earlier, the literature reveals a variety of legal scholars that have asserted how 'others'/'outsiders' perceive legal academia in a way that is persistently negative and homogeneous. While aware that we were inviting speculation, we also asked our legal academic survey population to undertake such an exercise. We asked them to select from the same list of 21 descriptors the attributes they believed non-legal academics might select in typifying legal academia. In respect of those surveyed, while the legal academics' imaginaries often contrasted with how non-legal academics responded, we do see a number of points of alignment. Attributes frequently selected by legal academics in terms of how they imagined non-legal academic responses, included *Theoretical* (VLS: 83.3%; ALS: 40%)—an attribute which was in the top five of those selected by non-legal academics. In respect of *Reliant on Documents*, a large proportion of both parts of the law school (VLS: 83.3%; ALS: 80%) also anticipated this attribute as one that non-legal academics would likely select (non-legal: 41.6%), which also sat in the top five of attributes selected by non-legal academics in practice.

Nevertheless, for the greater part we see very different portrayals of legal academia emerging between the imaginaries of legal academics and how non-legal academics actually typified the field. In terms of *Interesting*, no VLS members anticipated that non-legal academics would select this attribute to describe legal academia. Only 10% of ALS imagined that non-legal academics would select this attribute—a factor also mirrored in the frequency of ALS respondents selecting *Boring* (60%) as an attribute that they imagined non-legal academics would select. In fact, only 6.9% of non-legal academics selected this attribute. While a high number of vocational lawyers and academic lawyers had selected *Academic* in terms of their 'own' perception of the discipline, when coming to imagine how outsiders might perceive law, this factor was far less pronounced (VLS: 16.7%; ALS: 25%). Legal academics' perceptions were rather far off the mark on *Unscientific*. In practice, while a small percentage of legal academics had selected this item in terms of their 'own' assessment (VLS: 16.7%; ALS: 10%), 66.7% of VLS respondents imagined that non-legal academics would perceive legal academia this way, whilst 35% of ALS respondents shared this view. In practice, only 7.8% of non-legal academics made this assessment (with 11.8% of non-legal academics positively selecting *Scientific*). Again, in respect of the movement away from their self-assessment of the field of legal academia to how they imagine outsiders will portray the field, both vocational and academic lawyers downgraded *Applied* as a factor (VLS: 33.3% to 16.7%; ALS: 45% to 15%), whilst this was the second most popular descriptor selected by non-legal academics in practice (54.9%).

C. BLEAK LEGAL IMAGINARIES

When evaluating the responses afforded by non-legal academics, the 'other'/'outsider' perspective emerging from our survey presents a rather different

narrative to that appearing within the legal scholarly literature. Although there are limitations to a survey, undertaken at a single university and drawing on a relatively small population of academics, we see that a high proportion of the surveyed non-legal population characterize legal academia as ‘academic’, ‘interesting’, and ‘theoretical’. While some emphasised its vocational dimension, as well as its applied nature, these are attended by a broader range of descriptors which suggest that survey participants from a non-legal academic background anticipate a far richer and diverse scholarly field.

While this is an interesting finding, what is perhaps more striking, is the shift in attitudes of legal academics themselves between their *own perceptions of their field*, and their imaginaries about how outsiders might regard legal academia. This is perhaps most revealing in those areas where legal academic constituents have upgraded or downgraded attributes away from their ‘insider’ descriptions. In respect of the vocational lawyers, such shifts can be seen strongly on three particular attributes: *Applied* (from 33.3 to 16.7), *Vocational* (66.7 to 16.7) and *Practical* (66.7 to 0). In fact, all of these descriptors were selected by a significant number of non-legal academic survey participants (54.9%, 37.3% and 42.2%). This may highlight the possibility that VLS constituents believe that ‘outsiders’ will regard the field in ways that stand not only at odds with how they perceive it, but potentially more in line with an academic legal portrayal.

When turning to the responses of ALS respondents, what we see is a remarkably similar pattern of responses that mirror the negative imaginaries that populated the rather bleak ‘outsider’ narratives in legal scholarship. There is a very clear pattern that emerges, from ‘insider’ assessments to ‘insider imaginaries’ of outsiders, that suggests a high level of pessimism about how non-legal academics might perceive the field of legal academia. The shifts away from self-appraisals of the field (and the often upbeat narratives legal academics provided) are striking across the board: *Uncreative* (from 5% to 30%) whilst only 3.9% of non-legal academics selected this descriptor; *Arcane* (from 15% to 40%) whilst 17.6% of non-legal academics selected this; *Creative* (70% to 5%), whilst 15.7% of non-legal academics selected this option; *Unscientific* (10% to 35%), whilst 7.8% of non-legal academics selected this; *Modern* (30%) and *Innovative* (50%) are both downgraded to zero (whilst 13.7% and 10.8% of non-legal academics selected these attributes); *Methodological* was downgraded from 45% to 5%, whilst 37.3% of non-legal academics selected this. Aspects we have already noted, such as *Academic* moved from 80% in terms of self-perception to 25% in evaluating how non-legal academic ‘outsiders’ might see legal academia (whilst 60.8% selected it in practice - the most commonly selected descriptor). In similar force, *Interesting* moves from 90% to 10%, whilst 45.1% of non-legal academics selected interesting. And *Boring* moves from 5% to 60%, while only 6.9% of non-legal academics selected this in practice. Other noteworthy descriptors include *Empirical*, where 55% ALSs selected this in their self-assessment, but downgraded this to 5% when imagining the responses of outsiders (whilst 24.5% of non-legal academics selected this) and *Practical* moves from 75% to 15% (whilst 42.2% of non-legal academics selected this).

The overall picture presented in terms of how ALS imagine legal academia through the eyes of ‘outsiders’ is pretty bleak and fairly peculiar – *arcane*, *uncreative*, *unscientific*, *unapplied*, *non-methodological*, *an impractical* field, with minimal *empiricism*, minimal *coherence*, that is vocationally-orientated, *boring*, and perceived as less *academic*. What remains, confidently, is an imaginary that outsiders will see the field as one that is highly *Reliant on Documents* (80% of legal

academics selected this; whilst 46.1% of non-legal academics did). To the extent that this attribute is selected by all populations it highlights some alignment between legal academic imaginaries and outsider perspectives; despite this, the overall thrust of legal academics' imaginaries is that outsiders are unlikely to grasp the more nuanced position that 'documents' or 'text' occupy within the field—a factor that one of our ALS respondents was keen to emphasise to the 'hypothetical outsider',

The legal discipline always implies the analysis of legal texts (whether hard law, soft law, or case law) in a way no other discipline does. At the same time, the legal discipline engages with the context of these texts; mostly to understand them better, while some legal research reverses that order by primarily aiming to understand the societal reality in which the texts operate. Understanding that reality (partially by analysing the texts) is then the main focus, rather than aiming to interpret the texts by taking into account the contextual reality (ALS Survey Respondent).

D. THE NATURE OF AND APPROACH TO LEGAL RESEARCH (AND SCHOLARSHIP)

While our survey was directed to two main groups, legal academics and non-legal academics, the legal academics constituted the critical benchmark for evaluating all of the responses of non-legal academics, and indeed, the legal academic imaginaries. In approaching the next major aspect of this article—notably how legal academics imagine that 'outsiders' will portray legal research specifically, it proved necessary to devise an approach that could capture (a) how legal academics in our survey population typify their own research approaches; (b) how legal academics imagine 'outsiders' in the academic population will typify their research; and (c) how non-legal academics will conceptualise the approaches that they believe are ones typical in the field of legal research.

This element of the survey proved to be the most challenging by virtue of a range of considerations. The first major challenge concerned the issue of how to design a survey inviting responses around legal research approaches that would also be comprehensible to multiple audiences, consisting of both insiders and outsiders. As noted earlier, some of the terms deployed by legal academics to describe different legal research orientations can be interpretatively slippery even to insiders. That concern is amplified when centralizing non-legal academics, some of whom may be entirely unfamiliar with concepts such as 'black-letter law' or 'socio-legal'. Our approach to this was to include more general categories of research (such as *empirical*, *vocational* and so on) which would be comprehensible to all survey populations. The second challenge related to how one goes about analyzing these categories so that one can sensibly map the approaches that (1) legal academic respondents actually take to their research, as distinct from (2) their imaginaries of how outsiders will typify legal research approaches, and (3) non-legal academics beliefs about legal academic research. Both of these issues are discussed shortly. The final major consideration, and certainly quite an initial stumbling block for us, related to our legal academic survey sample and the question of which legal academics should be included. We tackle this latter issue first.

Insofar as this aspect of the survey concerned *legal research*, as distinct from *scholarship*, there had been considerable debate within our research team about whether to include the VLS population at all. As noted earlier, the activities and work

profiles of VLS scholars can be seen as distinctive in many respects from those of the ALS population, and engagement in research constitutes a clear point of distinction. Vocational legal scholars employed at Cardiff Law are typically on teaching and *scholarship* contracts, rather than teaching and *research*, and their central work consists of work activities that have a vocational and practical lawyering orientation rather than an academic leaning. In turn, VLS colleagues, as with all those on teaching and scholarship contracts are not expected to meet research benchmarks (e.g. through producing research outputs) for promotion or other institutional requirements. Yet, VLS and ALS are all ‘legal academics’. Moreover, there are some members of the VLS population, who, despite contract type, *are* engaged in research activities, just as ALS is not composed exclusively of individuals on teaching and research contracts (e.g. one of our ALS survey respondents was employed on a teaching and scholarship contract). These considerations, alongside our value of the work of VLS colleagues and our belief that the distinction between scholarship and research is an unpromising and problematic qualifier for sorting out who is, and who is not a ‘legal academic’, led us to explore further the ways that including the VLS population might prove fruitful. In this respect, we considered that even where a clear delineation emerged between the VLS and ALS populations, including distinctions between approaches to *scholarship* and *research* in terms of paradigm orientations, this, coupled with the imaginaries produced by both populations and the alignment with non-legal academic responses might produce useful and interesting results. For these reasons we sought to design our ‘legal academic’ facing survey on inclusive grounds so that it captured approaches to *scholarship* and *research* in this section of the survey. The categories that speak to approaches therefore serve to span those two potentially distinctive paradigm orientations.

So here we start by highlighting how we went about capturing the research and scholarship approaches of those within the VLS and ALS populations. All legal academics were presented with the following categories, and were asked to situate on a sliding scale how much they thought the subjects and approaches best described *their own* research or scholarship:¹²⁸

- **Descriptive**, concerned with legal judgments, statutory provisions and other legal instruments;
- Investigative/**empirical** approaches;
- **Normative**/Philosophical/Analytical Approaches.
- Investigation of **social phenomena**;
- Adopt **vocational approach** with strong focus on legal education and legal profession;
- **Theoretical** and critical approaches, including social, economic, feminist, historical and political.

For each of these categories, participants were presented with a sliding scale which ran from 0 – 100 (‘does not describe well’ – ‘does describe well’), with the default sitting at 50. Survey respondents could also select ‘not applicable’ under each item which if selected would have the effect of returning a zero response for that item.

¹²⁸ We also included the categories Individual/Armchair/Library based, *Lone Scholarship* and *Collaborative/Cross-Disciplinary Work*.

Following this, legal academics were presented with the same question but one which invited them to highlight, in the same way, how they thought academics from other disciplines would respond to such a question.

This question set was also put to non-legal academics in the main survey. The question asked non-legal academics to highlight on the sliding scale the extent to which they believed each of these categories described the research and research approaches of legal academics.

E. CONSTRUCTING A RESEARCH PROFILE SPECTRUM – BLACK-LETTER TO SOCIO-LEGAL

Each survey response to this question elicited a range of scores which the survey participants provided. Legal academic survey participants would weight the extent to which their *own* research (or where appropriate, scholarship) was weakly or strongly typified by *Descriptive, Empirical, Normative, Social Phenomena, Vocational* and *Theoretical* approaches on a sliding scale. Where this question was put to non-legal academics, that population was being asked to evaluate their beliefs or knowledge about research approaches typical of the legal academic field. The sliding scale afforded a numerical score from between 0 to 100. By way of an example, three different individuals, X, Y and Z, might use the sliding scales to typify research approaches in law in the following way:

Figure 2. Example Legal Research Profiles.

Example Respondent	Descriptive	Vocational	Normative	Social	Empirical	Theory
X	40	20	40	70	30	50
Y	100	90	10	10	0	10
Z	20	10	50	80	70	80

The collection of those scores, running from *Descriptive* through to *Theoretical* produced by each survey respondent is then treated as a unique and indivisible research profile record. The aim of so doing is to give us an idea of the range of approaches that a survey respondent considers to best represent their own research/scholarship in the case of a legal academic, or that a survey respondent believes is typical of legal research where they are a non-legal academic.

To evaluate and map the different research profiles of our survey respondents, and the raw scores within them, we created an overarching scoring method. We sought to produce a scoring method that could translate a series of raw scores contained within individual research profiles, into something more globally meaningful. In line with the different paradigm orientations highlighted in the literature, we settled on achieving an indicative spectrum running from *black-letter law* to *socio-legal* onto which the individual research profile records could be plotted, and enable us to make sense of a series of raw scores. While crude, the aim was simply to provide an overall visualisation of the kind of paradigm research (or scholarship) orientation that survey respondents claimed to possess (or imagine). While the associations that we make can be debated, each of the 'approach' variables (*Descriptive, Vocational*

and so on) were treated as indicators of a particular paradigm orientation in the following way. *Descriptive* and *Vocational* were treated as approach variables more commonly associated with a *pure black-letter law* approach, *Descriptive*, *Vocational* and *Normative* as indicators of a *black-letter law* approach (rather than ‘pure’),¹²⁹ and *Social Phenomena*, *Empirical*, *Theoretical* and *Normative* were treated as indicators of a more *Socio-Legal* approach.

These approach variables were organized within an equation accordingly (see Figure 3 below). The effect of the equation when applied to the individual raw scores of research profiles was to produce an overarching Research Profile Score. The overall calculation for a research Profile Score is achieved through combining the *Socio-Legal* score, the *Normative* element, the total from which the *Black-letter Law* score is deducted. This achieved a single “Research Profile Score” for each unique research record.

Figure 3. Calculating the Research Profiles.

	Descript (a)	Vocation (b)	Black Let (c)	Norm (d)	Social (e)	Empiric (f)	Theory (g)	Socio- Legal (h)	Socio-L & Normative (j)	Research Profile Score
X	40	20	30	40	70	30	50	50	90	+20
Y	100	90	95	10	10	0	10	6.66	16.66	-78.34
Z	10	2	6	50	80	70	80	76.66	126.66	120.66
	$(c) = \frac{(a)+(b)}{2}$				$(h) = \frac{(e)+(f)+(g)}{3}$				$(j) = (d) + (h)$	$= (j)-(c)$

These overall ‘Research Profile Scores’ could then be plotted on a Spectrum accordingly. In Figure 4 below, the Research Profile Scores are visualised on a graph which runs from Black-Letter Law through to Socio-Legal.

In testing the spectrum, the *maximum scores* achievable under the two main categories (at either end of the spectrum) were as follows. For *pure black-letter law*, the maximum research profile score would stand at -100¹³⁰ where scores consisted

¹²⁹ Some of the legal scholarship we highlighted earlier noted normative dimensions of legal research, with some theorists affording it a particularly special place (e.g. SMITS, *supra* note 4.) Nevertheless, distinct from the other categories (e.g. vocational, empirical and so on) it proved extremely challenging to determine where (if anywhere) a normative approach to law might fit within different research paradigm orientations. A legal academic who considers herself to be doctrinal *or* socio-legal (or a blend of the two) might well conceptualize herself as engaged in work that has a normative dimension to it. Coupled with a hypothesis that those engaged in practical and vocational ‘scholarship’ within the VLS population might be less inclined than their ALS counterparts to typify their work as possessing a normative dimension, we separated out ‘normative’ as a category in its own right for analysis.

¹³⁰ We could, of course, have reversed this overarching research rating in order to produce a minus value for scores associated with *Socio-Legal* attributes, rather than *Black-Letter law*. On reflection, while such a change would have been presentational only, it may have been worthwhile given how the assertion of a negative/minus value here appears to

exclusively of 100 on both *vocational* and *descriptive* approaches, with all other ingredients (i.e. empirical, normative, social phenomena, theoretical) being scored by the survey respondent at zero.¹³¹ In fact, one VLS respondent mapped directly onto this definition of 'pure black letter law' having selected 100 *Vocational*, 100 *Descriptive* with all other attributes scored to zero (see Figure 4 below). At the other end the spectrum is *purely socio-legal*, where the maximum research profile score would stand at +200. This would be achieved through responses of 100 on each of the categories of *social phenomena*, *empirical*, *normative* and *theoretical*, with an absence of all black-letter law ingredients.

Scores sitting in between -100 and zero are typified by a dominance of black-letter law approaches—e.g. a score of zero can represent a response of 100 for *Vocational*, *Descriptive* and *Normative*. Nevertheless, scores around zero can also denote an increasing mixture of approaches, but these remain more strongly typified by those attributes highlighted here as black-letter law factors. Scores between zero and 100, indicate an increasingly mixed profile which becomes more dominated by socio-legal approaches towards 100. Profiles above 100 sit within a terrain very strongly dominated by socio-legal approaches with an extremely limited emphasis on *Vocational* and *Descriptive* factors. This spectrum and the scoring method provided the framework for plotting the profiles of legal academics (and in the main survey, the profiles of 'non-legal academics') and enabling subsequent analysis.

To be clear, the aim here is not to achieve a neat categorisation of all individual survey participants into either 'black-letter law' or 'socio-legal'. Considerable debate can be enjoyed over whether specific approaches are genuinely indicative of a 'black-letter law' or 'socio-legal' approach. Instead, the intention is to create an *indicative* spectrum that indicates in relative terms differences in paradigm orientation to legal research and scholarship. Even if we arrive at final research profile scores that indicate a paradigm orientation that is more socio-legal than black-letter law, or even 'mixed', the final assessment is designed to achieve relative scoring and to compare and contrast different sub-populations (e.g. all legal academics, or VLS and ALS).

F. FINDINGS ON RESEARCH APPROACHES

Earlier in this article when discussing survey responses around general depictions of the field, we noted that while legal academic survey respondents generally held favourable views about their own field, they were noticeably more pessimistic in their estimation of how non-legal academics would view their discipline. This was

tacitly feed into, rather than depart from, the sustained criticism that purely black-letter law approaches have been subjected to. Our aim here is not to suggest that particular approaches to legal research are preferable to others, nor to diminish the (critical) value of doctrinal/black-letter law approaches.

¹³¹ This is, of course, contestable. While some definitions of 'black-letter law' often include normative elements (See Bartie, *supra* note 4.), this would appear to be contested by others (for example, see SMITS, *supra* note 4). Moreover, insofar as those engaged in scholarship might be involved in work that is not necessarily self-consciously involved in addressing overarching questions about 'how society ought to be', it seemed to us a better description of more vocationally-orientated work to exclude normative dimensions. What we found in practice was that while most respondents across the legal academic population selected 'normative' to some degree, the respondents that did not include this element sat exclusively in the VLS population.

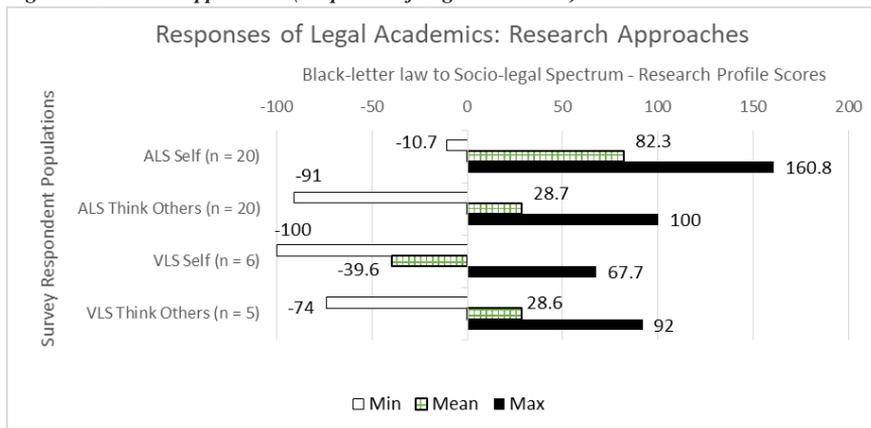
particularly apparent with the ALS survey respondents, where it was anticipated that non-legal academics would portray the field as: *Arcane, Uncreative, Unscientific, Unapplied, Non-methodological, impractical* field, with minimal *empiricism*, minimal *coherence*, vocationally-orientated, *boring*, and perceived as less *academic*. While such a perspective aligns quite neatly with the asserted ‘outsider’ view presented in legal scholarship, as we highlighted, it did not align with the portrayals provided by the non-legal academics we surveyed. While some key elements converged (e.g. *Reliance on Documents*), the general pattern was of divergence, with a typification of the field by non-legal academics as ‘academic’, ‘interesting’, and ‘theoretical’.

The current exercise sought to dig more deeply into such attitudes and beliefs. Engaging all survey respondents in a more granular evaluation of the field by focusing on the range of research methods and methodologies available to researchers, presented two opportunities. First, it allowed us to evaluate the consistency of some of the responses provided earlier. However, the second, is that it provided survey respondents with a different opportunity to articulate their impressions of the field, and indeed, to think through in a more detailed way about how outsiders/non-legal academics might come to imagine it. If, as the ALS respondents seemed to believe on the basis of their earlier responses, non-legal academics would regard the field as non-methodological, impractical, unempirical or largely vocational—the current question invited them to state the extent to which they believed that would be so.

1. Legal Academics’ Presentation of Own Research and Scholarship Approaches

The overall mean of each legal academic group, ALS, and VLS, in respect of self-rating (‘my approach to research and scholarship’) is reflected below in Figure 4 as ‘ALS self’ or ‘VLS self’, and the rating in respect of how ALS and VLS groups believe non-legal academics will respond when addressing such a question is detailed under ‘ALS Thinks Others’, and ‘VLS Thinks Others’, accordingly. The results present the overall means of these groups, as well as providing the minimum and maximum Research Profile Scores from each constituent group.

Figure 4. Research Approaches (Responses of Legal Academics).



In respect of self-reports of ALS, the overall mean sits within “mixed” territory, but with a strong orientation towards socio-legal approaches, and to a lesser degree, a tendency to also draw on approaches associated black-letter law. 7 of the ALS survey participants had Research Profile Scores that were above 100, indicating profiles that are very strongly socio-legal, with very low scores on black-letter law factors (an overall black-letter mean score of 16). Nevertheless, for the remaining ALS population (n = 13) factors associated with black-letter law, *Vocational* or *Descriptive*, or both, most clearly have a place in their work (with a black-letter mean of 43). The maximum ALS Research Profile Score at 161, highlighted a profile composed of 85 Social Phenomena, 5 *Vocational*, 12 *Descriptive*, 80 *Theoretical*, 85 *Normative*, and 88 *Empirical*. At the minimum end, the lowest Research Profile Score recorded is -10.7. This was the only ALS score that dipped below 0, and the profile belonged to the only survey respondent on a teaching and scholarship contract in the ALS population. Such a finding appears to support the conclusions reached by Cownie, and Siems and Síthigh, to the extent that there would appear to be a strong prevalence of mixed approaches within the field of legal academia, with a strong socio-legal orientation.¹³²

In respect of the survey responses of VLS, the overall mean score demonstrates the opposite pattern, sitting firmly below zero, indicating a very strong orientation towards black-letter law factors. An overall Research Profile Score of zero, would typically indicate a profile composed of *Vocational*, *Descriptive* and *Normative*, whilst a score of -100 indicates a more “Professional Law” profile consisting exclusively of *Vocational* and *Descriptive*. In practice, 5 VLS Research Profile Scores sit below zero (-17, -23, -74, -91, and -100) indicating an orientation that ranges between black-letter law towards a more professionally distilled form of black-letter law. Out of the 6 VLS respondents, only one had a Research Profile Score above 0, sitting at 67.7 with a strongly mixed profile: 82 *Social Phenomena*, 96 *Vocational*, 82 *Descriptive*, 80 *Theoretical*, 80 *Normative*, and 68 *Empirical*. Overall, these findings align neatly with our expectation of the VLS population in light of contract type and professional orientation.

2. *Insiders' Imaginaries of Outsiders' Depictions of Legal Research*

In the context of how legal academics ‘imagine’ others/outsideers will regard legal research, here we see particularly interesting results. The imaginaries of both ALS (n = 20) and VLS (n = 5)¹³³ were fairly similar with means that sit within the “mixed” territory. This sits somewhat at odds with the earlier insider imaginaries our legal academic survey respondents provided in respect of general depictions of the legal academic field—and it certainly provides a very stark contrast with the imaginaries of ‘Others’/‘Outsiders’ as presented in the literature which highlight a portrayal of legal academia that is strongly black-letter law in orientation. This stark portrayal, however, might well reflect a key weakness of that earlier survey

¹³² COWNIE, *supra* note 3; Siems & Síthigh, *supra* note 4.

¹³³ Across other areas of the survey, we report 6 VLS survey respondents. The drop of 1 VLS participant here reflects that one of our VLS respondents that had provided a self-report of approaches to research and scholarship, and went onto complete the remainder of the survey, nevertheless selected ‘not applicable’ for all elements of this aspect of the survey. No explanation was given for this.

question, which sought out broad typifications of the legal academic field through the presentation of a series of binary choices (e.g. boring/interesting, academic, unacademic etc.), rather than affording survey participants the opportunity to offer more nuanced/measured evaluations of how ‘others’/‘outsiders’ might think. As such, if the prior survey question suggested extreme pessimism among the legal academic community in terms of how they think others/outsiders will perceive the field, the present question elicited responses which suggest that the overall view is not as bleak as it had first appeared.

The overall scores of ALS and VLS populations highlight a belief that non-legal academic ‘others’/‘outsiders’ will regard the field as consisting of a “mixed” terrain, rather than squarely ‘black-letter law’. However, as Figure 4 above shows, both the ALS and VLS populations anticipate that non-legal academics will nevertheless portray the research approaches in law very differently to how ALS and VLS populations themselves depict them. In common with our earlier finding, across both legal populations we see a combination of up- and down-grading from self-reported data that suggests that legal academics expect to see a strong divergence between ‘insider’ and ‘outsider’ perspectives. This pattern can be seen in Figure 5 below. Across both legal populations, we see significant movement away from self-assessments, with 17 survey respondents migrating on average 76 points towards or deeper into black-letter law territory, and 8 survey respondents moving on average 65.9 points towards or deeper into socio-legal territory. While we see movement across all categories (social phenomena, vocational etc.), the most significant changes can be seen in the stronger emphasis placed on black-letter law factors, *Vocational* and *Descriptive*, with some downgrading of other categories. Interestingly, the only factor that remains more or less stable is *Normative*.

Figure 5. Shifts in Means from Self-Assessment to Imagined ‘Other’/‘Outsider’ (n = 25).

(n = 25) ¹³⁴	<i>Social Phenomena</i>	<i>Vocational</i>	<i>Descriptive</i>	<i>Theoretical</i>	<i>Normative</i>	<i>Empirical</i>
Self-Assessment	57.4	43.1	51.7	61.9	60.0	45.6
Think Others	41.2	66.9	84.4	58.8	59.4	34.8

Looking within the specific populations, we can potentially account for the strength of the overall pull towards black-letter law factors by virtue of the comparatively larger population of ALS. It is the majority of the ALS population that accounts for the strong migration towards black-letter law in their assessments (ALS constitute 16 of the 17 respondents that migrate in this direction). This particular population very strongly moves away from self-reported Research Profile Scores. While the overall mean for self-assessment Research Profile Scores falls squarely into ‘mixed’ territory, with a maximum sitting high in socio-legal and the lowest score sitting narrowly below zero, when it comes to imagining how others/

¹³⁴ By virtue of considerations highlighted in n 134 above, the overall sample of legal academics is impacted (n=25, rather than n=26).

outsiders might survey the field, the score lines shorten considerably so that profiles appear far less socio-legal (on average by 77.6 points). The overall imaginaries of the ALS population seem to suggest an expectation, on the part of the majority, that non-legal academics will see the field of law as extremely different to the approaches they take to their research. But, insofar as this suggests an expectation that 'others'/'outsiders' will see it as *more* vocational and descriptive, this is a far cry from an expectation that non-legal academics will anticipate a field that is purely doctrinal. Instead, the overall results highlight an expectation that outsiders might see the field as largely mixed.

In turn, while a smaller population pull in the opposite direction, towards socio-legal factors, 8 of our legal academic survey participants made selections which demonstrated this trend. Here we see an even split between 4 VLS and the remaining 4 ALS (including 1 ALS on a teaching and scholarship contract, and another ALS that is recorded as a part-time tutor). While the VLS population is small, those migrating towards a more socio-legal depiction are far more pronounced with a very strong shift away from self-reported Research Profiles (VLS: an average of 89.2 point rise). In respect of the 4 ALS participants who anticipate a more socio-legal depiction, we see a 42.5 point rise.

The general pattern across the populations of VLS and ALS is highly consistent; a series of imaginaries that others/outsiders will categorise the field in ways that are at odds with own approaches. Certainly, for the ALS population, this maps to some degree onto our earlier findings of a tendency towards pessimism in respect of how 'others'/'outsiders' think. Nevertheless, this is far less marked, and the overall results provide a series of legal academic voices which sit at odds with those in the legal scholarly literature. Moreover, even if the overall trend highlights that the ALS community in particular hold an expectation that 'others'/'outsiders' will regard the field in a way that is *more* vocational or descriptive in orientation, there are exceptions to this. We noted a number of exceptions earlier, in respect of two ALS survey participants on non-typical contract types (teaching and scholarship and part-time casual tutor) who migrate away from their own research profiles towards a stronger socio-legal depiction when imagining the responses of non-legal academics (from Research Profile Score of 37 to 69, and -11 to 76 respectively). However, two further ALSs also shifted higher up the socio-legal scale, highlighting a perception that others/outsiders might imagine the field to be slightly more typified by socio-legal approaches than was the case with their own research depictions (migrating from 40 to 65, and 73 to 100 respectively).¹³⁵

¹³⁵ While we have cross-linked all profile responses with a range of separate markers around cross-disciplinary collaboration, we found no particular pattern emerged between those that migrated from one Research Profile Orientation to another. Nevertheless, what we did find is that these 2 ALS respondents were among 8 out of the entire cohort of legal academics (n = 25) that had high cross-disciplinary collaborative scores, and consistently reported this orientation across the survey. Nevertheless, to assess the extent to which higher levels of collaboration might provide greater insight into the beliefs of others, would require far more detailed questioning than our survey set out to achieve.

3. Do Legal Academics' Imaginaries Align with the Views of 'Others'/'Outsiders'?

Central to the present article has been the insider imaginaries of legal academics about how 'others'/'outsiders' will perceive the field of legal academia. As we noted at the outset, this was a theme which emerged from our evaluation of the legal literature and the results of the benchmarking surveys from our scoping study at Cardiff Law. Our key aim in the scoping study as a whole was to explore how non-legal academics conceptualized legal academia, their attitudes towards and insight into the field. While the results of our main survey are discussed extensively elsewhere,¹³⁶ our findings around how non-legal academics at Cardiff University perceive legal academia and the extent to which this aligns with imaginaries, merits brief discussion here.

A key reason for this is by virtue of how some of our results from the non-legal academic survey responses appear to disrupt the imaginaries that we have noted throughout this paper. What is particularly disrupted is the view maintained within legal scholarship around how 'others'/'outsiders' regard the field. In particular, the assumption that 'others'/'outsiders' will perceive the field of legal academia in a negative light, and as largely doctrinal, unempirical, untheoretical etc. is one that appears to be countered by the survey responses from non-legal academics. We earlier highlighted how our survey findings around field wide descriptions (e.g. *interesting, boring, academic, unacademic* etc.) suggested a more positive portrayal of the field on the part of 'others'/'outsiders' than the imaginaries of legal academics surveyed. In similar force we find points of non-alignment between legal academics' imaginaries on the benchmark survey and the survey responses of non-legal academic population in respect of depictions of approaches to legal research.

The results on approaches to legal research as reported in the main survey, and as highlighted below in in Figures 6 and 7, organize the non-legal academic survey Research Profile scores by interaction. This used the frequency of self-reported interaction with legal academics across a range of settings (e.g. teaching, supervision, workshops, research etc.) as a vehicle for evaluating whether the extent of interaction with legal scholars and researchers might make a difference to their responses. While this is discussed elsewhere at greater length,¹³⁷ here we comment on the aggregate finding—notably, that standing in contrast with the portrayal within the legal scholarship that others/outsiders will regard the legal academic field as being dominated by a doctrinal or black-letter law focus, the results as a whole highlight that non-legal academics portray the field as one which is overwhelmingly *mixed* in terms of the nature of research and research approaches deployed.¹³⁸ While scores below zero indicate research profiles more strongly characterized by black-letter law approaches, significantly, none of the non-legal academic Research Profile score *means* dip below zero (or even come close to zero). Only 7 of the overall 102 non-legal respondents produced Research Profile Scores that dipped below zero, moving into black-letter law territory. The remainder are situated above zero, with over 55 per cent recording Research Profile

¹³⁶ Priaux et al., *supra* note 7.

¹³⁷ *Id.*

¹³⁸ This finding is one that is also supported strongly by a second set of surveys run at Cardiff University.

Scores above 50, and nearly 6 per cent with a Research Profile above 100. As we noted earlier, while the VLS population on aggregate is more strongly characterized by black-letter law approaches, none of the 'outsider' groups (represented here as 'no', 'low', 'medium' and 'high' interactors), nor the non-legal academic population on aggregate, come close to resembling the legal scholarly profile of our VLS population in overall mean score.

Note that in Figures 6 and 7 below, the 'Survey Respondent Populations' highlighted as *No interaction*, *Low interactors*, *Medium Interactors* and *High Interactors*, all belong to the non-legal academic group of survey respondents.

Figure 6. VLS Imaginaries and Non-Legal Academics.

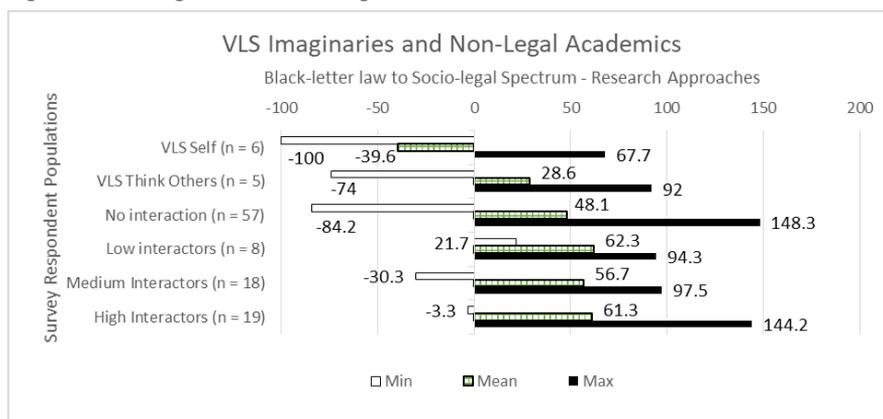
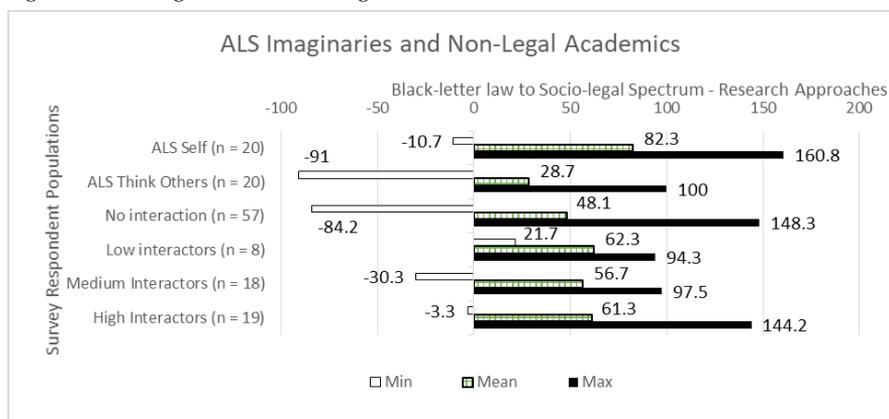


Figure 7. ALS Imaginaries and Non-Legal Academics.



When we focus on the legal academic respondents in our survey, a slightly more nuanced and less extreme series of imaginaries emerge—most certainly ones which sit at odds with the imaginaries profiled in legal scholarship. While the minimum scores among both the ALS and VLS populations suggest imaginaries that non-legal academics are likely to regard the field of legal academia as bordering

on ‘purely black-letter law’ in approach (with the ALS group anticipating this to an even stronger degree with a Research Profile minimum score of -91), the mean scores of both the ALS and VLS groups both appear to suggest an expectation that ‘others’/‘outsiders’ will regard the field as more mixed in practice. While the VLS group self-reports a more black-letter law orientation, the imaginaries as to how others/outsiders are likely to regard the field of legal academia shifts in the opposite direction—with a mean that anticipates that ‘others’/‘outsiders’ are likely to perceive the field as more mixed in practice (and at odds with the approaches VLS take to their own work). In contrast, while the ALS group self-reported mean sits high on the socio-legal spectrum, and this drops significantly when imagining the responses of ‘others’/ ‘outsiders’, there would appear to be an expectation that others will anticipate the field to be populated by more mixed legal research approaches in practice. On the basis of the mean scores however, the ALS imaginaries do tug the hardest towards the black-letter law end of the spectrum.

Overall then, we find a series of responses around research approaches that diverge quite significantly from the imaginaries within legal scholarship as to how ‘others’/‘outsiders’ will perceive the field of legal academia; this is not only by virtue of how our non-legal academic population responded, but also the imaginaries provided by legal academics themselves. What we do find, however, is that even if legal academics imaginaries suggest an expectation that ‘others’/‘outsiders’ are unlikely, on the balance, to depict the field as starkly ‘black-letter law’, the difference between self-reported approaches to research and scholarship highlights an expectation that how others will regard legal research will be rather different (i.e. more dominated by black-letter law approaches or socio-legal approaches) to how legal academics go about their own research in practice.

While our surveys highlight pessimism within the legal academic community at Cardiff University about how others/outsiders might perceive the field at the point of field-wide description, with an expectation that others will see legal academia as unacademic, untheoretical, purely doctrinal, unapplied, non-empirical or indeed, boring—the results from the imaginaries in respect of research approaches, suggest *less* pessimism. While there is an expectation that non-legal academics/‘others’ might perceive the field in ways that are distinctive from the self-perceptions of legal academics themselves in terms of approaches to legal research, the overall results do not suggest that legal academics expect ‘others’ to regard the field as purely black-letter law. Perhaps there is now an emerging sense, at least amongst this community of legal academics, that the field of law is now far more strongly integrated within the academy so that it would be inconceivable that academics in other parts of the University could come to imagine the discipline in the particularly stark and harsh terms that legal scholarship has portrayed.

IV. CONCLUSION

Throughout this piece, we have centralized the legal academic ‘imaginary’ around how legal academics believe that ‘others’/‘outsiders’ perceive their field. In the legal academic literature, as with our survey findings, we identified a bleak series of such imaginaries. While certainly far more pronounced in the legal scholarly literature, both the literature and our surveys suggest an expectation that ‘others’—whether in the world at large, or within neighbouring disciplines at Cardiff University—perceive the field of legal academia in a negative light.

Expectations of this kind may have a far from benign effect. As we noted at the beginning of this article, 'imagination' has a performative dimension. In this respect, the persistently pessimistic beliefs and expectations that legal academics appear to hold about how 'others'/'outsiders' might regard them and their field, suggest the potential for inhibiting, forestalling and closing down the kinds of collaborative opportunities and intellectual partnerships that legal academics could strongly benefit from. If legal academics expect to find that others regard legal academia as boring, methodologically deficient, unscientific, or irrelevant, this is perhaps more likely to encourage legal academics to be more cut-off from the wider intellectual environment than is desirable, given the value of the work that they perform, and of its potential to inform cross-disciplinary discussions. Indeed, in the context of legal scholarly contributions which emphasize the critical importance of cross-disciplinary collaborative engagements for the future of law as a discipline,¹³⁹ and its relevance to the outside world, these imaginaries suggest potential anxieties about taking this step given the expectation that 'outsiders' will perceive the legal academic field in a largely negative way.

Perhaps the most notable finding of our research, however, is how these negative imaginaries contrast so markedly with legal academics' beliefs about their *own* field. While legal academics at Cardiff who participated in our empirical research appear to imagine that other academics would hold a similarly negative view of their discipline to that found in the literature, when asked to evaluate their own field, many expressed a sense of confidence and pride. Again, we see a sharp contrast with the literature which highlights uncertainty on the part of insiders about their discipline, tantamount to an 'identity crisis'.¹⁴⁰ One possibility is that this sense of rampant confidence, pride and general security within legal academia is specific to Cardiff Law—but this seems doubtful. Here we see a rich description, charged by a sense of positivity, and at points displaying excitement at being part of a "muscular" and "stimulating" discipline. Yet when invited to contemplate how 'others'/'outsiders' might regard the legal academic terrain, this sense of confidence and excitement is far more muted, and on some accounts, entirely absent. In undertaking field-wide description, the overarching responses or imaginaries, are most certainly negative—but as we noted, when asked to evaluate research methods and methodologies from an insider and outsider perspective, the insider imaginaries softened so as to become *less* harsh and pessimistic. Nevertheless, overall, the pattern is clear: when moving from self-evaluation to the imagined evaluation of others, the accounts become *gloomier*.

Across both these substantive areas of the survey, the shifts in tone and tenor from self-evaluation to imaginary was very striking so that it was possible to identify that legal academics appeared Janus-like, speaking in two voices depending on which judgement, inward-facing or the imagined outsider looking in, was begged. Whether vocationally-orientated or situated on the academic side, the legal academic imaginary of how outsiders would depict the discipline of law strongly resonates with the often 'hostile' and 'cruel' commentaries provided by some of Becher's interviewees several decades ago. Moreover, so too does this harsh voice resonate with some of the legal scholarship when it comes to thinking about the

¹³⁹ Little, *supra* note 105; GENN ET AL., *supra* note 4.

¹⁴⁰ SMITS, *supra* note 4, at 4.

outside world—of devaluing the discipline—through the voice of the imagined ‘other’/‘outsider’. As we highlighted earlier, this other/outsider *is* imagined. As implicated within the legal scholarship, this ‘other’ often appears as a fleeting, but ultimately rhetorical vehicle. There is, however, one constant in terms of when the outsider appears—his/her personality, thoughts and perspectives are crafted largely on the back of fantasy, rather than based on external enquiry about how ‘others’ contemplate legal academia.

Although the imaginaries of legal academics have constituted the central focus for us in this article, we found it useful to make reference to some of our wider findings around how ‘others’/‘outsiders’ regard legal academia. Crucial here, was the question as to whether the views of ‘outsiders’ would resonate with the imaginaries emerging from the legal scholarly literature, and survey responses of legal academics themselves. Significantly, the non-legal academics who participated in our study generally provided far more positive evaluations of legal academia than those espoused in the literature. We also found an extremely low incidence of negative appraisals on the part of non-legal academics about the legal academic field. The attributes selected least frequently by non-legal academic survey respondents were *Uncreative, Unscientific, Dealing in Pure Ideas* or *Boring*. Instead, non-legal academics placed greater emphasis on attributes that aligned more strongly with the more positive characterizations of the legal academic field provided by legal academics themselves. The extent to which these findings are generalizable of course requires further investigation. In similar force, as we noted in respect of research approaches, here too, the ‘imagined’ view that non-legal academics would generally come to portray the legal academic field as doctrinal, unacademic, unscientific and so on—fitting a description of a field that is strongly doctrinal/black-letter law—also sharply contrasted with our findings across the non-legal academic population. Overwhelmingly, the vast majority of our non-legal academic population anticipated a field that would be composed of mixed approaches to legal research.

While we acknowledge the limitations of this study, it is noteworthy that our small-scale study has provided results that do not adhere to the negative portrayals of legal academia found in the literature. The findings of this study provide some room for asserting that the depictions of the ‘other’/‘outsider’ as presented within legal scholarship might more strongly find their roots in legal scholarly imaginations, than in reality. That is not to say that the non-legal academics responding to our survey necessarily possessed strong insight into the discipline (this went beyond what our survey sought to capture), nor that we gained depth of insight into or invited open narratives—and indeed, deeper enquiry might well tell a different story. Again, further research is needed to evaluate how and whether these trends might be replicated elsewhere, and perhaps in the context of broader populations beyond Higher Education. But until that work is undertaken—and if external perceptions about legal academia as a discipline matter, as we contend they do—our study opens up the possibility of a new and far more upbeat narrative that can be told—one which departs from negative ‘folklore’ imaginaries entrenched within the psyche of legal scholars, but whose place in reality appears more questionable.

For us, this points to the importance of a dual strategy for the legal academy. The first, which speaks to the reason for us coming to write this article, is that there is a pressing need to disrupt the (negative) folklore ideas apparent in the literature of how ‘others’ regard the legal academic field. While we do not claim that the small population of non-legal academics in our survey speaks to how all

'others'/'outsiders' would represent legal academia, that our findings quickly trouble a series of negative accounts that find their roots in speculation and imagination rather than in empirical reality, does strike us as significant. Our hope is that this will prompt others to move away from speculation as a device for thinking about how 'others'/'outsiders' perceive the field in favour of evidence-based approaches. Connected to this, our second point concerns how *legal academics* 'talk' about the field of legal academia as a whole. We started out with a concern about how these negative imaginaries can have a performative effect in limiting and foreclosing collaborative horizons. But so too, can imaginaries potentially help to open up and expand horizons.

The concerns here are two-fold, but both ultimately point to the desirability of placing meta-disciplinary accounts on a stronger empirical footing. One of the striking aspects of some of the legal academic literature that we have captured here has been how a number of authors attempting meta-disciplinary level analyses have produced fairly critical takes on the state of the field, from its development, the approaches that define it, to advocacy about how the field ought to develop. While we highlighted the role that speculation played in the context of portrayals of how 'others'/'outsiders' view legal academia, it is hard to avoid the conclusion that speculation might play a role in how some depict legal academia more generally, from the attitudes of 'others' to more substantive concerns about the techniques, approaches and topics that populate the field. While valid questions can be asked about the extent to which single authors are well situated to capture legal academia at large,¹⁴¹ which given the incredible diversity of methods, methodologies and concerns it invites, should be a tall order for most of us, what particularly interests us here is *how* one portrays the field. While some have portrayed a field in crisis, as uninteresting or 'irrelevant' to 'others'/'outsiders', our small investigation with legal academics at Cardiff University highlights the presence of a far more optimistic set of conceptualizations of the legal academic field. This was most apparent in the context of inviting legal academics across Cardiff Law to describe the field to the hypothetical 'outsider'. These more positively charged, richer and diverse accounts, particularly when contrasted with negative portrayals that find their root in imagination, highlight the potential benefits of giving voice to those from within and across legal academic field. It also highlights the presence of a largely untapped resource that could enable a new way of talking and thinking about the legal academic field. It may be that broader investigation, with this more positive end in sight, could reveal a far wider range of resources with different audiences in mind, that make far more visible and apparent to insiders and outsiders what is useful, important, and promising about contemporary legal studies.¹⁴² This points to the presence of a potentially far more promising terrain for communicating to a range of publics, within and outside the academy, what legal academics do,

¹⁴¹ Buanes & Jentoft, *supra* note 8, at 451.

¹⁴² See, e.g., the positively charged account of Neil H. Buchanan, *Legal Scholarship Makes the World a Better Place*, in LEGAL SCHOLARSHIP WE LIKE AND WHY IT MATTERS (2014), <https://jotwell.com/legal-scholarship-we-like-and-why-it-matters-program/> (last visited Aug. 18, 2019). See also the Research Excellence Framework 2014 (REF2014) Impact Case Studies which highlights a large range of impactful research produced by members of the legal academic community (REF 2014 IMPACT CASE STUDIES, <https://impact.ref.ac.uk/casestudies/> (last visited Sept. 5, 2019)).

why their academic research and scholarship matters and signalling the way that legal academics can collaboratively contribute to a wide range of cross-disciplinary projects. In a significant way, we are pointing to the increased importance of legal academics being prepared to 'talk up' the work that they do, and to be increasingly willing to project these more positive articulations of an exciting, rich, diverse and relevant field to the outside world.

V. APPENDICES

APPENDIX 1. SURVEY QUESTIONS (PHASES ONE AND TWO)

Across the surveys, we also posed a series of demographic questions in respect of age, gender, level of education, job title, contract type, employment status, length of time in higher education, College/School. We also included an open text box at the end of the surveys allowing individuals the opportunity to provide comments/suggestions.

Table 1.

Phase One Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
1	<i>Interactional Assessment – Intensity</i>	
	Please select the frequency that you meet/talk/work with legal academics	<ul style="list-style-type: none"> • Never • Rarely • Occasionally • Frequently
2	<i>Interactional Assessment – Contexts</i>	
	In which contexts, if any, have you met/interacted with legal academics (you may select all those that apply)?	<ul style="list-style-type: none"> • Research (research groups, workshops, conferences, reading groups, research projects) • Private (social friendship) • Citizenship (advisory boards, multidisciplinary ethics committees etc) • Teaching (joint supervision, joint teaching) • Administrative (e.g. University committee meetings etc) • Other (please state)
3	<i>Interactional Assessment – Quantifying</i>	
	Please make a rough assessment of how many legal academics you know in a teaching or research context (e.g. joint supervision/teaching, interaction in research groups, reading groups etc.).	<ul style="list-style-type: none"> • None • 1 or 2 • 3-5 • 6-9 • 10+
4	<i>Interactional Assessment – Engagement with Research and Legal Scholarship</i>	
	Please select statements below that best represent you (you may select all those that apply)	<ul style="list-style-type: none"> • I do not use any legal scholarship for my research/teaching • I access and read work of legal scholars for my research/teaching • I collaborate with legal scholars in the production of research/collaborative teaching • I seek advice from legal academics in respect of my work • Other

Table 1 contd.

Phase One Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
5	Beliefs and knowledge about legal academia as a discipline	
	Please indicate, by clicking on the appropriate radio buttons, which attributes you believe best describe law as an academic discipline (you may choose as many as you wish).	Practical, Scientific, Creative, Innovative, Academic, Boring, Fragmented, Modern, Methodological, Vocational, Coherent, Interesting, Unapplied, Unscientific, Reliant on Documents, Empirical, Arcane, Dealing in pure ideas, theoretical, applied, uncreative.
6	Describing Personality Traits of Legal Academics	
	13 Personality factors are listed below, each is subdivided into 4 primary personality traits and individual qualities. Please select only 1 primary personality trait per factor that you believe best describes legal academics (this may be on the basis of generalising about the legal academics you know, or in the absence of this, what kinds of personality traits you believe legal academics generally possess).	Warmth , Reserved, Attentive to Others, Caring, Impersonal; Reasoning , Concrete, Deliberative, Abstract, Quick-thinking; Emotional Stability , Reactive, Co-operative, Assertive, Aggressive; Liveliness , Enthusiastic, Serious, Spontaneous, Careful; Social Boldness , Timid, Thick-Skinned, Socially bold, Threat-sensitive; Vigilance , Suspicious, Trusting, Unsuspecting, Skeptical; Abstractedness , Abstracted, Imaginative, Practical, Down-to-earth; Privateness , Genuine, Discrete, Private, Forthright; Openness to Change , Experimenting, Conservative, Attached to Familiar, Open to Change; Self-Reliance , Individualistic, Group-orientated, Affiliative, Solitary; Perfectionism , Perfectionistic, Tolerates disorder; Organized, Flexible; Rule-Consciousness , Non-conforming, Expedient, Rule Conscious, Dutiful.
7	Prestige Markers in Legal Academia	
	Please rate the extent to which you think that the following items constitute research prestige markers (for career, promotion) for legal academics.	[Slider bar – between 0 [low prestige] and 100 [high prestige] <ul style="list-style-type: none"> • Peer-reviewed Journal Articles • Student Texts • Journal articles in practitioner journals • Case notes (on legal judgment) • Impact on legal practice (e.g. citation in judgments, ideas influencing legal reform) • Acquisition of grant funding • Monograph • Short letters announcing findings • Citations
8	Nature of and Approach to Legal Research	
	Please highlight on sliding scale how much you think these subjects and approaches best describe the research and research approaches of legal academics.	<ul style="list-style-type: none"> • Collaborative cross-disciplinary work • Descriptive, concerned with legal judgments, statutory provisions, and other legal instruments • Individual – lone scholarship • Investigation of social phenomena • Theoretical and critical approaches, including social, economic, feminist, historical and political • Normative/Philosophical/Analytical approaches • Armchair/library based approach • Adopt vocational approach with strong focus on legal education and legal profession • Investigative/empirical approaches

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Table 1 contd.

Phase One Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
9	Sources of Belief/Understanding	
	Please indicate how you have acquired your understanding of legal academia and legal academics (you may select all those that apply)	<ul style="list-style-type: none"> • Professional contact with legal academics (collaborations, committees, conferences, workshops etc.) • Films and TV Dramas etc. • Academic literature • Private Contact with Legal Academics (twitter, Facebook, friendships etc.) • Popular literature and print media • Other
10	General Interdisciplinary Attitudes	
	How would you describe your approach to research in interdisciplinary terms? (You may select all those that apply)	<ul style="list-style-type: none"> • I wouldn't describe myself as very interdisciplinary – I prefer to stick to my own discipline • I like to draw upon the work of other disciplines for my research • I attend workshops/conferences which are interdisciplinary in nature • The research problems I work on are inherently interdisciplinary and require collaboration with scholars from other fields • Other

Table 2.

Phase One Survey – Legal Academics at Cardiff University (Benchmarking Survey)		
No.	Statement/Questions	Response choices
1	Interactional Assessment – Intensity	
	Please select the frequency that you meet/talk/work with academics from other disciplines (i.e. non-legal academics)	<ul style="list-style-type: none"> • Never • Rarely • Occasionally • Frequently
2	Interactional Assessment – Contexts	
	In which contexts, if any, have you met/interacted with non-legal academics (you may select all those that apply)?	<ul style="list-style-type: none"> • Research (research groups, workshops, conferences, reading groups, research projects) • Private (social friendship) • Citizenship (advisory boards, multidisciplinary ethics committees etc.) • Teaching (joint supervision, joint teaching) • Administrative (e.g. University committee meetings etc.) • Other (please state)

Table 2 contd.

Phase One Survey – Legal Academics at Cardiff University (Benchmarking Survey)		
No.	Statement/Questions	Response choices
3	<i>Interactional Assessment – Quantifying</i>	
	Please make a rough assessment of how many non-legal academics you know in a teaching or research context (e.g. joint supervision/teaching, interaction in research groups, reading groups etc.).	<ul style="list-style-type: none"> • None • 1 or 2 • 3-5 • 6-9 • 10+
4	<i>Interactional Assessment – Qualifying your Response</i>	
	If you wish you can expand on the above in the text box below. We are interested in learning more about your interactions with non-legal academics (e.g. are these at Cardiff? Do you collaborate on funded/unfunded projects? How (if at all) does these interactions impact upon your research and teaching? We are also interested in learning about those that collaborate with others outside of academic (e.g. business, external bodies, third sector, government, professional societies, etc.).	<ul style="list-style-type: none"> • Open text box.
5	<i>Interactional Assessment – Engagement with Non-Legal Research and Scholarship</i>	
	This question seeks to identify whether you use scholarship from disciplines other than law in your research/teaching. Please select statements that best represent you (you may select all those that apply).	<ul style="list-style-type: none"> • I do not use any non-legal scholarship for my research/teaching • I access and read work of non-legal scholars for my research/teaching • I collaborate with scholars from other disciplines in the production of research/collaborative teaching • I seek advice from non-legal academics in respect of my work • Other
6	<i>Your Beliefs and Knowledge about Legal Academia as a Discipline</i>	
	How would you describe <i>law as an academic discipline</i> to a non-legal academic interested in what kinds of research, scholarship and enquiries populate the discipline as a whole? (This is a hard question but we'd value any response you can offer).	<ul style="list-style-type: none"> • Open text box.

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Table 2 contd.

Phase One Survey – Legal Academics at Cardiff University (Benchmarking Survey)		
No.	Statement/Questions	Response choices
7	<i>Your Beliefs and knowledge about legal academia as a discipline</i>	
	Please indicate, by clicking on the appropriate radio buttons, which of the following pre-attributes you believe best describe law as an academic discipline (you may choose as many as you wish).	Practical, Scientific, Creative, Innovative, Academic, Boring, Fragmented, Modern, Methodological, Vocational, Coherent, Interesting, Unapplied, Unscientific, Reliant on Documents, Empirical, Arcane, Dealing in pure ideas, theoretical, applied, uncreative.
8	<i>Others' Beliefs and knowledge about legal academia as a discipline</i>	
	The following list of attributes has been given to non-legal academics in order to ascertain how they typify legal academia. Please indicate, by clicking on the appropriate radio buttons, which attributes you think academics from other disciplines would select when asked to describe law as an academic discipline (you may choose up to five attributes).	Practical, Scientific, Creative, Innovative, Academic, Boring, Fragmented, Modern, Methodological, Vocational, Coherent, Interesting, Unapplied, Unscientific, Reliant on Documents, Empirical, Arcane, Dealing in pure ideas, theoretical, applied, uncreative.
9	Describing Personality Traits of Legal Academics	
	13 Personality factors are listed below, each is subdivided into 4 primary personality traits and individual qualities. Please select only 1 primary personality trait per factor that you believe best describes you (You might experience difficulties completing this question, but it has been included for comparative purposes by virtue of an earlier study on academics undertaken in the early 1980s).	<i>Warmth, Reserved, Attentive to Others, Caring, Impersonal; Reasoning, Concrete, Deliberative, Abstract, Quick-thinking; Emotional Stability, Reactive, Co-operative, Assertive, Aggressive; Liveliness, Enthusiastic, Serious, Spontaneous, Careful; Social Boldness, Timid, Thick-Skinned, Socially bold, Threat-sensitive; Vigilance, Suspicious, Trusting, Unsuspecting, Skeptical; Abstractedness, Abstracted, Imaginative, Practical, Down-to-earth; Privatness, Genuine, Discrete, Private, Forthright; Openness to Change, Experimenting, Conservative, Attached to Familiar, Open to Change; Self-Reliance, Individualistic, Group-orientated, Affiliative, Solitary; Perfectionism, Perfectionistic, Tolerates disorder, Organised, Flexible; Rule-Consciousness, Non-conforming, Expedient, Rule Conscious, Dutiful.</i>
10	Prestige Markers in Legal Academia	
	Please rate the extent to which you think that the following items constitute research prestige markers (for career, promotion) for legal academics.	<p style="text-align: center;">[Slider bar – between 0 [low prestige] and 100 [high prestige]]</p> <ul style="list-style-type: none"> • Peer-reviewed Journal Articles • Student Texts • Journal articles in practitioner journals • Case notes (on legal judgment) • Impact on legal practice (e.g. citation in judgments, ideas influencing legal reform) • Acquisition of grant funding • Monograph • Short letters announcing findings • Citations

Table 2 contd.

Phase One Survey – Legal Academics at Cardiff University (Benchmarking Survey)		
No.	Statement/Questions	Response choices
11	<i>Nature of and Approach to Legal Research - YOU</i>	
	Please highlight on sliding scale how much you think these subjects and approaches best describe your research and scholarship.	<p><i>[Slider bar, including ‘not applicable’ box]</i></p> <ul style="list-style-type: none"> • Collaborative cross-disciplinary work • Descriptive, concerned with legal judgments, statutory provisions, and other legal instruments • Individual – lone scholarship • Investigation of social phenomena • Theoretical and critical approaches, including social, economic, feminist, historical and political • Normative/Philosophical/Analytical approaches • Armchair/library based approach • Adopt vocational approach with strong focus on legal education and legal profession • Investigative/empirical approaches
12	<i>Nature of and Approach to Legal Research – Beliefs of Non-Legal Academics</i>	
	Please highlight on sliding scale how you think academics from other disciplines would be likely to typify legal research.	<p><i>[Slider bar, including ‘not applicable’ box]</i></p> <ul style="list-style-type: none"> • Collaborative cross-disciplinary work • Descriptive, concerned with legal judgments, statutory provisions, and other legal instruments • Individual – lone scholarship • Investigation of social phenomena • Theoretical and critical approaches, including social, economic, feminist, historical and political • Normative/Philosophical/Analytical approaches • Armchair/library based approach • Adopt vocational approach with strong focus on legal education and legal profession • Investigative/empirical approaches
13	<i>General Interdisciplinary Attitudes</i>	
	How would you describe your approach to research in interdisciplinary terms? (You may select all those that apply)	<ul style="list-style-type: none"> • I wouldn't describe myself as very interdisciplinary – I prefer to stick to my own discipline • I like to draw upon the work of other disciplines for my research • I attend workshops/conferences which are interdisciplinary in nature • The research problems I work on are inherently interdisciplinary and require collaboration with scholars from other fields • Other

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Table 3.

Phase Two Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
1	<i>Interactional Assessment – Intensity</i>	
	Please select the frequency that you meet/talk/work with legal academics	<ul style="list-style-type: none"> • Never • Rarely • Occasionally • Frequently
2	<i>Interactional Assessment – Contexts</i>	
	In which contexts, if any, have you met/interacted with legal academics (you may select all those that apply)?	<ul style="list-style-type: none"> • Teaching (Joint supervision, joint teaching) • Broader citizenship and external engagement activities (advisory boards, Government, Third sector activities etc.) • Events largely aimed at academics in my field/discipline (research groups, workshops, conferences) • Administrative (e.g. committee meetings, Senate meetings, interview panels, general training) • Collaborative Research (e.g. joint publishing, research projects) • Multidisciplinary Events aimed at no discipline in particular (e.g. Cardiff Futures, interdisciplinary workshops etc.). • Interdisciplinary/Multidisciplinary Events that are law-specific (law-based workshops, law conferences or network events, with law as a primary focus etc.). • Other (please state below).
3	<i>Interactional Assessment – Quantifying</i>	
	Please make a rough assessment of how many legal academics you know in any of the above contexts.	<ul style="list-style-type: none"> • Box for individuals to provide number of their choice.
4	<i>Interactional Assessment – Engagement with Legal Research and Scholarship</i>	
	Please select which of the statements that apply (you may select all those that apply).	<ul style="list-style-type: none"> • I do not use any legal scholarship for my research/teaching • I access and read work of legal scholars for my research/teaching • I collaborate with legal scholars in the production of research/collaborative teaching • I seek advice from legal academics in respect of my work • Other [open box]

Table 3 contd.

Phase Two Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
5	<i>Prestige Markers in Legal Academia</i>	
	<p>What kinds of publications, markers and activities do you think are likely to be most highly regarded in research prestige terms, for the career and promotion prospects of a legal academic?</p> <p>Here we give you a set of 10 items to select from. Please take these items from the list and rank them relative to each other in the ‘Prestige’ box. ‘1’ being the highest item in prestige, and 10 the lowest.</p>	<ul style="list-style-type: none"> • <i>Peer-reviewed Journal Articles</i> • <i>Student Texts</i> • <i>Publications for legal practitioners</i> • <i>Case notes (on legal judgment)</i> • <i>Impact on legal practice (e.g. citation in judgments, ideas influencing legal reform)</i> • <i>Grant funding</i> • <i>Monograph</i> • <i>Publication in Conference Proceedings</i> • <i>Successful litigation of a Case</i> • <i>Short notes/letters/case study</i> • <i>Citations</i>
6	<i>Prestige Markers in Your Own Field/Discipline</i>	
	<p>What kinds of publications, markers and activities are most highlight regarded in research prestige terms, for your career and promotion prospects in your field?</p> <p>Here we give you a set of 9 items to select from. Please take these items from the list and rank them relative to each other in the ‘Prestige’ box. ‘1’ being the highest item in prestige, and 10 the lowest. We also want to learn about your discipline too. If you can think of one other item relating to your own field/ discipline, we give you the option to fill in the ‘other’ text box.</p>	<ul style="list-style-type: none"> • <i>Peer-reviewed Journal Articles</i> • <i>Student Texts</i> • <i>Publications for practitioners</i> • <i>Case notes (on legal judgment)</i> • <i>Impact</i> • <i>Grant funding</i> • <i>Monograph</i> • <i>Publication in Conference Proceedings</i> • <i>Short notes/letters/case study</i> • <i>Citations</i> • <i>Other [open text box]</i>

FEAR AND LOATHING IN LEGAL ACADEMIA: LEGAL ACADEMICS' PERCEPTIONS OF THEIR FIELD AND THEIR CURIOUS IMAGINARIES OF HOW 'OUTSIDERS' PERCEIVE IT

Table 3 contd.

Phase Two Survey – Non-Legal Academics at Cardiff University (Main Survey)		
No.	Statement/Questions	Response choices
7	<i>Nature of and Approach to Legal Research</i>	
	We want to know what kinds of subjects and approaches you believe are likely to describe the research/research approaches of legal academics, and those that you believe would be poor descriptors. Please choose four or more items from the list below and place into the relevant groups.	<p><i>[Slider bar, including 'not applicable' box]</i></p> <ul style="list-style-type: none"> • Collaborative work • Descriptive, concerned with legal judgments, statutory provisions, and other legal instruments • Interdisciplinary approach • Individual (lone scholarship) • Investigation of social phenomena • Theoretical and critical approaches, including social, economic, feminist, historical and political • Normative/Philosophical/Analytical approaches • Armchair (library based approach) • Vocational approach: strong focus on legal education and legal profession • Investigative/empirical approaches
8	Sources of Understanding and Belief	
	<i>We have already asked you about a variety of interactive contexts where you might meet/mix with legal academics. We are keen to identify other sources of understanding/knowledge of legal academia and legal academics (you may select all those that apply)</i>	<ul style="list-style-type: none"> • Newspapers/print media (please give examples if you can) [open text box] • Films and TV Dramas etc. please give examples if you can) [open text box] • Popular literature please give examples if you can) [open text box] • Documentaries please give examples if you can) [open text box] • Other [Open Text box]
9	<i>Your Own Research/Scholarship and Interdisciplinarity</i>	
	Which statements best describe you (You may select all those that apply)?	<ul style="list-style-type: none"> • I wouldn't describe myself as very interdisciplinary – I prefer to stick to my own discipline • I like to draw upon the work of other disciplines for my research/scholarship • I attend workshops/conferences which are interdisciplinary in nature • The research problems I work on are inherently interdisciplinary and require collaboration with scholars from other fields • Other

Table 4.

Phase Two Survey – Legal Academics at Cardiff University (Benchmarking Survey)		
No.	Statement/Questions	Response choices
1	<i>Prestige Markers in Legal Academia</i>	
	<p>What kinds of research markers, outputs and activities do you think are most highly regarded in research prestige terms, for the career and promotional prospects of a legal academic (on a teaching and research, or research only contract)?</p> <p>Here we give you a set of 10 items to select from. Please take these items from the list and rank them relative to each other in the ‘Prestige’ box. ‘1’ being the highest item in prestige, and 10 the lowest.</p>	<ul style="list-style-type: none"> • <i>Peer-reviewed Journal Articles</i> • <i>Student Texts</i> • <i>Publications for legal practitioners</i> • <i>Case notes (on legal judgment)</i> • <i>Impact on legal practice (e.g. citation in judgments, ideas influencing legal reform)</i> • <i>Grant funding</i> • <i>Monograph</i> • <i>Publication in Conference Proceedings</i> • <i>Successful litigation of a Case</i> • <i>Short notes/letters/case study</i> • <i>Citations</i>
2	<i>Prestige Markers</i>	
	<p>Are there any items on this list that you think do not belong here at all (please leave comments if you wish)?</p>	<ul style="list-style-type: none"> • Open Text Box.

APPENDIX 2. DEMOGRAPHICS

Phase One Surveys - Demographics

College/School (Non-Legal Academics)

Arts, Humanities and Social Sciences	44	Biomedical and Life Sciences	42	Physical Sciences and Engineering	16
<i>Business</i>	4	<i>Biosciences</i>	7	<i>Architecture</i>	2
<i>English, communication and philosophy</i>	4	<i>Healthcare sciences</i>	14	<i>Chemistry</i>	1
<i>History, archaeology and religion</i>	9	<i>Medicine</i>	14	<i>Engineering</i>	8
<i>Politics</i> ¹⁴³	7	<i>Optometry and Vision Sciences</i>	3	<i>Mathematics</i>	2
<i>Modern Languages</i>	1	<i>Pharmacy and Pharmaceutical sciences</i>	1	<i>Physics and Astronomy</i>	3
<i>Planning and Geography</i>	4	<i>Psychology</i>	3		
<i>Social Sciences</i>	15				

Legal Academics

Law Department	26
<i>Centre for Professional Legal Studies</i>	6
<i>School of Law</i>	20

<i>All - Participation by Age</i>		<i>All - Job Title</i>		<i>All - Length of time working in the University</i>		
	Non-Legal Academics	Legal Academics		Non-legal Academics	Legal Academics	
<i>Under 25</i>	1	1	<i>Lecturer Senior Lecturer</i>	30	9	<i>Less than 5 years</i> 19
<i>25-34</i>	16	7	<i>Lecturer</i>	18	6	<i>5-10 years</i> 21
<i>35-44</i>	28	6	<i>Reader</i>	9	3	<i>10-15 years</i> 14
<i>45-54</i>	39	9	<i>Professor</i>	20	3	<i>15-20 years</i> 22
<i>55-64</i>	14	3	<i>Research Assistant</i>	2	-	<i>20+ years</i> 26
<i>65-74</i>	4	-	<i>Research Associate</i>	16	-	
			<i>Research Fellow</i>	4	-	
			<i>Other</i>	3	5	

¹⁴³ Politics is a department which is part of the School of Law and Politics (following a merger in 2014).

Phase Two Surveys - Demographics

College/School (Non-Legal Academics)

Arts, Humanities and Social Sciences	12	Biomedical and Life Sciences	8	Physical Sciences and Engineering	9
<i>Business</i>	2	<i>Biosciences</i>	1	<i>Computer Science</i>	6
<i>English, communication and philosophy</i>	3	<i>Healthcare sciences</i>	3	<i>Earth and Ocean Science</i>	3
<i>Music</i>	2	<i>Medicine</i>	1		
<i>Politics¹⁴⁴</i>	1	<i>Psychology</i>	1		
<i>Journalism Media and Cultural Studies</i>	3	<i>Dentistry</i>	2		
<i>Social Sciences</i>	2				

Legal Academics

All – Gender

Law Department	19	Non-legal Academics		Legal Academics
<i>Centre for Professional Legal Studies</i>	1	<i>Female</i>	7	11
<i>School of Law</i>	18	<i>Male</i>	19	6
		<i>Other</i>	3	1

¹⁴⁴ Politics is a department which is part of the School of Law and Politics (following a merger in 2014).

DIRECTIONS FOR THE STUDY OF MASCULINITY: BEYOND TOXICITY, EXPERIENCE, AND ALIENATION

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ABSTRACT

The relationship between the law and masculinity has not been as thoroughly examined as the relationship between the law and feminism or, more generally, between the law and gender. Yet, the reach of masculinity stretches deep into the very fiber of the law. Masculinity has for too long served as an invisible bedrock on which the law founded both its substance and method. The struggle for formal equality during the last half century sought the elimination of the masculinist bias, but has only exposed the extent of the entrenchment. The popular idea is that the law exists in a removed and exalted position where it sits in judgement of a pre-existing and fully formed masculinity. Indeed, much of the internal coherence of the law is premised on the integrity of the subject and the propagation of sexual difference. Thus, the law is precluded from acknowledging or engaging with its own productive power and vacuously characterizes itself as a neutral arbiter. Today, while significant changes occur in sex and sexuality, the study of masculinity appears theoretically stagnant.

Part I of this paper distinguishes between masculinity studies and the men's movement and explains the relationship of each to feminist theory. Part II looks at how the power of the law works and how masculinity studies is an effective tool to help understand how that power manifests and is employed. Part III examines the relationship between feminist legal theory and masculinity studies with a particular focus on two areas where I view masculinity studies as having successfully employed insights from feminist theory. Finally, Part IV considers four areas where I suggest masculinity studies could better incorporate certain insights from feminist theory, which would result in a more rigorous understanding of the relationship among power, masculinity, and law, and point masculinity studies in a more nuanced direction. To advance this critique, the paper analyzes underlying arguments that support the power of law based in classic liberal political theory. It employs recurrent critiques of the law, and of liberalism more generally, found in Feminist Legal Theory, Critical Race Theory, Queer Theory, and Critical Legal Studies to reveal the law as always already intertwined with masculinity.

KEYWORDS

Masculinity Studies, Feminist Theory, Gender, Sexual Difference, Brett Kavanaugh

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INTRODUCTION: WHY MASCULINITY STUDIES?

Why study masculinity in the first place? Why study masculinity and law? Historically, the masculine subject position has been the default. It was not until the mid-1990s that scholars even decided that men also had a gender. To the surprise of many, not only were men also gendered, but so too were structures, institutions, relationships, and discourses. The invisible but ever-present subject (never the object) refused to be named, thus rendering male domination even more insidious. Since then, a rich history of scholarship has emerged dealing with the relationship between masculinity and law, from varied perspectives and ideological viewpoints.¹ A substantial component of masculinity studies consists of using feminist and queer theory to explore variations and dynamics among masculinities. Indeed, feminist theory has provided the foundation, both analytically, theoretically, and historically, upon which masculinity studies is based. Yet, the critical study of masculinity within a legal context remains woefully marginal to mainstream legal study.

While feminism has had a discernable impact on history, politics, philosophy, sociology, economics, and law, masculinity is most marked by its absence, its invisibility.² Masculinity is simultaneously nowhere and everywhere; as Richard Dyer has commented, it is a bit like air: you breathe it in all the time, but you aren't aware of it much.³ In much the same way that heterosexuality, in contrast to homosexuality, is constructed as not being historically contingent—masculinity, until recently, has been thought of as a more self-evident, natural, and stable category than femininity. The overseeing and invisible subject—as de Beauvoir has called masculinity⁴—however, is now the object of study.

Part I of this paper distinguishes between masculinity studies and the men's movement and explains the relationship of each to feminist theory. Part II looks at how the power of the law works and how masculinity studies is an effective tool to help understand how that power manifests and is employed. Part III examines the relationship between feminist legal theory and masculinity studies with a particular focus on two areas where I view masculinity studies as having successfully employed insights from feminist theory. Finally, Part IV considers four areas where I suggest masculinity studies could better incorporate certain insights from feminist theory, which would result in a more rigorous understanding of the relationship between power, masculinity, and law, and point masculinity studies in a more nuanced direction.

I. MASCULINITY STUDIES AND THE MEN'S MOVEMENT

The study of masculinity has taken two distinct, and often antagonistic, trajectories: masculinity studies and the men's movement. While both assert that masculinity

¹ See, e.g., R.W. CONNELL, *MASCULINITIES* (2005); JACK S. KAHN, *AN INTRODUCTION TO MASCULINITIES* (2009); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* (2000); RICHARD COLLIER, *MEN, LAW AND GENDER: ESSAYS ON THE 'MAN' OF LAW* (2010).

² RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* 4 (1995).

³ Richard Dyer, *Male Sexuality in the Media*, in *THE SEXUALITY OF MEN* (Andy Metcalf & Martin Humphries eds., 1985).

⁴ SIMONE DE BEAUVOIR, *THE SECOND SEX* (1972).

is a particular phenomenon that should be investigated in its own right, they emerged out of very different political arenas. Masculinity studies emerged from a foundation of feminist theory, while at the same time being a response to the men's movement—a political undertaking that began in the 1980s to “reclaim manhood” from the purported emasculating effects of industrial society, feminism, and consumer culture.⁵ While the men's movement is quite variegated, one thread that runs through its various manifestations is the search for an essence of masculinity. In contrast to the men's movement's essentialism, masculinity studies generally views manliness and masculinity itself as social constructions and “situate[s] masculinities as objects of study on par with femininities, instead of elevating them to universal norms.”⁶

Masculinity studies is grounded in the idea of finding a space beyond patriarchy. Examining the history of the critical study of masculinity reveals this emancipatory nature; the connection between masculinity studies and freedom. When considered through either an experiential or theoretical lens, masculinity both restrains and shepherds male behavior, thereby limiting an individual's freedom. Like feminist studies, masculinity studies strives to break free from the confines of patriarchy. In addition, and in contrast to the emphasis on freedom, masculinity studies has focused on identity and practice, by exposing what masculinities are and how they function.⁷ In this way, masculinity studies is an inquiry into the “nature” of masculinity, but it also, in some ways, is a response to the men's movement and the “crisis” in masculinity which purportedly created that movement.

Examining the way in which masculinity studies emerged as a response to the men's movement highlights an inherent tension that continues to shape the discipline today. In many ways, feminism led to two ideologically opposite gendered projects (the men's movement and masculinity studies). Masculinity studies is cognizant of the fact that the men's movement was also a response to feminism and is thus, in some sense, compelled to address its relationship to the men's movement or at least the concerns of the men's movement. The tension results from masculinity studies needing to engage with the often xenophobic and patriarchal men's movement (e.g., issues of men's perceived powerlessness and emasculation) while respecting the analytic traditions of feminist theory. So, in addition to the overarching agenda of dismantling patriarchy, masculinity studies responds to the men's movement by attempting to speak to the experiential lives of men (which is what the men's movement maintains it does) without, crucially, suggesting that masculinity contains an *essence*. Whereas the analytical tools

⁵ As Robert Bly suggests in the opening lines of his quintessential men's movement book, *Iron John: A Book About Men*: “We are living at an important and fruitful moment now, for it is clear to men that the images of adult manhood given by popular culture are worn out; a man can no longer depend on them. By the time a man is thirty-five he knows that the images of the right man, the tough man, the true man which he received in high school do not work in life. Such a man is open to new visions of what a man is or could be.” ROBERT BLY, *IRON JOHN: A BOOK ABOUT MEN* ix (1990).

⁶ Harry Brod, *Introduction: Themes and Theses of Men's Studies*, in *THE MAKING OF MASCULINITIES: THE NEW MEN'S STUDIES* 2 (1987).

⁷ Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 209 (2008).

borrowed from feminist (and queer) theory tend to favor more macro issues—like the existence of gender categories and both epistemological and ontological inquiries into sexual difference and subjectivity—masculinity studies must also respond to the more micro, deep-seated experiential alienation felt by particular men. Indeed, this micro/macro tension within masculinity studies continues to seriously affect the level of nuance and sophistication brought to the critical study of gender today. In addition, the clear need to eradicate the explicit sexism, misogyny, transphobia, and “toxic masculinity” ubiquitous in our present culture—issues that, decades ago, the more optimistic among us thought would no longer exist in 2020—renders the more macro issues less seemingly urgent.

In its early days, masculinity studies, like the men’s movement, appeared relatively self-serving, portraying men as victims of the social construction of masculinity.⁸ Masculinity studies represents, simultaneously, a struggle against patriarchy and a response to an experiential crisis felt by many men. In this respect, masculinity studies perpetually searches for a balance between engagement with larger structural issues that perpetuate patriarchy and with more specific experiential conditions which lead to individual men feeling alienated and masculinity as a whole being characterized as in crisis.

The way identity politics have played out is important in this context because of the impact they have had on masculinity. Feminism has provided the theoretical framework from which to think more profoundly about the role of masculinity within patriarchy *and*, in some sense, led to the creation of the men’s movement, a movement premised on masculinity being in crisis. That feminism has provoked these two hostile (to one another) reactions illustrates how relational identities are and how neither feminine nor masculine identities exist in a vacuum: “feminisms exist precisely because masculine power regimes exist; feminisms are a point of dynamic resistance, providing their own distinct knowledges, truths, practices, not merely as a point of opposition but by offering ontological possibilities through pronouncing and identifying distinct epistemologies.”⁹ Thus, feminism, while providing the analytical and theoretical foundation for masculinity studies, has undermined male supremacy and contributed to the “crisis” in masculinity.

The men’s movement began in the late 1980s to revision and reclaim manhood. At the same time, the burden of the normative constraints of masculinity on men began to intensify. What is distinctive about the “crisis” from the perspective of the men’s movement is that it resulted from a tension between men who were still expected to be “at the helm” in a culture that now expected them to be reflective about their masculinity.¹⁰ (In contrast, to better contextually comprehend the presence of the crisis, legal scholar Nancy Dowd has highlighted how the feeling of

⁸ STEPHEN M. WHITEHEAD, *MEN AND MASCULINITIES: KEY THEMES AND NEW DIRECTIONS* 48 (2002) (describing Susan Faludi’s argument “that modern man has been ‘betrayed’ by a combination of factors, notably a sexist consumer culture that commodifies and objectifies the male; the loss of economic authority; the weakening and reshaping of men’s relationship to the world of work; the public exposure of dominant notions of masculinity to ridicule and censure; and the failure of men, as a gender group, to ‘rebel’ against their emasculation by ‘the culture.’”).

⁹ *Id.* at 107.

¹⁰ *Id.* at 48.

crisis is itself a characteristic of masculinity and has often been used as a rationale for reinterpreting masculinity in a way that reconstitutes patriarchy.)¹¹

In response to the perceived crisis, the men's movement sought to identify and reinstitute a singular, unifying essence of masculinity. In contrast, masculinity studies stresses that "masculinity should be seen as always ambivalent, always complicated, always dependent on the exigencies of personal and institutional power."¹² The building blocks of masculinity studies derive from the same ambivalent crises of identities and paradoxes that propelled the rise of the men's movement. While the men's movement addresses these crises by resorting to an essentialized understanding of what it means to be a man in today's world, masculinity studies recognizes the inherent struggles and dichotomies which plague any attempt to bound masculinity.

In the context of the men's movement, masculine identity is very much about loss and lacking.¹³ Thus, the men's movement has emphasized the theme of "retrieval" as being critical, psychologically and tangibly, if masculinity is to become whole again. Robert Bly, one of the progenitors of the men's movement, argued that such retrieval can be accomplished once men get in touch with their "true selves" by bonding with other men. Bly suggested that a significant part of adult male pain originates from the lack of a relationship between fathers and sons and that feminism was to blame for the shift in power that left masculinity in crisis. The pride and stoicism prevalent in earlier cultural tropes of ideal manhood and found in popular representations like John Wayne or Clint Eastwood have given way to a defensive masculinity that views itself as constantly under threat and wallows in self-pity. Men, the traditional genderless masters of the public/political arena, have been branded in certain circles as politically problematic, gendered subjects.¹⁴

¹¹ See Dowd, *supra* note 7, at 208. Further, the men's movement can be distinguished from other rights' movements due to the privilege held by the group seeking recognition. While other rights' movements could point to an oppressor against whom to struggle, not only did white men lack an oppressor, but they themselves were already portrayed as the oppressor of others. This characterization—of men struggling against the requirement that they relinquish a degree of power while continuing to bear the full burden of prior expectations—utilizes a one-dimensional understanding of power that falls into the intuitive trap of thinking of power solely in a judicial sense. The suggestion is that male identity is "in crisis" because some amount of power has been taken away from men; a suggestion that assumes that power is a commodity that transfers between groups and individuals. The unidirectional understanding perpetuates an oppressor-victim dualism fundamental to liberalism, and fails to account for the productive, identity-forming and knowledge-creating component of power. Furthermore, the notion that something is "off" about the way in which gender relations are structured now—as opposed to at some earlier, utopic, more natural time; a pre-feminism time—both suggests that a natural gender order does exist and takes a normative position on what that gender order should look like.

¹² Maurice Berger et al., *Introduction to CONSTRUCTING MASCULINITIES 3* (Berger, Wallis, & Watson eds., 1995) (noting the shared conclusion of the collected essays).

¹³ FIDELMA ASHE, *THE NEW POLITICS OF MASCULINITY: MEN, POWER AND RESISTANCE 1* (2007) ("the key terms that have emerged in popular discourse about the plight of the modern man have been 'crisis', 'loss' and 'change'").

¹⁴ *Id.*

Certain cultural feminist critiques view normative masculinity as a constitutive element of the inequity, violence, and degradation that characterize white, western, capitalist culture. By critiquing the normative male, feminists have contributed to the disavowal of traditional attributes of manhood such as “self-direction and discipline” and “toughness and autonomy,” and have suggested they be replaced by “soft” behavioral traits such as emotional sensitivity and vulnerability. Traits traditionally attributed to women and children are now being ascribed to men. In contrast, the men’s movement has sought to find an ahistorical, transcultural, and almost mythological definition of full-fledged masculinity. This goal of the men’s movement, believers argue, has been supplanted, eroded, covered over, and destroyed by the tandem of feminism and “the mode of industrial domination.”¹⁵ According to men’s movement adherents, industrial society and feminism work complicitly to tame the archetypal male; they are not separate and distinct realms, but by-products of one another—equally guilty perpetrators of the castration of the modern man.¹⁶

Notwithstanding the ostensibly progressive agenda of masculinity studies—particularly in contrast to the men’s movement—it undoubtedly has had multiple effects. Masculinity studies has tended to favor a critique of masculinity itself, as opposed to a critique of gender categories. And it has tended to favor a relatively narrow critique of patriarchy, without challenging the overarching political and social structures that facilitate patriarchy. While masculinity studies has tended to view itself as emancipatory, in many ways, it simply reifies established ideas about sexual difference. Thus, masculinity studies is often in danger of falling into essentialist rabbit holes and privileging experience over theoretical inquiry (and over a comprehensive critique of the relationship between masculinity and power). This relationship—between masculinity and power—has always been at the forefront of how the law engages with patriarchy.

Perhaps most important when thinking about the direction of masculinity studies, particularly in the context of its relationship to the law and with both feminist theory and the men’s movement, is the role that power has in masculinity studies. The issue of power has been front and center in both the genesis of the men’s movement (arguably the “crisis” in masculinity is most concisely described as the forced relinquishing of power by men and the resulting psycho-social impact) and in feminist theory. Thus, it is no surprise that power (and the power of law) is also a critical issue for masculinity studies. Significantly, though, many of the insights regarding power that were foregrounded in feminist theory either

¹⁵ Bly, *supra* note 5, at 98.

¹⁶ Yet, while this occurs there is a sensitive father emerging, struggling and advocating for the right to be the primary caregiver for his children, and “burdened” by having to be his household’s primary breadwinner. The father’s rights’ movement is central to the men’s movement, and intricately tied to the liberal conception of the self at the heart of this critique, in the sense that traditional notions of fatherhood have been tied to an individualized notion of autonomy, which, in turn, was associated with a set of beliefs about the nature of masculinity. The evolving nature of the role of the father is the archetypal representation of the crisis and tension in masculinity. When thinking about fathers’ rights or the men’s movements, or the large swaths of alienated white, rural, working-class men in the 2016 election, the so-called solution cannot be either the outright dismissal of the position nor can it be the full embrace of their experience. It is equally unfeasible to either embrace the experience as true or to dismiss it as untrue.

have not received the attention they should or have been too easily dismissed because of what are thought to be more pressing concerns (e.g., dealing with explicit sexism, discrimination, and misogyny). Ultimately, I am suggesting that a more robust understanding of masculinity requires a return to an engagement with issues surrounding power, notwithstanding such concerns. Absent real engagement with issues of power, today's problems will be exacerbated rather than solved. Masculinity studies seeks to change the misogynistic and sexist behavior of men by highlighting the restrictive and unhealthy components of masculinity. But while it is tempting to simply argue against the naturalness of how masculinity is presented in today's popular social and cultural world, real growth will only occur if a more robust engagement with issues of power is undertaken.

II. THE POWER OF LAW

Masculinity studies places great emphasis on issues of power. Indeed, as MacKinnon observed, if masculinity is anything at all it is a system of power.¹⁷ Much work has been done examining the functioning of power, but power has been considered less as a discursive force and more as the foundation of patriarchy. Power, from the perspective of the law, is often considered as a force to regulate or redistribute, but the law ought to spend more time self-consciously reflecting on the impact of its own power. The law serves as a technology of sex¹⁸ that reifies masculinity and sexual difference by constructing masculinity as a biological given rather than a discursive category that is part of a neoliberal political agenda. Nevertheless, the mainstream understanding of the relationship between the law and masculinity focuses on how the law is needed to control and rein in masculinity. The notion that the law is actually privileging and perpetuating a particular form of masculinity is not taken seriously in mainstream legal analysis.¹⁹ Masculinity studies, on the other hand, opens the door to a view of the law as a contributor to, if not outright creator of, existing power relations and not simply a regulator of pre-existing ones.

¹⁷ Male dominance “is perhaps the most pervasive and tenacious system of power in history.” Catharine A. Mackinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8(4) SIGNS 638 (1983).

¹⁸ By “technology of sex”—borrowing here from Teresa de Lauretis, *The Technology of Gender*, in TECHNOLOGIES OF GENDER (1987)—I mean the way in which the law acts as a creator of norms, standards, rules, techniques, and discourses that govern—in a specific way that emphasizes a particular relationship between power, truth, and knowledge—how we think about sex.

¹⁹ It is, though, considered very seriously in masculinities studies. An example of where this dynamic plays out is in criminal law where a “heat of passion” defense reduces a charge of murder to manslaughter, and “heat of passion” involves “men killing women who have bruised their masculine esteem by denigrating their sexual prowess or becoming involved with other partners.” As McGinley and Cooper have pointed out “it seems that defending one’s masculinity against women is reasonable enough to cut years off your sentence. Here, then is an example of law mirroring, if not reinforcing or even creating, a culture in which we assume ‘boys will be boys.’” Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 338 (2013).

A. LAW AS A TECHNOLOGY OF SEX

Masculinity studies allows for a view of the law as a contributor to what masculinity itself is, rather than just a regulator of a pre-existent masculinity. I use the very passive language “allows for” (as opposed to saying that masculinity studies, in fact, is *doing* something) because while the discursive space is available to masculinity studies due to its theoretical foundations, the analysis of power (and specifically the way the power of the law is exercised) it employs is often lacking. While feminist theory was interested in thinking about redistributing power and, significantly, about *how* power operated, masculinity studies often acts as if the “how” question already has been answered, and the only remaining issue is redistribution. Like mainstream civil rights advocates, masculinity studies tends to be preoccupied with combating patriarchy through legalistic means, as opposed to thinking about power as relational, productive, and, crucially, not solely held by certain individuals like a commodity. Thus, while the ideas about power discussed above, born in feminist legal theory, have found application in masculinity studies, each has been embraced to varying degrees.

According to a conventional understanding of how power manifests, law is prohibitive and repressive; it exerts its power primarily through domination. Particularly in U.S. Constitutional law, where the charter is conceived of as containing negative liberty rights that protect citizens from the government stepping into their private lives, as opposed to a source of positive liberty rights, the law rarely conceives of its power as productive. If, in contrast, power actually manifests in the creation of norms and the productive deployment of disciplinary techniques, then the juridical power of law is easily dismissed as a residual accessory to the predominant powers of modernity. Equating the power of law exclusively with repression fails to account for all the ways that the law’s power functions productively to create norms and form cultures—which are the predominant powers of modernity—and “excludes a richer consideration of the law’s constitutive capacities.”²⁰ Due to the combination of repressive and productive powers, the law occupies a unique position with respect to the reproduction of gender relations in our social environment.

To the extent that the law attempts to influence a society, it identifies qualities that can be scaled up from a model individual,²¹ and the society created reflects the qualities that the law has validated and perpetuated in the model individual. Of note, the so-called model individual evidently exists within a patriarchy and, thus, any scaling up from such individual perpetuates a phallogentric culture. Thus, the law creates a structure for society based on an already-adopted theoretical position on the nature of sexual difference and the characteristics of an individual subject that is both formed and dominated by the law. In this way, the law can never be separated from its own understanding of sexual difference, which is forever intertwined with the model of the world the law seeks to create. Therefore, the law is a “technology of sex” in that it is a creator of techniques, norms, standards, rules, and discourses that dominate and govern the way society understands sex and gender.

²⁰ BEN GOLDBER & PETER FITZPATRICK, *FOUCAULT’S LAW* 17 (2009).

²¹ Saul Levmore & Martha C. Nussbaum, *Introduction to AMERICAN GUY: MASCULINITY IN LAW AND LITERATURE* 1 (Saul Levmore & Martha C. Nussbaum eds., 2014).

In the words of James Boyd White, the law is:

not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture. It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified or preserved, by the individual mind. The law makes a world.²²

The law is perpetually invested in re-articulating its own world view, resulting in the “creeping hegemony of the legal order.”²³ This creeping hegemony matters because it affects the way masculinity is thought about. Indeed, once coopted by the legal order, the study of masculinity becomes another tool by which the law can propagate—implicitly and explicitly, intentionally and unconsciously—a particular form of masculinity and, in the process, further entrench sexual difference. The power of the law, therefore, is continually reinforcing itself, re-articulating its own worldview, and weighing on society until the perspective it is advocating has been internalized. As certain scholars have highlighted, the law operates in its own realm, yet it also plays a role in power struggles over cultural dominance.²⁴

If, on the other hand, the power of the law was actually recognized to be productive (*and* if sex was considered fluid and dynamic), then it would be accepted that the law had an impact on sexual difference, and the legal order would be accountable in some sense. But, since sexual difference is predominantly thought about as binaried and natural, the legal order is rarely considered to have an impact on sexual difference and is not held responsible—how could the law (something so conceptual) actually affect something like sexual difference (something so corporeal)? The law’s reasoning, though, is teleological: in order to not be held responsible for the way masculinity manifests in the world, the law needs to believe in both a particular conception of the power of law *and* a particular idea of sexual difference. The law claims to not have a productive power by pointing to the naturalness of sexual difference which is, from the law’s perspective, clearly beyond the influence of the law. The reluctance to take accountability compels the law to maintain essentialist understandings of masculinity which reinforce its conception of sexual difference, and the cycle begins again. Therefore, the law serves as a technology of sex that perpetuates a hegemonic masculinity, yet it fails to take any culpability when that masculinity manifests in undesirable but inevitable ways. Rather than being presented as fractured and disjointed social constructs, sexual categories are presented as resilient and stable, harking back to dated notions of a stable subject and suggesting that, through much trial and error, masculinity will one day find its essence.

²² JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xiii (abridged version 1985).

²³ CAROL SMART, *FEMINISM AND THE POWER OF LAW* 5 (1989).

²⁴ LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 206 (2006).

B. RICCI V. DEStEFANO: ABOUT MASCULINITY, TOO

The 2009 Supreme Court decision in *Ricci v. DeStefano*,²⁵ ruling on a reverse discrimination (discrimination against traditionally advantaged groups) claim against the City of New Haven, and the subsequent Senate confirmation hearing for then-Judge Sotomayor, provides an example of how the law utilizes its power to create norms with a scope far greater than the explicit subject matter of any one particular case. In *Ricci*, white firefighters scored higher than their Black and Latino counterparts on written tests for promotion. Given the disparities in exam scores, the City's civil service board declined to certify the results. The suit alleged that, by discarding the test results, the City discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

The Court concluded that race-based action like that of the City is impermissible under Title VII unless the employer can demonstrate that, had it not taken the action, it would have been liable under the disparate-impact statute. According to the Court, the City's race-based rejection of the test results could not satisfy the strong-basis-in-evidence standard. The Court found that, because the tests were job related, the City lacked sufficient evidence that it would have been liable for disparate impact had it certified the test results. While the Court's opinion explicitly focuses on race, the decision and the spectacle that ensued when two of the plaintiffs testified at the Sotomayor confirmation hearing,²⁶ which adopted the image of the "firefighter hero"²⁷ as a white male, feature elements that would benefit from being viewed from a perspective informed by gender.

Applying a masculinity studies lens to *Ricci* reveals the extent to which particular conceptions of masculinity are ingrained in our culture in three main ways. (Counterintuitively, the insidiousness of hegemonic masculinity is often most apparent when gender issues are *not* being addressed directly.) First, *Ricci* highlights the complexities and biases that permeate assessment mechanisms and, more specifically, how internalized, gendered ideas inform the selection of relevant performance criteria. Second, *Ricci* perpetuates a notion of hegemonic masculinity that ultimately results in feelings of powerlessness and inadequacy among young men, who are compelled to prove their manhood in harmful ways. Third, *Ricci* exemplifies how the law decides to see a case from one perspective (the aggrieved white and sometimes Latino firefighter) that both privileges and endorses a specific notion of hegemonic masculinity.

²⁵ *Ricci v. DeStefano*, 557 U.S. 557 (2009).

²⁶ Judge Sotomayor was a member of the Second Circuit panel whose affirmance of a district court's decision had been appealed. See *Ricci v. DeStefano*, 264 Fed. Appx. 106 (2d Cir. 2008).

²⁷ The decision has been described as an "ahistorical, acontextual victory to the plaintiff-petitioners [who] engaged in the construction of the firefighter hero as white (and on one occasion, Hispanic) and male." Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J. L. & GENDER 581, 584 (2010).

1. Defining Leadership: Assessment Mechanisms Bursting with Male Bias

The *Ricci* decision provides a classic example of the law employing its power in a norm-creating, non-judicial manner. The criteria believed to be determinative of character and leadership, which have been internalized by the law and which are endorsed by the Court, exhibit a substantial male bias that renders leadership and “character” more accessible to those who perform masculinity in a conventional manner. At the heart of the *Ricci* decision and the subsequent questioning of two of the plaintiffs by the Senate Judiciary Committee was the accuracy and fairness of the mechanism by which the City assessed fitness for job promotion.²⁸

The Committee Republicans (seven white men) invited plaintiffs Frank Ricci and Ben Vargas to testify. Their questioning touched upon the validity of the firefighter promotion exams. Ricci and Vargas repeatedly noted that the tests were “unquestionably job-related” and stressed their fairness.²⁹ When asked why the tests were important Ricci answered “over 100 firefighters die in the line of duty each year, an additional 80,000 are injured. You need to have a command of the knowledge in order to make command decisions. . . . Experience is the best teacher, but only a fool learns in that school alone.”³⁰

The opinion, penned by Justice Kennedy, includes an excerpt of a statement by Ricci: “I don’t even know if I made it [b]ut the people who passed should be promoted. When your life’s on the line, second best may not be good enough.”³¹ The second sentence aligns with the Court’s focus on the job-relatedness of the tests, but Kennedy’s choice to include the first sentence (“I don’t know if I made it. . . .”) is curious.³² Here, he highlights Ricci’s integrity, picking an example of the firefighter’s magnanimity—he brought this suit not out of self-interest, but because he cares about the profession! The quote does not speak to the value of the

²⁸ The Court ruled on this issue stating: “There is no genuine dispute that the examinations were job related and consistent with business necessity. The City’s assertions to the contrary are “blatantly contradicted by the record.” *DeStefano*, 577 U.S. at 587-88. The Court also cited evidence that showed the opposite—expert testimony that the written exams were not the best way to determine leadership and command presence—the skills necessary to be a good fire officer. *Id.* at 571-72.

²⁹ The respondents in *Ricci* did not argue that the test was not “job-related.” This was a distortion of the issue by the plaintiffs and the questioning Senators. As explained in Justice Ginsburg’s dissent, the relevant inquiry is whether there was a more appropriate way to evaluate the relevant skills in applicants and identify the best candidates, not whether the test was job-related. 577 U.S. at 635 (citing *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 798, n. 7 (4th Cir. 1971) (“It should go without saying that a practice is hardly ‘necessary’ if an alternative practice better effectuates its intended purpose or is equally effective but less discriminatory.”); *Boston Chapter, NAACP v. Beecher*, 504 F. 2d 1017, 1021-1022 (1st Cir. 1974) (“A test fashioned from materials pertaining to the job . . . superficially may seem job-related. But what is at issue is whether it demonstrably selects people who will perform better the required on-the-job behaviors.”)). Focusing on job-relatedness eliminates the “business necessity” component of the standard. *Id.* at 636 (citing *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F. 3d 478, 489 (3d Cir. 1999)).

³⁰ Transcript of Judge Sonia Sotomayor Confirmation Hearings (July 17, 2009), nytimes.com/2009/07/16/us/politics/16confirm-text.html.

³¹ 577 U.S. at 568.

³² *Id.*

assessment mechanism, but rather to Ricci's character—something that, due to its inclusion, we can assume Kennedy found relevant.

The worth of the assessment mechanism can be considered in numerous ways: on the one hand, whether the assessment mechanism in question was discriminatory;³³ on the other, how as a society we assess character and leadership. The Court's conflation of character and competence is exacerbated by the flimsiness of our ways to measure character—as McGinley points out: "No one questioned whether the test results would necessarily locate the persons who would be best for the jobs. All equated test results with merit and with hard work."³⁴ Indeed, Kennedy noted expert testimony regarding the inadequacy of written tests to assess people,³⁵ but punted, explaining that the case was concerned only with whether the City could certify the test results.³⁶

Almost as if taking a cue from Kennedy's highlighting of character, most of the plaintiff firefighters' time during the confirmation hearing was spent describing the character needed to fight fires. They spoke about fairness and that they had "played by the rules." They spoke about hard work and sacrifices. They spoke about the danger and complexity of their jobs. They spoke about their roles as the heads of their families, as breadwinners, fathers. Senator Lindsey Graham told Ricci that he would "want [him] to come to my house if it was on fire." Ricci and Vargas were repeatedly thanked for their service, held up as exemplar members of their community, and commended for their courage.

That emphasis on the ways to determine character was on display again when then-Judge Brett Kavanaugh testified before the Senate Judiciary Committee at his confirmation hearing in October 2018. Like the firefighters, much of Kavanaugh's testimony,³⁷ focused on his character; Ricci, Vargas, and Kavanaugh all testified

³³ The Court addressed the question of whether the promotion test was discriminatory: "Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair." *Id.* at 592-93. As Justice Ginsburg explained in her dissent, a finding of "good intent or the absence of discriminatory intent" is not relevant to a Title VII analysis; what must be examined is the test's "business necessity." *Id.* at 621-22. The disparate treatment of applicants was not an issue in *Ricci*. No argument was made that there was discriminatory intent or disparate impact.

³⁴ McGinley, *supra* note 27, at 618.

³⁵ "Janet Helms . . . declined to review the examinations and told the CSB that, as a society, 'we need to develop a new way of assessing people.' That task was beyond the reach of the CSB, which was concerned with the adequacy of the test results before it." 577 U.S. at 592.

³⁶ Kennedy frames the case as one of determining the legality of the race-based action performed by the city (whether the city's actions in discarding the test results violated Title VII), but this is straightforward legal abstraction. The decision is cloaked in the difference between disparate treatment and disparate impact, but the case is fundamentally about assessing people and the validity of the assessment mechanisms in question. Helms' determination that "we need new ways to assess people in society" is beyond the scope of the case because of how the Court chooses to frame the case. The case, however, communicates quite clearly that the way we currently assess people is perfectly acceptable.

³⁷ Transcript of Senate Judiciary Committee Hearing: Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Sept. 27, 2018), <https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/>.

about the characteristics that made them good men and good leaders. According to McGinley and Boyd “The explicit message [from the Senate hearings] was that the nearly-all white plaintiffs were “real men” and “real firefighters” who worked hard and cared for their families.”³⁸ In Justice Kavanaugh’s testimony, he repeatedly returned to his athletic prowess in high school as a foundation of his leadership skills and character. As some commentators have pointed out (somewhat flippantly): a teenager who makes it to practice for four years will enjoy the presumption of integrity for the rest of his life.³⁹

Like his mentor Kennedy, Kavanaugh recognizes the importance of integrity. The issue here is not whether integrity matters, but rather how we measure it and what we think it consists of. Sports have at least since the industrial revolution been used in schools to build integrity and masculinize men,⁴⁰ but the Kavanaugh episode takes this tradition a step further and mixes up character and competition.

While Ricci and Vargas did not explicitly point to sports for their character bona fides, their refrains of hard work, sacrifice, and “playing by the rules”—a sports metaphor—echo precisely Kavanaugh’s list of workout sessions, practices, and captaining his athletic teams. In addition, their testimony displayed their conformance with gender norms (as did Kavanaugh’s),⁴¹ and all three invoke patently masculine definitions of character and leadership. Kavanaugh’s testimony exploited the American patriarchal fallacy that success in high school sports is tantamount to having integrity, while the plaintiff firefighters’ testimony “lionized a particularly traditional form of heterosexual masculinity”⁴² which places “men

³⁸ McGinley, *supra* note 27, at 584.

³⁹ Justice Kavanaugh mentioned sports nearly fifty times in his testimony. See Lauren Collins, *Brett Kavanaugh and the Innocence of White Jocks*, THE NEW YORKER, Sept. 28, 2018, www.newyorker.com/news/our-columnists/brett-kavanaugh-and-the-innocence-of-white-jocks-christine-blasey-ford.

⁴⁰ See Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, in MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH 207 (Frank Rudy Cooper & Ann C. McGinley eds., 2011) (“In the United States, sports were introduced into schools in response to fears that boys were being feminized by the shift from an agrarian to an industrial labor force, leaving boys in the day-to-day care of their mothers.”).

⁴¹ From Ricci’s testimony: “I studied harder than I ever had before—reading, making flash cards, highlighting, reading again, all my listening to prepared tapes. I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it.” Sotomayor Confirmation Hearing, *supra* note 30.

Vargas’ testimony: “. . . so I spent three months in daily study preparing for an exam that was unquestionably job-related. My wife, a special-education teacher, took time off from work to see me and our children through this process. I knew we would see little of my sons during these months when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me when I would get tired and went to stop—wanted to stop. I would look at the pictures, realize that their own futures depended on mine, and I would keep going. At one point, I packed up and went to a hotel for days to avoid any distractions, and those pictures came with me. I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it.” *Id.*

And Kavanaugh: “I was at the top of my class academically, busted my butt in school. Captain of the varsity basketball team. Got in Yale College.” Kavanaugh Confirmation Hearing, *supra* note 37.

⁴² See also McGinley, *supra* note 27, at 618 (“the promotion process, the lawsuit, the Supreme Court’s response, and the Senate Judiciary Committee’s hearing, all of which favored the status quo of men living a traditional “manly” lifestyle and doing a traditional “manly” job”).

at the head of their families, in the traditional role as breadwinner and protector, doings men work.”⁴³ Both Kavanaugh and the firefighters articulated definitions of character that are patently masculine and, thus, unavailable to those who do not fit into traditional gender norms, nor, really to women at all.⁴⁴

In many ways the similarities between the testimonies are not surprising; with respect to the construction of masculine identity, the firehouse and the frat house at Yale where the respective masculinities were formed are mirror images. The performances of masculinity in both settings have been known to include verbal harassment and physical hazing purportedly designed to create a strong sense of “brotherhood” that is prioritized above all else. The firehouse and college fraternity both value hard work and dedication, and view outsiders, including and especially women, as lacking the dedication, drive, and ability needed to succeed.

Such articulations of straight, white, male “character” in America today prove dangerous because they reify a conception of character that excludes and alienates non-conforming individuals. Therefore, “character,” in practice, ends up privileging a particular type of person (*e.g.*, white, straight, men) and, crucially, does so under the neo-liberal pretenses of objectivity and neutrality. Again, as expert witness Janet Helms testified in *Ricci* (and as Justice Kennedy quoted): “regardless of what kind of written test we give in this country . . . we can just about predict how many people will pass who are members of under-represented groups”⁴⁵—*i.e.*, the white supremacist patriarchy that is America does not provide for anything else. Yet, the marginalized are not told that structural barriers are in place or that subjective decisions are being made against them, but rather that they do not measure up on some objective scale.

Once again, the insidious invisibility of masculinity suffocates those who fail to conform. Beneath the surface of the legal argumentation in *Ricci* lie internalized determinations about integrity and character that supersede the persuasiveness of any juridical argument a disagreeing Justice could make. Part of the project of masculinity studies has been to expose and objectify masculinity, to no longer allow it to remain hidden behind the cloak of objectivity and neutrality. While it remains hidden, masculinity takes on deific qualities, ubiquitous in the quotidian. This underscores the imperative of masculinity studies exposing, objectifying, and rendering visible the practices of masculinity.

⁴³ Nancy E. Dowd et al, *Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 45 (Cooper & McGinley eds., 2012); McGinley, *supra* note 27, at 619 (“Instead of engaging in subversive masculine practices, such as violent forms of hypermasculinity, in order to prove their manhood, Ricci and Vargas adhered to the more acceptable traditional masculine norms which describe men’s identities as breadwinners and heads of their families. They got married, had children, and worked hard. We find them sympathetic because they followed the script. But this script is not equally available to women and some men.”).

⁴⁴ Collins, *supra* note 36 (“Try to imagine a Supreme Court nominee returning fifty times to his or her interest in pottery—you can’t. . . . it’s a pretty good deal [conflating competition/sports and character], one that is obviously more available to men than to women, even those who count sports among their passions.”).

⁴⁵ 557 U.S. at 571-72.

2. *A Vicious Cycle: Notions of Hegemonic Masculinity
Leading to Perceived Powerlessness That then Result
in Harmful Exhibitions of Masculinity.*

A masculinity studies analysis of the *Ricci* plaintiffs' presentations and the picture of Justice Kavanaugh's teenage years demonstrates how the identity of men is formed equally by male/male relationships as it is by male/female relationships. Sex-based harassment frequently results from a desire to prove the perpetrators' masculinity, rather than to pursue sexual pleasure/gratification, and underlines how society and courts ignore that harassing behaviors and the motives behind them are nearly identical in schools and workplaces.⁴⁶

Prior to the Kavanaugh performance, the last time privileged boys' high school behavior received such public and legal scrutiny was the 2015 case of Owen Labrie. A masculinity studies analysis can help explain how we got from Labrie to Kavanaugh. Labrie, at the time an eighteen-year-old senior at the St. Paul's School, was accused of sexually assaulting a fifteen-year-old as part of the school's "senior salute," a ritual in which male students propositioned female classmates for as much sexual activity as permitted. The *New York Times* said the case was "at its core, . . . about an intimate encounter . . . between a 15-year-old girl and an 18-year-old acquaintance, and whether she consented as it escalated."⁴⁷ Ultimately, Labrie was found not guilty of felony sexual assault charges, but was convicted of having sex with a person who was below the age of consent. The legal issues in the case boiled down to a question of consent. Notwithstanding this framing, the case was very much about masculinity, specifically, about how boys "become men" and our culture's role in that process. In the eyes of the law, this case dealt with the legal definition of rape and of consent, and the factual question of whether consent existed.

In feminist theory, male identity is often viewed as coming from a privileged position of power and defined in contrast to females. However, according to masculinity theory, male identity is often formed by feelings of powerlessness and, in contrast, not to females, but to other men. Patriarchy is not based straightforwardly on misogyny; there is a mimetic component to patriarchal violence, like that inflicted by Owen Labrie, that renders the responsibility collective. Unlike feminist theory, that tends to not think of patriarchy outside of a male/female paradigm, masculinity studies recognizes the impact that competition among men has on patriarchy. The desire for hegemonic masculinity does not come from the deep recesses of male souls, as the men's movement would have us believe, but whether we follow Foucaultian theory of desire (desire dependent on power) or a Girardian theory (we imitate the desires of others), the responsibility for the violence of patriarchy is rendered collective.

Male identity is as much about relations with other men as it is about relations with women. Males are perpetually competing with one another over who can come closest to achieving the ideal of hegemonic masculinity. Both the plaintiff

⁴⁶ See, Ann C. McGinley *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99 (2018).

⁴⁷ Jess Bidgood, *Owen Labrie of St. Paul's School Is Found Not Guilty of Main Rape Charge*, N.Y. TIMES, Aug. 28, 2015, <http://www.nytimes.com/2015/08/29/us/st-pauls-school-rape-trial-owen-labrie.html>.

firefighters and Justice Kavanaugh delivered testimony promoting this ideal of hegemonic masculinity. Nevertheless, it is the rare man that meets the hegemonic masculinity standard.⁴⁸ Thus, while men as a group are powerful, individual men do not always or necessarily feel powerful. While the men's movement posits that this powerlessness is a backlash to gains made by women and minorities, masculinity studies suggests that the feeling of powerlessness derives from competition among men to conform to the unattainable hegemonic masculine ideal.⁴⁹ Whether stemming from a backlash or a failure to conform to an unattainable standard, the feeling of powerlessness leads to men's rejection of a core claim of feminism—that men are the most powerful social force. It is for this reason that the equality riddle that feminism is perpetually working to solve must almost necessarily include an analysis of relationships solely between males.⁵⁰

When high school males exhibit toxic masculinity that is sometimes written off as “boys being boys,” what they are doing is competing with one another over who best achieves the ideal of hegemonic masculinity that has been communicated to them.⁵¹ Masculinity scholars have explained how “boys’ masculinities include a process of shutting down emotion and taking risks in order to prove manhood.”⁵² In *Ricci* example and in the Kavanaugh testimony, the ideal of hegemonic masculinity that boys strive for is validated and fêted by the law and the Senate Judiciary Committee. Why is it surprising then, that high school boys feel intense pressure to “prove their manhood”? When viewed through a masculinity studies lens, we can understand that Labrie’s participation in the “senior salute” had less to do with his relationship with or opinions about women and girls and more to do with his need to compete with his male peers to meet a standard of masculinity that the law acclaimed in *Ricci* and Senators glorified in the Kavanaugh hearing. (Was Kavanaugh’s “Devil’s Triangle” any different from Labrie’s senior salute?)

When viewed through a masculinity studies lens, Labrie’s participation in the senior salute can be understood not as an explicit brandishing of male power, but as a reaction to a feeling of powerlessness stemming from the perpetual cultural, legal, and political veneration that hegemonic masculinity receives in our society.⁵³

⁴⁸ Dowd, *supra* note 7, at 231.

⁴⁹ Dowd, *supra* note 40, at 44.

⁵⁰ Feminist theory has been more concerned with women and has tended to view the construction of male identity as informed predominantly by males’ relationship with females/power over females and the patriarchal dynamic of our society. However, masculinity studies has illustrated how male identity and the existence of patriarchy is equally informed by men’s relationship with other men. What this highlights is that the gendering process is relational: “understandings of gender solely through feminist theory or masculinities studies are unidimensional, while gendering is a multidimensional, dynamic, and relational process.” *Id.* at 37.

⁵¹ See Dowd, *supra* note 7, at 233 (“there is also an underlying dynamic in masculinity that pits every man against every man. In addition to being challenged to meet a standard of masculinity that must continuously be performed, masculinity also is a process of comparison, of measuring, that puts each man against all others.”).

⁵² Dowd, *supra* note 40, at 31.

⁵³ The feeling of powerlessness that many men feel is real even if it is not always entirely accurate: “we have long recognized that irrationality sustains much of the unconscious as well as conscious thinking about inequalities of gender, as well as those of race, class, and sexual orientation. What may be most important is to understand that this conviction is real and stands in the way of changing consciousness of men about men,

Society continuing to place a particular form of hegemonic masculinity on a pedestal encourages men to engage in a constant struggle with other men to prove their masculinity and inevitably results in instances of masculinity gone astray—like Labrie and Kavanaugh.

3. *Perspective Is Everything: Endorsing a Particular Kind of Masculinity by Pretending It Doesn't Exist*

While the law holds itself out a neutral arbiter, the Kavanaugh and *Ricci* examples reveal the ever-present straight, white, male lens through which the law views disputes. The image of the blindfolded, robed woman holding a set of scales might represent, instead, the law's failure to see that which is not male. By continually affirming the validity of a particular male perspective, the non-judicial power of the law propagates a particular form of masculinity. The law repeatedly communicates the reasonableness and fairness of this perspective, without actually addressing it, until ideas like "men should be breadwinners" and "character and competence are interchangeable" become internalized.

Arguably the most important role played by judicial opinions, particularly appellate opinions, is to educate prospective litigants, lawyers, and lower court judges.⁵⁴ In *Ricci*, for example, the law is signaling to employers what they can and cannot do in order to render their hiring practices non-discriminatory and, importantly, signaling to employees, potential employees, and the larger community whether or not certain hiring practices are acceptable. This educational component of judicial decisions both provides concrete direction that applies to very specific sets of facts and creates structures and systems that suggest legally correct ways of approaching and seeing the world. The educational role of the law consists of disseminating a specific perspective to receptive audiences. There is nothing "natural" or "correct" about seeing the world in the way presented by the law; it is just one way among many to make sense of the world.

The law, with respect to its educational role, is more focused on the reasons why the judgement is made than on the decision itself.⁵⁵ The reasons provide guidance and perspective. The reasons are what communicates to the audience the way they should view the world and the principles and values which should form their sensibilities. What the law is ultimately doing here is creating norms and standards that guide its citizenry; it is exercising its non-judicial power. Indeed, this educational role is a major reason that thinking about the power of the law as being primarily judicial misses its biggest impact.

Two common elements in the *Ricci* and Kavanaugh examples help us understand the law's power to act in this non-judicial capacity. Traditionally, hegemonic masculinity contained an element of stoicism; however, that stoicism was not present in the testimony of Ricci, Vargas, or Kavanaugh. All three presented themselves as victims. This willingness to articulate one's victimhood and explain

and of women about men so that movement toward equality is possible." Dowd, *supra* note 7, at 233.

⁵⁴ See generally Mitu Gulati et al., *The New Old Legal Realism*, 105 Nw. U. L. REV. 689. (2011).

⁵⁵ Consider the importance of *Roe v Wade* being decided on privacy grounds rather than equal protection grounds.

to crowds of people how wronged one has been is a relatively new component of masculinity. The impetus for this willingness to play the victim is readily traced to the men's movement and its belief in and highlighting of the disempowering effects of the civil rights movement on straight white men.⁵⁶

The victimized white male became the prevailing perspective in each confirmation hearing and in Justice Kennedy's decision.⁵⁷ In both hearings, the other side was heard from, but the alternative perspective was discarded.⁵⁸ The three male witnesses were repeatedly congratulated for their hard work, courage, and strength to stand up to the unfairness to which they were exposed. During Ricci's confirmation hearing testimony, Senator Lindsey Graham emphasized how Ricci had been wronged: "I appreciate how difficult this must have been for you, to bust your ass and to study so hard and to have it all stripped at the end."⁵⁹ Interestingly, it was Senator Graham whose diatribe at the Kavanaugh hearing switched the tenor of the remainder of Committee Republicans' questioning and even the delivery of Kavanaugh's testimony itself from calm and measured to an outrightly hostile and aggressive presentation about how Kavanaugh had been wronged. When given his five minutes, Senator Graham's face reddened and pointing his finger he boomed: "This is the most unethical sham since I've been in politics . . . I cannot imagine what you and your family have gone through . . . if you are looking for a fair process, you came to the wrong town at the wrong time my friend."⁶⁰ Vargas and Ricci were lauded by the Committee Republicans because they represented right against wrong in the lawsuit.⁶¹ The prevailing narrative in both hearings was that these men had been wronged, they had been treated unfairly, they were victims.

⁵⁶ Indeed, the Senate Judiciary Committee Republicans embraced the narrative of victimhood in order "for white, upper-middle class male senators to confirm to the people back home that they believed in hard work, that they understood the plight of the white working man, and that they did not intend to let him down." McGinley, *supra* note 27, at 584.

⁵⁷ While Justice Kennedy never mentions perspectives of those perhaps harmed by the decision, Justice Ginsburg attempts twice to include the perspective of the aggrieved white firefighters in her dissent: "The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion;" "It is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process." 557 U.S. at 608, 644.

⁵⁸ During the Sotomayor confirmation hearings, two witnesses testified on behalf of then-Judge Sotomayor's *Ricci* decision. But even those who supported her were less than enthusiastic about the decision: "Judge Sotomayor has participated in thousands of cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of *Ricci v. DeStefano*. Whatever one may feel about the facts in this case, we all agree that the Supreme Court in its *Ricci* decision set a new standard for interpreting Title VII of the 64 Civil Rights Act. Using this one decision to negate Judge Sotomayor's seventeen years on the bench does a disservice to her record and to this country." Sotomayor Confirmation Hearing, *supra* note 30. (Hardly a glowing review.) And while the Committee listened to Dr. Christine Blasey Ford testify about her vivid memory of being sexually assaulted by Justice Kavanaugh, the Republicans on the Committee either did not believe her or did not care about what she had to say.

⁵⁹ Sotomayor Confirmation Hearing, *supra* note 30.

⁶⁰ Kavanaugh Confirmation Hearing, *supra* note 37.

⁶¹ See Dowd, *supra* note 40, at 43.

Of course, this white, male victim perspective was not the only one the Court and the Senate Judiciary Committee could have embraced. What about the Black, Latino, and female firefighters who had not succeeded in the exam? What about the Black applicants who did much better in the oral part of the exam?⁶² What about the role of the law as educator . . . what message was being communicated to both the white firefighters and to the female, Black, and Latino firefighters? What message was being communicated about how character is measured? What is being communicated to young girls about their opportunities? The perspective embraced is that of the aggrieved, innocent, white man. The voices of those unable to become firefighters because of the structural and systemic disadvantages they encounter are not heard.

When decisions are rendered that blatantly mischaracterize an existing law or when society must deal with cases of explicit bigotry or sexism, locating and remedying the problem is a more straightforward exercise than when one is dealing with an issue of perspective. Masculinity exerts its power more subtly in this context. Perhaps its most ubiquitous characteristic is its invisibility, which manifests here as an ability to shape the perspective through which issues are viewed. Hidden under the liberal cloaks of neutrality, merit, fairness, and colorblindness, one perspective is adopted, and others are marginalized. The perspectives adopted and endorsed by the law in the *Ricci* and Kavanaugh examples demonstrate the importance of question framing as opposed to simply arguing the merits. When we ask whether the *Ricci* firefighters merited promotions we have chosen the wrong framing because the validity of the tools that were used to assess merit is itself in question. Similarly, if we ask the question of whether or not Brett Kavanaugh sexually assaulted his teenage peer Christine Blasey, larger systemic issues like how our society defines sexual assault, how it is proved, how victims who speak out are treated, and whether a past assault should disqualify a person from elevation to a seat on the highest court are ignored and voices other than that of the accused are marginalized.

III. SUCCESSFUL INCORPORATION OF FEMINIST THEORY INSIGHTS

As explained above, like feminist theory, masculinity studies is an emancipatory project. Initially, discrimination and patriarchy were conceptualized as problems of *equal treatment*—problems tailor-made for the law to tackle. But once patriarchy emerged as structural and equality not simply as something formal, solutions proved more elusive. The depressing conclusion that patriarchy was built into the discursive arrangements of society complicated the goal of emancipation. However, because the law has historically served as a relatively receptive place for rights-based arguments and because success can be measured in more tangible ways in the legal arena (after all, one can win a case), the law continues to be viewed by many as an attractive avenue for addressing the problems of patriarchy. Notwithstanding ingrained problems of perspective revealed in *Ricci* that permeate the law, for advocates it remains a space to fight patriarchy, rather than one that perpetuates it.

⁶² “No one asked why the black men who took the test scored significantly better on the oral part of the test than on the written portion. No one questioned whether the test results would necessarily locate the persons who would be best for the jobs. All equated test results with merit and with hard work.” McGinley, *supra* note 27, at 618.

Rights-based arguments were, in many ways, conceptualized to appeal to an individuated, neoliberal, legal system based on the *reasoned elaboration* of principles and policies. In addition, feminist equality/difference arguments are something that the law is inherently receptive to—particularly in areas of employment law—because the masculine subject position remains the de facto norm against which the alternative position will either be found equal to (with the male remaining the norm) or different from (confirming the inimitableness of masculinity). Equality, or lack thereof, for example, is not the reason that women are paid less for the same work as men; the reason is, rather, that society does not value the work that women do the same way it values the work that men do. As the expert witness in *Ricci*, Janet Helms, pointed out, the table has already been set by the time the guests show up to dinner; racist and patriarchal relations inform the very production of subjects in the first place. Therefore, legal claims of “equality” will never actually threaten the balance of power. Until the production of subjectivity can occur within gender relations that are not patriarchal, we (like Helms) will not need to look at the tests to know what the results will be.

Lip service has been paid to the dependence of masculinity studies on feminist theory, yet not all of the significant insights from feminist theory have received their due consideration. Masculinity studies has succeeded in incorporating certain insights (about essentialism, intersectionality, substantial equality, sex roles, and hegemonic masculinity),⁶³ while it has been less successful at incorporating others (e.g., issues of power, the “search for origins,” the authority of experience, and the political nature of sexual difference/categories).

A. ESSENTIALISM

Masculinity studies encountered essentialism within the context of men as a social category existing as oppressor and as homogenous—a category, it was argued, that failed to account for the diversity and complexity of men’s lives. This reductionist approach brushed over critical differences among men, like race, class and sexuality, which radically altered the experience of being a man in the world. Masculinity studies was forced to address a patriarchal system in which it was assumed that all men benefited equally from male supremacy. Indeed, the tendency to characterize men as a homogenous and oppressive group risks ignoring the dangers of hegemonic masculinity, which, as we have seen in the Labrie example, leads to feelings of powerlessness and inadequacy that affirm our patriarchy. A further risk in essentializing male identity is that the complicated process of identity creation for men is not taken seriously and relationships between males—recall Ricci’s firehouse and Kavanaugh’s fraternity house—are seen as less intrinsic to patriarchy than relationships between men and women.

Within feminist theory, anti-essentialists have criticized the biologicistic basis of certain strands of feminism that have a one-dimensional view of women, which suggested that victimhood was an almost immutable condition, counterpoised against a similarly reductivist view of men as oppressors.⁶⁴ The construction of

⁶³ Essentialism and intersectionality are discussed below; the other enumerated insights are discussed in an expanded version of this paper.

⁶⁴ Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, AUSTRALIAN FEMINIST L.J. 20, 10 (2004).

men in this manner created an all-powerful category, with every member part of a seemingly omnipotent global cabal. Indeed, characterizing the male experience in this way ultimately hindered attempts at empowering women and was seen as equally androcentric as the theories it attempted to supersede. Nonetheless, work continued to be done illustrating how, while differences exist among men and certain men benefit from patriarchy more than others, all men benefit from patriarchy in some sense. This “benefit” has been called the patriarchal dividend: the advantage men in general gain from the subordination of women and from being complicit in the hegemonic project without the tensions or risks of being on the front line of patriarchy.⁶⁵ (Many self-identified progressive men do not do laundry.)

Written into arguments about essentialism are perhaps the most intuitive replies when one challenges the biological foundations of sex categories: what about chromosomes, what about testosterone, what about estrogen?⁶⁶ The essence to sex categories, the argument posits, is that males have one x chromosome and one y chromosome and females have two x chromosomes, and that males are full of testosterone and that females are full of estrogen.⁶⁷ However, these arguments lack a biological basis. According to Dr. Anne Fausto Sterling:⁶⁸

What matters, then, is not the presence or absence of a particular gene but the balance of power among gene networks acting together or in a particular sequence. This undermines the possibility of using a simple genetic test to determine “true” sex.” And of the Trump administration’s attempt to legally define sex as “a person’s status as male or female based on immutable biological traits identifiable by or before birth” stated: “It flies in the face of scientific consensus about sex and gender, and it imperils the freedom of people to live their lives in a way that fits their sex and gender as these develop throughout each individual life cycle.”⁶⁹

⁶⁵ Connell, *Masculinities*, *supra* note 1, at 79.

⁶⁶ See Lynn Liben, *Probability Values and Human Values in Evaluating Single Sex Education*, in *SEX ROLES* 410 (“Males and females are assumed to have different ‘essences’ that, although largely invisible, are reflected in many predispositions and behaviors. These essences are given—at the individual level—by a range of genetic and hormonal processes and—at the species level—by evolution. They are viewed as part of the natural order, likely to be presumed to operate across contexts and across the lifespan, and often presumed to be immutable (at least in the absence of herculean and unnatural efforts to change them.”).

⁶⁷ The question of addressing opposition to the consensus in the scientific community regarding sexual difference is more relevant than ever considering the Trump administration’s attempts to “define transgender out of existence.” See Erica L. Green, *‘Transgender’ Could Be Defined Out of Existence Under Trump*, *N.Y. TIMES*, Oct. 21, 2018, <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

⁶⁸ See generally ANNE FAUSTO STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000); Claire Ainsworth, *Sex Redefined*, *Nature* (Feb. 15, 2015); CORDELIA FINE, *TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY* (2017).

⁶⁹ Anne Fausto Sterling, *Why Sex Is Not Binary*, *N.Y. TIMES*, Oct. 25, 2018, <https://www.nytimes.com/2018/10/25/opinion/sex-biology-binary.html>.

The consensus in contemporary sex determination science now recognizes that genetic sex is not located in a stark binary but is scattered about the genome. Furthermore, the correlation between chromosomes and hormones with the brain and behavior is even more fallacious and harmful: “the effect of the genetic and hormonal facets of sex on the brain and behavior must not inflexibly inscribe or ‘hardwire’ particular behavior profiles or predispositions into the brain.”⁷⁰ Of course, the fact that sexual difference is constructed, is not “natural” or determined by chromosomes, does not make it any less real.⁷¹

Essentialism also appears under the guise of values and cultural attributes that are encoded as masculine. Autonomy, reason, individualism, aggressiveness, and self-sufficiency serve as the basic tenets of liberal legalism and are generally thought of within western political culture as quintessentially masculine. Thus, while essentialism on the one hand reduces the complexity of men’s experience it also genders otherwise gender-neutral cultural characteristics. It is this dynamic that leads to the internalization of a particular perspective by Justice Kennedy in *Ricci*, which ends up privileging white men. Both law and masculinity are constituted in discourse and the overlap intertwines the two: the law, like masculinity, is constructed as rational and natural. It is this association that renders cases like *Ricci* arguably just as important as cases that deal explicitly with rape/sexual assault law in the struggle against patriarchy. Dismantling patriarchy is as dependent on defying heterosexism and reshaping ideas about fatherhood, or challenging implicit connections between character, integrity, and masculinity like those seen in *Ricci*, as it is on the specifics of Family Law. The ostensibly gender-blind discourse of law in *Ricci* in fact replicates the patriarchal order in the other areas of our social lives. It is this challenge to naturalistic assumptions about masculinity which recalibrates the debate as being more about politics and less about revealing hidden gendered assumptions that permeate the social world. In other words, when the naturalistic assumptions about masculinity are exposed, the political and ideological components can be challenged. For instance, the task becomes not locating where in the social world reason is being privileged over emotion, but rather disentangling the forces that bind masculinity to reason in the first place and to exposing their political nature. Consequentially, connections that appear commonsensical when the naturalistic assumptions are applied are exposed as teleological when those assumptions are removed. For instance, Smart deconstructs the connection among rationality, men, and lawyering: “So law is not rational because men *are* rational, but law is constituted as rational as are men, and men as the subjects of the discourse of masculinity come to experience themselves as rational—hence suited to a career in law.”⁷²

B. INTERSECTIONALITY

Related to the idea of essentializing the experience of being male is the concept of how to account for differences among men like race, class, and sexuality, and

⁷⁰ Cordelia Fine, *TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY* 87 (2017).

⁷¹ Fausto Sterling, *supra* note 65, at 27, n.135 (“Just because something is constructed does not mean that it is not real.” (citing Fujimura); “The bodies are perfectly ‘real.’ Nothing about corporealization is tropic and historically specific at every layer of its tissues.” (citing Haraway).”).

⁷² CAROL SMART, *FEMINISM AND THE POWER OF LAW* 87 (1989).

how to avoid simply writing in those differences on top of the heterosexual white male experience. This problem was addressed in feminist theory under the rubric of intersectionality—a concept pioneered in the work of Kimberlé Crenshaw.⁷³ Within the context of masculinity studies, the question becomes how these cultural characteristics impact the way particular individuals experience and perform masculinity. Much of the work in this tradition has focused on cultural representations of masculinity and how the specific histories and identities of individuals engage with those cultural representations.⁷⁴ In this sense, each individual has a unique encounter with hegemonic masculinity—one that is neither necessarily positive nor negative and which, therefore, can help identify why certain subjects have different reactions to masculinity.

Ricci serves as a paradigmatic example of Black and Latino male firefighters not being able to access the privileges available to the white male firefighters, who nonetheless experience the whole process very differently than women firefighters did. The *Ricci* majority⁷⁵ opinion does not once mention the experience of women firefighters with the test. The uniqueness of the subject position of the Black firefighter is one where they experience firsthand the privilege of their gender *and* the discrimination of their race. This particular intersectionality is one that has not been thoroughly interrogated in feminist theory, since women do not feel the privilege of the gender hierarchy, but should still be considered.

Masculinity studies has recognized that an intersectional analysis is fundamental in understanding identity creation. The intersectional analysis takes on different dynamics when applied to masculinity rather than femininity. Whereas, in feminist theory, being a woman (not an already privileged cultural category) intersected with race, class, and sexual orientation, in the case of men, an already privileged identity intersects with these same components. Thus, while Black women are in a sense doubly burdened, subject in some ways to the dominating practices of both a sexual and a racial hierarchy,⁷⁶ a Black man, in a sense, dominates the sexual hierarchy and is marginalized racially. However, one of the crucial insights from feminist theory about an intersectional analysis is that Black women's suppression cannot simply be reduced to white women's suppression plus Black men's suppression equals Black women's suppression. This reductionist equation fails to understand the unique position of Black women within the hierarchies of power. The position of Black women in dominant American social relations is in many senses unassimilable into the discursive paradigms of gender and race domination, and therefore many of the dominant discourses of resistance available to white women and Black men are unavailable to Black women.⁷⁷ Furthermore, the structure of the legal system

⁷³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL FORUM 1 (1989).

⁷⁴ See STUART HALL, REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES (1997).

⁷⁵ In her dissent Justice Ginsburg mentions *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, which examines the contours of disparate treatment legislation from a male/female context.

⁷⁶ Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 404 (Toni Morrison ed., 1992).

⁷⁷ *Id.*

forces Black women, if they want legal recognition, to fit their experiences into known, understandable, and palatable pre-existing narratives.⁷⁸ The manner in which racism and sexism are thought about in dominant American social relations often precludes those stories which do not fit nicely into the narratives of white women and Black men. When racism and/or sexism take more nuanced forms than the prevalent modes understood by mainstream society, the methods of resistance at the disposal of the subjugated are severely diminished. An intersectional analysis was vital when examining, for example, the inability of Anita Hill to effectively communicate the reality of her experience at the Senate confirmation hearing of Clarence Thomas. Because she was situated within two fundamental hierarchies of social power, the central disadvantage that Hill faced was the lack of available and widely comprehended narratives to relate her story.⁷⁹

If thinking about Black women's oppression simply as being "doubly burdened" is inadequate and inaccurate, then similarly thinking about Black men's position using the equation: sexual privilege minus racial discrimination equals Black men's experience is necessarily reductionist and fails to capture any semblance of the reality of Black men's experience. The question becomes one of understanding how an intersectional analysis applies to men who are subjugated in some other area of social relations—notably race, sexuality, or class. The denial of privileges offered to white men often results in masculinity manifesting itself in different ways (ways which often support male privilege even when the particular men in question do not benefit from it themselves). A fundamental tension lies between thinking about all men benefiting from a patriarchal dividend and simultaneously recognizing that masculinities that do not fit within the dominant paradigms cannot readily access that privilege. An intersectional analysis reveals the shortcomings of a gender analysis, a class analysis, a racial analysis, or a sexuality analysis, in and of themselves. An effective analysis must examine the workings of power more overarchingly and engage with how each of the social hierarchies work together to marginalize certain groups of people.

As in the early days of feminist theory—where gender was used to distinguish between what was seen as "natural" (sexual difference) and what was seen as a social construct (gender)—masculinity studies spends much energy struggling against naturalistic and essentialist conceptions of masculinity.⁸⁰ In contrast to feminism, though, masculinity's relationship to equality is not a conventionally aspirational one. Men's relationship with equality is not complicated because of a lack of power, like women, but rather because of the enormous power they hold.

⁷⁸ *Id.* ("The particularities of black female subordination are suppressed as the terms of racial and gender discrimination law require that we mold our experience into that of either white women or black men in order to be legally recognized.").

⁷⁹ *Id.*

⁸⁰ See Dowd, *supra* note 7, at 201-04 ("Feminist Theory has examined men, patriarchy, and masculine characteristics predominantly as a source of power, domination, inequality, and subordination...In much feminist analysis, men as a group largely have been undifferentiated."). And masculinity studies, unlike feminist theory, has not engaged the distinction between sex and gender. Collier, *supra* note 1, at 466 ("This critique of the division between (biological) sex and (socially constructed) gender, present within, if still marginal to, much contemporary work on masculinities, can be located within the context of broader attempts within feminist sociological theory and socio-legal work to transcend binary oppositions that have informed understandings of gender and law.").

Equality, for masculinity studies, as opposed to feminist theory, is not about equality of opportunity, power, or freedom, but rather about coping with, recognizing, and relinquishing privilege. This adds a dynamic to masculinity studies not necessarily present in feminist theory. Part and parcel with reconciling men's relationship with privilege is distinguishing between individual men and men as a group. Considering that the de facto male subject position is one of privilege, masculinity studies continues to sometimes contribute to a culture of victimhood within non-hegemonic masculinities, and thus fails to recognize the "patriarchal dividend."⁸¹

Generally, within masculinity studies there ought to be a self-awareness that while essentializing and naturalizing masculinity is harmful to both men and women, we nonetheless continue to live in a patriarchal system with men holding power over women. Indeed, hegemonic masculinity need not be enacted to have consequences. The power is always available to men whether they want to use it or not: "this is the mechanism through which every male enacting an identity as a man, whether he strives to enact hegemonic masculinity or not, is granted male privilege—cultural benefits and unearned advantages conferred by virtue of membership in the social category men."⁸² However, importantly, this process reminds us that male privilege is not absolute or universal, and gender privilege, as well as subordination, is differentiated along race, class, and sexual orientation lines.

IV. OPPORTUNITIES FOR INCORPORATING FEMINIST THEORY INSIGHTS

Despite the success of masculinity studies in incorporating insights about essentialism and intersectionality gleaned from feminist theory, there are four other insights that masculinity studies has failed to take as seriously as it could. In part, the history of masculinity studies and the presupposition of masculinity as an object of study are responsible for such failure. The framing of masculinity occurs within a white, heteronormative conception of gender that essentializes male/female difference and tends to ignore differences within gender categories. "[T]he concept of masculinity is said to rest logically on a dichotomization of sex (biological) versus gender (cultural) and thus marginalizes or naturalizes the body."⁸³ A slight variation to this point is that the importance of focusing on masculinity as its object of study has led masculinity studies to have a sharp disinterest in the female subject; in masculinity studies, "separatism is a hallmark, then of much of masculinities scholarship."⁸⁴

⁸¹ NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 61 (2010) (The patriarchal dividend are the benefits "that all men have from the overall dominance of men in the gender order" and "from the reinforcement of male dominance."). Nevertheless, masculinity studies recognizes that, often, "men, although powerful, feel powerless." Dowd, *supra* 40, at 28.

⁸² Matthew B. Ezzell, *Healthy for Whom?—Males, Men, and Masculinity: A Reflection on the Doing (and Study) of Dominance*, in *EXPLORING MASCULINITIES: IDENTITY, INEQUALITY, CONTINUITY, AND CHANGE* 190 (Pascoe & Bridges eds., 2016).

⁸³ R.W. Connell & James M. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 *GENDER & SOC'Y* 6, 836 (2005).

⁸⁴ Dowd, *supra* note 7, at 33.

This theoretical foundation has led to segregative thinking when it comes to addressing practical concerns.⁸⁵ The assumption of gender difference both creates a disinterest in the other gender among those looking for solutions to problems characterized as only impacting a particular gender, and often contains within it a built-in remedy.⁸⁶ The tendency is to make gender analysis a zero sum game: either you analyze the impact on men or the impact on women, or you analyze something other than gender. Thus, the incorporation of issues and insights that are not specific to masculinity has had trouble gaining traction in masculinity studies. Masculinity studies should show more of an appetite for thinking beyond the confines of masculinity.

A. POWER ANALYSIS

The first concern centers on power. In many respects, though by no means all, the impetus behind masculinity studies is the existence of patriarchy, and, thus, an understanding of the oppressive power of male supremacy is central to masculinity studies. Patriarchy generally conceptualizes power as repressive. Masculinities scholars tend to evaluate the ways that conceptions of masculinity are used to produce power. Partly because a so-called “power analysis” remains the centerpiece of feminist advocacy—the struggle to equalize power between the sexes—masculinity studies has been focused on the issue of power within society and within masculinity.⁸⁷

Hegemonic masculinity is founded on the idea that it exerts a normative power on men to conform to its tenets—as discussed above with respect to the Labrie case. Thus, power manifests in a juridical manner in two distinct ways—both as supremacy over females and over men who do not conform to conventional gender identities.⁸⁸ Male power though, in both of these dynamics, exerts its might in an essentialist manner. In other words, power is more or less characterized as univocal and oppressive; it is one dimensional and focused on men as a group having power over women as a group and over men who “do” masculinity differently.

Masculinity studies scholar Jeff Hearn has posited that “while power functions, flows and re-forms in multiple ways, it is difficult to avoid the fact

⁸⁵ *Id.* at 39 (“segregative thinking—thinking about legal problems as affecting a single sex and requiring a sex-specific remedy”); see also David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, in *MASCULINITIES AND THE LAW* 168 (“Understanding sex segregation should be a vital part of the study of law and masculinity. In fact . . . current-day sex segregation is one of the central ways that law and society define and construct who is a man and what it means to be a man.”).

⁸⁶ Dowd, *supra* note 7, at 40 (discussing gender-specific education and how researchers looking to solve the “boy crisis” in education, since they have already divided their constituency by gender, end with a sex-segregative remedy).

⁸⁷ See CHRIS WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 1* (1987) (“Feminism is a politics. It is a politics directed at changing existing power relations between women and men in society. These power relations structure all areas of life, the family, education and welfare, the worlds of work and politics, culture and leisure. . . . as feminists we take as our starting point the patriarchal structure of society.”).

⁸⁸ See Cohen, *supra* note 78, at 168 (discussing hegemonic masculinity and the hegemony of men). See also Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 (1) *FEM. THEORY* 49 (April 2004).

that in most societies, and certainly those of western, ‘advanced’ capitalism, men are structurally and interpersonally dominant in most spheres of life.”⁸⁹ Thus, “looking at gender and power is an important part of the anti-essentialist project, as essentialist notions of gender reinforce power structures.”⁹⁰ Challenging dominant notions of masculinity has an impact on disrupting the hegemony of men. To Hearn, the project should focus on the hegemony of men, which he defines as “that which sets the agenda for different ways of being men”⁹¹ rather than on the identification of hegemonic masculinity, and, in this way, have the focus be more individualized.

The analysis of power within masculinity studies has employed various frameworks. Two of the most prevalent are: a capacity to dominate others, and ideological conditioning.⁹² The second view directs one to a more structural level. It strays slightly from a juridical understanding of power, yet by emphasizing the ideological components, it nonetheless highlights its agentic components. The analyses of power in masculinity studies, therefore, continually fail to seriously engage with the production of masculinities from a perspective that sees power as productive and, crucially, discursive. Further, if power is recognized as productive, then its ideological components ought not to be the focus of the analysis, as this analysis suggests a misunderstanding of the role played by individual subjects. Individual subjects do not simply own an amount of power which they deploy as they see fit. Power flows between individuals and is thus not wholly subject to the whims of specific individuals. Power, in that sense, is both relational, and dependent on those who have some *and* those who have none. Hearn has suggested that masculinity studies should ask “which men and which men’s practices . . . are most powerful in setting those agendas of those systems of differentiations,”⁹³ here we see, once again, an example of the intentionality only present in a juridical understanding of power being considered.

Masculinity studies gives lip service to the idea that power flows, but continues to paint a picture of it as something that functions juridically. There is the sense of something ideological going on; dismantling patriarchy *is* conceived of as a political project, yet political in the wrong sense. The fight against patriarchy has emerged as a contest to root out sinister masters of the universe who pull society’s levers. The focus on hegemony is “about the winning and holding of power and the formation (and destruction) of social groups in that process . . . hegemony involves persuasion of the greater part of the population, particularly through the media, and the organization of social institutions in ways that appear ‘natural’, ‘ordinary’, ‘normal’.”⁹⁴ This operation foregrounds the individual subject and position *him* in a dominating position that again views power as hierarchical rather than circulatory.

Hearn, for instance, while at numerous times suggesting that he thinks about power as something that flows and should not be conceptualized in a unitary sense, distinguishes between men who both are formed in the hegemonic gender order and form the hegemonic gender order, and women who are solely formed in it. This

⁸⁹ *Id.* at 51.

⁹⁰ Cohen, *supra* note 78, at 173.

⁹¹ Hearn, *supra* note 85, at 60.

⁹² *Id.* at 52.

⁹³ *Id.* at 60.

⁹⁴ Mike Donaldson, *What Is Hegemonic Masculinity?*, THEORY & SOC’Y 22(5), 645 (Oct. 1993).

understanding of power is one directional, with women being the passive recipients of the force of power deployed by men. While it is easy to say that “power flows,” it is much more difficult to theorize ways of making sense of masculinity while accepting that premise. This is true both because a juridical understanding of power has been internalized by most in our society; it has become common sense. As Butler reminds us, “power is not stable or static, but is remade at various junctures within everyday life; it constitutes our tenuous sense of common sense, and is ensconced as the prevailing episteme of a culture.”⁹⁵ It is more difficult to find solutions when thinking about power in that sense. It is easier to address and counteract patriarchy when it is conceptualized as something ideological, complete with intentionality and agentic subjects directing it.

The concept of hegemonic masculinity, for instance, derived from masculinity studies, provides an analysis of power that is exceedingly helpful to understand the process of male identity creation. For instance, with respect to the Labrie case, this concept renders it easier to comprehend the powerlessness felt by many young men and that the perpetuation of patriarchy is just as much about competition among men as it is about misogyny. Masculinity studies, however, tends to pinpoint the idea, in the sense that it is very good at locating examples of where hegemonic masculinity appears, yet it is less successful at deconstructing the idea. It tends to characterize hegemonic masculinity as stable, controlled, and somewhat self-serving; it is interested in understanding how power dominates, yet understanding the complexities and relationality of power makes dealing with hegemonic masculinity more difficult than locating it.

B. SEARCHING FOR ORIGINS

A second problem with the current direction of masculinity studies is that, because it remains tied to an emancipatory ethos, it is focused on a misguided search for origins. The project remains guided by a search for a freedom beyond patriarchy and, in this way, is always intertwined with liberalism. Masculinity studies is tied to the project of locating masculinity, which involves asking whether masculinity existed prior to its production through social structures, and, if it did, then somehow rendering “the problem” less to do with the action of actual men. The search for origins drowns out the experiences of particular individuals, marginalizes male practices, and “involves an evacuation of questions of responsibility and agency.”⁹⁶ Thus, on the one hand, masculinity studies remains tied to an idea of power as ideological conditioning, which grants individual subjects too much agency, and, on the other, it remains committed to a “search for origins,” which takes agency away from individual subjects. Masculinity studies perpetually struggles with this “agency” balance.

In *Ricci*, the search for origins problem manifests quite clearly, particularly in the arguments suggested by the expert witness Janet Helms. Recall that Helms did not need to look at tests to claim that she knew how minority candidates would perform in it. As she recognized, equality is impossible in a world where patriarchal relations inform the production of the subjects. It is not possible to reach a pre-

⁹⁵ JUDITH BUTLER ET AL., *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* 14 (2000).

⁹⁶ Collier, *supra* note 2, at 468.

patriarchy place. Indeed, even the tools of legal method which had been presumed to be neutral have now been exposed, and ideas like equality itself, are problematic because one is always equal *to* something. A masculinity studies analysis of *Ricci*, therefore, allows one to see that a case that apparently has nothing to do with gender is actually infused with patriarchal ideas, yet it continues to wrongly suggest failed ideas for moving beyond them.

The problems tied to the “search for origins” are one of the reasons that the usefulness of masculinity as an analytical category has been questioned by theorists who argue for a shift of attention to men’s actual practices. But that shift remains emancipatory and problematically suggests that the problem of patriarchy is solvable by changing the actions of men. The trend in masculinity studies has been to narrow the scope, to move away from grand theories, to focus on the local, where change can be seen and felt. While this does provide some sense of tangible change, it ultimately suggests that patriarchy is solvable by ridding the world of the “bad” acts of men *and* that the existence of patriarchy itself is due to these particular “bad” acts of men. This has the effect of ultimately disempowering those subjects who do not identify as men because they are characterized as not being a part of or having a role in what has created the social world.

Further, part of the reason that masculinity was initially thought of as being a ripe area of study, in contrast to simply thinking about the actions of men which perpetuate male supremacy, is that there were structural, political, and theoretical impasses identified in feminist theory that were not “solvable” simply by identifying these patriarchy perpetuating acts. Focusing on the hegemony of men, rather than on masculinity, fails to recognize that the category of men is equally problematic, and constructed, as the category of masculinity. Trying to move beyond masculinity to men suggests the knowability of some sort of original position, some sort of pre-discursive, pre-gendered position, from which actions were taken which resulted in patriarchy, and that emancipation is possible by re-tracing and reversing those actions.

The insight from feminist theory to be worked from is not identifying the actions of subjects who identify as men which contribute to the domination and subordination of others, but rather to be critical of the existence of the categories in the first place. Each of these tasks appears political, yet the more radical position and the position that offers the least feel-good results is that of critiquing sexual difference/categories as a whole. This is not to suggest, necessarily, that the project should be to dismantle sexual categories (sexual categories are perhaps re-signifiable to serve ends that do not contribute to male supremacy),⁹⁷ but that engaging in the process of examining particular acts, rather than holding men accountable, is actually disempowering and perpetuates the system as a whole. In short, the question becomes is it possible to preserve gender without preserving domination?⁹⁸

⁹⁷ Although the idea of any hegemonic masculinity serving progressive ends seems far-fetched. As one commentator has asked: “What exactly does one do nowadays to inhabit a male-positive gendered identity that feels—and is—worthy of respect (by oneself and others)?” John Stoltenberg, *Why Talking about Healthy Masculinity Is Like Talking about Healthy Cancer*, *FEMINIST CURRENT* (Aug. 9, 2013). Stoltenberg argues that attempting to attain a “healthy” masculinity just “reinvigorates the disease.” *Id.* Examining how social agents “do” masculinity through a normative lens perpetuates the existence of gendered hierarchies.

⁹⁸ MICHAEL SCHWALBE, *MANHOOD ACTS: GENDER AND THE PRACTICES OF DOMINATION* 170 (2014).

Again, this is not to suggest that in a practical sense these actions should be condoned or ignored, but that the job of masculinity studies should be about addressing the categories themselves, rather than just focusing on the actions, which only serve to reify those categories. When the point of masculinity studies is thought of as being emancipatory—that masculinity studies has a goal and that the goal is equality or freedom or the dismantling of patriarchy—then masculinity studies is expressing its problem with origins. The concern of disembodiment masculinity from men, of divorcing an analysis of masculinity from the “real” impact of the actions of men, suggests that masculinity studies should focus on equalizing power between categories, rather than on the validity of the categories themselves. Collier has cautioned against remaining tied to masculinity and has suggested re-theorizing men identities “in ways that might produce a richer, more nuanced conceptual framework in which men’s and women’s practices, subjectivities, and bodies can be approached.”⁹⁹ Such an approach would undoubtedly move beyond the actions of those subjects socially categorized as men, while acknowledging men’s agency within contexts shaped by power.

C. AUTHORITY OF EXPERIENCE

The emphasis on the behavior of particular men also highlights the importance of experience in the context of masculinity studies. Experience, in practice, often becomes the most authentic evidence on which to base claims to truth. Within masculinity studies, when the focus turns to ways of “doing” masculinity and to an analysis of the actions of men, “truth” is found through experiential claims. The paradigm suggested by turning toward the specific behavior of individuals is one in which the reality of patriarchy is attributable to the actions of certain bad apples. The focus on domination on a micro level renders the views of particular individuals the source of explanations.¹⁰⁰ The problem with this is that “[experience] operates within an ideological construction that not only makes individuals the starting point of knowledge, but that also naturalizes categories such as man, woman, Black, white, heterosexual, or homosexual by treating them as given characteristics of individuals.”¹⁰¹ This tendency brushes aside issues of language, discourse, structure, and history, and instead focuses on how particular subjects experience the world. Rather than focusing on how particular subjectivities are constructed and how discourse precedes subjecthood, masculinity studies works generally from a more humanistic perspective that sees individuals who have experiences.

There appears to be a tension between the need for a local, contextualized approach to problems of gender oppression (which avoid buying into essentialist accounts of gender) and not overly relying on the evidence of experience; anti-essentialism suggests going more micro while critiques of experience seem to suggest a more macro approach. The trend in masculinity studies has been to turn inward, to move from macro to micro, to be practical and focus on the actual behavior of men, rather than on big boring questions about discourse, theory, and language. But something gets lost in making this decision. There need not be any

⁹⁹ Collier, *supra* note 2, at 473.

¹⁰⁰ See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. (1996).

¹⁰¹ Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773 (1991).

grand theory that suddenly makes masculinity comprehensible. In fact, focusing on individual experiences is partly done because of a desire for tangible solutions, to reduce harm and eliminate suffering, to make the world a tangibly more just place. The implication is not to throw out experience—as we are cautioned by Scott, “[e]xperience is not a word we can do without, although, given its usage to essentialize identity and reify the subject, it is tempting to abandon it altogether,”¹⁰²—but simply not to rely on it as something apolitical and devoid of interpretation.

In the context of *Ricci*, we see how the experiences of the firefighters are constructed as the foundation of the truth. The categories within which the firefighters built their reality—*e.g.*, white, Black, male, female—are made to appear ahistorical, and thus devoid of interpretation. The subjects, though, have been conceived within patriarchal and white supremacist social relations; the visions of the firefighters are structured through particular discourses and histories, and the experiences are not pre-discursive, but rather formed in discourse. The question, in this case, is not one of choosing between two alternative perspectives (white vs. Black; man vs. woman), but rather about questioning the structures that formed the subjects.

One of the insights from Janet Helms, the expert witness in *Ricci*, was that subjects are formed within existing social (*e.g.*, racist and patriarchal) relations. It is not only that there are two contrasting perspectives that are equally true. That paradigm is palatable to the law, it adheres to the conventional narrative of history that new evidence is discovered that changes existing interpretations; the constant being that the experiences themselves are occurring to subjects and not that the subject are constituted by the experience. The insight of Helms is not palatable to the law, and, thus, her testimony was considered beyond the scope of the case and not taken seriously by either the majority opinion or the dissent. But the insight is an important one because it reorients the focus from the question of choosing between two contrasting experiences to that of the naturalness of the categories that structure the experiences themselves.

When experience is viewed as the foundation of truth, then we risk missing the fact that experience is both always already an interpretation and something that needs interpreting. The subject is constituted through the experience, as opposed to subjects simply *having* experiences. In practice, however, the law does determine which experiences to privilege and which perspective to adopt. In doing so, the fact that subjects are formed within patriarchal relations continues to play a role. In the example of Judge Kavanaugh’s confirmation hearing, patriarchy rendered Dr. Ford’s experience *an* interpretation while Judge Kavanaugh’s was something *to be* interpreted.

Experience should not serve as a stand-in for an analysis of the production of knowledge. Thinking within the terms dictated by experience simply reproduces the categories of analysis without any critical turn, which, in the context of masculinity studies, is vital considering the validity, usefulness, and effect of the category, is what is being interrogated. Thinking about structural problems, the discursive construction of subjects, and of the need to think beyond and in different terms than sexual differences allow, is a daunting task without tangible near-term goals. Indeed, making the decisions to not pursue these questions, or rather to

¹⁰² *Id.* at 797.

emphasize the others, is making a political decision; a decision that claims, rightly or wrongly, that the overarching political structure within which we live is capable of accommodating the changes that are sought.

D. POLITICAL NATURE OF SEXUAL DIFFERENCE

Finally, the political nature of this emancipatory project is also present when one looks at the manner in which masculinity studies tends to think about subjectivity. The existence of a pre-existing subject buys into the humanist conception of each individual containing some sort of essence, and thus, potentially, being worthy of certain rights. Masculinity studies, therefore, by foregrounding a pre-discursive subject and describing its project as emancipatory, is implicitly buying into the politics of liberal humanism. It becomes difficult to suggest a radical politics or agenda within a discipline defined by those parameters. Masculinity studies is, essentially, a humanist project, striving for freedom and equality through rights and law, but it need not be. The focus can turn back to the political implications of thinking about sexual difference as naturalistic and inevitable, it can focus on the implications of thinking about masculinity studies as an emancipatory project focused on retrieving a pre-patriarchal space, it can stop exclusively focusing on the actions of individual men and recognize how experience is not the sole key to knowledge.

When thinking about and studying masculinity there is a fear that, as a culture, we will fall into silly stereotypes, that we will accept “frat boy” behavior out of young men, that we will propagate outdated ideas about what it means to be a man and about the rituals that “make boys men,” that we will contribute to the seemingly endless perpetuation of patriarchy. But these should not be the only concerns. There are equally important questions about masculinity regarding more than just falling into stereotypical and essentialized ideas about masculinity. No longer does the major challenge—although it remains part of the challenge—only entail suggesting that masculinity comes in different shapes and sizes and that there is more than one way to be a man. It is no longer enough for critiques of masculinity to problematize sex roles and power imbalances, to highlight experiences of injustice, and to offer easy solutions that provide superficial critiques of patriarchy resorting back to an imaginary origin where equality was ubiquitous. Masculinity studies is in danger of turning clinical to avoid the uncertainty and agnosticism pivotal to an honest study of masculinity. Masculinity and the law remain pieces in a neoliberal puzzle that not only continues to re-articulate patriarchal relations in new ways, but falsely promises an illusory cohesiveness and an emancipation that is both inapt and misdirected.

WILLIAM O. DOUGLAS AND THE ASSAULT ON OBJECTIVITY

Thomas Halper*

ABSTRACT

William O. Douglas, venerated by some and reviled by others, was very much his own man, disdaining his colleagues on the bench and the work they produced. For him, the point of judging was simply to do justice. However, justice is not always self evident, and legal norms and values, like objectivity and stare decisis, are ignored at a high cost. Nor, as it turns out, was his carefully carved authentic persona more than a mask of lies.

KEYWORDS

Douglas, Supreme Court, Rule of Law, Legal Realism

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I. INTRODUCTION

Once upon a time, conventional wisdom dictated that the job of the judge was to apply the law objectively, impartially, untainted by politics, and, as the saying went, without fear or favor. To this day, countless court houses are guarded by statues of blindfolded Lady Justice, unsmiling and holding scales, and judicial nominees are queried as to their views on Chief Justice Roberts' trope that the judge's task is simply to "call balls and strikes."¹ Determining constitutionality, as an earlier Justice Roberts announced, is said to be essentially like comparing paint chips at Home Depot: "lay the article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former."² Judges "are human computers."³

Meanwhile, however, legal realists reminded us that laws are often vague or ambiguous, that multiple doctrines might be applied to a single set of facts, that judges are human and will be influenced by their policy, partisan, or ideological preferences,⁴ that judging is "an emotive experience in which principles and logic play a secondary part,"⁵ and that if they "are a little clever"⁶ they will be able to manipulate the results. As there is often more than one legally defensible solution to each case, we must look outside the law, they counsel, if we are to understand why judges decide as they do—and "too often the doctrine that courts invoke is not really the normative standard upon which they really rely."⁷ As an eminent circuit court judge put it, "I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself—*forget about the law*—what is a sensible resolution of this dispute?"⁸

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

² *United States v. Butler*, 297 U.S. 1, 62 (1936).

³ LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 50 (2013). The authors are highly critical of this model.

⁴ Charles G. Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 116 (1922). More recently, an examination of parole decisions of Israeli judges found that food breaks appeared to have major effects on their rulings. Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889 (Apr. 26, 2011).

⁵ Hessel Ytema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468, 480 (1928).

⁶ Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 361 (1925).

⁷ Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975 (2015). A popular theme among political scientists is the "attitudinal model," according to which justices "may freely implement their personal policy preferences." JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 111 (2002). That judges "legislate from the bench" has become a cliché among pundits. Eric Segall, *Supreme Court Justices Are Not Really Justices*, SLATE (Nov. 14, 2014); Rachel DiCarlo Currie, *The Supreme Court Shouldn't Be So Important*, INDEP. WOMEN'S FORUM (Sept. 27, 2016).

⁸ Richard A. Posner, *quoted in Adam Liptak, An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES, Sept. 11, 2017 (emphasis added).

It is the burden of this essay that Justice William O. Douglas learned the realists' lesson well, perhaps too well. Their point, easily vulgarized—that judicial reasoning is mere rationalizing, a sophisticated effort at covering up inexorable subjectivity—entails a very practical conclusion—why waste time and energy on judicial opinions? Why, especially if one has a dozen other urgent calls on his time? Hiking, writing memoirs and travel books, dreaming of becoming president. Why, in any case, pursue *elegantia juris*, when the point of judging is justice. Everything else, Douglas seems to have believed, when it is not beside the point, is simply a means to this end.

How much of his opinions represent Douglas' own words? In the current era when most justices routinely farm out first drafts to law clerks—and some justices play even a lesser role⁹—Douglas for many years bucked the trend, even insisting on fewer clerks than his colleagues. Still, by 1965, his clerks produced first drafts of his *per curiam*, concurring, and dissenting opinions, by the early 1970s occasional majority opinions, as well, and after his serious stroke on the last day of 1974 their role increased substantially.¹⁰ Taking this into account, consider his opinions in high profile cases drawn from each decade of his tenure, all cases he plainly considered of high importance.

II. THE EARLY PERIOD: SKINNER V. OKLAHOMA EX REL. WILLIAMSON

A century ago, eugenics was a reform idea that captivated enlightened opinion in America and Europe.¹¹ Theodore Roosevelt, Woodrow Wilson, Margaret Sanger, George Bernard Shaw, Harry Emerson Fosdick, A. Lawrence Lowell, Alexander Graham Bell, Helen Keller, John Maynard Keynes, H.G. Wells—many of the most prominent intellectuals of the age advocated improving the human race by selective breeding, legitimating racism with a *faux* scientific respectability.¹² In this scenario, coercion was often required, and in 1927, the Supreme Court approved a compulsory sterilization law in the notorious *Buck v. Bell*.¹³ The Nazis pricked eugenics' bubble of respectability by implementing it through mass murder,¹⁴ but

⁹ According to one biographer, Blackmun “delegated virtually all opinion drafts to his clerks [and] spent hundreds of hours each term cloistered in the justices’ library, painstakingly checking his clerks’ citations and closely monitoring their drafts, ever alert to their grammatical and spelling errors—while they largely sculpted the substantive elements of his jurisprudence.” TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 346 (2008).

¹⁰ Marshall L. Small, *William O. Douglas Remembered: A Collective Memory by WOD’s Law Clerks*, 32 SUP. CT. HIS. 297, 304 (2007).

¹¹ THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA ch. 7 (2016).

¹² On the history of eugenics, see DANIEL KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985).

¹³ *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁴ The influence of American eugenics advocates on Nazis is detailed in Barry A. Mehler, *A History of the American Eugenics Society, 1921-1940*, ch. 6 (1988) (unpublished Ph.D. dissertation, University of Illinois) (on file with the University of Illinois at Urbana-Champaign); STEFAN KUHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND

sterilizations continued to be practiced in a number of states even after World War II, though the new laws “at least in appearance, . . . respect[ed] some form of reproductive choice.”¹⁵ In the end, over sixty thousand Americans were sterilized.¹⁶

Consider, in this light, *Skinner v. Oklahoma*,¹⁷ one of the first important opinions Douglas produced. The case concerned Oklahoma’s Habitual Criminal Sterilization Act that required the sterilization of persons convicted two or more times of “felonies involving moral turpitude,” provided that the person “may be rendered sexually sterile without detriment to his or her general health.”¹⁸ Certain offenses, including “violations of the prohibitory laws, revenue acts, embezzlement, or political offenses” were expressly excluded. Jack T. Skinner, convicted twice of armed robbery and once of stealing six chickens, was ordered sterilized.¹⁹ He had offered data countering the eugenic premise of the statute, indicating that Oklahoma prisoners were unlikely to come from families of convicted criminals, but the court had refused to permit him to present the evidence. He appealed to the Oklahoma Supreme Court, which, deferring to the legislature, upheld his conviction,²⁰ and then to the United States Supreme Court.

Douglas, writing for the majority, struck down the law as violative of the Fourteenth Amendment’s equal protection clause. An embezzler may steal far more money than a robber, and a chicken thief may steal far less than “a Bailee of the property [who] fraudulently appropriates it,”²¹ yet both the embezzler and the Bailee escape sterilization; this, Douglas wrote, constitutes “a clear, pointed, unmistakable discrimination.”²²

But it is not only the law’s inconsistent coverage that Douglas objects to. His very first sentence refers to “a sensitive and important area of human rights,” which he then defines as “the right to have offspring,” and later he speaks of “the basic civil rights of man,”²³ marriage and procreation.²⁴ Because these basic rights are implicated, Douglas announces that the statute will be subjected to strict scrutiny.²⁵

GERMAN NATIONAL SOCIALISM ch. 8 (1994); EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE (2d ed. 2012).

¹⁵ Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform after World War II*, 14 CARDOZO J. L. & GENDER 319, 323 (2008).

¹⁶ The recent development of gene editing has generated fears of a new, high technology kind of eugenics. Robert Pollack, *Lurking in the Shadow of CRISPR*, 348 SCI. 871 (2015); Carolyn Brokowski et al., *Cutting Eugenics out of CRISPR-Cas 9*, 6 ETHICS BIOLOGY, ENGINEERING & MED.: INT’L J. 263 (2015).

¹⁷ *Skinner v. Oklahoma*, ex rel. Williamson, 316 U.S. 535 (1942).

¹⁸ OKLA. STAT. ANN. tit. 57, §§ 171-195 (West). The original law, passed in 1931, provided for the sterilization of the insane; as amended, after lobbying by eugenics advocates, it applied also to habitual criminals.

¹⁹ On his trial, see VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS ch. 7 (2008).

²⁰ *Skinner v. State*, ex rel. Williamson, 189 Okla. 235, 115 P.2d 123 (Okla. 1941).

²¹ *Skinner*, supra note 17 at 539.

²² *Id.* at 541. In this, Douglas echoed an argument of Guy Andrews, one of Skinner’s lawyers. See NOURSE, supra note 19, at 138. Frankfurter successfully pressed the argument on Douglas. *Id.* at 142-43. The two had not yet become enemies.

²³ *Skinner*, supra note 17, at 536.

²⁴ *Id.* at 541.

²⁵ *Id.* Skinner’s lawyers argued that sterilization, by eliminating the risk of pregnancy, increased the likelihood of promiscuity. Dubler maintains that this is a useful way of

Today, a long list of cases²⁶ has established that the term requires a compelling governmental interest and narrowly tailored means, the compelling interest justifying the abridgement of rights and the narrow tailoring ensuring that the abridgement be as little as possible. Perhaps because strict scrutiny was new to the Court, it was so undeveloped that Douglas seems to have taken it simply as a turn of phrase meaning that the Court would greet the law with considerable skepticism.²⁷

The equal protection claim raises the question: suppose Oklahoma had not offered exceptions to the moral turpitude coverage, leaving embezzlers and chicken thieves treated alike? This is not a hypothetical, as the law had a severability clause, which presumably would raise the issue. Douglas' answer is that the Oklahoma Supreme Court upheld the law "without reference to the severability clause,"²⁸ and so he would leave the question "for adjudication by the Oklahoma court."²⁹ Yet as the Oklahoma court upheld the entire law, it would have no reason to address severability; in any event, whether the Oklahoma court addressed severability would not foreclose Douglas from addressing it. Douglas ends the discussion by writing that "it is by no means clear"³⁰ whether severability would save the law, undermining his refusal to consider the issue. The constitutionality of compulsory sterilization, as a result, is left standing, if wobbly. Had he dismissed eugenics as junk science, he might have eliminated the rationale for the law, but though he averred that "We have not the slightest basis for inferring that [thieving] has any significance in eugenics,"³¹ he declined to pass on "the state of scientific authorities respecting inheritability of criminal traits."³² *Buck v. Bell* was not reversed.

As to the newly found rights to marry and to procreate, what kinds of rights are they? If I experience difficulty in procreating, is the state obliged to help me, for example, by paying for appropriate medical procedures? If I have a right to marry, may the state charge me for exercising that right by forcing me to buy a license? Or force me to take a blood test? Or ban me from marrying members of my family? Is it obliged to subsidize my membership in Match.com, if I am unable to find a spouse on my own? If these are, indeed, legal rights, what is their constitutional or statutory basis?³³ Why raise the subject of marriage, inasmuch as Oklahoma is not preventing Skinner from getting married? Nor is marriage, a legal construct that

understanding the case, but inasmuch as she concedes that the Court "did not explicitly address" this contention, her argument is hard to sustain. Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1348, 1362 (2010).

²⁶ *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *United States v. Paradise*, 480 U.S. 149, 154-55 (1987); *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995).

²⁷ Stone, who originated the concept in his famous footnote four in *United States v. Carolene Products*, 304 U.S. 144, 152 (1938), made no mention of strict scrutiny in his concurrence.

²⁸ *Skinner*, *supra* note 17 at 542.

²⁹ *Id.* at 543.

³⁰ *Id.*

³¹ *Id.* at 542.

³² *Id.* at 538.

³³ A dissenter on the Oklahoma Supreme Court, Judge Osborn, asserted that "the right to beget children is one of the highest natural and inherent rights," citing the state and national constitutions, but Douglas offered no citation to the Constitution.

confers formal benefits and responsibilities, comparable to procreation, which, as he says, “is basic to the perpetuation of the race.”³⁴ If a woman were sentenced to a term in prison that extended through her menopause, could she claim that her right to procreate was abridged? What of a man sentenced to life in prison?³⁵ May a judge offer a convicted defendant probation, conditioned on his not procreating?³⁶ Does the right to procreate imply a right not to procreate, that is, a right to contraception or an abortion? Interestingly, though the law seems to target the lower classes, who are more likely to be chicken thieves and less likely to be embezzlers, Douglas sidestepped its class basis, for his solution was not at all class based, but instead a declaration of a new right (or rights) to be enjoyed by all.

As to whether the punishment violated the Constitution’s *ex post facto* prohibition, Douglas simply avoided the question. Skinner’s convictions occurred in 1926, 1929, and 1934. The Habitual Criminal Sterilization Act was not adopted until 1935. Oklahoma argued that the purpose of the law was eugenic, not punitive, and thus that the prohibition that was confined only to criminal matters would not apply.³⁷ However, Skinner certainly understood sterilization as punitive,³⁸ and the law expressly tied it to criminal conduct, and so a counter argument could easily have been made. Douglas, seizing the opportunity to declare basic rights, was plainly not interested in basing his decision on such narrow grounds.³⁹

Douglas’ opinion has an unsettling, unfinished quality. Brash in its proclaiming rights, it does not bother to sketch them or identify how they are tethered to the Constitution nor does it make an effort to elucidate the meaning of the key corollary to these rights, strict scrutiny. Nor does it seize the obvious opportunity to invalidate compulsory sterilization or even to reconsider *Buck v. Bell*. It is, then, an odd mixture of the bold and the timid.

III. THE MIDDLE PERIOD: ZORACH V. CLAUSEN

The First Amendment provides, *inter alia*, that “Congress shall make no law respecting an establishment of religion.” Beyond barring the creation of an American version of the Church of England, the words simply invite speculation.

³⁴ *Skinner*, *supra* note 17, at 536.

³⁵ In *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001), the court held that the right to procreate applied to a life term prisoner seeking to impregnate his wife via artificial insemination. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court held that the right to marry applies to prisoners.

³⁶ A father of nine, found guilty of a felony of intentionally refusing to pay child support, could be offered probation, subject to this condition. *Wisconsin v. Oakley*, 629 N.W. 2d 200 (Wis. 2001). On the other hand, the Indiana Court of Appeals turned down a similar probation offer presented to a woman found guilty of neglect of a dependent in the death of her infant son. *Trammell v. State*, 751 N.E.2d 283 (Ind. Ct. App. 2001).

³⁷ The same argument was used to refute at the state level the charge that sterilization constituted “cruel and unusual punishment” under the Eighth Amendment. *See Skinner supra note 20*, at 126.

³⁸ Skinner, married thirty-seven years, died childless. *See Nourse, supra note 19*, at 157.

³⁹ *Skinner, supra note 17*, at 538. Nor did *ex post facto* interest Stone and Jackson in their concurrences, though both seemed uneasy with Douglas’ bold reach.

Do they imply, in Jefferson's famous terms, "a wall of separation"?⁴⁰ Or do they permit state and church to reach some kind of accommodation? The Supreme Court, it must be confessed, has not always addressed the issue with consistency or analytical rigor.⁴¹ In a key case, in which it declared that "the wall between church and state . . . must be kept high and impregnable [without] the slightest breach," for example, the Court upheld a state program reimbursing parents for the cost of bussing their children to parochial schools.⁴²

Decided a decade after *Skinner; Zorach v. Clausen*⁴³ concerned a New York City released time program that permitted students, on request of their parents, to leave public school during classes to receive religious instruction at houses of worship, which in turn made weekly attendance reports to the schools.⁴⁴ Other students remained in school. Tessim Zorach, a taxpayer and resident of the city, asked that the program be declared unconstitutional as contravening the First Amendment's establishment clause. As Douglas summarized Zorach's arguments, "the weight and influence of the school is put behind the program for religious instruction; public school teachers police it, keeping tabs on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this 'released time' program . . . would be futile and ineffective."⁴⁵

Douglas agrees with Zorach that the real issue is whether New York abridged the establishment clause,⁴⁶ clearing the way for a discussion of an obvious recent establishment case, *McCullum v. Board of Education*,⁴⁷ which struck down a religious instruction program in Illinois. *McCullum* is an inapposite precedent, he explains, because here "classrooms were used for religious instruction and the force of the public school was used to promote that instruction," whereas in *Zorach* "the public schools do no more than accommodate their schedules to a program of outside religious instruction."⁴⁸ A central consideration, he observes, is coercion. If

⁴⁰ Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), reprinted in *THE WORKS OF THOMAS JEFFERSON* 346 (Paul L. Ford ed., 1905).

⁴¹ STANLEY FISH, *THINK AGAIN: CONTRARIAN REFLECTIONS ON LIFE, CULTURE, POLITICS, RELIGION, LAW AND EDUCATION* 290 (2015).

⁴² *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). The rationale, that the aid was intended to help the parents and children and not the school, ignored the obvious fungibility of money, for the support plainly had the effect of helping the church by permitting it to use the money for other purposes. Madison famously opposed spending even a threepence of public funds to support teachers of the Christian religion: James Madison, *Memorial and Remonstrance against Religious Assessments*, in *SELECTED WRITINGS OF JAMES MADISON* 23 (Ralph Ketchum ed., 2006).

⁴³ *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁴⁴ N.Y. Education Law sec. 3210-1 authorized "Absence for religious observance and education . . . under rules that the commissioner [of education] shall establish."

⁴⁵ *Zorach*, *supra* note 43, at 309.

⁴⁶ *Id.* at 310. The free exercise clause is irrelevant, he states, because "[n]o one is forced to go to the religious classroom and no religious exercise of instruction is brought to the classrooms of the public schools." *Id.* at 311.

⁴⁷ *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty., Ill.*, 333 U.S. 203 (1948).

⁴⁸ *Zorach*, *supra* note 43, at 315.

schools coerced students to attend, “a wholly different case would be presented.”⁴⁹ But there is “no evidence in the record”⁵⁰ of such coercion.

The constitutionally mandated church-state separation, he says, is “complete and unequivocal and absolute,” but this implies a “common sense” approach, not one that is “hostile, suspicious, and even unfriendly.”⁵¹ Invalidating the New York law “would have wide and profound effects,”⁵² for it would rule out such commonplace acts of cooperation as acceding to a request from a Jewish student to be excused for Yom Kippur or from a Protestant student wishing to attend a family baptism. “We are a religious people,” he declares, “whose institutions presuppose a Supreme Being.”⁵³ Of ten opinions Douglas wrote on the establishment clause, this was the only one to speak for a majority and, perhaps not coincidentally, the only one to turn down an establishment claim.

An odd part of the opinion is that the issue it identifies as central is given only cursory treatment, for the question of coercion is allotted only a single seven line paragraph. How to determine if a given practice is coercive? The most obvious answer is: examine how it operates. Though each side presented information on this point, Douglas rejects considerations of “practical experience” because he believes they involve extraconstitutional considerations, like the wisdom or educational efficiency of the system.⁵⁴ Yet considerations of practical experience need not be extraconstitutional. Indeed, such considerations are often a staple in constitutional inquiries. *Yick Woo v. Hopkins*,⁵⁵ for example, struck down a San Francisco ordinance based not on its wording but on its operation; *Brown v. Board of Education*⁵⁶ famously referred to the practical effects of racial segregation on black children; *Gideon v. Wainwright*⁵⁷ was based on the real life consequences of the absence of legal representation in criminal cases. The list could be extended on and on. Dismissing the constitutional relevance of “practical experience,” in short, is bizarre and would be inexplicable, had Douglas not failed to follow his own advice, for he announces that there is “no evidence in the record” of coercion.⁵⁸

Only two pages later, in a footnote, does he disclose why there is no evidence of coercion: “The New York State Court of Appeals declined to grant a trial on this issue, noting . . . that appellants had not properly raised their claim.”⁵⁹ Or as Frankfurter acidly put it in his dissent, “there could be no proof of coercion, for the appellants were not allowed to make proof of it.” He added, “When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established.”⁶⁰ Why, one asks, hold religious instruction during school hours? The answer, according to research conducted around the time of *Zorach*, is that “where released time systems have been abandoned, attendance at religious classes

⁴⁹ *Id.* at 311.

⁵⁰ *Id.*

⁵¹ *Id.* at 312.

⁵² *Id.* at 313.

⁵³ *Id.*

⁵⁴ *Id.* at 309.

⁵⁵ *Yick Woo v. Hopkins*, 118 U.S. 356 (1886).

⁵⁶ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

⁵⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁸ *Zorach*, *supra* note 43, at 309.

⁵⁹ *Id.* at 311.

⁶⁰ *Id.* at 321-22.

has declined.”⁶¹ For Black the element of coercion in mandatory education taints released time.⁶² For Douglas, the absence of evidence is evidence of absence.

A larger, more abstract issue is whether the establishment clause requires official neutrality among religions or as to religion itself. Douglas clearly favors the first option. “We sponsor an attitude on the part of government that shows no partiality to any one group. . . . The government must be neutral when it comes to competition between sects [and is not required to] show a callous indifference to religious groups.”⁶³ In an earlier draft, he wrote, “we are a God-fearing people whose every institutions [sic] presuppose not atheism or agnosticism, but a faith in God.”⁶⁴ From this premise, he infers a legitimate role for government in protecting religion and a First Amendment aimed only at barring the preference of one religion over another.⁶⁵ In any event, he concludes, the state did “no more than accommodate [the students’] schedules to a program of outside religious instruction.”⁶⁶ An opinion that begins with a declaration of separation concludes with a paean to accommodation, though the problem with applying the accommodationist rationale is that it is intended to relieve religions of burdens, not to confer benefits.

Douglas’ opinion leaves the impression that he was favorably disposed toward religion and because the accommodationist stance was most connected with Catholics, with the Church, as well. But though the son of a Presbyterian minister, by the time of *Zorach* he had long since become hostile to religion and made no attempt to hide it, confessing to “a residue of resentment of which I have never quite got rid—resentment against hypocrites in church clothes.”⁶⁷ Religion, he believed, was a powerful means of social control, with clergy “defenders of the status quo and against the rabble.”⁶⁸ As to the Catholic Church, he seems to have shared a prejudice then common among liberal intellectuals:⁶⁹ Wiecek wrote of Douglas’

⁶¹ Russell N. Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROBS. 92, 111 (1949).

⁶² A prominent Catholic authority on church-state relations retorted that nearly all children attend school not because the law requires it, but rather because their parents recognize that it is their “natural duty to educate their children”; the compulsory rule, then, applies only to the small number whose parents ignore this duty. George E. Reed, *Church-State and the Zorach Case*, 27 NOTRE DAME L. REV. 529, 548 (1952).

⁶³ *Zorach*, *supra* note 43, at 314.

⁶⁴ James E. Zucker, *Better a Catholic than a Communist: Reexamining McCollum v. Illinois and Zorach v. Clausen*, 93. VA. L. REV. 2069, 2116 (2007).

⁶⁵ Black, dissenting, countered that a state preferring believers over nonbelievers “is just what . . . the First Amendment forbids. It is because the Framers understood that Americans are a religious people that they intended “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters [and preserve] the freedom of each and every denomination and of all nonbelievers [to] be maintained.” *Zorach*, *supra* note 43, at 318-19. Similarly, Jackson in his dissent, declared, “The day the country ceases to be free from irreligion it will cease to be free for religion—except for the sect that can win political power.” *Id.*, at 325.

⁶⁶ *Id.* at 315.

⁶⁷ WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 62 (1974); JAMES F. SIMON, *INDEPENDENT JOURNEY* 1-2 (1973).

⁶⁸ See DOUGLAS, *supra* note 67, at 14.

⁶⁹ John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-60*, 84 J. AM. HIST. 97 (1997); Mark S. Massa, *The New and Old Anti-Catholicism and the Analogical Imagination*, 62 THEOLOGICAL STUD. 549, 553-61 (2001).

“scarcely concealed anti-Catholicism,”⁷⁰ and Powe of his “thorough-going, long-standing anti-Catholicism.”⁷¹ Presumably, the absence of Catholics on the Court should have made acting on this hostility easier. Moreover, *Zorach* concerned children and education, and much of the opposition to the Church focused on its efforts to socialize the young. All this might lead to a confident prediction that Douglas would oppose the released time practice.

Yet in *Zorach*, Douglas sounds like a believer sympathetic to the Church’s needs. How is this to be explained? Two authorities, aware of Douglas’ powerful desire to become president, attribute his opinion to “the bonds of political ambition,”⁷² apparently referring to a need to attract Catholic voters to aid his bid for the Democratic presidential nomination that summer. This, however, is not entirely persuasive; Douglas had ruled out seeking the presidency three months before *Zorach*, and in his opinions in contemporaneous national security cases⁷³ and in calling for United States recognition of Communist China,⁷⁴ he was alienating precisely this segment of the electorate. A decade later, Douglas came around to the separatist position in a series of Sunday blue laws cases,⁷⁵ leaving *Zorach* an isolated exception to the rule. His stance here is difficult to understand.

IV. THE LATER PERIOD: GRISWOLD V. CONNECTICUT

Perhaps no right today is the subject of as much discussion as privacy. Noting fears and annoyances, Americans feel that their privacy is more threatened than ever before, usually as a consequence of modern technology.⁷⁶ Yet though it has become a cliché that modern life imperils privacy, arguably privacy itself is an artifact of

⁷⁰ WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 173 (1988).

⁷¹ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 368 (2000).

⁷² BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 357 (2003); David Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 *YALE L. J.* 975, 995 (1964).

⁷³ *Dennis v. United States*, 341 U.S. 494 (1951); *Adler v. Bd. of Educ.*, 485 U.S. 380 (1952).

⁷⁴ *Justice Douglas Urges China Recognition*, *WASH. POST*, Sept. 1, 1951.

⁷⁵ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Gallagher v. Crown Koshier Meat Market*, 366 U.S. 617 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown* 366 U.S. 599 (1961). In fact, one study concluded, “In its fully developed form, Douglas’ literal reading of the establishment clause as proscribing *all* laws regarding an establishment of religion led him to find the clause violated by *any* government assistance to religion, no matter how minuscule, how indirect, or how long-standing and widely accepted.” Nadine Strossen, *The Religion Clause Writings of Justice William O. Douglas*, in *HE SHALL NOT PASS THIS WAY AGAIN* 91, 96 (Stephen L. Wasby ed., 1990). In his subsequent opinions, Douglas never acknowledged that he changed his mind, even citing the “We are a religious people” statement in *Zorach* in a school prayer case striking down the practice. *Engel v. Vitale*, 370 U.S. 421, 437, 442 (1962).

⁷⁶ E.g., Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship among Law, Technology, and Privacy*, 130 *HARV. L. REV.* 61 (2016); Wolter Pieters, *Explanation and Trust: What to Tell the User in Security and AI?*, 13 *ETHICS & INFO. TECH.* 53 (2013); Morgan Hochheiser, *The Truth Behind Data Collection and Analysis*, 32 *J. MARSHALL J. INFO TECH & PRIVACY L.* 33 (2015).

modern life, which offers unprecedented opportunities to be by ourselves at home, at work, and in transit, plus as ciphers in large impersonal organizations. Given this history, it is not surprising that the Constitution is silent as to privacy nor that this silence came to be seen as an anachronistic defect requiring correction.

Which brings us to *Griswold v. Connecticut*.⁷⁷ Of all the hundreds of opinions Douglas produced, *Griswold* may well be the most significant. Connecticut had made it a crime to use contraceptives or to provide information counseling their use.⁷⁸ Estelle Griswold, the executive director of Planned Parenthood in Connecticut, gave contraceptive information and counseling to married couples, and was convicted and fined \$100. Her conviction was affirmed at the state level, and she successfully appealed to the Supreme Court.

Douglas begins his consideration of the merits, declaring, “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions.”⁷⁹ He then establishes that the Constitution embodies certain rights not expressly mentioned, relying on a handful of precedents. These “peripheral rights,”⁸⁰ implied by the expressed rights, “suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance.”⁸¹ He closes the case by arguing that penumbras from the First (the right to associate), Third (the right to be free from being forced to quarter soldiers in one’s home during peace time), Fourth (the right to be secure in one’s person and be free from unreasonable searches and seizures), Fifth (the privilege against self incrimination), and Ninth (the Constitution’s enumeration of rights is not necessarily exclusive) Amendments, together create a zone of privacy protected by the Constitution.⁸² At this point, Douglas turns to the fact that *Griswold* was counseling *married* couples. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?” he asks, following with a paean to marriage as “an association for as noble a purpose as any involved in our prior decisions.”⁸³

Often, apparently revolutionary rulings in hindsight may be seen as merely culminating a lengthy incremental process. The famous *Brown* desegregation case,⁸⁴ for example, which struck many as a bolt from the blue, actually followed from a

⁷⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁸ Gen. Statutes of Conn., §§53-32, 54-196 (1958 rev.). The law had essentially been unenforced, rendering it impervious to judicial review. *Poe v. Ullman*, 367 U.S. 497 (1961). *Griswold* was concocted to test the law.

⁷⁹ *Griswold*, *supra* note 77, at 482.

⁸⁰ *Id.* at 483.

⁸¹ *Id.* at 484.

⁸² *Id.*

⁸³ *Id.* at 585-86. Feldman suggests that “Douglas, after all, loved the institution [of marriage] so much he entered into it four times.” NOAH FELDMAN, *SCORPION: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 427 (2010). Douglas, a notorious and often abusive womanizer, left his twenty-five year old wife a few weeks after his *Griswold* decision, and the next year married a twenty-three year old cocktail waitress. Though the National Father’s Day Committee named him Father of the Year, Douglas had a strained relationship with his children, who regarded him as “scary.” MURPHY, *supra* note 72, at 287, 198.

⁸⁴ *Brown*, *supra* note 56.

series of holdings⁸⁵ and was really the next logical step. Occasionally, however, the revolutionary ruling has no obvious forebears. *New York Times v. Sullivan*,⁸⁶ which rewrote the law of libel, is one such case. *Griswold* is another.⁸⁷ Such acts of discontinuity might seem to require more than the usual level of justification. But in *Griswold*, the constitutional right to privacy rests on a single paragraph on penumbras and emanations.

Thus, Douglas makes no effort to rebut contrary views. For example, he assumes that the various emanations from the five amendments add up to a right to privacy. But if this is so, why have the five amendments and not a single privacy amendment, for a generalized right to privacy might render them superfluous? Or why not conclude that the Framers favored only the privacy related rights expressed in the amendments and nothing more?

To the obvious question, If the Framers wanted a general right to privacy, why did they not include it in the Constitution, Douglas' response seems to be: let us remedy the oversight. An advocate of the living Constitution, he appears to have taken it for granted that it was the Court's responsibility to update the document to take into account evolving beliefs and opinions. Harlan, in his concurrence, criticized the "constitutional outlook . . . to keep the Constitution in supposed 'tune with the times,'"⁸⁸ and Black, in his dissent, made the same point even more emphatically, comparing *Griswold* with the notorious *Lochner* case.⁸⁹ Douglas disavowed this charge,⁹⁰ but Justice Peckham might have used emanations (from the contract and due process clauses) as a rationale, if only he had been as creative as Douglas. Black believed that a right to privacy should be added to the Constitution through the "old-fashioned" amending process.⁹¹ If the constitutional right were formally proposed, there would be a text to parse, plus congressional hearings and debates, not to mention analyses by lawyers, pundits, politicians, and ordinary citizens. This elaborate discourse would certainly not avoid all confusion as to the meaning of the text.⁹² But it would clearly be more helpful than examining only the cryptic term, "right to privacy." In ordinary speech, we may think of peeping toms or stolen diaries as privacy infringements. Would we also think of abortions?⁹³ Possibly. But

⁸⁵ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁸⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁷ Privacy had been discussed, at least since Samuel Warren and Louis Brandeis' classic, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and numerous cases had been decided on the tort of the invasion of privacy. But this is very different from a constitutional right to privacy.

⁸⁸ *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965).

⁸⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁰ *Griswold*, *supra* note 77, at 482.

⁹¹ *Id.* at 522.

⁹² Justice Scalia would have had no patience with the use of legislative history. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997). Still, as an originalist, he would have had a formal text to explicate.

⁹³ On how *Griswold*'s marital contraception privacy was transmuted in less than eight years into *Roe*'s abortion privacy, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 335-88 (1994). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the privacy rationale was dropped.

not necessarily.⁹⁴ Black was prescient when he predicted that privacy was “a broad, abstract, and ambiguous concept which can easily be shrunken [or expanded] in meaning.”⁹⁵

What to make of penumbras and emanations?⁹⁶ Presumably intended to imply a tie between the core (i.e., the amendments) and the periphery (i.e., privacy), the metaphor seems unconnected with the facts of the case. Nor are the cases cited, as implying a larger privacy right, well chosen.⁹⁷ How is counseling about contraceptives related to any of the amendments cited, for example, to quartering soldiers or self incrimination?⁹⁸ For that matter, how is running classes counseling couples a private act? Black, dissenting, echoed Alice’s complaint: “The question is . . . whether you can make words mean so many different things.” To which Douglas, following Humpty Dumpty, essentially replies: “The question is . . . which is to be master—that’s all.”⁹⁹ For Black, the words, that is, the Constitution, are the master; for Douglas, it is the judge. Thus, Black, though conceding that the Connecticut law is “offensive,”¹⁰⁰ goes on to say, “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”¹⁰¹ For Douglas, the absence of a specific provision is no problem.

And why, as in *Skinner*, did Douglas shine a spotlight on marriage?¹⁰² For him, the marital bedroom was a “sacred precinct,” off limits to police searching for telltale signs of contraceptives. Would the police also be barred from searching it for telltale signs of guns or drugs or counterfeit bills? Would marital bedrooms be impervious to search warrants? Would the Connecticut law survive, so long as it was not enforced against married couples? Before long, the Court jettisoned the marriage rationale, extending the right to contraceptives to unmarried persons¹⁰³

⁹⁴ Thomas Halper, *Privacy and Autonomy: From Warren and Brandeis to Roe and Cruzan*, 21 J. MED. & PHIL. 121 (1996).

⁹⁵ *Griswold*, *supra* note 77, at 509.

⁹⁶ Harlan derided them as “radiations.” *Id.* at 500. Justice Thomas is said to have hung a sign in his chambers reading, “Please don’t emanate in the penumbras.” JEFFREY ROSEN, *THE SUPREME COURT: PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 173 (2006).

⁹⁷ *Skinner* was an equal protection case; *Breard v. Alexandria*, 341 U.S. 622 (1951), was a First Amendment case, *Monroe v. Pape*, 365 U.S. 167 (1961) and *Frank v. Maryland*, 359 U.S. 360 (1959) were search and seizure cases; and *Lanza v. New York*, 370 U.S. 139 (1962), was a due process case. The only case where privacy was mentioned was *Public Utilities v. Pollak*, 343 U.S. 451 (1952), and here the privacy clam was rejected.

⁹⁸ At conference, when Douglas tied privacy to the freedom of assembly, Black retorted that the “right of a husband and wife to assemble in bed is a new right to me.” Thereupon Paul Posner, a law clerk to Justice Brennan, drafted a letter, which Brennan sent to Douglas, suggesting tying privacy to the Third, Fourth, and Fifth Amendments. DAVID J. GARROW, *REPRODUCTIVE RIGHTS AND LIBERTIES, IN PASSION AND REASON: JUSTICE BRENNAN’S ENDURING INFLUENCE* 110 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

⁹⁹ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 205 (HarperCollins Publishers 1934) (1871).

¹⁰⁰ *Griswold*, *supra* note 77, at 507 (1965).

¹⁰¹ *Id.* at 510.

¹⁰² He had discarded his wife of twenty-eight years in 1963 to the consternation of his children: MURPHY, *supra* note 72, at 289-95.

¹⁰³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

and then to minors.¹⁰⁴ No wonder the opinion generated three concurrences and two dissents.

V. THE FINAL PERIOD: SIERRA CLUB V. MORTON

Few cases so engaged Douglas as *Sierra Club v. Morton*¹⁰⁵ (1972). Lauded as the “Environmental Justice”¹⁰⁶ and the “First Supreme Court Environmentalist,”¹⁰⁷ he was perhaps “the most prominent conservationist in public life” of his time.¹⁰⁸ Long before the environmental movement became fashionable, Douglas was a dedicated outdoorsman, who, for instance, hiked the entire two thousand plus mile Appalachian Trail and climbed the Cascade Mountains. More than that, he was unceasingly active in efforts at preservation. For example, he was perhaps the key figure in helping to block a proposed parkway to be built along the Chesapeake & Ohio Canal, running from Washington to Cumberland, MD.¹⁰⁹ He also wrote a series of well publicized books on the wilderness.¹¹⁰ These kind of activities brought him considerable renown. A portion of the Appalachian Trail is known as the Douglas Trail; his statue oversees the C & O hiking path; and the Sierra Club established an award in his honor that is given to persons who made outstanding use of the legal/judicial process to achieve environmental goals.¹¹¹

This commitment to the environment was also reflected in his opinions on the Court. In 1960, for example, Douglas took the unusual step of dissenting from a *certiorari* denial concerning the aerial spraying of DDT and kerosene to eradicate gypsy moths that were damaging forests. Ignoring legal considerations, he detailed the harmful pollution produced by the practice.¹¹² Near the end of his service on the Court, he wrote a concurrence to a *per curiam* opinion, also very unusual, in a case upholding the Atomic Energy Commission’s power to approve commercial nuclear powered electric plants. Warning of the dangers of agency abuse, he expressed his concerns regarding nuclear power.¹¹³

¹⁰⁴ *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

¹⁰⁵ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹⁰⁶ ADAM M. SOWARDS, *THE ENVIRONMENTAL JUSTICE: WILLIAM O. DOUGLAS AND AMERICAN CONSERVATION* (2009).

¹⁰⁷ Peter Manus, *Wild Bill Douglas’s Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 *TEMP. L. REV.* 111 (1999).

¹⁰⁸ STEPHEN COX, *THE AMERICAN CONSERVATIONIST MOVEMENT: JOHN MUIR AND HIS LEGACY* 239 (1981); SIMON, *supra* note 67, ch. 24.

¹⁰⁹ William O. Douglas, *Potomac Sanctuary*, *WASH. POST*, Jan. 19, 1954.

¹¹⁰ WILLIAM O. DOUGLAS, *MY WILDERNESS: THE PACIFIC WEST* (1960); WILLIAM O. DOUGLAS, *MY WILDERNESS: EAST TO KATAHDIN* (1961); WILLIAM O. DOUGLAS, *A WILDERNESS BILL OF RIGHTS* (1965); WILLIAM O. DOUGLAS, *FAREWELL TO TEXAS: A VANISHING WILDERNESS* (1967).

¹¹¹ Douglas had served on the board of the Sierra Club, resigning in 1962 because it “may be engaging in litigation . . . which at least in their potential might reach this Court.” WILLIAM O. DOUGLAS, *THE DOUGLAS LETTERS: SELECTED FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* 62 (Melvin I. Urofsky & Philip E. Urofsky eds., Adler & Adler 1987).

¹¹² *Murphy v. Butler*, 362 U.S. 929 (1960).

¹¹³ *Northern Indiana Public Service Co. v. Izaak Walton League*, 423 U.S. 12, 17-19 (1975).

Sierra Club v. Morton turned on a narrow, technical question, though Douglas' argument was anything but narrow and technical. Specifically, the case was about standing. Article III authorizes federal courts to hear only "cases and controversies," which courts have interpreted to mean that "the plaintiff must have suffered an 'injury in fact,' . . . that the injury has to be 'fairly traceable' to the challenged action of the defendant . . . [and] it must be likely . . . that the injury will be redressed by a favorable decision."¹¹⁴ Absent the injury in fact, there is no case.

Walt Disney Enterprises secured a thirty year use permit from the U.S. Forest Service to develop an eighty acre complex of motels, restaurants, and other facilities as part of a ski/summer resort in Mineral King Valley in the Sequoia National Forest. Running through the forest would also be a high voltage power line and a twenty mile highway, each tied to the development. The Sierra Club, a nonprofit organization devoted to conservation and sound maintenance of national parks, saw the proposed development as threatening to the ecology and character of Mineral King and sought to block the development in order to maintain its quasi-pristine appearance. Unsuccessful in its efforts through the political process, the Sierra Club sought a declaratory judgment that the development violated federal statutes and regulations.

The majority took the position that the Sierra Club lacked standing, and therefore could not proceed with the law suit. In order to challenge the Forest Service decision, the Sierra Club had to demonstrate a personal stake in the dispute. The Sierra Club pointed to section ten of the Administrative Procedure Act, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof;" as a conservation group, the Sierra Club felt sufficiently aggrieved to qualify. Justice Stewart, writing for the majority, conceded that the development "may amount to an 'injury in fact,'"¹¹⁵ but added that the Sierra Club "failed to allege that it or its members would be affected" by it.¹¹⁶ That the development was a public action and that the Sierra Club considered itself a representative of the public did not relieve it of its standing obligation, for if the Sierra Club could proceed, so, too, could any *bona fide* organization or even individual.¹¹⁷

In a "famous"¹¹⁸ impassioned dissent, Douglas begins by suggesting that standing be refashioned in cases involving environmental litigation, such as by "the conferral of standing upon environmental objects to sue for their own preservation."¹¹⁹ "Inanimate objects," like ships and corporations, "are sometimes

¹¹⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For a devastating critique of the doctrine, see William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988).

¹¹⁵ *Sierra Club*, *supra* note 104, at 734.

¹¹⁶ *Id.* at 735.

¹¹⁷ *Id.* at 739-40. Stewart was very far from hostile to Sierra. Indeed, in footnote 8 he wrote that the decision did not bar Sierra from amending its complaint to cover individualized grievances and thereby meet the standing threshold. Sierra took the hint, amended their complaint, and won the suit.

¹¹⁸ FELDMAN, *supra* note 83.

¹¹⁹ *Sierra Club*, *supra* note 104, at 742. This argument, as he acknowledged, had recently attracted a good deal of attention: Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Art. 120 of the

parties to litigation;¹²⁰ indeed, “the problem is to make certain that the inanimate objects which are the very core of America’s beauty, have spokesmen before they are destroyed.”¹²¹ Who can perform this task? “Congress is too remote . . . and its machinery is too ponderous,” and federal agencies cannot be trusted because “they are notoriously under the control of powerful interests,”¹²² with the Forest Service “notorious for its alignment with lumber companies.”¹²³ Only the courts remain as actors ready, willing, and able to do the job.

Few judicial opinions display so nakedly the policy preferences of their author. Douglas presents the Mineral King controversy in entirely Manichean terms, with virtuous environmentalists contesting with evil developers and co-opted regulators. Do developers generate social benefits, in the form of recreation and employment? Will bringing more people to the wilderness not only despoil it but also perhaps allow some visitors to discover its wonders and work to sustain it? For Douglas, developers are simply destroyers. One law professor who spent some time with him recalled, “He was deeply distressed at the polluted condition of the environment, blaming it all on the work of giant corporations.” Then Douglas told him, “I’m ready to bend the law in favor of the environment and against the corporations.”¹²⁴ The result in this case was insisting that the Sierra Club could bring an action on behalf of “valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air.”¹²⁵

More fundamentally, Douglas’ dissent poses the question as to how, in a democracy, such controversies are to be resolved. The Sierra Club and other environmental groups would apparently prefer not to have to persuade the public or its representatives, both of whom may be too doltish to comprehend the message. Instead, the Sierra Club would rather seek the assistance of an unelected, unaccountable Court. Which, in turn, raises the question: why confine judicial dominance to environmental issues? Why not permit self appointed groups to act as guardians *ad litem* in other areas, as well? Douglas’ answer is that natural environmental inanimate objects cannot protect themselves. Of course, this rationale could easily be extended to agriculture—who protects hogs from slaughter and soy beans from herbicides?—and architecture—who protects this landmark bridge or that neighborhood store?—and art—who protects this portrait or that can of excrement?¹²⁶—or manufacturing—who protects this factory or that machine? All these other areas involve what Locke called property, mixing human

Swiss constitution requires that living creatures, including plants, be treated with dignity. See FEDERAL ETHICS COMMITTEE ON NON-HUMAN BIOTECHNOLOGY, THE DIGNITY OF LIVING BEINGS WITH REGARD TO PLANTS: MORAL CONSIDERATIONS OF PLANTS FOR THEIR OWN SAKE (Apr. 2008), available at <https://www.ekah.admin.ch/inhalte/ekah-dateien/dokumentation/publikationen/e-Broschure-Wurde-Pflanze-2008.pdf>.

¹²⁰ *Sierra Club*, *supra* note 104, at 742.

¹²¹ *Id.* at 745.

¹²² *Id.*

¹²³ *Id.* at 748. The case had nothing to do with lumber companies.

¹²⁴ Red Schwartz, *quoted in* Murphy, *supra* note 72, AT 455.

¹²⁵ *Sierra Club*, *supra* note 104, at 743.

¹²⁶ Catherine Milner, *The Tate Values Excrement More Highly than Gold*, TELEGRAPH (London) (June 30, 2002), <https://www.telegraph.co.uk/news/uknews/1398798/The-Tate-values-excrement-more-highly-than-gold.html>.

labor with whatever the state of nature provided.¹²⁷ Douglas may imagine that the “river as plaintiff speaks,”¹²⁸ but its existence, not mixed with human labor, may have even less claim than Locke’s property. For as it was humans who planted the beans or built the bridge or created the art, these inanimate objects would seem to have a stronger argument for human protection than a river created without human intervention. Though few take seriously the idea of defending the interests of all inanimate objects, it is difficult to see how only *natural* inanimate objects deserve judicial succor. And if only judges are wise enough to protect these objects, why not have them decide everything, particularly, since Douglas offers little reason to turn to Congress or federal agencies?

Relatedly, Douglas does not entertain the possibility that the economic marketplace merits respect. If people want to ski at Mineral King, for example, that activity is evidently seen as virtually the equivalent of a felony, for its value to these people or even its legitimacy is never acknowledged. The result is that this judge, who prided himself as a defender of the people, exhibits disdain for the chief ways the people exercise choice, democratically and as marketplace consumers.

VI. AUTHENTICITY

The other day, a friend and I repaired to a local tavern, seeking respite from a long, hard day of doing very little. I ordered a glass of Goose Island IPA, which I think tastes pretty good,¹²⁹ whereupon my friend berated me for drinking beer made by the Budweiser corporate behemoth. It used to be real, he informed me, but after it was bought by Budweiser, it ceased being authentic. I am not sure exactly what makes beer authentic, but I am sure that when the term is applied to the effluvia of everyday life, it plainly has become a highly prized tag.

If asked the meaning of authenticity, many might reply with that windbag Polonius’ famous advice: “To thine own self be true, and it must follow, as the night the day, thou canst not then be untrue to any man.”¹³⁰ Yet this is not quite what authenticity means, for Polonius justifies being true to oneself with reference to dealing with others; authenticity, by contrast, justifies being true to oneself entirely by its value to oneself. Can authenticity exist, then, in mass society? That mass society generates powerful conformity pressures that war with authenticity has been a complaint of innumerable social critics.¹³¹ At the same time, though, we understand that the self does not, like babies, arrive via storks, but is to a significant extent the result of interactions with one’s environment. Perhaps, then, only a hermit raised by wolves could claim perfect authenticity, in the sense that his or

¹²⁷ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 5, § 27 (1689).

¹²⁸ Sierra Club, *supra* note 104, at 743.

¹²⁹ The Chicago Tribune’s beer expert agrees that it is a “very solid beer”; see Josh Noel, *We Rate Anheuser Busch Versions of Goose Island Beers 5 Years after Sale*, CHI. TRIB., Aug. 1, 2017.

¹³⁰ WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 3.

¹³¹ See e.g., SØREN KIERKEGAARD, *SICKNESS UNTO DEATH: THE CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING* (Howard V. Hong & Edna .H. Hong eds. & trans., Princeton University Press 1980) (1849); DAVID REISSMAN ET AL., *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* (1950).

her self is not affected or manipulated by others but is created free of external human influence, though such a person would literally be uncivilized. Moreover, as another of Shakespeare's characters observed, "All the world's a stage and all the men and women merely players;"¹³² with each of us compelled by circumstances to play different roles, how to know which (if any) is authentic? The difficulties and impediments conspiring against authenticity, in short, are everywhere. The truly authentic person, triumphing over these impediments, is heroic.

There seems little doubt that Douglas regarded himself as such a person. Indeed, in memoirs and speeches, he detailed his struggles against formidable obstacles in the way of his expressing his true character and fulfilling his true destiny. As one journalist put it, "Here is a justice who refuses to conform."¹³³ Or as Justice Clark recalled, "At conferences, Bill believed that rather than seek harmony, one should seek disharmony."¹³⁴ For William Orville, Douglas was a self made man in more senses than one. In best selling writings, he described a childhood in Yakima, Washington marred by poverty and polio, which by dint of intelligence and hard work he vanquished, bringing to life the great American dream. He was not after fame or money or what William James called "the bitch goddess SUCCESS,"¹³⁵ but instead was driven by an urge to make the world a better place. It was this that led him to overcome polio, build up his scrawny physique, become an outdoorsman in the Theodore Roosevelt tradition, and serve in the Army in Europe during World War I; it was this that allowed him to live uncomplaining in a tent while at college and then propelled him (via freight cars) to New York, where he worked his way through Columbia Law School, graduating second in his class; it was this that induced him to leave a white shoe law firm for academia, where he specialized in bankruptcy and corporate finance, and to leave academia for the Securities and Exchange Commission, where he soon became chairman, an informal advisor of President Roosevelt, in sum, "one of the most prominent and successful New Deal players;"¹³⁶ and it was this that at age forty saw him appointed to the Supreme Court, the youngest appointee since Joseph Story in 1811. In this elaborate narrative, the private and public selves each harmoniously illuminate the other.

Underlining this maverick persona is Douglas' writing.¹³⁷ He "prided himself on being the fastest writer on the Court,"¹³⁸ and his opinions are brief, unencumbered by jargon or arcane references, almost conversational. They often read as if they were addressed to the educated layperson, not a sophisticated attorney or judge.

¹³² WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 2, sc. 7.

¹³³ Milton Viorst, *Here Is a Justice Who Refuses to Conform*, CHI. TRIB., June 14, 1970.

¹³⁴ Tom C. Clarke, J., *quoted in* JAMES F. SIMON, *INDEPENDENT JOURNEY* 353 (1973).

¹³⁵ Letter from William James to Miss Theodora Sedgwick (Sept. 13, 1906), *in* 2 *THE LETTERS OF WILLIAM JAMES* 260 (Henry James ed., Atlantic Monthly Press Boston 1920).

¹³⁶ FELDMAN, *supra* note 83, at 169.

¹³⁷ Judge Posner lists several signs of bad judicial writing—a lack of candor, concreteness, and economy of expression; overuse of jargon; preoccupation with trivia—and none of these can be found in Douglas' opinions. Richard A. Posner, *Legal Writing Today*, 8 *SCRIBES J. LEGAL WRITING* 35 (2001).

¹³⁸ BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 63 (1979). His first clerk recalled that Douglas was "absolutely determined to get through [his work] and get through fast." C. David Ginsberg, *quoted in* Howard Ball, *Loyalty, Treason and the State: An Examination of Justice William O. Douglas' Style, Substance, and Anguish*, *in* Wasby ed., *supra* note 75, at 7, 35.

This was by design, for he saw his role as that of a national teacher, speaking in plain words to the public at large.¹³⁹ At the same time, the opinions seem clearly the product of an impatient man. Rationales that might have produced a narrower ruling—for example, severability or *ex post facto* in *Skinner*—are not seriously considered. Central issues—like the application of the establishment clause to nonbelievers in *Zorach*—are sometimes avoided. The language is aggressive; basic rights to privacy, marriage, and procreation are announced as if by ukase. And it is also careless. At one point in *Zorach*, Douglas declares that “separation must be complete and unequivocal;” two sentences later, he tells us that this “does not say that in every and all respects there shall be separation.”¹⁴⁰ In *Griswold*, he assures us that he will not act as a super legislature—and then acts as a super legislature. Where others might dress up their arguments in legal verbiage, he appears to have agreed with a colleague at the Yale Law School, his “good friend,”¹⁴¹ Fred Rodell, in seeing these words as “hocus-pocus.”¹⁴² For Douglas, authenticity seems to mean breaking the mold, ignoring accepted norms, going your own way. “The only soul I have to save is my own,” he said,¹⁴³ and though a member of a formal group, the Supreme Court, that reached decisions through voting, he “did not conceive his role as one of attempting to persuade others to his point of view.”¹⁴⁴ His opinions, blunt and often without the usual legal apparatus, did not read like conventional opinions; his relations with his colleagues, mostly cold, brusque, and distant, did not follow standard practice. In his eyes, “He was a people’s judge,” unconcerned with “whether or not his views were well supported by precedent.”¹⁴⁵

Was this disdain for the views of others evidence of authenticity? To the extent that Douglas was being true to his own deepest instincts, the answer would seem to be yes. But there is a problem here, for to be fully one’s own person, it is not enough to simply follow one’s own instincts, for these instincts may have been implanted by other people. Douglas, it seems, never bothered developing a judicial philosophy that would guide him and protect him from being manipulated. Did he follow the text, like his colleague, Black?¹⁴⁶ Or original public meaning, like Scalia?¹⁴⁷ The point of such theories is to distance the judge from his own predilections, but it was precisely these predilections that Douglas wanted to follow.

We now know, too, thanks to a biographer who refused to take Douglas at his word,¹⁴⁸ that much of Douglas’ classic Horatio Alger autobiography that resonated so widely is fiction. His family was middle class, not poor; he suffered from a psychosomatic intestinal condition, not polio; he served two months in the Whitman College Student Officers Training Corps to beat the draft, not the Army; he lived at

¹³⁹ SIMON, *supra* note 67, ch.25.

¹⁴⁰ *Zorach*, *supra* note 43, at 312.

¹⁴¹ MURPHY, *supra* note 72, at 346.

¹⁴² FRED RODELL, WOE UNTO YOU, LAWYERS! 64-5 (1939).

¹⁴³ Howard Ball, *Loyalty, Treason and the State: An Examination of Justice William O. Douglas’ Style, Substance, and Anguish*, in Wasby ed., *supra* note 75, at 7. Douglas referred to himself as a loner: see DOUGLAS, *supra* note 67, at 35.

¹⁴⁴ Robert Jerome Glennon, *Collegialism and Change Over Time*, in Wasby ed., *supra* note 75.

¹⁴⁵ SIMON, *supra* note 67, at 354.

¹⁴⁶ Hugo Black, *The Bill of Rights*, 35 N. Y. U. L. REV. 865 (1960).

¹⁴⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹⁴⁸ See MURPHY, *supra* note 72.

a fraternity house while at Whitman, not a tent; he rode a passenger train to New York, not freight cars; at Columbia, where he graduated fifth, his schoolteacher wife supported him; at the SEC his obsession was publicity, not cleaning up the financial industry; and for decades, he found his service on the Court a bit of a bore, the great goal of his life being the presidency, which as his friend Tommy Corcoran said, he wanted “worse than Don Quixote wanted Dulcinea.”¹⁴⁹ Apparently, his arrogance was so vast that it never occurred to him that a researcher would uncover his numerous, often pointless lies.¹⁵⁰ His language, so different from the stereotypical stodgy legalese, branded him with authenticity. Yet authenticity for Douglas was entirely divorced from truth-telling.

VII. REALISM AND JUSTICE

In an important study of federal judges, Epstein, Landes, and Posner make the common sense point that judges may be motivated by factors other than mechanistic detachment or ideological conviction. Among the goals they cite are satisfaction with their own job performance, collegial friendships, income, leisure time, and opportunities for promotion.¹⁵¹ Applying these criteria to Douglas reveals how unusual a justice he was. So slap-dash are many of his opinions that job performance, at least in the sense of judicial craftsmanship or esteem from his colleagues, does not seem a prime motivator.¹⁵² Often cantankerous and nasty, he hardly seemed to have valued highly friendship with his fellows on the Court. On the other hand, chronically short of money, income was important to him, as was leisure time, which he used to write, travel, and hike. Promotion, which Epstein, Landes, and Posner considered significant only for lower court judges, was also for years at the front of his mind, in the form of the presidency. In fundamental ways, Douglas was far from a typical Supreme Court justice.

Yet if we try to place him in the competing narratives of objectivity and realism, Douglas was clearly in the realism camp. Less than twenty years before he was born, Holmes had announced that “the life of the law has not been logic; it has been experience,”¹⁵³ later adding that the pretense that the law is a formal construct may

¹⁴⁹ JOSEPH LELYVELD, *HIS FINAL BATTLE: THE LAST MONTHS OF FRANKLIN ROOSEVELT* 156 (2016).

¹⁵⁰ For example, he bragged that his grandfather, Orville, had seen combat in the battle of Vicksburg, when instead he was a deserter. Murphy, *supra* note 72, at 475-76.

¹⁵¹ EPSTEIN, *supra* note 3, at ch.1.

¹⁵² According to Woodward and Armstrong, his clerks dubbed some of his opinions “‘plane-trip specials’ because they were written after the Friday conference on an airplane, as Douglas traveled to some speaking engagement.” See WOODWARD & ARMSTRONG, *supra* note 138. Often, a few weeks before the end of the term, Douglas would finish his work and leave for his vacation home in Goose Prairie, sometimes neglecting even to inform his colleagues that he had left. The Court would not have completed its work, and he would phone in his votes. His colleagues resented the practice, and he did not care. SIMON, *supra* note 67, at 432-33; Melvin I. Urofsky, *Getting the Job Done: William O. Douglas and Collegiality in the Supreme Court*, in Wasby ed., *supra* note 75, at 33, 36 (1990).

¹⁵³ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

disguise “considerations of social advantage,”¹⁵⁴ a point he made with devastating effect in his famous dissent in *Lochner*.¹⁵⁵ Around the same time, Pound derided the popular notion of mechanical jurisprudence, according to which the law is a coherent collection of premises and inferences that could be scientifically applied, leaving judges as mere technicians.¹⁵⁶ Later legal realists, like Llewellyn¹⁵⁷ and Felix Cohen,¹⁵⁸ elaborated on these themes to great effect; at Yale, the very heart of the realist beast,¹⁵⁹ Douglas encountered prominent realists, who reinforced his skeptical beliefs. By the time Douglas joined the Supreme Court in 1939, realism had achieved a dominant status in progressive opinion, and he was one of its most assertive exponents.

Douglas’ legal realism perhaps was a corollary of his relentless drive for authenticity. Indeed, his entire life, as he laid it out in multiple memoirs, was that of a maverick, “a man’s man,” as Rodell put it,¹⁶⁰ “about as independent a cuss as I knew,” in the words of Thurgood Marshall,¹⁶¹ a rugged individualist, a “champion of the underdog,”¹⁶² a true man of the West with a big chip on his shoulder. What, then, is the proper role of a maverick judge? The answer, it seems, for Douglas is settled by another question: what is the proper role for anyone?¹⁶³ His answer: to do justice. Now, one may reply with a well worn anecdote, involving an encounter between the great judge, Learned Hand, and Holmes.¹⁶⁴ “Well, sir, goodbye,” said a young Hand. “Do justice!” “Come here. Come here,” replied Holmes. “That is not my job. My job is to play the game according to the rules.”¹⁶⁵ Or as Holmes later wrote Wu: “I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”¹⁶⁶ For Holmes, the issue facing the judge is not what justice requires, but what the law requires. Law, though it often speaks in ethical terminology (duty, responsibility) and often has an ethical basis (thou shalt not steal/theft), is distinct from morality.¹⁶⁷ In the

¹⁵⁴ Oliver Wendell Holmes, Jr., *The Path of the Law*, in COLLECTED LEGAL PAPERS 184 (Harold Joseph Laski ed., Harcourt, Brace & Co. 1920).

¹⁵⁵ *Lochner*, *supra* note 89, at 74.

¹⁵⁶ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

¹⁵⁷ Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930).

¹⁵⁸ Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

¹⁵⁹ LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1987).

¹⁶⁰ Fred Rodell, *quoted in* JAMES F. SIMON, *INDEPENDENT JOURNEY* 276 (1973).

¹⁶¹ Fred Rodell, *quoted in* Melvin I. Urofsky, *Getting the Job Done: William O. Douglas and Collegiality in the Supreme Court*, in Wasby ed., *supra* note 75.

¹⁶² Ball, *supra* note 143, at 26.

¹⁶³ Judge Posner believes that judges should be seen as “ordinary people responding rationally to ordinary incentives.” Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1 (1993).

¹⁶⁴ Michael Herz, “Do Justice!”: *Variations on a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).

¹⁶⁵ LEARNED HAND, *A PERSONAL CONFESSION*, reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES* 302, 306-07 (Irving Dilliard ed., Vintage Books, 3d ed. 1959) (1952).

¹⁶⁶ Letter from Oliver Wendell Holmes, J., to John Wu (July 1, 1929), in *JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932*, 53.

¹⁶⁷ The notion that law is separate from morality has been called the separation thesis. ANTHONY D’AMATO & ARTHUR J. JACOBSON, *JUSTICE AND THE LEGAL SYSTEM* 234 (1992).

division of labor, moral concerns belong with the lawmakers and legal concerns with the judges.

For Douglas, this is a rationalization for avoiding responsibility, and he will have none of it. From his perspective, Holmes' view simply rests on an impoverished understanding of democracy, which identifies elected lawmakers as the officially designated voice of the people. "The goal of Congress," eighty-five percent of Americans agree, "should be to make the decisions that a majority of Americans would make if they had the information and time to think things over that Congress has."¹⁶⁸ As Godwin put it long ago, "A representative is but the mouthpiece and organ of his constituents."¹⁶⁹

One flaw in this view is that it connects voting to public policy in an unrealistically simplistic fashion, compelling us to infer public approval from legislative actions and ignore the agency problem.¹⁷⁰ Large segments of the electorate neither know nor care much about politics,¹⁷¹ and vote for reasons only tangentially related to policy, like party or candidate personality.¹⁷² Even voters choosing to vote on a policy basis will find that a given candidate has taken a variety of positions on a number of policies; a voter may agree with some of these positions, disagree with others, and be indifferent to still others.¹⁷³ In fact, it is not always easy even to define the policy in question. When President Trump calls for building a wall on the Mexican border, is the policy at issue the wall, illegal immigration or immigration generally? Or is it less a policy than a signal,¹⁷⁴ whose true message his followers can decode?¹⁷⁵ Even the act of asking voters their policy opinions may be problematic, as apparently such minor considerations as question

¹⁶⁸ STEVEN KULL, EXPECTING MORE SAY: THE AMERICAN PUBLIC ON ITS ROLE IN GOVERNMENT DECISIONMAKING 13-14 (1999).

¹⁶⁹ PARKE GODWIN, POLITICAL ESSAYS 40 (1856).

¹⁷⁰ Steven A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973). A classic study of legislator-constituency relations distinguishes between the delegate role, where the legislator expresses the constituency's "views . . . even if I personally disagree," and the trustee role, where the legislator "represents the welfare of the community as I see it." JOHN C. WAHLKE ET AL., THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR 277, 275 (1962). An analysis of 268 scholarly histories of policy change post-1945 concluded that "endogenous patterns of cooperation in governing networks," including officials, bureaucrats, lobbyists, and so forth, had far greater impact on policies than public opinion and elections. MATT GROSSMAN, ARTISTS OF THE POSSIBLE: GOVERNING NETWORKS AND AMERICAN POLICY CHANGE SINCE 1945 7 (2014). At the same time public opinion may be permissive, allowing policy makers to act within a broad range of options, or constraining, barring them from acting.

¹⁷¹ ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER, (2d ed. 2016).

¹⁷² MICHAEL LEWIS-BECK ET AL., THE AMERICAN VOTER REVISITED (2008).

¹⁷³ The effectiveness of elite manipulation of public opinion remains in dispute. For example, Zaller emphasizes how hard it is to accomplish. JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION ch. 12 (1994). For another view, see LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS ch. 2 (2000).

¹⁷⁴ On signaling, see Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. MGMT. 39 (2011).

¹⁷⁵ On decoding messages, see Glenn C. Loury, *Self-Censorship in Public Discourse*, 6 RATIONALITY & SOC'Y 428 (1994).

wording¹⁷⁶ or ordering¹⁷⁷ may have substantial impact on opinion results. Making matters even murkier, voter preferences will vary greatly in their intensity. A voter who cares deeply about one policy may disregard candidate positions on many others that he or she cares little about. Compounding the problem, even when the public may have taken a position on an issue, lawmakers may be unaware of this position.¹⁷⁸ If these kinds of considerations make it hard to connect voter to policy, imagine the difficulties when the voters number in the hundreds of thousands or millions, as, indeed, they regularly do.

Sometimes, as connoisseurs of false consciousness might insist, a well informed representative may know the constituencies' true interests better than they do, and so the voters may actually benefit from having their views ignored. Proposed policies, after all, might be quite complex or be closely entangled with inflammatory symbols. But just as constituents have a very imperfect understanding of their representatives, so the representatives have a very imperfect understanding of their constituents, and so even the best intentions do not insulate them from error. The representatives may misapprehend what is in their constituencies' interests or be thrown off by complexities or symbols. But, of course, we cannot always assume the best of intentions, for there is also the unavoidable matter of a conflict of interest: the representative will always have interests different from (and sometimes hostile to) his or her constituents, as well as opportunities to pursue these interests at the constituencies' expense. In this context, perhaps it is enough to say that Douglas' aggressive judging may be defended as simply one of a myriad checks and balances that reflect the Framers' obvious reservations about unadorned democracy.

Yet this argument for activist judging may misconceive democracy, too, for the connection between public opinion and public policy is far less central than the connection between electorate and representative.¹⁷⁹ As Schumpeter wrote in his classic discussion, the great argument for democracy is that it provides a means for holding leaders accountable to the voters "by refusing to reelect them."¹⁸⁰ It is not necessary or perhaps even desirable for the electorate to be highly knowledgeable and activist, for if it is too participatory, it may make excessive demands on government.¹⁸¹ Given this, what role ought unelected judges with lifetime appointment to follow? One answer is: it depends. If lawmakers act to

¹⁷⁶ See e.g., Alec Tyson & Carol Doherty, *Polling on the Deficit: Why Question Order Matters*, PEW RESEARCH CENTER (Dec. 20, 2013), <http://pewrsr.ch/1jqqaL>.

¹⁷⁷ See e.g., Dalia Sussman, *New Poll Shows Support for Repeal of 'Don't Ask, Don't Tell'*, N.Y. TIMES: THE CAUCUS (Feb. 11, 2010, 1:58 PM), <https://thecaucus.blogs.nytimes.com/2010/02/11/new-poll-shows-support-for-repeal-of-dont-ask-dont-tell/>.

¹⁷⁸ A survey of nearly 4000 incumbent state legislators and challengers, for example, reveals that they are generally not well informed as to their constituency's preferences, even on high profile issues. See David Broockman & Christopher Skovron, *Bias in Perceptions of Public Opinion among Political Elites*, 112 AM. POL. SCI. REV. 542 (2018).

¹⁷⁹ Achen and Bartels in a widely discussed book argue that group attachments and social identities are key in shaping party identification, which in turn is powerful in determining voting decisions. Policy views tend to be bent to fit these factors. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016).

¹⁸⁰ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 272 (1942).

¹⁸¹ GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* ch. 13 (1963).

impair democratic accountability, courts may act to open up the process, as it would be folly to expect those benefitting from the impairment to act against their own interest. Only an institution, like the courts, detached from the process, can escape the incentives supporting the violations. Arguing that the white primary should be opposed through the political process, for example, runs up against the fact that the legislators to be persuaded used the process to get elected.¹⁸² In this kind of situation, the democratic political process is incompatible with its chief rationale, accountability. The democratic process, after all, may produce anti-democratic results, and a reasonable judicial activism might be valuable in this context.

But Douglas, apparently feeling licensed to pursue justice, does not confine his activism to this kind of situation. For him, there is no hand-wringing over the counter-majoritarian difficulty¹⁸³ or Thayer's rule of the clear mistake,¹⁸⁴ both of which he apparently regards as pedantic obstacles in the way of doing justice. Where others may focus on means, he understands that it is the ends that count. Result oriented jurisprudence, then, possesses not only the candor of the realists but the moral *gravitas* of the serious person trying to do good.

This begs the question, however, of inquiring as to what justice is or how we are supposed to explore the question. Douglas speaks in universals that he takes to be self evident and thus need no justification. But this ignores practical controversies over the meaning of key terms that may undercut the rhetoric of universals. Does privacy, for instance, "invariably reflect very local cultural understandings, traditions, and beliefs"?¹⁸⁵ Is marriage variable enough to include polygamy and same sex marriage? No matter. For Douglas, rights, though sometimes expressed with empathy for the individuals involved, exist only at an abstract level. Are they rooted in natural law? Unlike some other justices, who expressly follow this path,¹⁸⁶ Douglas does not say. Do they derive from sympathy for the plight of the litigants? He does occasionally express these feelings—which are unpredictable, subjective, and therefore problematic¹⁸⁷—but his emphasis is always is on the larger principle entailed. The *ad hoc* quality of his reasoning is obvious and in the open, and lends it a certain authenticity. But its very nature poses an additional pair of questions. First, is it just for a judge to rule on the basis of standards that he or she created and did not exist at the time of the act in question? Second, what of the cost inherent in disrupting the stability of settled expectations? These are not mere quibbles, though they are ignored as such.

¹⁸² See *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁸³ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

¹⁸⁴ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17, 144 (1893).

¹⁸⁵ RONALD J. KROTOSZYNSKI, JR., *PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LET ALONE* 184 (2016). The European Union, for example, has embraced the right to be forgotten, which the United States has rejected as abridging the freedom of speech.

¹⁸⁶ See, e.g., *Harris v. Hardeman*, 55 U.S. 334, 341 (1852) (Daniel, J., delivering the opinion of the court); *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 756-57 (1884) (Field, J., concurring); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327-28 (1897) (Brewer, J.).

¹⁸⁷ Susan Bandes, *Compassion and the Rule of Law*, 13 INT'L. J. L. CONTEXT 184 (2017).

Also lost is accountability, for Douglas does not bother to consider how it applies to judges generally. Even assuming that Douglas somehow always spoke for justice does not eliminate the problem, for how to grant him the authority without also granting it to other judges, who might not be so blessed? How to empower Douglas, who believed in conservation, without also empowering McReynolds, who believed in white supremacy?¹⁸⁸

Aristotle spoke of three chief modes of persuasion, *logos*, *ethos*, and *pathos*.¹⁸⁹ *Logos*, the appeal to logic or reason, might seem the mode best suited to judicial opinions, but it is not the mode Douglas favors. Instead, he prefers *ethos*, an appeal to the writer's good character, and *pathos*, an appeal to the reader's emotions. Douglas appears to rely heavily on his own carefully cultivated reputation for straight forward, no nonsense authenticity, and at key moments, he is prone to emotional appeals, as in his reference to the police entering the sacred precinct of the marital bedroom in search of contraceptives or his disquisition on the vulnerability of nature. *Logos* evidently does not interest him. Indeed, the conventions of judging—close analysis of statutory text and precedents, doctrinal consistency, providing reasoned justifications, respecting traditional limits on discretion, treating his colleagues with respect—do not interest him much, either. Yet as a judge known for his openness to judicial creativity observed, “Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side.”¹⁹⁰ Thus, even a friendly biographer conceded, “it was not Douglas' egocentricity . . . that galled his colleagues as much as what they considered his professional irresponsibility.”¹⁹¹

Yet how to ensure that the maverick judge in fact does justice? Even avoiding the philosophical briar patch—what is justice?—and defining justice in terms of consensus on particular issues, what to do in cases where there may be no consensus.¹⁹² And to the extent that law requires predictability, consistency, and uniformity, what role can it offer to the maverick? Why, in any event, should we expect a maverick judge to follow a consensus? A second difficulty is that if justice is to mean more than instinctual choices, the judge must elaborate on how he or she came to his or her conclusion. This is particularly important if the judge's decision appears policy driven, for the depth of his or her expertise is often in question. Where legislators can call on a wide range of sources plus their own policy making experience, judges are far more limited in their informational resources. For Douglas, this hardly mattered. In *Sierra Club*, he drew on his experiences as an outdoorsman and his reading of popular works by conservationists. This was sufficient. He knew what he knew. Addressing other points of view was pointless. Though he frequently disagrees with the majority, he rarely engages them in debate. Usually, he is satisfied simply with a brief statement of his position.

¹⁸⁸ A. Leon Higginbotham, Jr. & William C. Smith, *The Hughes Court and the Beginning of the End of the “Separate but Equal” Doctrine*, 76 MINN. L. REV. 1099, 1110 (1992).

¹⁸⁹ See ARISTOTLE, *THE RHETORIC*, bk. I, ch. 1, at 1356a (W. Rhys Roberts trans. 1965). Available at <http://data.perseus.org/citations/urn:cts:greekLit:tlg0086.tlg038.perseus-eng1:1356a>.

¹⁹⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136-37 (1921).

¹⁹¹ SIMON, *supra* note 67, at 432.

¹⁹² E.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

Douglas' practice of bypassing elaborate argumentation may seem to suggest a down to earth rejection of pretentious legal pomposities, the kind of ostentatious displays he ridiculed when presented by his hated rival, Frankfurter.¹⁹³ Yet what they really convey is an utter lack of humility. His conclusions, as if arriving from Heaven, do not require the elaborate defenses other justices mount. It is enough that he states his views. Judging, for Douglas, entails opportunity, but not burdens, moral or intellectual. These burdens might impel others to hesitate or decide on narrow technical grounds or craft opinions qualified by conditions and contingencies or urge other bodies to take on the responsibility or become immersed in legal disputation. These legalistic responses, resting merely on long established norms and conventions, he brushes aside without explanation. For Douglas, acceding to the demands of these burdens bespeaks meekness if not cowardice, and it is hard to imagine him following this path. It might be appropriate for other justices, but certainly not for him. Yet this would seem to conflict with the conventional view of the judge's job as "settling disputes by applying pre-existing standards,"¹⁹⁴ for when he writes of a right to marry and procreate or a right to privacy or the standing of natural things, he is quite deliberately ignoring or even renouncing the authority of pre-existing standards.¹⁹⁵ If this subjected actors to standards unknown when they acted, it seemed a small price to pay for progress.

A practical consequence is the very limited precedential value of Douglas' opinions. The *Sierra Club* case, for example, provided an opportunity to develop rationales that might have served as a foundation for the emerging area of environmental law. Instead, he wrote about the standing of natural inanimate objects, an argument that he must have known would appeal to no one but himself. It may have served the expressive function of making him feel as if he were fighting the good fight, but as an instrumental means to his desired end, it was useless. Unlike the great dissenters of the past, Holmes, for example, in *Lochner*¹⁹⁶ or *Abrams*,¹⁹⁷ Douglas makes no real effort to persuade, and so his work has no obvious progeny.¹⁹⁸

But there is a larger problem with Douglas' cavalier treatment of justifying his decisions, for in a free society we believe that if we can be coerced into obeying laws, we are entitled to have them publicly justified; there exists a "presumption in favor of liberty," in Feinberg's words, which means that "coercion always needs

¹⁹³ After one of Frankfurter's long, professorial lectures, Douglas remarked, "When I came to conference, I thought the judgment should be affirmed [Frankfurter's position], but Felix just talked me out of it." (SIMON, *supra* note 67, at 352).

¹⁹⁴ LESLIE GREEN, LAW AND THE ROLE OF A JUDGE, IN LEGAL, MORAL, AND METAPHYSICAL TRUTHS, 324 (K. Ferzan & S. Morse eds., 2016).

¹⁹⁵ This hyper-individualism also meant that Douglas was not well suited for a profession rooted in a small, tradition bound, collegial institution Even Black, for years his ally in free speech cases, refused to speak to him for an extended period. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 532 (1997).

¹⁹⁶ *Lochner*, *supra* note 89.

¹⁹⁷ *Abrams v. United States* 250 U.S. 616, 624 (1919).

¹⁹⁸ A polar opposite was Cardozo, who habitually suppressed his ego because he understood it as an obstacle to influence. His famous opinion in *MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916), for example, did not claim to embody major theoretical changes or policy implications, though its ramifications were immense. Also, in the interest of collegiality, he often refrained from producing dissents.

some special justification.”¹⁹⁹ This is especially the case when “constitutional essentials” are involved.²⁰⁰ Is Douglas’ justification sufficient? The answer must depend upon which audience is considered. The general public will never read his opinions and, at best, be only dimly aware of them through media reports; these people hardly require much justification and presumably would be unable to make use of elaborate arguments, even if they were supplied. On the other hand, the legal and political communities have a much greater stake in the proceedings; reasoned discourse may contribute to a “will formation” that may change minds and lead to rational consensus.²⁰¹ Douglas, however, in the words of one biographer, “wrote exclusively for himself.”²⁰² In the eyes of his external audience, his efforts may seem inadequate.

It finally needs to be asked whether the formalist myth Douglas and his fellow realists have worked so hard to demolish serves a social purpose. Is it, to put the matter bluntly, one of Plato’s noble lies?²⁰³ Consider the notion of the independent judiciary. We all know that judges and everyone connected with the judicial enterprise are government employees. They are selected by government officials following government procedures. Their paychecks come from the Treasury Department and are drawn from funds collected by law from taxpayers. Judges rule under authority granted them by constitution and statute, and government officers enforce their decisions. Recognizing this, why should anyone go to court to resolve a dispute with the state, civil or criminal? Why expect an arm of the state to fairly address a conflict with the state? Isn’t this a classic conflict of interest? In many societies—the Soviets under Stalin, Venezuela under Maduro—this would be a perfect diagnosis. If judges ignore the law, why expect anyone else to follow it? How, then, even to have a legal system? As Bickel put it, “The methods of reason and principle . . . alone justify the exercise of supreme judicial power in a democracy.”²⁰⁴

But in societies characterized by the rule of law, we expect and demand that judges lay aside their multiple entanglements with the state, so that we have, in Adams’ famous words, “a government of law, not of men.”²⁰⁵ This standard, of course, is not always met, but nearly everyone regards it as a legitimate goal, Douglas included. Yet his contempt for established norms and the myth of objectivity they embody is clearly at war with the presumptions underpinning judicial independence. For in case after case, he makes it clear that he is not driven by the law. In fact, he does not really try to hide it. It is his commitment to the environment or to certain social rights (like the right to marry and have children) that predetermine his decision. As time passed, his characteristic pose was to thumb his nose at, well, his colleagues, the law, anything that caught his ire. For him, the law with its superstructure of analysis was simply a means to impose policy, an

¹⁹⁹ JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 9 (1987).

²⁰⁰ JOHN RAWLS, *POLITICAL LIBERALISM* 140 (2005).

²⁰¹ JURGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 68 (1999).

²⁰² SIMON, *supra* note 67, at 353.

²⁰³ See PLATO, *REPUBLIC* 414b (Allan Bloom trans., Basic Books 1968).

²⁰⁴ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 95 (1970).

²⁰⁵ John Adams, *Novanglus* (Mar. 6, 1775), in 4 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 106 (Charles Francis Adams ed., Little, Brown, & Co. 1851).

instrument of power, a political phenomenon. But the law is also a means to limit arbitrary and oppressive official conduct, and this requires that judges make a good faith effort to reach the unreachable objectivity and at the very least cultivate an appearance of objectivity.

Could Douglas have been a great judge? We will never know because the temptation to do justice prevailed over the quotidian obligations of judging. He was, as one writer said, “a man of action, not reflection.”²⁰⁶ Though a United States Supreme Court justice for a record thirty-six years, he hardly seemed like a judge at all.

²⁰⁶ L.A. Powe, Jr., *Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENT. 267, 271 (1989).

MORAL COGNITION IN CRIMINAL PUNISHMENT

Jason R. Steffen*

ABSTRACT

Scholars often appeal to Kant in defending a retributivist view of criminal punishment. In this paper, I join other scholars in rejecting this interpretation as insufficiently attentive to Kant’s wider theory of justice, particularly as found in the Rechtslehre, a section of the Metaphysics of Morals. I then turn to the Tugendlehre, where I examine analogies between Kant’s treatments of morality and justice. In particular, I argue that Kant’s own views about conscience and moral cognition should cause us to rethink the importance of lex talionis (an integral retributive principle) in the criminal justice system, and to adopt a more merciful attitude toward punishable criminals than we might otherwise be inclined to do. I end with a few policy proposals aimed at encouraging such moral cognition in contemporary Anglo-American criminal justice systems

KEYWORDS

Punishment, Kant, Freedom, Virtue, Lex Talionis

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The purpose of this paper is to advance a new understanding of Immanuel Kant's view of punishment which will, in turn, cause us to reevaluate our penal practices. One might be skeptical of the possibility of saying anything new in this area, as much ink has been spilled about punishment generally and, more specifically, punishment from a Kantian perspective. I aim to show, however, that the traditional interpretations of Kantian punishment are problematic—and that a more compelling interpretation should cause us to embrace fairer practices in the criminal justice system.

I shall therefore begin by addressing (in §I) two popular, competing views of Kantian punishment. I shall argue that both suffer from various deficiencies that should lead us to search for an alternative view. I shall then offer, as a third possibility, an interpretation of Kantian punishment that builds on Kant's view of civic freedom. Following this (in §II) I shall argue that a Kantian account of civic virtue should cause us to modify Kant's theory of punishment in an important way. Finally (in §III) I shall give several examples of what punishment would look like in a criminal justice system devoted to Kantian ideals.

I. KANTIAN PUNISHMENT: THREE INTERPRETATIONS

In debates over the ethical permissibility of punishment, scholars often cite Kant as the paradigmatic example of a retributivist.¹ Such a characterization is hardly surprising; after all, Kant himself claims that “only the law of retribution . . . can specify definitely the quality and the quantity of punishment.”² The retributivist interpretation is also supported by Kant's uncompromising stance on capital punishment: if someone “has committed murder he must *die*. Here there is no substitute that will satisfy justice.”³

As facially compelling as the retributivist interpretation may be, however, some scholars have taken Kant's punishment theory to be a “mixed” or “hybrid” account. On this view, retributivism only partially grounds punishment, but relies on utilitarianism for justificatory completeness.⁴ A third approach is to examine Kant's wider theory of justice in order to discover the foundational principles underlying his discussion of punishment. My aim in this section is to show that the justice-based interpretation provides the most compelling account of Kantian punishment.

¹ See, e.g., Jeffrie Murphy, *Introduction*, in PUNISHMENT AND REHABILITATION 2, 1 (Jeffrie Murphy ed., 1995); Thomas E. Hill, Jr., *Punishment, Conscience, and Moral Worth*, in KANT'S METAPHYSICS OF MORALS: INTERPRETIVE ESSAYS 233, 233 (Mark Timmons ed., 2002); Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 265 n.8, 262 (1983).

² IMMANUEL KANT, THE METAPHYSICS OF MORALS 105 (Mary Gregor, trans., Cambridge Univ. Press, 1996) (6:332). (Here and in subsequent footnotes, I put the standard *Akademie* pagination in parentheses after the regular citation.)

³ *Id.* at 106 (6:333).

⁴ See generally, B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 L. & PHIL. 151 (1989) and Scheid, *supra* note 1, at 262.

A. THE TRADITIONAL VIEW: KANT QUA RETRIBUTIVIST

An initially plausible interpretation of Kant's justification for the imposition of criminal punishment is straightforwardly retributive: the government can and must punish criminals because (and only because) they have committed a particular kind of wrong—that is, one which violates the Universal Principle of Right (UPR).

In the *Rechtslehre*, the section of Kant's *Metaphysics of Morals* concerned with matters of justice, the UPR is given as the standard against which we can measure our social progress toward justice. It is a "universal criterion" we can use to determine whether an act is just or unjust, and it (similarly to the Categorical Imperative proposed in the more well-known *Groundwork of the Metaphysics of Morals*) is cognizable "in reason alone."⁵ In other words, Kant believes we will naturally arrive at the UPR if we think about what it means to act justly or unjustly. Succinctly stated, the UPR holds that "[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."⁶

Kant thinks that if we affirm the UPR (which we must if we are to have a just social order) then we will agree that "whatever is wrong is a hindrance to freedom in accordance with universal laws."⁷ If someone violates the UPR by taking an action that limits another person's freedom, then the State may properly use coercive force against the violator. The use of such coercion is admittedly "a hindrance to freedom," but it is one that is justified because it is limiting the freedom of somebody who has chosen to act contrary to the principle on which the just State is founded.

To give a simple example, the UPR would require that I refrain from kidnapping a fellow citizen—a very obvious deprivation of that person's freedom. If I were to kidnap someone, however, the State could justifiably imprison me—an equally clear deprivation of my freedom. Imprisoning citizens would normally be unjustified: the ruling party cannot simply imprison opposition leaders on a whim, because this would violate the UPR. But imprisoning me after I have violated the UPR is consistent with the UPR.

On this view, punishment is a moral obligation, not merely a facultative policy option at the state's disposal. The State may not consider another rationale for punishment: it "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*."⁸ This language would seem to eliminate both rehabilitation ("some other good for the criminal himself") and even deterrence or incapacitation ("some other good . . . for civil society") as justifiable grounds for criminal punishment.

Furthermore, once punishment has been found to be warranted on retributivist grounds, the "quality and quantity" of punishment must also be determined by the "law of retribution" or *lex talionis*:⁹ the punishment must be coextensive with the

⁵ KANT, *supra* note 2, at 23 (6:230).

⁶ *Id.* at 24 (6:231).

⁷ *Id.* at 25 (6:231).

⁸ *Id.* at 105 (6:331) (emphasis in original).

⁹ *Id.* at 105 (6:332). Kant uses the term *jus* in place of *lex*, and this may be the most appropriate word: *jus* properly refers to "law in the abstract" or a "legal right, power, or principle,"

crime, as in the proverbial “eye for an eye.”¹⁰ So it would appear that not only can punishment not be imposed for reasons other than retribution, but the nature and extent of the punishment must also be determined by “pure and strict” retributivist principles.¹¹

One of the common passages used to support the retributivist interpretation is where Kant avers that one who murders another must be put to death in order to satisfy the law of retribution, and any lesser punishment for any reason would be a “public violation of justice.”¹² A sentencing judge could apparently not consider, for example, the murderer’s age or criminal history, the circumstances of the crime or relationship of criminal and victim, and so forth. The law is clear: “If . . . he has committed murder he must *die*.”¹³ On the retributivist interpretation, similar propositions must hold for other types of crimes—for example, if someone maims another’s arm, her body must be wounded to the same extent.¹⁴

Although facially plausible, there is a rather significant problem with interpreting Kant as a retributivist simpliciter: the passages used to justify the retributivist interpretation are contradicted by other passages, sometimes on the same page of text. For example, although Kant says that punishment must be meted out only “because [the criminal] has committed a crime,” he also seems frequently to refer to deterrence or rehabilitation as goals of criminal punishment. Thus he says that the State may properly “draw[] from [the criminal’s] punishment something of use for himself or his fellow citizens,” which sounds suspiciously like rehabilitation (something of use for the criminal) and general deterrence (something of use for fellow citizens).¹⁵ This passage is prefaced by the statement that the criminal “must previously have been found *punishable* before any thought can be given” to these objectives, but it is not clear that being punishable necessarily entails a retributivist reason therefore.¹⁶ The retributivist might argue that Kant intends to relegate these alternative policy goals to secondary considerations: we have determined that the defendant must be executed for murder, but we are now free to consider *how* to execute him in order to, for example, maximize general deterrence (e.g. publicly, on prime-time television). This, though, seems an unsatisfactory, *ad hoc* resolution to the “apparent incompatibility” between these various passages.¹⁷ The retributivist is committed to saying that Kant is rather sloppily inconsistent.¹⁸ We should, however, entertain the possibility of a more charitable interpretation.

while *lex* is technically reserved for “[p]ositive law,” or even “a statute.” BLACK’S LAW DICTIONARY, s.v. “jus” and “lex.” However, this technical distinction is not well maintained in Anglo-American legal scholarship, which tends to use “lex” in this context.

¹⁰ This law or principle has ancient roots. See, e.g., *Exodus* 21:22-25.

¹¹ KANT, *supra* note 2, at 106 (6:332).

¹² *Id.* at 106 (6:333).

¹³ *Id.* (emphasis in original).

¹⁴ Kant does grant that, for certain types of crimes, it is not possible, or morally permissible, to punish the criminal by doing to her exactly what she has done to the victim. *Id.* at 130 (6:363). In such a case, a reasonable substitute punishment may be imposed. For example, the rapist is not to be raped, but castrated, *id.*, and the thief may be sentenced to “convict or prison labor.” *Id.* at 106 (6:333).

¹⁵ *Id.* at 105 (6:331).

¹⁶ *Id.*

¹⁷ Scheid, *supra* note 1, at 265.

¹⁸ Thomas E. Hill Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 L. & PHIL. 412 (1999).

Another textual oddity bears particular mention. Kant explicitly approves of non-punishment in cases of what he terms “necessity”—for example, where the drowning man kills another in order to save his own life.¹⁹ Kant explains that we should excuse the killer, not because the killing is morally justifiable, but because “[a] penal law of this sort could not have the effect intended”; nobody would be deterred by the threat of death in the far future when she is facing the immediate prospect of death “that is certain (drowning).”²⁰

A retributivist adhering to *lex talionis* would have to say that the drowning offender should be put to death. We might, more commonly, be inclined to say that the person in this case has an *excuse* for his wrongdoing: perhaps it was wrong to kill the victim, but we can understand why one might do so in order to save one’s own life. Finally, we might think that what the killer did was wrong and inexcusable, but was not murder—perhaps it was manslaughter or some kind of lesser crime. These latter two cases might be compatible with (a weaker form of) retributivism, though not with *lex talionis*. Still, Kant does not appear to give any of these explanations. Instead, he takes the death penalty off the table for what appear to be purely utilitarian reasons: because the goal of deterrence would be fruitless in such a case. If the retributivist interpretation of Kant’s penal theory is correct, then the section on “necessity” is mistaken: Kant neglected to follow his own reasoning to its logical conclusion in this particular case.

In summary, aside from the obvious point that goals such as deterrence and incapacitation are intuitively reasonable ones that Kant likely would have included in his theory (as he explicitly does in the necessity case), the retributivist’s main problem is reconciling the clearly retributive-sounding passages in the *Rechtslehre* with other, equally clearly non-retributive-sounding ones. These do not exhaust the potential worries we might have about retributivism generally, or even about a retributivist interpretation of Kant²¹, but they certainly suffice to cast doubt on such an interpretation. We shall therefore turn our attention to a second possible way of interpreting Kant’s penal theory.

B. AN ALTERNATE VIEW: KANT QUA MIXED THEORIST

Legal and moral philosophers have proposed various versions of “mixed” or “hybrid” theories of punishment, not all of which claim to derive from Kantian thought. As a historical matter, one might see mixed theories as an obvious solution to a philosophical problem: that utilitarianism and retributivism are both attractive but ultimately deficient theories with which to justify punishment. As Whitley

¹⁹ KANT, *supra* note 2, at 28 (6:235-36).

²⁰ *Id.* Related cases Kant mentions are the woman who kills her illegitimate child and the military officer who kills another in a duel—though each kills, neither is punishable. *Id.* at 108-09 (6:336). These cases are even stranger given contemporary mores: children born out of wedlock are not subject to lifelong “disgrace,” and we do not think of one who “fails to respond to a humiliating affront with a force of his own” as being a coward. *Id.* Still, setting aside such feelings we might have about the examples, the main point here is that Kant approves of non-punishment of murderers in certain cases, which is puzzling if he is a pure retributivist.

²¹ For additional considerations, see Scheid, *supra* note 1; Byrd, *supra* note 4; Ekow Yankah, *Crime, Freedom, and Civic Bonds: Arthur Ripstein’s Force and Freedom: Kant’s Legal and Political Philosophy*, 6 CRIM. L. & PHIL. 255 (2012).

Kaufman puts it: “[i]n the mid-twentieth century, it was widely believed that the problem [of justifying punishment] had finally been solved. In a burst of creativity, a number of different thinkers—most famously H.L.A. Hart and John Rawls—developed an approach that purported to reconcile utilitarianism and retribution”²² Although Kaufman believes the mass experiment with mixed theories to have been ultimately unsuccessful from a philosophical standpoint, the tradition seems to be alive and well with respect to interpretation of Kant.

To give a salient example of someone who applies the “mixed” viewpoint to Kant, B. Sharon Byrd argues, based on textual as well as “[h]istorical considerations”²³ that “for Kant general deterrence was the justification for criminal law provisions threatening punishment. Retribution, on the other hand, was not a goal or reason for punishment but rather a *limitation* on the state’s right to inflict punishment”²⁴ Thus one may threaten to punish citizens, with the goal of deterring crime, but “[a]fter a criminal violation has occurred,²⁵ the focus shifts from instrumental priorities of general crime prevention to the just treatment of the individual.”²⁶ The “just treatment of the individual” is embodied in a “limitation on the state’s right to inflict punishment,” which limitation is the principle of *lex talionis*, or retributive proportionality in punishment. Byrd notes that some prominent scholars, such as H.L.A. Hart, have interpreted the “state’s right to inflict punishment” as deriving from *lex talionis* itself.²⁷ Kant, though, does not make this argument—*lex talionis* is clearly important to his view of punishment, but it is not cited as a justification for that practice.²⁸

²² Whitley Kaufman, *The Rise and Fall of the Mixed Theory of Punishment*, 22 INT’L J. OF APPLIED PHIL, 38, (2008).

²³ Byrd, *supra* note 4, at 151. Byrd does not develop her “historical” argument; she cites one journal article for the proposition that “[t]he distinction between punishment as a threat used actively to bind an individual to the rules of conduct and the execution of punishment as a response to the breach of one’s obligation was made both before and immediately following Kant’s critical philosophy.” *Id.* at 184. I do not, however, think that this point is crucial for her argument, which is mainly conceptual and textual.

²⁴ *Id.* at 152-53.

²⁵ This is the phrase that Byrd uses, but it seems likely that she means after a *conviction has been obtained*. The *commission* of a crime paradigmatically initiates a process of investigation, accusation, and trial, all of which is public and apparently entails the promotion of various values, among them truth, preservation of the defendant’s rights—but also deterrence. Surely, then, she must mean that the shift from deterrence to retribution occurs after someone has been *convicted* of a crime.

²⁶ Byrd, *supra* note 4, at 153.

²⁷ *Id.* at 152.

²⁸ Byrd conceives of the justification in a libertarian fashion: “for Kant law is a means of coercive force applied to guarantee a necessary minimum of external conditions. . . . The conditions for this universal freedom are secured through civil society. . . . The purpose of the criminal law is to protect this social order.” *Id.* at 153-54. Scheid seems to agree that the libertarian interpretation is correct: “an individual enjoys freedom to the extent that there are activities he may undertake without forceful interference from other people. Essentially, freedom is the absence of coercion by others.” Scheid, *supra* note 1, at 269. Punishment is merely a hindrance; “[a]ny infringement of the individual freedom defined according to universal laws is wrong, and so coercion which prevents the infringement of such individual freedom is justified.” *Id.* The strict libertarian reading is, I think, problematic—I shall not explore that argument further here, except to reiterate that it seems inconsistent with his conceptions of justice and

Byrd correctly points out that Kant does not claim that *lex talionis* does the work that pure retributivists need it to. It is, at most, a limiting principle on the extent of punishment. Scheid phrases the limiting potential of *lex talionis* this way: “What right does the state have to punish an individual for the purpose of deterring others? Indeed, whether the individual is guilty or not, how can the state ever be justified in using a person in this way, as a mere means?”²⁹ Even if we agree that “the general justifying aim of punishment is crime control, this goal must nevertheless be pursued in a morally acceptable way, that is, in a way which gives full moral respect to the persons to whom the penal system is applied.”³⁰ *Lex talionis* thus acts as a check on the tendency of the state to over-punish individuals who breach the terms of the social contract.

So on this “mixed” interpretation, the role of *lex talionis* is as a guarantor of “moral acceptability” of the punishment itself. Crime-control considerations (deterrence) give us reason to *threaten* citizens with punishment. But the “law of retribution” guarantees that, if someone does in fact break the law, she will be punished to the extent she deserves—and no more (but, of course, also no less). This would seem to allay one concern that is commonly raised about purely utilitarian punishment schemas: that they license the punishment of the innocent and the overpunishment of the guilty. Kant would, on this view, permit citizens to be threatened with punishment for violations of the UPR, to whatever extent necessary to deter crime—but would ensure that the actual punishments citizens receive were limited by *lex talionis*.

This view has some obvious advantages over the pure-retributivist one. It explains the apparent contradiction in Kant’s use of deterrence language in some places and retribution language in others: he simply has in mind two different functions of criminal punishment (and perhaps neglects to distinguish clearly between them in his text). The hybrid approach also appeals to common-sense intuitions about the need for societies to deter crime—a theory of criminal justice that sees *no* role for deterrence would, at best, be one that departs radically from most countries’ penal practices.

There is, however, a problem with the hybrid view, which suggests that Kant would not have endorsed it. Some reflection on how criminal justice systems function will show that bifurcating the criminal law into threat and execution is pragmatically bizarre and possibly incoherent. Assume for a moment that we had a mixed deterrence-retributivist system. Legislators under this system would need to enact legislation that threatens citizens optimally. So, for example, we might find that threatening fifteen years in prison for burglary is the best way to deter people from committing burglary. Of course, it is unrealistic to suppose that *nobody* will ever commit burglary even when the threatened sentence is this high. Suppose, then, that a judge is now faced with sentencing a burglar—one of the few who were not dissuaded by the severity of the law. We might find that *lex talionis* demands that the burglar receive five years in prison for his crime. True, we *threatened* him with fifteen years, but he *deserves* exactly five years.

citizenship that Kant would think the *sole* justification for criminal punishment is the minimalist protection of “social order.”

²⁹ Scheid, *supra* note 1, at 272.

³⁰ *Id.*

We now face a conundrum. If the judge imposes five years, then he has rendered the legislation ineffectual. Citizens would observe that, despite what the law says, the burglar in fact only gets five years. The deterrent effect of the fifteen-year threat is vitiated—indeed, we might expect that the only deterrent effect would be of the actual five-year sentence. On the other hand, if the judge were to impose fifteen years, then the deterrent effect of the legislation would be upheld—but at the impermissible cost of violating *lex talionis*. So it would appear that the mixed-justification view leads either to illegitimacy (the law is deceptive and untrustworthy) or incoherence (*lex talionis*, putatively necessary, in fact cannot provide the judge with a reason for deviating from what the legislature has threatened).³¹

A related question is whether it is reasonable that, as Byrd would have it, our focus should shift entirely away from “instrumental” concerns once an accused criminal has been convicted. Is it really the case that “just treatment of the individual” is the *only* thing that we ought to be concerned with in determining her punishment? This seems unlikely, for several reasons. Common sense would lead us to assume that, in order for the deterrent effect of a “threat” to be effective, we would at least need to publicize criminals’ sentences—otherwise, the threat of criminal sanctions would be an entirely empty one. Moreover, Kant would surely not say that the *only* thing that matters once a criminal has been sentenced is how we treat him. This is an important concern—perhaps the most important one—but other considerations merit our attention: whether a dangerous offender will be incapacitated, whether there is a mechanism for publicizing the punishment to the public for deterrence purposes, whether anyone victimized by the crime has been vindicated, and so forth.

For example, suppose that David is convicted of raping Victoria. On the hybrid view, the deterrent purpose of (the threat of) punishment is served by the promulgation of public legislation proclaiming that rape shall be punished by exactly thirty years in prison. This lengthy sentence should, the legislature thinks, dissuade any rational person from committing rape. Once David has been convicted, though, all that matters is discerning the “just” sentence for him. But in order to have a hybrid system be coherent (or something besides a lie), then *lex talionis* has to play some role at the deterrent stage (the legislature has to figure out what is the appropriate penalty—or range of penalties, perhaps—for a given crime). Conversely, deterrence must play a role in sentencing (it would seem perverse from a deterrence standpoint if we sentenced David to a \$100 fine and 20 hours of community service in lieu of prison, even if that were demanded by *lex*

³¹ It would also be possible for *lex talionis* to demand a more *severe* punishment than necessary for deterrence purposes, though this seems less likely in practice. In fairness, my example presupposes that would-be criminals have access to, and in fact obtain, information about sentences handed down by the criminal courts. It might be possible to construct a criminal justice system where all sentences are private—this is the default position in juvenile delinquency cases in the United States, for example, though they are not technically “criminal” matters. It seems unlikely, however, that nobody would catch on to the fact that there was a radical difference between threatened and imposed punishments—surely questions would be raised when Uncle Bill suddenly turned up at the family reunion only five years after his burglary conviction. More importantly, a criminal justice system that was radically private in this way might face significant questions about procedural fairness. In any event, it seems very unlikely that this is the kind of system that Kant had in mind—and it is certainly not one likely to be relevant to readers.

talionis). Surely, if we care about deterrence at all, then we still care about it when we are punishing David. So the “focus-shifting” aspect of the hybrid view is also problematic.

To be fair, interpreting Kant via a mixed theory that separates criminal punishment into threat and execution does seem to be an improvement over the pure-retributivist position. And perhaps there is some way to save the hybrid or mixed approach in order to avoid the kind of problem I have identified. I think, however, that we need not make such an attempt—because there is a third way of interpreting Kant’s views on punishment which will suggest that whatever roles deterrence and retribution play in Kant’s theory, they are at most derivative features of his account of justice as presented in the *Rechtslehre*.

C. A THIRD WAY: PUNISHMENT AS A REQUIREMENT OF CIVIC FREEDOM

Kant’s account of criminal punishment is, I believe, best understood as one facet of his theory of justice. As explained above, Kant conceives of a just society is one whose basic structure is founded on the Universal Principle of Right. The UPR guarantees that all citizens will be able to pursue their chosen ends, to the extent that those ends are compatible with those of their fellow-citizens. We are free, in the political (rather than moral) sense, when we choose to be governed by just laws, which in turn ensure that our wills are not governed by others’. A requirement of justice, then, is that each of us, as citizens, willingly submits to the just laws of our community.

Willful violations of these just laws—specifically, of those laws which ensure the political conditions of citizens’ civic freedom—are properly referred to as crimes. A criminal is someone who has willfully violated the civic freedom of his fellow citizens; he has not only interfered with others’ freedom, but has also done so in a way that undermines the foundational structures upon which such freedom is based.³²

A criminal, then, is someone who has broken the reciprocal bond that is the foundation of a just society. The “rightful condition” of civil society has been upset. According to Kant, though, restoring a state of free, equal, and independent citizenship depends crucially on the availability of state coercion—indeed, this is why he says that such coercion is *necessary*.³³ A lack of state power (or willingness) to punish criminals would have obvious ramifications for all citizens’ civic freedom. If my freedom to pursue my chosen ends is threatened in a significant way by a fellow-citizen’s behavior, then I can reasonably expect the state to step in and prevent or rectify such “hindrance” to my freedom.³⁴

³² Note that if one violates another’s civic freedom, but lacks the will to do something incompatible with the UPR (i.e. does not act on such a maxim), then the violation is, by definition, not a criminal act. The state may be justified in using some kind of lesser coercion in order to restore the rightful condition that existed before, but is not justified in violating the actor’s civic freedom.

³³ Kant, *supra* note 2, at 89 (6:311-12). Note that Kant’s view is retributive in this limited sense: crime necessitates punishment, and so punishment will always be in “retribution” (a more neutral term might be “response”) for a crime.

³⁴ *Id.* at 25 (6:231).

This line of reasoning has strong intuitive force. We perceive societies that lack adequate police and judicial powers—or willingness—to prosecute criminals as being less free than societies which have such capacities. We feel that our government does wrong, and we worry about our own rights and those of other citizens, when it fails to punish certain classes of offenders for spurious reasons—racial bias being an obvious example. The State is, then, rightly viewed as obligated to protect us against violations of the conditions of civic freedom, and to hold people who do commit such violations accountable for their actions.

The fact that the state is obligated to punish criminals in order to restore a rightful condition consistent with the UPR is helpful. Still, we may be left wondering how it is that punishment could be justifiable for one who embraces Kantian values, such as respectful treatment of all human beings. After all, “[c]riminal punishment is coercive state power in its most brutal form. . . . If locking human beings in cages or killing them is not a bad way to treat people, it is hard to imagine what would be. Punishment, in short, seems to involve conduct that is in itself wrong.”³⁵ And even when punishment is administered humanely, it still seems to violate citizens’ civic freedom. A fine or a community service order are, after all, still coercive in nature and, therefore, restrict the citizen’s ability to fully govern himself. What, then, gives the government the *right* to impose such punishments, let alone more severe ones (such as imprisonment)?

The answer is, in one sense, quite simple. A citizen’s civic freedom is, as we have seen, dependent upon his respect of others’ civic freedom. But a crime is, by definition, a willful violation of another’s freedom. Therefore, it follows that someone who has committed a crime loses the protection of the UPR. A criminal has, in a sense, forfeited or lost his civic freedom.³⁶ And, if he has no civic freedom, then it would not be unjust for the government to treat him coercively.

Now, this answer is perhaps too simple. For it would appear, upon closer inspection, to engender some questionable results. For one thing, if someone has lost his civic freedom *entirely*, then the government would appear to be justified in doing *anything* to him. Someone who is not free could, after all, be made a slave. Another worry is that if someone lacks civic freedom, then he is not a citizen (at least not in the full Kantian sense). But if he is not a citizen, then his fellow-citizens have no obligations toward him as far as justice is concerned. They may retain some moral obligations toward him—but they would still be justified in imposing punishment on him themselves, rather than letting the government do so.

These concerns are unwarranted, however, because Kant places some definite limitations on the coercive power of the state—and these limitations are not merely *ad hoc*, but are results of the structure of civic freedom. First, Kant asserts that while criminals lose the “dignity of citizenship,” they do not lose their *human* dignity.³⁷ The difference between these types of dignity can be clarified by noting

³⁵ Murphy, *supra* note 1, at 1.

³⁶ This account is probably compatible with the rights-forfeiture view of punishment, at least on some accounts. See, e.g., Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371 (2012). It does, however, provide a clearer explanation of *why* we are justified in asserting that criminals forfeit their rights.

³⁷ Specifically, Kant asserts that “no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own crime, because of which, though he is kept alive, he is made a mere tool of

that, in the *Groundwork*, Kant refers to human dignity as arising from our capacity for moral self-legislation.³⁸ The concomitant notion in the *Rechtslehre*, the dignity of citizenship, therefore refers to the capacity that citizens have to be co-legislators of just public law. In particular, the notion of civic *independence* (one key aspect of civic freedom guaranteed by the UPR) is of a citizen who acts “as a member of the commonwealth,” which entails that he is a part of the “legislative authority [that] can belong only to the united will of the people.”³⁹

This, then, explains why Kant says that criminals lose their *dignity of citizenship*: by violating justly enacted laws, they betray themselves as legislators. They remove themselves from the body of those who act according to the “united will,” always upholding the UPR. Note, however, that the criminal retains her *dignity of humanity*. Human dignity is without “price”⁴⁰—it is not alienable, as property and even civic rights are. And because all human beings have an absolute duty to respect others’ humanity, no just punishment could ever be administered that would violate human dignity. The state is therefore justified in treating criminals in ways that would ordinarily violate their *civic* rights, but not their *human* rights.⁴¹

So the first limitation on punishment is that the criminal’s humanity must not be violated. Precisely what this means is debatable, but it seems clear that some kinds of treatment will be out of the question: torture, rape, and other sadistic practices are obviously incompatible with people’s humanity, and even if the criminal has perpetrated such acts on others, we can never be justified in doing so to him. One important question, particularly for American criminal justice, is whether capital punishment is compatible with the respect of human dignity. As we shall see, Kant thinks so—but we might reasonably debate whether this is the case.

Another clear limitation on punishment has to do with *who* is doing the punishing. If offenders lose their civic dignity, then why could *other citizens* not punish them? Kant thinks part of the social contract (wherein we, as members of a

another’s choice (either of the state or of another citizen).” KANT, *supra* note 2, at 104 (6:329-30) (emphasis removed). One oddity here is the parenthetical at the end of the passage, which makes it sound as if Kant thinks that criminal punishment can somehow be meted out by private citizens, rather than only by the state. This contradicts his later statements about punishment being the province of the government alone. It is *possible* that Kant has in mind some kind of lesser (civil) wrong; this may be what he has in mind when he later speaks, without clarification, of “private crime.” *Id.* at 105 (6:331). I shall proceed under the assumption that this passage is either an aberration, or explicable in another way.

³⁸ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor trans.), in *IMMANUEL KANT: PRACTICAL PHILOSOPHY* 37 (Paul Guyer & Alan W. Wood eds., Cambridge Univ. Press, 1996) (4:434-35).

³⁹ KANT, *supra* note 2, at 91 (6:313-14).

⁴⁰ KANT, *supra* note 38, at 84 (4:434).

⁴¹ That Kant thinks there are certain rights which nobody can lose, even via criminal activity, is supported in other passages. In answer to the question of “what kinds of punishment are [justifiably] adopted” by the government, he answers that “the legislator must also take into account respect for the humanity in the person of the wrongdoer.” KANT, *supra* note 2, at 130 (6:362-63). This leads him to suggest, as noted previously, that some crimes may require a substitute punishment when imposing *lex talionis* in a literal manner would violate the defendant’s humanity—as in the case of rape. *Id.* (I am not convinced that Kant’s solution—castration—qualifies as much more humane, but the principle seems sound even if the application is questionable.)

just community, agree to act in accordance with the UPR) entails leaving the right of punishment in the hands of the government. Thus, for example, he states that the “right to punish is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime.”⁴² He reiterates this in a discussion in the *Tugendlehre* on the difference between vengeance and punishment: “punishment is not an act that the injured party can undertake on his private authority but rather an act of a court . . . [for] no one is authorized to inflict punishment and to avenge the wrongs sustained by them . . .”⁴³ Kant is not as clear as he could be about *why* this is the case—he seems to take it for granted whenever he mentions punishment—but it is presumably because of concerns similar to those Locke raised, nearly a century earlier, about the difficulties of leaving punishment in the hands of individuals. In the state of nature, we can never be sure whether we are punishing the criminal too much or too little, or letting our personal biases interfere with a rightful determination of deserved punishment. It is therefore necessary to give up our power to punish to an impartial judge in order to ensure that criminals are punished to the proper extent.⁴⁴

In addition, recall that punishment restores the “rightful condition” of civil society. But individuals cannot, on their own, create such a condition, which is the product of the “united will” of a body of citizens. It follows that individuals cannot, by themselves, *restore* such a condition once it has been disrupted by a criminal act. Only the state—which, of course, is but a representation of the “united will”—can punish criminals in such a way that the reciprocal nature of the UPR can be upheld.

We have, then, good Kantian reasons to assert that punishment must be administered only by the state. We also saw that punishment which violates human dignity cannot be justified. One problem remains, however. Even if we were certain that a particular type of punishment—say, confinement within a safe, well-maintained correctional facility—was permissible, there would seem to be nothing to prevent the government from using it in ways that seem, intuitively, to be unjustifiable. For example, the government could imprison a petty thief for the rest of her life. Even if imprisonment as such is not inhumane, there is something intuitively unjust about imprisoning someone for many years for a minor offense. This is, of course, the oft-discussed problem of *proportionality*. How are we to ensure that whatever punishment we impose “fits” the crime?

As mentioned in subsection A above, Kant holds that the nature and extent of a punishment should be determined by the principle of *lex talionis*: punishments should be, as far as possible, *identical to* the crime committed. Kant thinks that this will answer both the means and extent questions—thus when someone steals, his property is forfeited; when he commits murder, “he must die.”⁴⁵ This,

⁴² *Id.* at 104 (6:331) (emphasis added).

⁴³ *Id.* at 207-08 (6:460).

⁴⁴ See the second chapter of JOHN LOCKE, *Second Treatise in TWO TREATISES OF GOVERNMENT* (Mark Goldie ed., Tuttle Publishing, 2000). Kant’s brief discussion of the problems human beings would face in the state of nature seems to echo Locke’s concerns—thus such a condition would be “a state devoid of justice in which when rights are in dispute, there would be no judge competent to render a verdict having force.” KANT, *supra* note 2, at 90 (6:312) (emphasis removed and parenthetical Latin translations omitted).

⁴⁵ KANT, *supra* note 2, at 106 (6:333) (emphasis removed).

though, is troubling. *Lex talionis* is, after all, one of the reasons scholars have traditionally thought of Kant as a retributivist. Moreover, a strict insistence on this principle—even excepting cases where its application would result in violations of human rights—can seem unfair in many cases. For example, we often assume that someone who is a first-time criminal offender ought to receive a lesser sentence than someone who has spent a lifetime violating the law. But applying *lex talionis* would seem contrary to the intuition that we should mitigate (or aggravate) sentences based, not merely on the nature of the offense, but also on the circumstances of the offender.

Perhaps some insight can be gained by considering *why* Kant seems to insist on *lex talionis*. What argument could justify his reliance on this principle as the *only* proper response to questions about extent and method of punishment? Here is the main passage in the *Rechtslehre* on this topic:

But what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. . . . [O]nly the law of retribution (*ius talionis*)—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.⁴⁶

Of note here is that the principle motivating *lex talionis* is not retribution—it is *equality*. Although Kant uses the word “retribution,” it is employed only to identify *lex talionis*, not to justify it. Kant’s sole reason for claiming that *lex talionis* is the *only* just way to punish is that any other way of meting out punishment would be “fluctuating.” Competing principles would cause the scales of justice to tip to one side or the other—to become unbalanced—resulting in an inequitable distribution of punishments.

⁴⁶ *Id.* at 105-06 (6:332) (emphasis in original). Note that Kant’s reference to “within the people” is consonant with the view that Kant conceives of crime as a breach of the social contract based on the reciprocal nature of the UPR. Wronging someone *outside* the state is not a crime (though morally wrong), because one is not legally bound in a reciprocal relationship with that person. The State cannot overstep its authority and punish wrongs that occur to people who are not parties to the social contract. This raises the question of whether Kant’s theoretical framework can provide a reasonable account of *international* criminal law. I cannot hope to broach that topic here, though it should be noted that Kant does discuss matters of international justice, particularly in *Toward Perpetual Peace: A Philosophical Project* (Mary Gregor trans.) in *IMMANUEL KANT: PRACTICAL PHILOSOPHY* 315-351 (Paul Guyer and Alan W. Wood eds., 1996)

In section II, I will argue that *lex talionis*⁴⁷ should be supplemented by a more flexible principle of punishment based on an aspect of civic virtue. For the moment, though, it is sufficient to note that, whatever misgivings we might reasonably entertain about *lex talionis*, Kant thinks that this principle serves the end of civic equality, and surely he is right that utilitarian calculations should not alter our commitment to just punishment. We should not be prepared to sacrifice the innocent at the whim of the majority, nor should not be willing to release the guilty because it is politically expedient. We might wonder whether consideration of the criminal herself, or even the crime victim, ought to cause us to alter our initial calculation of the degree of punishment the criminal deserves—but this is, I think, not the kind of factor that Kant is most worried about here. He seems, rather, to be cautioning against the kind of “Pharisaical” reasoning that would cause us to, as it were, crucify those who were above reproach on the one hand, and fail to mete out just punishment to deserving offenders on the other, simply because doing so would be unpopular.⁴⁸

Similar considerations seem to be at work in another passage, where Kant argues that it would be impermissible to offer to “preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made upon him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth.”⁴⁹ Kant thinks that this would be unacceptable because “justice ceases to be justice if it can be bought for any price whatsoever.”⁵⁰ On the one hand, one might wonder why this would be so offensive. If someone already condemned to death offered to undergo an experiment in the hopes of helping other people, why should we not allow him to do so? Would this not be a noble gesture? Might it not be born of a desire for penance on the part of the offender?

Kant’s objection, however, is probably twofold. First, this kind of experimentation seems to use the criminal’s very life as a mere means to an end, which is categorically prohibited by the moral law.⁵¹ Second, the proposal permits the criminal to buy his way out of punishment. If one can offer one’s body to science in order to escape punishment, why could one not offer the government enough money to reduce one’s sentence? This might seem more repugnant than

⁴⁷ For a more detailed argument against *lex talionis*, see Sarah Holtman, *Toward Social Reform: Kant’s Penal Theory Reinterpreted*, 9 UTILITAS 3 (1997). Holtman argues that Kant made some unwarranted empirical assumptions that motivate his discussion of *lex talionis*; if we do not accept these assumptions, then *lex talionis* becomes a less compelling principle. *Id.* at 18. Assessing the strength of each of these assumptions would be complicated; Holtman’s main project, though, is not to argue definitively against Kant’s insistence on *lex talionis*, but simply to point out that this commitment does not follow necessarily from his larger theory of justice. *Id.* My goal in the latter half of this paper is similar.

⁴⁸ KANT, *supra* note 2, at 105 (6:331). Kant’s allusion is presumably to the New Testament story of the Roman leader Pilate placating the Pharisees (portrayed as hypocritical religious leaders concerned with maintaining their positions of authority) by ordering Jesus (though innocent) to be killed, and a robber (though guilty) to be set free. See *Matthew 27*, esp. 20:24.

⁴⁹ KANT, *supra* note 2, at 105 (6:332).

⁵⁰ *Id.*

⁵¹ KANT, *supra* note 38, at 80 (4:429).

the possibility of medical experimentation—but Kant avers that, if justice is to be equal among citizens, then one cannot use any means whatever, be it one’s money or one’s body, as a get-out-of-jail card. To allow otherwise would be to offer an advantage to some criminals that is not extended to others—and this inequality would be impermissible from the standpoint of justice.⁵²

The bottom line here is that Kant thinks *lex talionis* is the proper answer to questions about the mode and extent of punishment because it is conducive to treating criminals equally, and equality is important in a system of Kantian justice. Whatever qualms we might have about Kant’s embrace of *lex talionis*, however, we have seen how punishment can reasonably be viewed as a requirement of Kant’s account of civic freedom. And this account is, I hope to have shown, significantly more convincing than the existing retributivist and hybrid ones.

D. OBJECTIONS TO THE PRECEDING INTERPRETATION

Thus far, our interpretation of Kantian punishment as a facet of his theory of justice sounds reasonable. Can we, though, reconcile this interpretation with textual concerns the hybrid theorist raises? Consider first the references Kant makes to deterrence (and occasionally rehabilitation) as apparent goals of punishment. Threatening citizens with punishment for the violation of the UPR can be seen as a way of preserving the freedom, equality, and independence of all concerned. Such deterrent threats, if effective, reduce the likelihood that a citizen will be victimized by a criminal. Deterrent threats of punishment are applied equally to all citizens—nobody is singled out as a potential criminal—which sends the message that the state takes seriously the rights of all citizens and wishes all to benefit from the freedoms gained by participation in civil society. They also put potential offenders on notice that their freedom will be diminished, and their status as independent citizen-agents jeopardized, should they choose to act in abrogation of their basic duties as citizens to uphold the UPR.

Thus, while deterrence is arguably an important aspect of (the threat of) criminal punishment in a Kantian scheme, this would only be the case insofar as deterring crime actually promoted Kantian justice within civil society—an important point that hybrid theories do not recognize. This is why we are able to evaluate the justness of criminal laws independently of their deterrent efficacy; unjust laws may well serve deterrent purposes admirably but nevertheless be problematic because, say, the act being punished is one compatible with (or even necessary for) civic freedom.

⁵² What if the medical experimentation were offered equally to all prisoners, or all prisoners condemned to death? Would this not fulfill the equality requirement? If so, perhaps this is not all that Kant is concerned about. I doubt, however, that this scenario would really be indicative of equality, at least of the kind Kant cares about. If all prisoners took part in the medical experiment voluntarily, it would still be the case that some would live and some would die. Or, even if the drug worked perfectly as expected, the scenario would still entail the *risk* of some living and some dying. Human life may well be characterized by random luck, but Kant seems to be saying that it is not a proper basis for a just social institution. We ought to demand more of political equality than having an equal chance at entering the lottery.

Rehabilitation as a (partial) aim of punishment from a Kantian perspective is a more interesting question. Insofar as the criminal justice system could “rehabilitate” offenders, it is worth asking what this might mean. Perhaps we could conceive of a kind of civic rehabilitation, in which the offender is offered help regaining his literal and figurative citizenship: his place in the community, and his commitment to the civic freedom of his fellow-citizens. This type of rehabilitation seems reasonable, and compatible with Kant’s view of civic freedom.

The justice-based interpretation can also make sense of the seemingly strange passage on “necessity” mentioned in above: the drowning man who, “in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself.”⁵³ Kant does seem to say that the reason the drowning murderer is unpunishable is that punishment would have no deterrent effect in such a case. But a closer look reveals that Kant’s main point is that “there could be no necessity that would make what is wrong conform with law.”⁵⁴ On the one hand, Kant seems to be saying that a morally bad act can never be “legal”: we would not want our law to say that murder is ever permissible. On the other hand, there is a certain category of bad-luck cases where murder does not, strictly speaking, violate the UPR, and where it would therefore be inappropriate to apply coercive punishment.

If I am drowning in the ocean, I am not acting as a citizen within civil society, but as an animal struggling for survival. The circumstances are not such that the demands of justice are relevant—nor can they be met. No action that I take under such circumstances will preserve the aims of the UPR. If I let myself die (which Kant acknowledges may be the more noble and morally worthy act), I fail to preserve my own freedom; whereas appropriating the plank for myself will fail to preserve the freedom of the other drowning man. There can be no equality here, since one of us must die. And our status as independent citizens is hardly at issue at the moment. Since state coercion is justifiable *only* to preserve the aims of freedom, equality, and independence of citizens, it fails to be relevant in this particular case—even though we privately might judge that I lack some personal virtue because I chose to save my own life at the expense of another’s. In legal terms, I am excused, though not justified: what I did might not be morally right, but I should not be punished for having done it.

Thus, while the hybrid theorist can point to the few references to deterrence in order to explain the “necessity” case, the justice-based interpretation provides a fuller and more compelling explanation of that initially abstruse passage. Now, however, we need to confront a particularly well-known section of the *Metaphysics of Morals* that is commonly used to paint Kant as a hard-nosed retributivist. Can we square Kant’s discussion of capital punishment with the justice-based interpretation?

Kant categorically rejects any sort of mitigation or tempering of capital punishment for convicted murderers.⁵⁵ If the death penalty is taken to be merely

⁵³ KANT, *supra* note 2, at 28 (6:235).

⁵⁴ *Id.* at 28 (6:236).

⁵⁵ Kant does say that we ought to execute murders humanely. *Id.* at 106 (6:333). However, this seems a rather minor concession considering that he apparently does not consider the possibility that *any* murder might be justly punished by anything other than death (except of course in the “necessity” cases).

the starkest example of Kant's retributivist stance—that is, if Kant intends us to be able to replace “murder” with any other crime and “death” with a concomitant penalty—then there would seem to be little need to appeal to other principles, as both the hybrid and justice-based interpretations attempt to do.

I believe, however, that this is not an accurate reading of the death-penalty discussion, which begins precisely by distinguishing murder from other crimes. Kant prefaces the murder passage with a discussion of theft, pointing out that, since taking all a thief's possessions would result in a burden on the state to “provide for him free of charge,” the thief can be forced to perform “prison labor” instead.⁵⁶ Kant believes murder to be different in kind, however, from ordinary crimes such as theft. Murder ends a human existence not only in the biological sense but also in the Kantian one, where human life is particularly valuable because of its potentiality: to be human is to be free and autonomous, capable of willing and creating and reasoning. To kill is to deprive a human being of such potential. For all other offenses,⁵⁷ no matter how heinous, the victim at least remains capable of realizing that potential (albeit possibly to a lesser degree than before the victimization). In the context of life in civil society, murder permanently deprives the victim of the freedom, equality, and independence of citizenship. Again, no other crime can effect such a result.

For this reason, Kant thinks that, while the thief can be punished by a method other than stealing, if a criminal “has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer.”⁵⁸ Whether or not we agree with Kant about this, the important point here is that Kant's commitment to capital punishment is grounded at least partly in a contemplation of the magnitude of the injustice perpetrated upon a victim by a murderer. Many will disagree with Kant's dramatic assertion that “blood guilt” will “cling to the people” who do not “insist upon [capital punishment]; for otherwise the people can be regarded as collaborators in this public violation of justice.”⁵⁹ Still, Kant is surely correct to emphasize the importance of punishment for certain types of crime, most notably murder. Failure to prosecute and punish murder amounts to a failure of justice: free, equal, and independent citizens can reasonably expect that the government will pursue and prosecute such offenses—and will naturally view

⁵⁶ *Id.* at 106 (6:333).

⁵⁷ Well, almost all. It is unclear whether Kant considers something like negligent homicide to be equivalent to murder. In that situation the negative impact of the defendant's actions is generally grossly disproportional to the defendant's punishment, which is normally something significantly less than life in prison, let alone the death penalty. I am setting aside for present purposes cases of crimes involving death where the defendant's *mens rea* is something less than intentional or knowing. Also, one could conceive of a situation where, say, the defendant only assaults the victim, clearly without the intent to kill, and the victim is rendered comatose for the rest of his life. In such a situation perhaps the defendant has committed an offense with substantively the same effects as a murder, although technically the victim has not died. Kant might simply treat this as a murder. I am also disregarding such difficult scenarios for now, since the distinction between murder and lesser crimes is usually much more obvious.

⁵⁸ *Id.* at 106 (6:333) (emphasis in original).

⁵⁹ *Id.*

police, lawyers, judges, and others as complicit in injustice if they fail to do so. If we were to accept the premise that the death penalty is the appropriate punishment for murder, then surely a failure to impose it *would* indicate a failure on the part of society to take murder seriously.

Many will nonetheless find Kant's argument in favor of capital punishment insufficient. We might think that, while murder is heinous and should be treated accordingly, the government ought to consider other options in punishing even the worst kind of criminals. If we are skeptical about the exacting demands of *lex talionis* in the first place, then we certainly should question whether homicide is really the *only* appropriate response to homicide. And while Kant criticizes an anti-death-penalty advocate for being "moved by overly compassionate feelings,"⁶⁰ perhaps justice would best be served by "tempering" retribution with mercy.⁶¹ Moreover, even if we were to accept that for the "average" murderer death would be the appropriate penalty, it is easy to construct a scenario where it seems grossly unfair to impose this sentence. Even in the United States, where capital punishment remains legal in many states and on the federal level, the Supreme Court has restricted the practice where certain categories of individuals are concerned—notably juveniles and those with mental handicaps. This seems right: surely at least *some* capital cases call for a "substitute" form of punishment.

Kant may simply not have thought out the injustice of executing certain classes of citizens. But we should also remember that Kant's initial attraction to *lex talionis* arises primarily out of a concern with *equality*. A common criticism of the death penalty as implemented in the United States is that it is racially biased. Although this is generally taken to be an argument in favor of abolishing capital punishment, one could understand why Kant, given a particular historical context, might *insist* on executing murderers. While it would be patently unfair to execute only black murderers while sparing the lives of white murderers, there is at least a sense in which equality would be served by executing *all* murderers, regardless of race. Many contemporary readers (including me) will find this conclusion incomplete, if not perverse—after all, we do not generally find it a good argument for clearly immoral practices (slavery, genocide, and so on) that people are victimized *equally*. If putting people to death is *prima facie* wrong, then the fact that we do it equally will not justify it morally. But, as Thomas Hill puts it, "considerations of comparative justice make understandable, even if not defensible, Kant's thought that the long-standing (supposedly) just policy of executing murderers should not be abandoned" until everyone has received the same kind of treatment.⁶²

Thus, regardless of one's feelings about capital punishment, Kant's endorsement of the practice can be explained within the context of a prior commitment to the promotion of a just social order—one in which citizens' civic freedom is of primary importance. We might easily disagree with Kant's conclusions while retaining the general structure of his theory of punishment.

⁶⁰ *Id.* at 108 (6:334-35).

⁶¹ See Carol S. Steiker, *Tempering or Tampering?*, in FORGIVENESS, MERCY, AND CLEMENCY 16 (Austin Sarat & Nasser Hussain eds., 2007).

⁶² Hill, *supra* note 18, at 434.

E. CONCLUSION

The foregoing constitutes an overview of three competing interpretations of Kantian punishment. I have argued that an interpretation based on Kant's account of justice—wherein the purpose of punishment is to preserve the civic freedom of all citizens—is superior to the standard retributivist and hybrid accounts. Further work remains to be done in order to show what practical implications this interpretation has for a criminal justice system aspiring to fulfill a Kantian model of justice. First, however, we must address a salient issue I mentioned and left unresolved: whether we should accept *lex talionis* as the ideal way of determining the nature and extent of criminal punishment.

II. PUNISHMENT AND CIVIC VIRTUE

If we agree with Kant that criminal punishment is morally justified, even required, then how do we determine the appropriate punishment for a given defendant? As I discussed in section I of this paper, Kant's response is simple: punish according to *lex talionis*. I suggested, however, that even if we agree with Kant's argument for the justification of criminal punishment, we ought to be skeptical of his reliance solely on this principle. In this section, then, I will argue that the second component of Kant's theory of justice—his account of civic virtue—can provide us with rationale for deviating from *lex talionis*. In order to do so, I use the novel approach of deploying Kant's moral theory in order to understand and strengthen his political theory. In particular, I will focus here on one moral value which, I will argue, is a desideratum of any just system of criminal punishment: moral cognition. In order to see what moral cognition has to do with criminal punishment, I shall first need to explain what role this concept plays in Kant's moral theory.

A. THE DUTIES OF CONSCIENCE AND MORAL COGNITION

In the *Tugendlehre*, the part of the *Metaphysics of Morals* concerned with personal morality, Kant describes two duties that one owes to oneself as an autonomous moral agent: the duty to be one's "own innate judge,"⁶³ and the duty to "know [one]self."⁶⁴ The former is tied to Kant's conception of conscience, which he analogizes to a court of law. In Kant's simplified courtroom, there is an accuser (the prosecutor), an advocate (the defense attorney), and a decision-maker (the judge). The attorneys plead their case, and the judge renders a verdict ("condemnation or acquittal").⁶⁵ Conscience, for Kant, is an analogous procedural mechanism internal to the rational moral agent. One brings charges against oneself based on some putative lapse of morality (as a prosecutor), defends one's actions against such charges (as a defense attorney), and passes judgment on oneself (as a judge).

⁶³ KANT, *supra* note 2, at 188 (6:437).

⁶⁴ *Id.* at 191 (6:441). Kant appears to use the terms "self-knowledge" and "moral cognition" interchangeably. I shall do so as well when discussing Kant's moral theory. However, when I argue for an extension of this duty to the societal realm, I will use the term "moral cognition" exclusively.

⁶⁵ *Id.* at 189 (6:438).

Finally, to this judgment is affixed a punishment: “happiness or misery” depending on whether the action has been judged to be morally worthy or not.⁶⁶ Kant clarifies, though, that an “acquittal” cannot lead to a “reward” nor to “joy” but to mere “relief from preceding anxiety.”⁶⁷ Furthermore, this internal tripartite courtroom drama is not only a capacity humans have, but is omnipresent in our consciousness: “Every human being has a conscience and finds himself observed, threatened, and, in general, kept in awe (respect coupled with fear) by an internal judge; and this authority . . . follows him like his shadow when he plans to escape.”⁶⁸ Kant thinks that we cannot escape self-judgment—at least, perhaps, without significant efforts at self-deception.

One might question whether this conception of conscience-as-courtroom is satisfying. For one thing, why is it that there is no “reward” for morally right actions? We have a tendency to praise others for morally laudable actions that is perhaps as strong as our penchant for condemning wrongdoing. We think *good* parents praise their children for right behavior as well as punish them for wrong behavior. It may be that children learn to act at least in part based on rewards and punishments, and Kant would say that they have for that reason not attained full moral development. We do, though, also reward *adults* who (for example) perform acts of charity in the community, or who sacrifice time and money on projects that benefit others. Perhaps these are supererogatory acts: public rewards are often bestowed upon those who seem to go above and beyond the requirements of morality. But what about the person who is overall an unsavory character but manages to rise above his animalistic inclinations to perform an act of “merely moral” quality? I am thinking, for example, of the addict who celebrates a few months free of her addiction, or the lifelong Scroogeish miser who finds joy in deciding, for once, to bestow his largesse on others. While Kant would find these people to have behaved in a morally worthy fashion, he seems to deny that they should be able to “reward” themselves for such laudable behavior.⁶⁹

A second potential objection is that it seems at first glance far too simplistic in at least some cases to be able to make a binary judgment about the moral worth of one’s actions. If your inner prosecutor calls you to task for having stolen something, it seems obvious that your inner judge will condemn you. Likewise, if you try to prosecute yourself for a momentary lapse of forethought (you unwittingly neglect to

⁶⁶ *Id.* at 189 (6:439) (author’s footnote).

⁶⁷ *Id.* at 190 (6:440).

⁶⁸ *Id.* at 189 (6:438).

⁶⁹ One possible response, compatible with the one I will explore shortly, is that “rewards” of this latter type are not for acting morally in the fullest sense, but because someone like the addict is, in part, morally childlike. Rewards in this type of case function as encouragement toward fuller moral development, which includes the capacity to act free of the influence of addictive substances. Importantly, though, Kant would likely point out that *all* of us are morally deficient in some respect—we are all subject to influences that interfere with our moral autonomy. Incentives toward goodness (publicly bestowed or granted by oneself) are perhaps a permissible way to encourage moral development, so long as we do not make the mistake of thinking of the reward as the right reason for acting morally. For further discussion of Kant’s views on moral training or education, see Barbara Herman, *Training to Autonomy: Kant and the Question of Moral Education*, in *PHILOSOPHERS ON EDUCATION: NEW HISTORICAL PERSPECTIVES* 255 (Amélie Oksenberg Rorty ed., 1998).

hold a door open for someone), it seems equally clear that a well-functioning inner judge will acquit you. In many cases where there is an ostensible moral violation, though, it is not at all clear that the correct judgment is simply condemnation or acquittal. It seems that in many cases something more is required: “No, I didn’t steal anything, *but* I had morally unworthy thoughts about doing so”; or “Yes, I failed to treat others with polite respect *but* I had a lot on my mind and had every intention to behave otherwise.” How can the binary “courtroom” model account for the seeming necessity of making these more nuanced judgments?

One way of responding to these concerns is by appealing to the second duty that Kant presents in this section of the *Tugendlehre*: that of self-knowledge.⁷⁰ Kant explains that to gain this knowledge one must “scrutinize” or “fathom” oneself, and that the knowledge sought is that of the “heart – whether it is good or evil.”⁷¹ The idea seems to be that we have a duty to explore our own motivations and desires, and to determine whether and to what extent our actions result from right reasons (conformity with the moral law) rather than morally suspect ones (desire for public approbation, say, or even the wish to be free from guilt). Kant thinks that engaging in this sort of “moral cognition will, first, dispel fanatical contempt for oneself . . . [and] will also counteract that egotistical self-esteem which takes mere wishes . . . for proof of a good heart.”⁷²

In other words, the particular self-judgments rendered by our conscience ought to be balanced by a more generalized view of our moral selves, which requires “impartiality” and “sincerity” about our “moral worth or lack of [moral] worth.”⁷³ I might, then, rightfully condemn myself for a moral failing, but nevertheless recognize when viewing myself objectively that I act in morally sound ways most of the time, and should regard myself as morally worthy, on the whole. On the other hand, I might correctly acquit myself of a certain transgression yet recognize that, all things considered, I was really just lucky that I did nothing wrong this time around.

The tempering effect of this type of self-knowledge—which allows us to avoid being both too hard and too easy on ourselves—supplies the apparently missing elements from Kant’s description of the conscience. For although our inner judge might not allow us to experience “joy” simply because we are acquitted of putative wrongdoing, perhaps Kant would allow us to feel this sort of “reward” when considering ourselves objectively. Thus the aforementioned addict who has found the strength of will to remain free from her vice for a period of time might genuinely experience joy at having come this far since, all things considered, that is rather an impressive accomplishment for her. Similarly, although one’s conscience renders a simple “guilty” or “not guilty” when considering the moral worth of a specific act, self-knowledge may be what supplies the “*but*” that we often attach to actions with moral content. Thus I might as an act of *conscience* correctly acquit myself of, say, a particular instance of lying, yet also as an act of *moral cognition* recognize that honesty is unfortunately not representative of my actions as a general matter and, therefore, I deserve very little self-satisfaction for not having lied on this particular occasion.

⁷⁰ KANT, *supra* note 2, at 191 (6:441).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

One question we might pose is whether Kant intends for the self-knowledge aspect of our moral duty to diminish or augment in any way the *penalty* our conscience-qua-judge imposes on us for violation of the moral law. Kant does not address this explicitly. Indeed, he does not say much at all about what the penalty is for a guilty verdict rendered by one's conscience—only that it will be “happiness or misery.” Presumably, though, not all moral failings ought to make us feel equally guilty: murdering and overindulgence in food hardly seem to warrant the same degree of self-imposed misery. It would seem, then, that there must be some means by which we determine how *much* misery or happiness we ought to allot ourselves based on our moral status. Since Kant does not supply such a mechanism in the section on conscience, but follows this up with the section on self-knowledge, it would be reasonable at least to consider whether this latter component of the moral being can do this work.

One might think that determining how much guilt to punish oneself with does not require self-knowledge in most cases. Obviously one who commits murder ought to feel much worse about himself than even the most reprehensible glutton. But the issue is not simply one of comparing two types of moral failings, but one type under different circumstances. Thus, for example, a person who has told a small lie one time to avoid a stressful confrontation might reasonably impose less misery on herself than ought to be entailed by the average lie; conversely, one who engages in systemic deception of a spouse in order to cover up an affair ought with full self-knowledge to impose a greater degree of conscience-ordered misery than for an average lie.⁷⁴ Viewed this way, the duty of self-knowledge is intended not primarily to augment or diminish self-punishment but, more importantly, to discover the *appropriate* punishment for one's wrongs.

So far, I have argued that Kant intends the duty of self-knowledge or moral cognition to temper or refine the judgment we pass on ourselves through our conscience, based on the totality of our moral life circumstances. This is not the usual interpretation of Kant's view of conscience, which is commonly characterized as being “far from a gentle whisper of moral encouragement. It places us on trial for (perceived) moral failings, accuses us, passes sentence, and makes us suffer.”⁷⁵ I am suggesting, though, that while Kant does view morality categorically in one

⁷⁴ Kant is notoriously opposed to all forms of lying, even in cases where doing so would seem to be morally permissible, if not obligatory—as in the infamous “murderer at the door” scenario. See Immanuel Kant, *On a Supposed Right to Lie from Philanthropy* in IMMANUEL KANT: PRACTICAL PHILOSOPHY 605 (Paul Guyer & Alan W. Wood eds., Mary Gregor trans., Cambridge Univ. Press, 1996). Part of the explanation for this may be Kant's concern about the moral wellbeing of the liar. Indeed, his discussion in the *Tugendlehre* on lying (*supra* note 2 at 183-83 (6:429-30)) falls under the general heading of “a human being's duty to himself merely as a moral being.” *Id.* at 182 (6:428) (capitalization altered). By lying, even about small matters, one opens oneself to the possibility of self-deception. But proper moral judgment requires, above all, honesty with oneself, for moral cognition cannot function properly in the absence of such truth. It might be possible to agree with this general sentiment without taking the seemingly extreme position that Kant does with respect to lying to the murderer. But there is undoubtedly *something* right, even noble, about his unwavering commitment to the truth.

⁷⁵ Hill, *supra* note 18, at 408.

sense (one does or does not violate the self-legislated moral law⁷⁶), he also views human beings as motivationally complex creatures, and invites us to acknowledge the complexities involved when we make choices that either comport with or deviate from the strict standards of morality. Such self-examination is just as much a duty to ourselves as is self-judgment, and inevitably leads to a more nuanced (and, often, more merciful⁷⁷) view of our selves than Kant is usually given credit for.

My point in this section has been to show that, while Kant's conception of conscience can seem just as unyielding as his discussion of punishment is sometimes taken to be, this is at best a superficial reading. While self-judgment is an important to our moral life, so is the duty of self-knowledge or moral cognition. Only when we attend to both of these duties do we treat ourselves in a way that is respectful both of our moral agency, but also of our position as imperfect human beings subject to many influences other than the self-legislated moral law. Assuming this interpretation is correct, we might then ask whether a Kantian should countenance some analogue to self-knowledge or moral cognition in our relationships with others—a proposition for which I argue in the following section.

B. MORAL COGNITION IN SOCIAL LIFE

Kant does not discuss the capacity for moral cognition as applicable beyond the duty of self-knowledge. I think, however, that reflecting on the ways that we interact with other people will convince us that moral cognition is, in fact, a natural and essential part of social life—and that Kant would himself willingly endorse such an extension of this principle. Consider, for example, the types of judgments we must regularly make about the motives behind someone's actions. For example, imagine that a friend fails to follow through on a promise, or that a child misbehaves, or that a spouse deceives. What are we to do under such circumstances?⁷⁸

I should think it clear that our response in such situations is highly dependent on the motives of the actor and background conditions of the action. If the friend is ill, or the child very young, or the spouse under intense stress, then we are likely to react in different—specifically, more merciful—ways than if the friend turns out to be selfish, the child old enough to know better, or the spouse systematically dishonest. But how do we make such determinations? Quite naturally, and without always being aware of it, we engage in moral cognition.

⁷⁶ This is not to say that all Kantian duties are simple or immediately recognizable. Many of our “imperfect” moral duties may be difficult to discern; it may certainly be challenging to balance all the ends to which we are required to attend. It is only to say that Kant endorses a view by which we can, ultimately, give a specific answer to questions such as: “Is my action a morally praiseworthy one?”

⁷⁷ I am thinking here of instances where we judge ourselves too harshly, as many of us are wont to do. Of course, at times we may also fail to appreciate the moral significance of our actions—we may underestimate the harm we have caused another, for example—in which case moral cognition will result in harsher judgment. My suggestion in section II of this paper will be that moral cognition in a social context will generally result in a tempering of our judgments rather than the reverse.

⁷⁸ I have chosen *negative* actions because, as should be obvious, I will ultimately be drawing an analogy with criminal actions. Still, this is clearly the case with *positive* actions as well. We must determine how to respond appropriately to praise, gifts, and other indicia of social approbation, esteem, or love.

For example, suppose that Joan's friend, Kevin, promises to watch her children one afternoon so that she can go to a job interview. Kevin does not show up, and fails to answer her phone calls. Joan, having relied on Kevin's promise, cannot find anyone else to watch her children on such short notice, and so she misses the job interview. This is a significant setback for her, since she has been unemployed for months, this job would have been ideal for her, and the interview cannot be rescheduled.

How should Joan react in this situation? That is, what should she do *with respect to Kevin* and their friendship? She has many options, such as telling Kevin what a great friend he is, pretending that nothing happened, writing an angry letter to him, refusing to ever talk to him again, explaining to him that she is upset, or hiring someone to kill him. Some of these options will be morally inappropriate due to their nature: killing someone without a sufficiently good reason is obviously immoral, and obsequiously praising someone who has harmed us may be as well.⁷⁹ But many other options seem open to Joan. How is she to determine which ones are morally appropriate in the case at hand?

What Joan ought to do is, of course, try to learn more. Ideally, Joan will determine the facts of the situation with "impartiality" and "sincerity" in order to determine Kevin's "moral worth" with respect to this incident.⁸⁰ Certainly, if Joan discovers that Kevin got into a serious car accident on the way to her home, then she ought to judge his failure to watch her children much differently than if it turns out that he spent all night drinking and therefore failed to wake up in time. It will matter, too, whether this is the first time Kevin has ever failed to follow through on a promise, or whether this is a chronic problem.

One might wonder whether expecting Joan to "morally cognize" Kevin in such a situation is unrealistic. Given the harm caused to her in this case, can we reasonably expect Joan to react in such a rational manner, when her initial inclinations will likely be anger at Kevin? Kant's moral theory is again helpful here. He proposes that personal virtue involves the "capacity and considered resolve to withstand a strong but unjust opponent."⁸¹ Such "opponents" include the "[i]mpulses of nature" that beset human beings and create "obstacles" to doing their moral duty.⁸² It is perfectly *natural* for Joan to be angry—it is even, in a sense, justifiable. But surely Joan ought ideally to resist her impulse to react angrily. Perhaps this means she should never act out of anger⁸³—but it means *at least* that she should not act from anger until she knows all the facts about Kevin's failure to appear for babysitting duty.

⁷⁹ See Kant's discussion of "servility," *supra* note 2, at 186-88 (6:434-37).

⁸⁰ *Id.* at 191 (6:441).

⁸¹ *Id.* at 146 (6:380). See also the discussion of virtue, *id.* at 156-57 (6:394-95).

⁸² *Id.* at 146 (6:380).

⁸³ Although it initially appears that anger is never a morally virtuous response to others' wrongdoing, I am unsure whether this is *always* the case. There may be something to be said for a kind of "righteous indignation" that impels us to seek justice for ourselves and others. Still, it seems clear that even this kind of response is improper until we are aware of all the relevant facts in a given situation. Helpful here is Kant's discussion of the "vices of hatred for human beings," in which he decries revenge, endorses forgiveness—but also distinguishes this from the "meek toleration of wrongs." *Id.* at 206-08 (6:458-61).

In reality, of course, engaging in moral cognition will be particularly difficult when we have been seriously wronged by others. In some cases it may simply be psychologically impossible under the circumstances, and we must be wary of judging Joan if she fails to fulfill this moral duty in this case. Still, it seems reasonable to assert that the use of moral cognition in social circumstances such as Joan's is the proper moral ideal, however difficult it may be to attain in practice.

A more significant worry here, though, is that the purpose of moral cognition—proper judgment of others—is misguided. While we might be *tempted* to pass judgment on other people, and while we might in fact *do* this regularly, we really *should not* do so. One might appeal to religious aphorisms, such as “judge not, that ye be not judged” in support of this proposition.⁸⁴ On this view, it would perhaps be acceptable to engage in moral cognition of *oneself*, but not of others; we should live in such a way that we accept others regardless of their actions, while leaving judgment in the hands of God. While there is certainly something noble about this kind of sentiment, as an objection it misses the aim of moral cognition. The purpose is not necessarily *judgment-qua-condemnation* of those who fail to meet some standard of goodness. Rather, the purpose is to understand what type of *judgment-qua-social response* is appropriate under the circumstances, given the relationship and other specific moral commitments we might have.

To see this, take a more serious case. Suppose that Vivian discovers that Wayne, her spouse, has had an affair; furthermore, Wayne refuses to admit to the affair, apologize, or even discuss the matter with Vivian. After engaging in the process of moral cognition, Vivian determines that the appropriate response is to seek a divorce. Vivian might reasonably say that she still cares about Wayne, wants the best for him, and respects him as a fellow human being; she has, however, determined that divorce is the morally appropriate response to Wayne's actions. Admittedly, maintaining such a positive attitude toward Wayne might be difficult, but the point is simply that Vivian's “judgment” of the appropriate response to Wayne need not entail a condemnation of Wayne. Moreover, this type of judgment is fully compatible with the notion that making an ultimate determination about whether Wayne is, all things considered, a “good” person or not is not one that mere mortals are equipped to make. What Vivian can, and should, make a judgment about is what her relationship to Wayne should be, and what response his actions and motives merit.

Finally, as a practical matter, it is hard to see how we can avoid making these kinds of judgments, nor would it be healthy in many cases to do so. We cannot, and should not, expect Joan, much less Vivian, to simply go about their lives as if nothing at all had happened. This may be possible (and desirable) in cases of very minor social conflicts, as when an inconsiderate driver cuts one off in traffic. But in cases where we suffer a cognizable harm at the hands of those we associate with, then we must determine what response is appropriate under the circumstances—and failing to do so, at least consistently, amounts to a failure to respect oneself.⁸⁵

⁸⁴ *Matthew 7:1.*

⁸⁵ Kant memorably declares that “[b]owing and scraping before a human being seems in any case to be unworthy of a human being. . . . [And] one who makes himself a worm cannot complain afterwards if people step on him.” *Id.* at 188 (6:437).

C. MORAL COGNITION IN CRIMINAL PUNISHMENT

So far, I have explained Kant's view that humans are capable of engaging in moral cognition after condemning themselves by the operation of their consciences—and that doing so is morally required in order to respect themselves as moral agents. I then proposed that we can and should conceive of moral cognition as possible and desirable in our interactions with other people, particularly in cases where others wrong us. In this section, I suggest that moral cognition is required of good Kantian citizens who act as decision-makers in the area of criminal punishment. My comments in this section will be mostly general, and are intended to motivate the proposition that moral cognition makes sense to discuss in this context; I turn to more specific proposals in subsection D. The main goal here is to show that moral cognition does better than *lex talionis* alone as a principle guiding the nature and extent of punishment.

As in the previous subsection, this analysis is intended as an extension of Kant's thought, rather than a direct interpretation of it. Indeed, Kant limits his discussion of moral cognition to the context of self-knowledge. My contention, however, is that introducing this notion into the criminal justice system will be in keeping with Kant's more general commitments to justice and morality.

Moral cognition in the realm of criminal punishment may be fruitfully compared to moral cognition in the two circumstances we have already covered:

(1) In its mode of self-knowledge, moral cognition complements the operation of the conscience. Fulfilling our duties of conscience and self-knowledge are both required in order to properly respect ourselves as human beings. When we submit to the judgment of our conscience, we respect ourselves as moral agents capable of choosing in accordance with the demands of morality. When we introspectively seek self-knowledge, however, we respect ourselves as mortal beings subject to factors external to our will. Both conscience and self-knowledge are required in order to properly fulfill our duties of personal virtue with respect to ourselves.

(2) In its mode of making social judgments, moral cognition complements the operation of practical reason. Respecting other human beings requires (in certain cases) passing judgment on their actions—in doing so, we respect them as moral agents. Yet respecting others also requires cognition of their circumstances, including the most general circumstance of being subject to the conditions of mortality. A judgment tempered by moral cognition is required in order to fulfill duties of personal virtue with respect to other people.

Moral cognition in criminal punishment is both similar and different from moral cognition in the areas above. For one thing, moral cognition of the self is required by all competent moral agents—it is an inescapable duty of beings that have the capacity for moral agency. Moral cognition of other people, while not strictly necessitated by virtue of being a moral agent, is inescapable as a practical matter due to the social nature of human beings. Judgments made through the operation of the criminal law, however, are rarer. Human beings are not called upon to make

such judgments except when required to serve as jurors or, perhaps, when making decisions about what kinds of criminal legislation to support.

Nevertheless, while the circumstances in which the moral cognition of criminals is relevant will be more limited than the previous categories, the duty will look quite similar:

(3) In its mode of judging convicted criminals, moral cognition moderates the binary judgment of the criminal law. Respecting people who have committed crimes requires punishing them, for this treats them as moral agents who could have chosen not to violate others' civic freedom. But it also requires attending to the circumstances and background conditions that contributed to the act in question. Both administering punishment and engaging in moral cognition of offenders are therefore required in order to fulfill our duties of virtue as citizens.

Virtuous Kantian citizens will, then, support policies and procedures which impose reasonable punishments that attend both to the nature of the criminal act (via *lex talionis*), but also to the motives and background of the criminal (via moral cognition).

It is worth thinking about the special difficulties citizens engaging in this kind of moral cognition will face. It will often require citizens to set aside their prejudices in order to reason about the needs of their community in pursuit of the ideal of justice. Most of us have no doubt experienced visceral negative responses in the face of serious criminal acts—either directed at us or at fellow human beings. Some theorists have argued that these sentiments are themselves indicia of the direction that criminal justice ought to take.⁸⁶ If Kant is correct, though, then such an approach is misguided. Although these sentiments are a natural part of the human experience, they alone do not provide us with good reason to act on them. We must, rather, reason about our moral obligations in order to determine what the morally appropriate attitudes toward criminality are.

Moreover, despite his reputation as a retributivist, Kant believes that we have the duty to “[d]o good to other human beings insofar as we can . . . whether [we] love[] them or not . . . [and] even toward a misanthropist.”⁸⁷ In the face of criminal behavior, which often stirs within us understandable feelings of revulsion and vengeance, Kant would say that we retain an obligation to act benevolently, and to attempt in doing so to develop an “inclination to beneficence in general” even in the face of wrongdoing.⁸⁸ Again, moral cognition in this sense is often going to be

⁸⁶ See, e.g., Michael Moore, *The Moral Worth of Retribution*, in PUNISHMENT AND REHABILITATION 94 (Jeffrie Murphy ed., 1995); and Jeffrie Murphy, *Getting Even: The Role of the Victim*, *id.* at 132.

⁸⁷ KANT, *supra* note 2, at 162 (6:402).

⁸⁸ *Id.* Virtue does not preclude us from making the necessary judgments about others' actions and responding accordingly. It does, however, require that we make such judgments in a way that is careful to distinguish what consequences another human being merits for her actions from the consequences we might initially be inclined to dispense due to our unexamined emotional responses. It might also require (or at least have the effect of) being “inclined” toward mercy rather than vengeance in the face of criminal

challenging, just as it can be difficult in the context of our self-knowledge or our social judgments. But simplicity is not necessarily a virtue, particularly where the result of our decision-making is imposing state-sanctioned misery on fellow human beings.

III. SPECIFIC PROPOSALS FOR MORAL COGNITION IN PUNISHMENT

Given Kant's commitments to justice (as described in §I) and his characterization of the duty of moral cognition (as described in §II), there are good reasons to think that moral cognition must supplement *lex talionis* in order to determine the nature and extent of criminal punishment. In order to demonstrate how moral cognition could fulfill such a role, consider first what it means to sentence a criminal offender according to such a principle. Just as self-knowledge could increase or decrease the extent to which we punish ourselves for a specific lapse based on our character generally, a similar moral cognition applied to the convicted criminal could cause us to alter his punishment (relative to a *lex talionis* baseline) based on factors relevant to his background.

Thus moral cognition might simply be viewed as the type of fact-finding undertaken by a judge or jury in a sentencing hearing. A person convicted of a particular crime may be exposed to a range of possible sentences. The prosecutor often asks for a harsh penalty, the defense attorney a less severe one—and the jury makes a decision based on all the circumstances, which generally includes, not just the circumstances of the crime, but other information about the defendant's age, mental health, upbringing, and so forth. Two people who commit the same crime may, therefore, receive disparate sentences depending on how these various factors are weighed. For example, if two people are convicted of participating in the same robbery, it is possible that one co-defendant might receive a mitigated sentence (he is younger, has no criminal record, and has led a generally exemplary life until this lapse) while the other might receive an aggravated sentence (he is an older, experienced criminal with no good deeds to his name).

While one might initially think that treating people in the *same* way manifests an equal respect for them, some reflection should cause us to realize this is not the case. Kant himself asserts that “different forms of respect [are] to be shown to others in accordance with differences in their qualities or contingent relations—differences of age, sex, birth, strength, or weakness, or even rank and dignity, which depend in part on arbitrary arrangements.”⁸⁹ Kant does not attempt to explain exactly how one ought to behave toward people who are “in a state of moral purity or depravity,” or in “prosperity or poverty,” for these are “only so many different ways of *applying*” the duties one owes to other people.⁹⁰ He indicates, however, that determining the precise contours of one's duties toward others *is* an important part of one's moral obligation to respect others' humanity.⁹¹

acts. See Martha Nussbaum, *Equity and Mercy*, in PUNISHMENT AND REHABILITATION 212 (Jeffrie Murphy ed., 1995).

⁸⁹ KANT, *supra* note 2, at 213 (6:468).

⁹⁰ *Id.* at 214 (6:468-69).

⁹¹ *Id.*

Those involved in sentencing convicted criminals will therefore be prepared to modulate punishments depending on relevant factors. A poor person who steals bread in order to survive deserves, intuitively, a much different response from citizens of her community than the rich person who steals because she wishes to live an even more comfortable lifestyle. Of course, determining precisely how to respond to the poor thief versus the rich one will not necessarily be easy—but the civic duty of moral cognition demands that we make the attempt.

Still, one might worry about such unequal outcomes. Permitting judges and juries to consider this type of information will lead to inequities with respect to defendants' sentences. And unequal sentencing seems, in some cases, problematic. After all, a common criticism of the criminal justice system in the United States is precisely that some categories of offenders (black men in particular) receive harsher sentences than others. We might therefore be inclined, as was Kant, to endorse a strict application of *lex talionis* (without attendant moral cognition) out of concern for equality.

I think, however, that such an endorsement would be misplaced. It is true that troubling examples of sentencing inequities abound in our system. But so, too, do examples of defendants' sentences in ways that, while equal to others with similar convictions, are intuitively unjust given the defendant's particular circumstances. What we need to decide is whether moral cognition, with the attendant possibility of inequality, is better or worse than *lex talionis* standing alone.

In doing so, we should first recognize that, while Kant initially seems convinced that *lex talionis* alone guarantees equality, it is also true that he recognizes the impracticability in many instances of doing to the criminal exactly what she has done to the victim.⁹² In such cases, Kant seems to allow for consideration of the criminal's background in fashioning an appropriate punishment. For example, Kant avers that "[a] fine . . . imposed for a verbal injury" would be insufficient punishment for a rich person, because he "might indeed allow himself to indulge in a verbal insult on some occasion" because of the minor cost of the criminal act.⁹³ However, the rich man is more likely to be harmed to the same extent as one he has verbally abused if he is forced "not only to apologize publicly to the one he has insulted but also to kiss his hand . . . even though he is of a lower class."⁹⁴ Apparently the fine would be an appropriate sanction for a lower-class person (because it would hurt as much as the "verbal insult" hurt the victim). Thus, despite his infatuation with *lex talionis*, Kant's interpretation of like-for-like punishment is not that the punishment must be identical to the crime, but that the impact on the offender must be proportional to the impact on the victim.⁹⁵

⁹² This would be most clearly a problem in cases of victimless crimes, though it is unclear whether Kant would recognize such a concept. As discussed earlier, Kant also recognizes the *immorality* of *lex talionis* in some cases.

⁹³ KANT, *supra* note 2, at 106 (6:332).

⁹⁴ *Id.*

⁹⁵ Assuming we could come to a correct determination of what *lex talionis* requires in a given case, there are two interpretations: the punishment itself must be as close as possible to the *criminal act*, or that the punishment must *result* in harm to the defendant that is as close as possible to the *harm caused*. The former interpretation results in the literal taking of the defendant's eye when the nature of the crime is that the victim has lost an eye. The latter interpretation could conceivably result in, say, eliminating both of the defendant's eyes even though he has only destroyed one of the victim's eyes (because,

But if we are able to take into consideration something like a person's wealth or social status in determining what his punishment ought to be, then why should we not be able to consider other factors, such as age, mental health, education, upbringing, criminal history, and so on? Surely in many (if not all) cases these factors are at least partially determinative of whether a proposed punishment would harm the defendant proportionally to the harm she has caused. Kant's example of the rich man being punished by shaming rather than fining suggests a sentencing jury may—and perhaps *must*—consider such factors.

Kant also makes a distinction between “punishment by a court” and “natural punishment . . . , in which vice punishes itself and which the legislator does not take into account.”⁹⁶ Perhaps Kant is referring to something like deleterious health effects brought about by substance abuse; or perhaps he is simply thinking of the pangs of guilt imposed by one's inner judge. In either case, Kant seems to be saying that whatever the “natural” consequences of one's action might be, they are separate and irrelevant to what punishment is appropriate based solely on the criminal nature of the act. Kant thus says that the *legislator* cannot consider natural punishment, and this makes some sense: statutory law proscribes certain conduct and affixes a proportional punishment to it, but is generally not concerned with specifics about a criminal's circumstances.

Kant does not explain, though, why courts may not appropriately consider “natural punishment” when using their discretionary authority to pronounce sentence in a specific case. Doing so would have the same effect as if a drug addict were to sentence herself to misery because of her choice to indulge in a narcotic, yet acknowledge that her life has already been turned upside down by her addiction. This self-knowledge might cause the addict to decide to focus on rehabilitation rather than further self-punishment. Likewise, the sentencing judge or jury might reasonably decide that the convicted addict has suffered enormously already and needs a sentence that involves more rehabilitation and less imprisonment. This vision of the sentencer's role makes sense if it is seen as responsible for using moral cognition to fashion an appropriate response to a criminal defendant that treats her as a free, equal, and independent moral agent—not merely as a wrongdoer.

Finally, another interpretation of Kant's approval of *lex talionis* suggests that “the law cannot assess the ‘inner’ moral worth of offenders because that would require knowing more about the agent's motives and ‘will’ than we can determine

say, the victim only had one eye to begin with; or because the victim is a child forced to live with one eye for the rest of her life, while the defendant has had the luxury of living an already long life with two eyes). Kant seems to favor the second interpretation at least in the case of the rich man who has insulted the lower-class citizen. He does not explain clearly why this is the case, however. These could result in considerably different consequences: the impact of a given sentence is almost sure to have a highly variable impact depending on both the defendants' and victims' circumstances. If it is correct that Kant countenances this version of *lex talionis*, this does not necessarily mean that Kant would agree with *mitigation* based on the defendant's character or circumstances. But if we are going to consider aggravation based on circumstances (the rich man gets a more significant, public penalty than the poor man) then surely we ought also to consider mitigation as well (e.g. the pauper who insults the rich man might also receive a different sentence than a fine, because this would be a catastrophic penalty grossly disproportionate to the harm caused).

⁹⁶ KANT, *supra* note 2, at 105 (6:331).

with confidence.”⁹⁷ We ought to be skeptical of such a claim, even if Kant believed it. For one thing, the law *does* do this, and has for centuries. Proving *mens rea* is essential to demonstrating that a crime actually occurred. The alleged criminal found to lack the right state of mind—the necessary motive or will—must, in theory, be set free. This is, admittedly, not an easy task in all cases. Moreover, while “moral worth,” in any deep, meaningful sense, is not what the criminal justice system attempts to discern, sentencing courts (good ones, anyway) *do* attempt to gather as much information about the circumstances surrounding the defendant’s crime as possible before imposing judgment. It may be that such determinations are often flawed—but certainly we should try, insofar as we are able, to distinguish between those who commit crimes for motives of profit and those who do so out of desperation; between those who harm others out of spite and those who do so out of ignorance; and between those who are fully cognizant of their options and those who have limited capacities for such introspection. Again, these are not always simple decisions, and when made properly, they may not serve the interests of “judicial economy.” But we know from our inner moral lives that they are necessary and relevant considerations when assessing wrongdoing. They therefore seem equally vital in assessing the proper punishment for offenders.

It would appear, then, that even Kant’s own view of punishment is more flexible than it first appears. Even if it were not, Kant’s own commitment to equality, which underwrites his endorsement of *lex talionis*, militates in favor of more flexible sentencing policies. Equality in a Kantian sense does not imply that we should punish all criminals in the same way. Rather, it implies that we ought to attempt to tailor a defendant’s sentence to take into account his background as well as his motives and intentions. Despite Kant’s thoughts to the contrary, *lex talionis* on its own seems destined to fail in realizing a full conception of Kantian equality.

This is sufficient to show that moral cognition needs to supplement *lex talionis* in making decisions about the nature and extent of punishment. I think, however, that the principle of moral cognition can do more. I shall therefore proceed to give several brief examples of ways in which developing this virtue can assist us in crafting more just criminal policies.⁹⁸

First, we must ensure that a criminal’s punishment is decent and humane—“free[] from mistreatment,” as Kant puts it⁹⁹—in order to respect her status as a human being. Kant believes that the virtue of our society, and our freedom as citizens, depends largely on the way in which we treat our fellow citizens—including those who are being punished for wrongdoing. There is a stark difference between being deprived of liberty for ten years, and being subjected to a violent nightmare for the same period of time. Unfortunately, the latter is closer to the reality in many American prisons.¹⁰⁰ Certainly an increased moral cognition of the plight of convicted criminals would encourage mostly stagnant efforts toward prison reform.¹⁰¹

⁹⁷ Hill, *supra* note 18, at 429.

⁹⁸ Once again, I intend these examples to be construed as reasonable derivations from Kantian principles. Kant himself does not necessarily endorse them—indeed, he has almost nothing to say about criminal justice policies at this level of detail.

⁹⁹ KANT, *supra* note 2, at 106 (6:333).

¹⁰⁰ Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 5-6 (2008).

¹⁰¹ See generally Sarah Holtman, *A Kantian Approach to Prison Reform*, 5 JAHRBUCH FÜR RECHT UND ETHIK 315 (1997).

Second, we can focus more attention on how we treat convicted criminals post-conviction and post-incarceration. Ideally, one of the things we do as moral beings who seek self-knowledge after an act of wrongdoing is to carefully attend to whatever conditions precipitated our action. We may find it necessary to spend time or resources to change something about ourselves or our situation in order to prevent subsequent misbehavior. Similarly, we ought to treat the convicted criminal in a way that reflects his status as a citizen as well as the specific background circumstances that might have contributed to the crime. Sometimes these circumstances call into question a citizen's capacity for independence, as may be the case with serious mental illnesses. Other times we may recognize a failure of civic equality and substantive freedom when, for example, the defendant has grown up in an impoverished community and has lacked access to basic resources and social goods such as education.

This is not to say that we ought not to punish offenders where appropriate. Punishment can be a way of recognizing a defendant's capacity for moral autonomy. It can, however, also be an opportunity to address regrettable injustices that have made the defendant's choices more difficult than they would have been in an ideally just society. Thus, while we have a duty to punish the criminal, we ought also to recognize a duty to discover his needs and attend to them, much as we might rightly experience emotional pain after doing something morally repugnant, but also muster enough self-knowledge to realize that we need something more than punishment (perhaps, for example, we need counseling to help us confront whatever demons are encouraging our moral misbehavior).

So even if we were to agree that, say, five years in prison were the appropriate response for an aggravated assault, after imposing that sentence we might have the continuing duty to offer services to the criminal, both during and after incarceration. Obvious examples of such services are mental health treatment, anger management counseling, education, and job training—whatever is necessary to help the person overcome circumstances contributing to the criminal act. We do this to some extent in our current system, but to an insufficient extent. Probation and parole are usually either overly onerous (resulting in inevitable violations and re-incarceration) or too lax (a lack of structure and assistance frequently resulting in recidivism and, again, re-incarceration). Part of the reason is, perhaps, that the rehabilitative model of criminal justice that was popular in the first half of the twentieth century has been largely abandoned. While there may be good reasons to distrust a purely “medical model” of criminology,¹⁰² surely rehabilitation ought to play a more distinctive role in our system than it currently does. This is particularly clear in the case of drug crimes, where imprisonment is, at best, unlikely to result in the changes within the individual which are necessary in order to prevent recidivism. Some jurisdictions are experimenting with “drug court” and similar diversion programs, with anecdotally positive results.

Third, we need to educate the average American about what criminal justice really entails. The tendency in American society is to view convicts with anger, fear, and contempt. We assume that people who commit crimes will do so again—and, as if to ensure that such prophecies are realized, we refuse to offer them the services and support that would maximize their chances for successful reintegration into society.

¹⁰² See generally Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 74 (Jeffrie Murphy ed., 1995).

At one time, the ostensible purpose of “penitentiaries” was what the word implies: to encourage penitence and character reformation.¹⁰³ Theoretically, people who emerged from such facilities were changed and ready to be welcomed back into the community. Instead, we now relegate criminals to facilities that are nearly certain to encourage, rather than dispel, whatever criminal intentions they arrive with. Clearly, “[t]reating offenders as worthless scum, utterly incapable of reform, is obviously contrary to Kantian principles.”¹⁰⁴ It is in keeping with the spirit of the Kantian moral law that we ought to treat people convicted of crimes better than we do. This must include recognizing their intrinsic worth, their adverse backgrounds, and their potential for progress—just as we recognize such factors when viewing ourselves with properly objective self-knowledge. Moreover, since the American public seems to think that prisoners have it too easy, education both about what conditions are like inside prisons, as well as what factors often contribute to criminal behavior, would be useful ways of increasing our collective moral cognition in this sphere. Doing so would serve the ends of Kantian justice, by promoting the civic equality and independence that would, in turn, make criminal violations of the UPR less likely to recur.

Related to this is my fourth and final point: we need to work toward replacing the retributive ethos that characterizes American criminal justice with something more Kantian. I return once more to Kant’s moral theory to show what I mean. Once we have condemned ourselves, via our conscience, for having acted wrongly, our subsequent moral cognition surely entails that we do not give up on ourselves—we respect ourselves as competent moral agents capable of repentance and worthy of redemption.¹⁰⁵ Kant asserts that moral cognition will “dispel fanatical contempt” for ourselves.¹⁰⁶ Though self-punishment (misery) is appropriate and necessary when we violate the moral law, moderation in self-perception through the process of cultivating self-knowledge is also necessary. While moral failures ought to involve a period of psychic self-flagellation, they ought not to induce self-hatred.

In the social context, one of the vices that Kant mentions in the *Tugendlehre* is “malice,” which he characterizes as “the direct opposite of sympathy.”¹⁰⁷ Significantly, Kant addresses in his discussion of malice the propensity which human beings experience toward vengeance:

The sweetest form of malice is the *desire for revenge*. Besides, it might even seem that one has the greatest right, and even the obligation (as a desire for justice), to make it one’s end to harm others without any advantage to oneself. . . . But punishment is not an act that the injured party can undertake on his private authority¹⁰⁸

¹⁰³ David J. Rothman, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 79 (rev. ed., Aldine Transaction, 2002).

¹⁰⁴ Hill, *supra* note 18, at 439.

¹⁰⁵ This is perhaps one reason Kant speaks so forcefully against suicide. KANT, *supra* note 2, at 176-78 (6:422-23).

¹⁰⁶ *Id.* at 191 (6:441).

¹⁰⁷ *Id.* at 207 (6:459).

¹⁰⁸ *Id.* at 207 (6:460) (emphasis in original).

Except in the case of punishment properly administered by a civil authority, acts of vengeance (even though seemingly “the greatest right”) are permissible only to God—the rest of us have “a duty of virtue not only to refrain from repaying another’s enmity with hatred out of mere revenge but also not even to call upon the judge of the world for vengeance.”¹⁰⁹

As Kantian citizens, then, one duty we incur by virtue of our status as moral beings is to refrain from punishing those who wrong us—another is to refrain from endorsing appropriate state punishment from motives of vengeance. This, in turn, provides us with some understanding of the way in which punishment is to be administered in a just society: “no punishment, no matter from whom it comes, may be inflicted out of hatred.”¹¹⁰ Criminal punishment must not be confused, in other words, with state-sanctioned vengeance. The former is an appropriate way for the community to demonstrate that certain types of behavior are unacceptable by its citizens; the latter is merely the institutionalization of malice.

To such a way of thinking about punishment, one might worry that there are at least *some* crimes which merit, if not *demand*, an attitude of vengeance.¹¹¹ Is it really the case that we should seek to cultivate a dispassionate attitude toward, say, serial killers or child rapists? It is surely true that humanity’s capacity for evil in some cases demands moral outrage. But it is worth considering how outrage, anger, and indignation differ from vengeance, hatred, and malice. For one thing, the former feelings are compatible with forgiveness, mercy, and sympathy, while the latter are not. The former may also be directed toward ideas—one is indignant that a human being could behave in such-and-such a way—while the latter seem inevitably directed at a person or group—one seeks revenge *on* someone, or hates *people like that*. Kant’s point is not, I think, that punishment should be entirely devoid of emotion. Rather, it is that punishment ideally involves certain kinds of publicly appropriate reactions to offenses but does seek to limit the extent to which we utilize punishment as a vehicle for satisfying our animalistic lust for revenge.

One of the concerns that might be raised here is the possibility of becoming too “soft.” If a person exhibits no response whatsoever to any sort of wrong inflicted on her, we might worry that she is being taken advantage of—that she is failing to exercise the self-respect that is sometimes manifested by the behavior of identifying and objecting to a wrong. Kant does address such an objection, though, when he notes that although “[i]t is therefore a duty of human beings to be *forgiving* . . . this must not be confused with *meek toleration* of wrongs . . . [nor with the] renunciation of rigorous means . . . for preventing the recurrence of wrongs by others; for then a human being would be throwing away his rights and letting others trample on them, and so would violate his duty to himself.”¹¹² Restraining oneself from exercising punishment, and endeavoring to act non-maliciously, does not mean that we should not assert our rights, where appropriate, or act in ways disrespectful of our own autonomy. We should surely not stay in an abusive relationship—but we can let

¹⁰⁹ *Id.* at 208 (6:460).

¹¹⁰ *Id.* at 208 (6:461).

¹¹¹ For such a view, see Moore, *supra* note 86.

¹¹² KANT, *supra* note 2, at 208 (6:461) (emphasis in original).

others do the punishing, and work toward forgiveness, but for the sake of the abuser and ourselves.¹¹³

Kantian morality therefore demands a fine balance in responding to crime. On the one hand, we must respect ourselves (and, by extension, our fellow-citizens) enough to stand against, and be willing to punish via appropriate authorities, criminal wrongdoing. On the other hand, we must strive to replace feelings of malice, hatred, or vengeance that we might experience with more productive sentiments that preserve our respect for the dignity of others. In doing so, we contribute to a more just society and, equally important for Kant, to our own moral development.

Here are three preliminary suggestions that aim at moral cognition in this area. First, scholars and jurists need to devote more energy toward educating the public about the connections between criminality on the one hand and socioeconomic privations on the other. Although we should not overstate such correlations, we must recognize that there is at least some responsibility that we bear collectively as citizens for permitting the social conditions to exist that foster criminal behavior.¹¹⁴

Second, we should also ensure that convicts' voting rights are maintained even during their period of incarceration. There are many rights which convicts reasonably forfeit for a period of time upon conviction—the right to travel, the right to own a firearm, and so on—but there is no compelling reason to prevent them from voting. The right to vote is the most basic right we can accord citizens, and while allowing criminals to vote harms no one, it is a small but symbolically significant step in the direction of conceiving of them as (punishable) fellow-citizens, rather than as outcasts.¹¹⁵

Third, we should follow some European countries' practice of viewing criminal convictions as private (or quasi-private) records, which in turn discourages discrimination in areas such as employment and housing on the basis of prior criminal behavior.¹¹⁶ Allowing people who have "served their time" to return to as normal a life as possible would encourage others to view them in a way that respects their status as free, equal, and independent fellow-citizens.

¹¹³ As Kant puts it, "a human being . . . possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world." *Id.* at 186 (6:434-35) (emphasis in original).

¹¹⁴ For an argument to this end, see David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976). Stephen J. Morse provides a response in *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976). Bazelon does, I think, overstate the case; nevertheless, his essay is a powerful antidote to the tendency to ignore social factors in attempting to understand and respond to criminal behavior.

¹¹⁵ It may turn out that permitting inmates to vote would do significantly more than this, since African-American communities may be disproportionately affected in terms of democratic representation by the incarceration of such a large percentage of their members. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration, in African American Communities*, 56 STAN. L. REV. 1271 (2004).

¹¹⁶ See generally James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 PUNISHMENT AND SOC'Y 3 (2012). Obviously there would need to be exceptions. Someone convicted of child abuse might reasonably be barred from working as a school teacher, but there is likely no good reason to prevent him from taking up a career in accounting.

These three suggestions are hardly the end of the story; they constitute merely preliminary thoughts about the way the notion of moral cognition could be deployed to counteract the lamentable retributive ethos that characterizes Anglo-American punishment practices.

IV. LAWYERLY OBJECTIONS

In the course of the preceding argument, I addressed a number of theoretical objections. Legal professionals, however, might also raise some legitimate pragmatic concerns. In particular, defense attorneys and prosecutors might worry that the concept of moral cognition could be detrimental to the interests they are ethically bound to protect.

The defense bar might be concerned about the possibility of moral cognition resulting in harsher sentences for criminal defendants. In many cases lawyers advise clients to enter plea agreements in order to reduce the risks and uncertainties of trial and subsequent sentencing hearings where a terrifyingly wide range of options may be open to the judge. To demand the moral cognition of each individual defendant invites judges or juries to punish some people more harshly than they would be able to do given the way the system works currently.

It is undeniable that moral cognition will *sometimes* incline us towards increasing punishment. Just as we sometimes reflect on our own actions and realize that we behaved in some way *worse* than we might initially have judged, so it is likely that some criminals are in fact deserving of harsher punishment than we initially think—though in no case could the upper limitation of *lex talionis* be exceeded. I suspect, however, that this is unlikely to be the outcome in the majority of cases. This is suggested by Martha Nussbaum, who has argued for an increase in mercy within the criminal justice system by way of the ancient Greek concept of *epieikeia*, which she explains as “the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation, and the ‘inclination of the mind’ toward leniency in punishing—equity and mercy.”¹¹⁷ She believes that while the “retributive idea is committed to a certain neglect of the particulars,”¹¹⁸ the practice of *epieikeia* is “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story.”¹¹⁹ Nussbaum’s contention is that an increased moral cognition, as Kant would say, almost always leads us to “see[] defendants as inhabitants of a complex web of circumstances, circumstances which often, in their totality, justify mitigation of blame or punishment.”¹²⁰

On the other hand, those who prosecute criminal cases might not see such an outcome as desirable. Some prosecutors might worry that an increase in moral cognition will result in too *little* punishment—that wrongdoers will “get away with murder” based on circumstances (poverty, abuse, and so on) shared by many non-criminals. More broadly, we might be concerned that, if moral cognition in fact generally inclines us toward mercy, such an approach negates the importance of

¹¹⁷ See Nussbaum, *supra* note 88, at 214.

¹¹⁸ *Id.* at 217.

¹¹⁹ *Id.* at 219.

¹²⁰ *Id.* at 235-36.

personal responsibility and minimizes the deterrent potential of the criminal law. Although I have less sympathy for this view, given the excessively harsh nature of criminal justice in our society, it is worth remembering that “[m]ercy is not acquittal.”¹²¹ Kant certainly agrees that wrongdoing must be punished—and that this is true both at the level of personal morality and within civil society. Moral cognition does not “fail to say that injustice is injustice, evil is evil.”¹²² It may, however, result in most cases in a more merciful and understanding approach to punishing those who violate our laws. To this extent, the prosecutor’s concern is well-founded: a system imbued with increased moral cognition will very likely result in shorter prison terms and fewer death sentences, among other consequences. I do not find this to be an objectionable result, particularly in the context of our current criminal penal practices.

The skeptical lawyer might still be shaking his or her head. Criminal justice in the real world is a messy business, and the suggestion that moral cognition ought to play a role in our penal practices is unrealistic. The skeptic has a point. Kant acknowledges the difficulty of moral cognition in its personal incarnation of self-knowledge, saying that “the depths . . . of one’s heart . . . are quite difficult to fathom”; still, he is confident that the attempt to do so is “the beginning of all human wisdom.”¹²³ Attempting to engage in moral cognition in the context of criminal justice will be equally difficult. Doing so will, however, result in penal practices that are similarly wiser—and more just—than our current ones.

¹²¹ *Id.* at 247.

¹²² *Id.*

¹²³ KANT, *supra* note 2, at 191 (6:441).

REVISITING DEATH'S DIFFERENCE: THE PHILOSOPHICAL ANTHROPOLOGY OF THE U.S. DEATH PENALTY AND THE IMPOSSIBILITY OF CAPITAL DUE PROCESS

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ABSTRACT

Within the United States, legal challenges to the death penalty have held it to be a “cruel and unusual” punishment (contrary to the Eighth Amendment) or arbitrarily and unfairly enacted (contrary to the Fifth and Fourteenth Amendments). The Eighth Amendment requires that punishments not be disproportionate or purposeless. In recent rulings, the U.S. Supreme Court has adopted a piecemeal approach to this matter. In regard to particular classes of defendant, the Court has sought to rule on whether death is likely to be a proportional and purposeful punishment, as well as whether—given the condition of these defendants—such a determination can be reliably and accurately gauged. This article will suggest a different approach. Instead of asking whether, given the nature of certain categories of human defendant, the death penalty is constitutional in their case, I will begin by asking what—given the nature of the U.S. death penalty—one must believe about human beings for death to be a proportionate punishment. From this, I will argue that to believe that these penal goals are capable of fulfilment by the death penalty entails commitment to an empirically unconfirmable philosophical anthropology. On this basis, it will be further argued that the beliefs required for the U.S. death penalty’s proportional and purposeful instigation (pursuant to the Eighth Amendment) are not congruent with the demands of legal due process.

KEYWORDS

Capital Punishment, Proportionality, Eighth Amendment, Due Process, Death Penalty, Philosophical Anthropology

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I. INTRODUCTION

Capital punishment remains popular in the United States. Depending upon the particular question asked and methodology used, polling indicates that although support for the death penalty does appear to be declining slightly in the U.S., it continues to enjoy a clear majority level of support.¹ Indeed, the status of capital punishment in contemporary America is that it may be regarded, without hyperbole, as a firmly established political and legal tradition. As Peter Hare writes, “[t]he death penalty is inextricably tied up with a huge number of firmly established aspects of American society”, to such an extent that it has “become virtually inseparable from various other major features of the American legal, moral, and religious landscape”.² Even within the courtroom, the U.S. death penalty possesses a unique status, insofar as those who unequivocally object to this punishment may be excluded from capital jury-selection so as to ensure that the panel is “death-qualified”.

Such popularity, or entrenched societal status, however, has not prevented the U.S. death penalty from being subjected to legal challenges. Following the case of *Furman v. Georgia* (1972), the Court suspended the death penalty in the U.S. until it was shown (in the 1976 case of *Gregg v. Georgia*) that the practice could be implemented without violating the Eighth Amendment right against cruel and unusual punishments, or the Fourteenth Amendment rights to “due process” and “equal protection” under the law.³ After first briefly examining some of the Court’s most impactful post-*Furman* death penalty rulings, this article will make the case for a new approach. Rather than looking at particular defendants and asking whether the death penalty complies with the Eighth Amendment in their case, this paper will seek to ask what, given capital punishment’s commonly-held penal purposes, human beings must be in order for death to ever be a proportionate punishment.

II. A BRIEF ACCOUNT OF THE U.S. SUPREME COURT’S RECENT “DEATH IS DIFFERENT” CAPITAL JURISPRUDENCE

In its recent rulings, the U.S. Supreme Court (“the Court”) has repeatedly recognised that when considered alongside other punishments, “death is different”. As the Court ruled in *Furman v. Georgia* (1972), “[t]he unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.”⁴ Such is the uniqueness of death as a penalty that it must be regarded as “different from all other forms of criminal punishment, not in degree but in kind”.⁵ That the death penalty is “unique in its severity and irrevocability”

¹ See instance e.g., Pew Research Center, *Less Support for Death Penalty, Especially Among Democrats*, Apr. 16, 2015, <http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/>.

² PETER HARE, PRAGMATISM WITH PURPOSE: SELECTED WRITINGS 270-78 (Joseph Palencik et al. eds, 2015).

³ See *Furman v. Georgia*, 408 US 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴ *Furman v. Georgia*, 408 U.S. 238, 289 (1972).

⁵ *Id.* at 306 (Stewart, J., concurring).

was subsequently reaffirmed by the Court four years later in *Gregg v. Georgia*.⁶ Whereas the consequences of other punishments are temporally limited for the criminal (for instance, if they are sentenced to a limited number of years in prison) and cannot affect the entirety of a person's subjective experience of the world, the consequences of the death penalty are permanent and all-encompassing, nothing less than the termination of the object itself.

A. THE SEVERITY OF DEATH AS A PENAL SENTENCE

Since the leading case of *Weems v. United States* (1910), the Court has consistently recognized that the question of a punishment's proportionality is integral to the matter of whether or not it violates the Eighth Amendment.⁷ One of the first cases in which consideration of death's uniquely irreversible harm was applied to the context of capital punishment's proportionality is *Coker v. Georgia* (1977). The Court held that although the crime of raping an adult woman was undoubtedly a serious crime, "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder."⁸ The reason for this divide is simply that murder (by its nature) always involves the death of the victim, whereas rape does not. Whereas the harm caused by murder is thus permanent and irreversible, the Court ruled that following rape, "life may not be nearly so happy as it was, but it is not over, and normally is not beyond repair."⁹ As proportionality demands that there be semblance between the nature of the harm inflicted by the crime and that which is delivered by the punishment, the Court in *Coker* ruled that the death penalty was an unconstitutionally "excessive" punishment for the crime of rape.

As a result of death's categorical difference, a consistent feature of post-*Gregg* jurisprudence in the United States has also been the narrowing of the category of defendant for whom the death penalty is thought an appropriate punishment. This narrowing can be traced to *Godfrey v. Georgia* (1980), in which the Court ruled against a defendant's execution on the basis that his crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."¹⁰ Apparent here is the connection drawn by the Court between culpability for action, and depravity of consciousness. The defendant in *Godfrey* was found guilty of murdering his wife and mother-in-law. The Georgian jury also found that the statutory aggravating factor of his murder being "outrageously or wantonly vile, horrible and inhuman" had been demonstrated beyond a reasonable doubt.

The question before the Court was whether this aggravating factor was correctly found in *Godfrey's* case. Writing his opinion on behalf of the Court, Justice Stewart took his cue from the Court's previous determination in *Furman* that the capital sentencer's discretion must be channelled so as to provide a "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases

⁶ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). See also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("the penalty of death is qualitatively different from a sentence of imprisonment, however long").

⁷ *Weems v. United States*, 217 U.S. 349 (1910).

⁸ *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

⁹ *Id.*

¹⁰ *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

in which it is not.”¹¹ By simply stating the above aggravating factor, the Court ruled that the Georgian courts had failed in this obligation. On the basis of the facts before them, the Court concluded that the defendant’s actions did not reflect a “materially more ‘depraved’ consciousness”, due to the fact that “[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”¹² The aggravating factor that the defendant’s crime had been “outrageously or wantonly vile, horrible and inhuman”, on which Godfrey had been sentenced to death, should not have been found.

In the beginning of the twenty-first century, this narrowing of defendants has been extended to two general categories: those who are under 17 years old on the day of their crime in *Roper v. Simmons* (2005), and the mentally retarded in *Atkins v. Virginia* (2002). In *Atkins*, the Court ruled that it violated the Eighth Amendment protection against “cruel and unusual punishment” to execute those classified as mentally retarded.¹³ Discussing how the death penalty fails to fulfil the goal of retribution in these cases, Justice Stevens (writing for the Court) first noted that due to lesser capacities in areas of reasoning, judgment and impulse control, those with mental disabilities do not possess the same culpability for their actions as those without these impairments. Directly citing the previous Court’s ruling in *Godfrey*, Justice Stevens stated that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”¹⁴

Similarly, in *Roper v. Simmons*, Justice Kennedy cited an “underdeveloped sense of responsibility” (leading to “impetuous and ill-considered actions”), a greater propensity to be influenced by others, and a fluid, unfixed character as three reasons why juveniles should generally be considered neither as culpable, nor as deterrable, as adult offenders.¹⁵ Focussing on the nature of juveniles’ characters, Kennedy wrote that “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character... a greater possibility exists that a minor’s character deficiencies will be reformed.”¹⁶ As a result, although the conduct of these individuals may evoke outrage, they are not of such culpability for their actions (*qua* agents) that they deserve to be executed. The Court concluded that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”¹⁷ The Court here alluded to its previous judgement in *Atkins* (which in turn drew on *Godfrey*) in order to suggest that because juveniles commonly exhibit a culpability which is below average, death—which by virtue

¹¹ *Id.* at 427 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972)).

¹² *Id.* at 433.

¹³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴ *Id.* at 319. In addition, the limited cognitive capacities of mentally retarded individuals, the Court argued, also make them less likely (in principle) to be deterred by even the most severe of penal consequences. As such, neither of the death penalty’s two principal penal goals are likely to be proportionately fulfilled in their case. *See id.* at 319-30.

¹⁵ *Roper v. Simmons*, 543 U.S. 551, 569-72 (2005).

¹⁶ *Id.* at 570.

¹⁷ *Id.* at 571.

of its severity requires a criminal culpability and depravity which is *greater* than average—is not a constitutionally appropriate sentence in their case.¹⁸

B. THE IRREVOCABILITY OF DEATH

The other qualitative difference which death possesses over other punishments is its irrevocability as a judicial sentence. Unlike other state measures, once made (and enacted), a death sentence cannot be overturned or reverse if found to be mistaken; nor can the defendant be compensated for the injustice done. The Court has consistently recognised this fact in recent years, leading it to address procedural shortcomings and anomalies with an urgency and seriousness arguably absent from similar cases of a non-capital nature.¹⁹ This difference of irrevocability, it may be suggested, is secondary and derivative of the previously mentioned difference of death's severity.

Aligned with this awareness of the irrevocability of death as a sentence, the Court in *Godfrey*, *Atkins* and *Roper* can be seen to make procedural and epistemic arguments which, although closely related, are separate from its arguments about the defendants' culpability. As described above, the case in *Godfrey* centred on the jury in Georgia making (on the basis of insufficient guidance) a determination that the defendant's crime had been "outrageously or wantonly vile, horrible and inhuman." The Court disagreed with the jury's finding, ruling instead that the defendant's consciousness in this case was not evidently "more depraved" than the average murderer's. Evident here are two distinct questions: whether or not the defendant's consciousness was (objectively) more depraved than average, and whether the jury was within its rights to judge the issue. In *Godfrey*, the Court effectively ruled negatively on both issues. Regarding whether the jury had correctly judged the issue, the Court determined that if an aggravating factor was simply stated to the jury (as happened in *Godfrey*'s case), then they would be insufficiently equipped to assess whether the defendant was of sufficient depravity to be executed. This is because, the Court observed, "[a] person of ordinary sensibility could fairly characterize *almost every murder* as 'outrageously or wantonly vile, horrible and inhuman.'"²⁰ Appropriate judicial guidance is thus to ensure that only the worst defendants receive the law's most severe punishment.

In ruling on the constitutionality of executing particular classes of defendants, the Court in *Atkins* and *Roper* can be seen to follow this belief that judicial safeguards must be adequate if juries are to be prevented from making fatally incorrect decisions. In *Atkins* for instance, the Court does not rule that the state execution

¹⁸ *Id.* Although Justice Kennedy does not directly cite the Court's dicta in *Godfrey* (referring only to it indirectly through *Atkins*), the thematic thread running from *Godfrey*, through *Atkins* to *Roper* is also picked up by Justice O'Connor, who argues in her dissenting opinion that (contrary to the Court's insulation), the defendant's actions in this case "unquestionably reflect 'a consciousness materially more 'depraved' than that of '...the average murderer.'" *Id.* at 601.

¹⁹ See e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Simmons v. South Carolina*, 512 U.S. (1994); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004).

²⁰ *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

of someone could never be a justified punishment. Rather, the Court argues that because of the cognitive difficulties it has listed in relation to mentally retarded persons' diminished culpability, these defendants may also be at a particular "risk" of unjust execution. This is due, in part, to them having a greater propensity to make false confessions to the police, as well as intrinsic difficulties in conveying mitigating factors which might entitle them to a lesser sentence.²¹

Further, the danger which the Court in *Atkins* discerns is not simply that this class of defendant might not be able to make a convincing case against being sentenced to death, but that they are intrinsically vulnerable to being sentenced on the basis of aggravating factors they do not possess. Justice Stevens singles out two non-statutory aggravating factors which the mentally retarded may inadvertently promote, even in cases where these factors do not refer to objective facts. First, the "demeanor [of mentally retarded defendants] may create an unwarranted impression of lack of remorse for their crimes."²² Second, citing the previous Court case of *Penry v. Lynaugh* (in which the constitutionality of executing the mentally retarded had been upheld),²³ Justice Stevens remarks that "reliance on mental retardation as a mitigating factor may ... enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."²⁴ As will be discussed further below in connection with the penal goal of "incapacitation", these two aggravating factors have amongst the strongest influence on capital jury deliberations. There is therefore a real danger, the Court concluded, that juries might mistakenly believe the characters of mentally retarded defendants to be such that they should be executed, when in fact this is not the case.

Likewise, in *Roper*, Justice Kennedy does not rule out the possibility that a juvenile might possess the kind of culpability which means that if they commit a crime of demonstrable depravity, state execution would be a proportionate response. As with Justice Stevens in *Atkins*, however, Kennedy expresses concern at the epistemological difficulty faced by the jury in ascertaining whether the person in the dock satisfies these criteria. Kennedy notes that the details of a crime will often overshadow considerations about the offender's age. "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."²⁵ Moreover, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."²⁶ As a result of these epistemic obstacles, "[w]hen a juvenile offender commits a heinous crime ... the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."²⁷ When the defendant is under 17 years old, there is no certain and definitive way by which to assess whether his apparent depravity is a permanent and essential part of his character, or part of a temporary stage in his development as a person. In those circumstances, the Court ruled, the risk of executing someone for whom

²¹ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

²² *Id.* at 321.

²³ *Penry v. Lynaugh*, 92 U.S. 302 (1989).

²⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²⁵ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

²⁶ *Id.*

²⁷ *Id.* at 574-75.

death would not be a proportionate punishment is simply too great.

In *Atkins* and *Roper*, the Court thus expressed an acute awareness of the epistemological difficulties involved in definitively determining defendants' depravity. In *Roper*, the Court expressed its concern that it could not be objectively known whether a youth's character was beyond repair, while in *Atkins*, it similarly noted the difficulties faced by mentally retarded defendants in making known their lack of depravity to the jury. For the Court in both cases, the condition of the defendants in question raises considerable doubts over whether their actions (however heinous) actually reflected an essentially depraved character. Whether someone possesses such a definitively depraved character may be more difficult to discern from their actions where they are susceptible to following others (*Roper* and *Atkins*), do not engage in reasoned deliberation prior to acting (*Atkins*), or have a character which is developing and malleable, rather than fixed and "irreparable" (*Roper*). The current Court thus appears conscious of the danger that a jury, focussing on the details of a defendant's act (*Roper*), or their dangerous appearance (*Atkins*) might make incorrect inferences from this regarding the depravity of the defendant's character and consequently sentence him to an undeserved death. The irrevocability of death as a judicial sentence therefore requires that the Court take additional safeguards to ensure that the decision to inflict this penalty is the correct one, particularly in regard to categories of defendant who are so vulnerable to being misjudged that they should not be eligible for the state's ultimate punishment.

C. SUMMARY

Through these cases, the U.S. Supreme Court has sought to interpret the Eighth Amendment's ban of "cruel and unusual punishments" in relation to the state's ultimate penalty. In regard to particular classes of defendant, such as children (*Roper*), or the mentally retarded (*Atkins*), the Court has sought to rule on whether death is likely to be a proportional and purposeful punishment, as well as whether—given the condition of these defendants—such a determination can be reliably and accurately gauged.²⁸ Although (as will be discussed further below) the Court's rulings do occasionally gesture towards the nature which would be required for the death penalty to be a proportional punishment, the overall approach has thus been to selectively rule on cases where the death penalty would be disproportionate (or "cruel"), rather than seeking to provide comprehensive answers as to precisely when capital punishment would *not* be disproportionate or purposeless.

This article will now proceed to explore a different approach. Rather than asking whether, given the nature of certain categories of human defendant, the death penalty is constitutional in their case, I will begin by asking what—given the nature of the U.S. death penalty—one must believe about human beings *per se* for death to be a proportional and purposeful human punishment. The answers to this, I will argue, undermine the current judicial assumption that capital penal goals such

²⁸ The Court's Eighth Amendment jurisprudence, of course, also involves many other aspects, such as how a punishment is determined to be "unusual" or violative (following *Trop v. Dulles*, 356 U.S. 86 (1958)) of society's "evolving standards of decency". Despite their importance, these aspects of the Court's approach lie outside the narrower focus of this article.

as deterrence or retribution are entirely “secular” in nature.²⁹ On this basis, a new ethico-legal challenge to the U.S. capital justice system will be proposed: namely, that the beliefs required for the U.S. death penalty’s proportional and purposeful instigation are not congruent with the requirements of legal due process.

III. THE PENAL GOALS OF THE STATE’S ULTIMATE PUNISHMENT

A. DETERRENCE

Within the philosophy of criminal punishment, deterrence is often divided into two categories: general deterrence and specific (or individual) deterrence.³⁰ While the former concerns the minds of prospective criminals within the general population, the latter focusses on the inhibitive effect of punishment on the future plans of the individuals in the dock. With the death penalty, it should be clear that only “general deterrence” is relevant. Following state execution, the defendant is not inhibited from committing further transgressions, so much as *prevented* from ever doing anything again.³¹ General deterrence (hereafter referred to just as deterrence) concerns the harm which others, through their criminal actions, might do if those who have previously done the same kind of action are not seen to be punished. Punishment towards this end, it is hoped, will sufficiently move potential criminals so that they abstain from unlawful acts which they would otherwise perform if the threat of punitive consequences was absent.³²

Deterring punishment need not be directed at the harm that the defendant has done, but at the harm which his actions had the potential to inflict (and may still have if done by someone else in the future). The penal goal of deterrence, it may be argued, lies behind the Court’s reservation of capital punishment for certain non-homicidal acts which the Court (somewhat disingenuously) has termed “offenses against the State.”³³ While simultaneously ruling that capital punishment was an unconstitutionally disproportionate punishment for child rape, the Court in *Kennedy v. Louisiana* (2008) lists “treason, espionage, terrorism, and drug kingpin activity” as examples of this type of crime.³⁴ Such crimes, it may be observed, do not *necessarily* cause death (or even severe disruption) to the lives of others.

²⁹ See e.g., *Holberg v. State*, 38 S.W.3d 137 (Tex. Crim. App. 2000) (rejecting a claim that the Texan death penalty violated the Establishment Clause of the First Amendment); *Hanson v. State*, 55 S.W.3d 681 (Tex. Ct. App., 2001); *Hogan v. State*, 139 P.3d 907, 917 (Okla. Crim. App. 2006), adhered to on reh’g (June 28, 2006).

³⁰ See, e.g. ROB CANTON, WHY PUNISH? AN INTRODUCTION TO THE PHILOSOPHY OF PUNISHMENT 35-37 (2012).

³¹ The penal goal of incapacitation which is relevant here will be discussed separately below.

³² For a contemporary proponent of deterrence as the justification for capital punishment, see Ernest van den Haag’s contributions in ERNEST VAN DEN HAAG & JOHN PHILLIPS CONRAD, THE DEATH PENALTY: A DEBATE (1983).

³³ See *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008); See also Heidi M. Hurd, *Death to Rapists: A Comment on Kennedy v. Louisiana*, 6 OHIO ST. J. CRIM. L. 351, 351 n.2 (2008).

³⁴ *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

However, it is arguably in the nature of these acts that they have the *potential* to cause widespread disruption, and even threaten the fabric of the socio-political community. It is therefore imperative (from a fearful or mistrustful perspective) that those who might otherwise be motivated to perform these actions be inhibited from doing so through the institution of legal punishment. Through deterring others in this way, the state acts in defence of those within society who have not yet become victims.³⁵ Understood through this lens, the goal of deterrence includes a proportionality principle loosely analogous to that of self-defence: the means of deterrence should only be as severe as is necessary to deter further harm from occurring.

With non-capital criminal punishment, the establishment of particular punishments for the purpose of deterrence intuitively makes sense. One can easily imagine that if there were no jail sentences, for instance, an increase in criminality would ensue. The anthropological assumptions in support for this are of an empirical, readily observable nature: namely, that as Jeremy Bentham wrote in the opening lines of his *The Principles of Morals and Legislation*, human action is “under the governance of two sovereign masters, pain and pleasure.”³⁶ Someone may be deterred following their experience of certain consequences after performing certain actions, or as a result of observing the consequences which befall others and inferring from this what might happen to oneself. In either case, the operating principle behind deterrence is that human beings may be cowed from doing what they otherwise might have done by the threat that this action would result in them suffering. As Jeffrie Murphy puts it, “[p]unishment as deterrence is essentially a system of threats, and threats appeal...to our capacities for *fear* grounded in *self-interest*.”³⁷

In the case of non-capital punishments, the fear elicited is usually either of being financially penalized (through the imposition of a fine), or of being deprived of liberty by being forced to spend a period of one’s life (or even the remainder) in prison. To reiterate, all that is required anthropologically here is that human beings, akin to other animals, are capable of anticipating the possible consequences of their actions, and will ordinarily desire to avoid these consequences if they involve physiological hardship.

The assumptions involved in positing the death penalty as a deterrent, however, are different. As Justice Brennan pointed out in *Furman v. Georgia*, underlying the logic of deterrence in capital cases is the assumption that “a particular type of potential criminal” exists, and is such that they would not be sufficiently deterred by the possibility of life incarceration.³⁸ Only the prospect of death will make them reconsider their actions. Justice Brennan expressed the opinion that “[o]n the face of it...the assumption that such persons exist is implausible.”³⁹ A similar observation is made by Justice Kennedy (in relation to youths) in *Roper v. Simmons*.⁴⁰ Assessing

³⁵ This is a distinguishing point between deterrence and retribution, where the state acts on behalf of those who are currently victims of that particular criminal.

³⁶ JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 1 (1879).

³⁷ JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 43 (2003).

³⁸ *Furman v. Georgia*, 408 US 238, 301 (1972).

³⁹ *Id.*

⁴⁰ Justice Kennedy writes that “To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the

the truth of this claim remains the remit of another project. The question asked here is: what beliefs are necessary concerning human beings for the death penalty to be construed as an efficacious and necessary (or proportional) deterrent in the context of contemporary society? Those who hold capital punishment to be permissible must implicitly believe that human beings, in general, are such that fear is necessary for social control. Moreover, they must hold that for some human beings, fear of even the longest deprivation of freedom—including complete separation from their society, friends and family—will not be sufficient to stop them from committing harm to others; their nature is such that the existential threat of state execution is required. Such human beings, it might be observed, would seem to present considerable danger to the safety of others within society.

Deterrence applies to calculated, premeditated, deliberative acts. Acts which are the result of a spontaneous, impulsive or compulsive agency cannot, by their very nature, be deterred. The degree of rational and deliberate calculation presupposed by the rationale of deterrence is, moreover, considerable. Deterrence supposes a mentality which constantly calculates the possible outcomes of a given situation, calibrates desires, assesses personal goals, tempers passions, and weighs long-term interests against short-term interests prior to taking action. In his seminal essay, 'Reflections on the Guillotine', the existentialist moral philosopher Albert Camus thus claims that "[f]or capital punishment to be really intimidating, human nature would have to be...as stable and serene as the law itself."⁴¹

In the context of current U.S. capital proceedings, the deterrable subject's calculation must also consider the fact that (unlike in Camus' France, perhaps), capital punishment law resembles a highly contingent and multi-variable process, rather than a "serene" law from which a certain outcome is assured. Having been charged with a capital crime, a defendant must be found guilty of this crime "beyond a reasonable doubt" by a jury of his peers. Even if this occurs, however, death may not be the awarded punishment. Since *Woodson v. North Carolina* (1976), a death sentence cannot automatically follow from a defendant's conviction, regardless of the crime. Mandatory death sentences, the Court has ruled, are unconstitutional.⁴² The implication of this for deterrence is that the death penalty cannot be assumed to follow a guilty verdict, but must instead be considered as a possible, contingent consequence of one's crime, alongside other lighter penalties such as life imprisonment. The probability of being arrested for his crime, found guilty, and given death must also be weighed by the criminal together with other contingencies, such as the possibility that he will be successful in any subsequent legal appeal against his prospective death sentence. In addition to being intrinsically dangerous therefore, the penal goal of deterrence supposes that the prospective criminal is highly calculating and deliberative.

The form of the modern state executions is also relevant here. In 'Reflections on the Guillotine', Camus suggests that the private format of state executions indicates that the state does not truly believe in capital deterrence. He remarks, "[h]ow can a furtive assassination committed at night in a prison courtyard be exemplary? At most, it serves the purpose of periodically informing the citizens

possibility of parole is itself a severe sanction, in particular for a young person." *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

⁴¹ ALBERT CAMUS, *RESISTANCE, REBELLION AND DEATH* 144 (Justin O'Brien trans., 1961).

⁴² *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

that they will die if they happen to kill—a future that can be promised even to those who do not kill.”⁴³ Since its last public execution in 1936, U.S. executions have usually had few public witnesses.⁴⁴ As Hugo Bedau observes, “[t]he relative privacy of executions nowadays (even photographs of the condemned man dying are almost invariably strictly prohibited) means that the average American literally does not know what is being done when the government...executes a criminal.”⁴⁵ Camus may be correct that such a lack of public visibility robs state execution of its efficacy as a deterrent. The question asked here, however, is what sort of criminal agency *would* be effectively deterred by this mode of threatened violence?

Devoid of concrete public visibility, the effectiveness of today’s death penalty as a deterrent relies more on the abstract *concept* of the state’s deadly agency towards would-be criminals. Individuals must be cognisant not simply that death may occur after their acts (which, as Camus points out, is guaranteed for everyone), but that this end could be prescriptively brought against them by the state. To believe that the U.S. death penalty could be an effective deterrent therefore supposes that the deterrable criminal subject is capable of cognising—and being motivated by—this abstract concept of state agency, instead of their immediate sensory experience, and prior to otherwise committing a horrendous crime. Here again, the anthropological assumptions necessary for death to be a good punishment include a high level of calculation and deliberative rationality.

B. RETRIBUTION

Retribution is a punitive response to what another “deserves” because of their actions. Intrinsic to this logic is a principle of proportionality. Any given punishment must be a proportional response; it must “fit the crime.”⁴⁶ An important *prima facie* question here is what is being weighed on retribution’s scales. This, in turn, will be affected by what the object of retributivism is. In *Getting Even*, Jeffrie Murphy makes a useful distinction between “grievance retributivism” and “character retributivism.”⁴⁷ The former is directed at the harm which has been caused by the defendant’s actions, while the latter concerns the defendant’s character as a human being.

Applied to the question of proportionality in retribution, grievance retributivism will ask whether the harm inflicted upon the criminal by particular punishment is proportional to the harm that they have caused through their actions.⁴⁸ A commonly

⁴³ CAMUS, *supra* note 41, at 136.

⁴⁴ For a U.S. legal scholar who provides an overview of how U.S. death penalty has developed in respect to public (in)visibility, as well as providing an argument in favour of increased media access into the procedure, see JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997).

⁴⁵ CAPITAL PUNISHMENT 26 (James A. McCafferty ed, 2017).

⁴⁶ For a recent and well-articulated defence of retributivism’s logic, see *e.g.* Louis Pojman, *The Case for Capital Punishment in* LOUIS P. POJMAN & JEFFREY REIMAN, *THE DEATH PENALTY: FOR AND AGAINST* 1-67 (2000).

⁴⁷ JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 43 (2003).

⁴⁸ For apparent representatives of this perspective on retribution, see *e.g.*, Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193 (1982); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS* (1992).

cited illustration of this is the biblical injunction of *lex talionis*: “an eye for an eye.” Character retribution, on the other hand, while not ignoring the level of harm caused, will place its emphasis on whether a punishment is proportionate to the depravity and culpability of the defendant.⁴⁹ Both forms of retributivism presuppose that the defendant is morally responsible for their actions, in the sense of knowing right from wrong. Character retributivism, it should also be noted, does not necessarily deny the relevance of the harmfulness of a person’s criminal action, particularly insofar as it may be indicative of their culpability.⁵⁰ The difference therefore lies in the weight possessed by moral culpability in determining whether a retributive punishment is proportional. In order to help gauge whether the retributivism pursued through U.S. capital punishment is accurately identified as a “grievance” or “character” form of retributivism, it is first necessary to examine the motivations behind the pursuit of this penal goal.

1. Outrage-Based Retribution

In *Gregg v. Georgia* (1976), the Court stated that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”⁵¹ Through this outrage, society expresses a reflexive belief that the crime which has been committed is “so grievous an affront to humanity” that its perpetrator deserves to be executed.⁵² This “instinct for retribution”, the Court asserts, “is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”⁵³ On this view, capital retributive punishment derives its *raison d’être* from the desires and dispositions of the individual human beings composing society.⁵⁴

Correlating to this, one of the key reasons which the Court in *Furman* identifies for capital retribution is the need to avoid the consequences which might follow if these abovementioned community desires were not addressed. “When people begin

⁴⁹ See e.g., J. ANGELO CORLETT, RESPONSIBILITY AND PUNISHMENT (2013); Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965). For an account arguing that in fact only culpability matters, to the exclusion of resulting harm, see e.g., LARRY ALEXANDER ET AL., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

⁵⁰ In ruling that victim impact statements were constitutional (overturning *Booth v. Maryland*), the Court thus stated that “We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

⁵¹ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

⁵² *Id.* at 184.

⁵³ *Id.* at 183.

⁵⁴ In *Spaziano v. Florida*, Justice Stevens thus writes that “[death is] the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community’s outrage” *Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part and dissenting in part). Recognition of this unique penal grounding in community outrage, Justice Stevens argued, provides further justificatory force for the view that the jury (as representatives of the outraged community’s conscience) should play the decisive role in capital sentencing, rather than government officials on the judicial bench. This view is replicated in *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting); *Ring v. Arizona*, 536 U.S. 584, 613-19 (2002) (Breyer, J., concurring.).

to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve’, then there are sown the seeds of anarchy.”⁵⁵ This view—that criminal punishment may act as a conduit for emotions of anger, resentment or hatred—is not new: Plato’s Athenian stranger in the *Laws* appears to express this view.⁵⁶ Similarly, writing in the late nineteenth century, Sir James Fitzjames Stephen argues that retributive emotions rightfully have an institutional outlet in the criminal justice system, just as sexual passions have an outlet in the institution of marriage.⁵⁷ The question remains, however, whether these emotions are to be regarded as an undesirable element of the human condition which must be controlled, or rather (as Fitzjames Stephen held) as normally-occurring, non-pathological and morally legitimate reactions to an offender’s wrongdoing.⁵⁸

Defenders of the normativity of the retributive emotions and their institutionalisation have argued that such emotions are necessary for the maintenance of a moral community,⁵⁹ contain a “kernel of rationality”,⁶⁰ or in any case are an “ineliminable” dimension of human justice.⁶¹ Regardless, however, of whether the Court in *Gregg* envisions retribution as a brute fact of social necessity, or a normative feature of the moral landscape, the fact remains that what drives this penological goal is moral outrage. Indeed, not only is societal outrage the driving force of retribution in U.S. capital punishment; it is also its proper end. In ruling against the constitutionality of executing those who are mentally ill in *Ford v. Wainwright* (1986) for instance, the Court has implied that retribution involves a dialectical relation between the executee and the society on whose behalf he is being killed.⁶² In order for the latter to be retributively satisfied, the former must be able to recognise what is being done to him, by whom, and why. Consequently, the Court ruled in *Ford* that the societal outrage which underpins the retributive goal of capital punishment cannot be vindicated by the execution of a prisoner who has no awareness of the true nature of his situation. No execution should thus take place.

The Court has thus recognised communal moral outrage as the underpinning of retributivism in relation to U.S. capital punishment. Anger is not expressed at something merely having *happened* (the act), but at something having been *done* (the act in relation to its actor). This aligns with a common intuition that anger directed at an inanimate object cannot have the same logical and justificatory

⁵⁵ *Furman v. Georgia*, 408 US 238, 308 (1972) (Stewart, J., concurring).

⁵⁶ See PLATO, *THE LAWS OF PLATO* 260-64 (Book X) (Thomas L. Pangle trans., 1988).

⁵⁷ JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883). For contemporary proponents of this view, see e.g., SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983); Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 217 (1988).

⁵⁸ The Court’s ambiguity on this point can be seen in Justice Marshall’s dissenting opinion in *Gregg*. See *Gregg v. Georgia*, 428 U.S. 153, 238-40 (1976).

⁵⁹ See e.g., Walter Berns, *The Morality of Anger*, in FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 151-59 (1979).

⁶⁰ Robert S. Gerstein, *Capital Punishment—‘Cruel and Unusual’?: A Retributivist Response*, 85 ETHICS 75 (1974); See also ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* (1995).

⁶¹ Richard A Posner, *Emotion versus Emotionalism in Law*, in THE PASSIONS OF LAW 317 (Susan A. Bandes ed., 1999).

⁶² *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

force as that which is directed at the agency which moved the object—whether an individual, or a collective. As pointed out by P.F. Strawson, moral outrage and other “reactive attitudes” presuppose that their object possesses culpability in the form of self-determining agency.⁶³ Such attitudes are predicated upon their objects having conscious control over their actions and apprehending, or being such that they could be expected to apprehend, the potential consequences of their acts.

Indeed, it may be argued that there is a direct correlation between the level of outrage which can be appropriately expressed, and the culpability of the agent towards which it is directed. Anger at something another person appears to have done is often immediately tempered if it later becomes apparent that the damage inflicted was accidental, rather than deliberate, or done by a different kind of agency altogether (for example, the household dog). Insofar as retributive punishment is driven by, and directed towards, the satisfaction of moral outrage therefore, the object of this punishment will never just be the harmful nature of the act; rather, it will always involve consideration of the personal and moral culpability of the agent – the mentality with which they perform their harmful acts.⁶⁴

2. *The Weight of Death: An Especially Severe Punishment*

In assessing the proportionality of punishment for the purposes of retribution, a key consideration is the severity of the punishment in terms of its consequences for the recipient. In this respect, as we have seen the Court acknowledge through its recent rulings, death is unlike all other punishments. If retribution is concerned with the moral character and culpability of the criminal, then the decision of the jury will not simply follow from the empirical fact of what the defendant has done (although this is a legitimate part of its determination). Rather, the jury must decide what it believes the defendant’s subjective condition and agency to be. This decision is made critical by the especially severe nature of death: its permanent and irreversible consequences for the defendant. As outlined above, in ruling that juveniles or the mentally retarded should not be executed, the Court itself can be seen to acknowledge the difference which death makes for retribution to be proportionally achieved. The irreversible consequences of death for its object, the Court has indirectly suggested, requires that capital defendants likewise be “irretrievably depraved” in character (*Roper*), as well for this depravity to be an essential rather than transient aspect of their character (*Atkins*; *Roper*), as opposed to a transient or contingent aspect of their personality when they committed the crime.

⁶³ See Peter F. Strawson, *Freedom and Resentment*, 48 *PROC. OF THE BR. ACAD.* 1 (1962). For a recent overview and critique of Strawson’s position and those of his chief interlocutors on this issue, see e.g., John Deigh, *Reactive Attitudes Revisited*, in *MORALITY AND THE EMOTIONS* 196-216 (Carla Bagnoli ed., 2011).

⁶⁴ This critique may be applied to Jeffrie Murphy himself, who suggests that capital punishment need not necessarily be a condemnation of the defendant’s character. See his *Christianity and Criminal Punishment*, in JEFFRIE G. MURPHY, *GETTING EVEN* 95–115. For further discussion of the interrelationship between culpability and harm, see e.g., FREDERICK M. LAWRENCE, *PUNISHING HATE* 58-63 (2009).

3 The Weight of the State: An Especially Severe Punisher

As the Court observed in *Godfrey*, not all conscious acts of killing are of the same severity; the moral culpability of the agent matters. Having outlined the Court's current appreciation for the qualitatively different nature of death as a penalty, and the permanently depraved criminal anthropology which is thus required for this punishment to be an instance of proportional retribution, I will now problematise the issue further by observing the difference made by the agency of the modern state.⁶⁵ As noted above, the explanatory ground of U.S. capital retribution is the outrage felt within civil society towards the perpetrators of particularly horrendous acts. In putting a criminal to death, the state serves as an expression and outlet of this societal outrage. Unlike individuals within society, however, the state as such is not an emotive agent; in conducting society's outrage and the homicidal desire which accompanies this passion, the *modus operandi* of the state is intrinsically procedural and deliberative.

As a result of death's inherent severity as a punishment, state execution strives towards consistency, reliability and a sense of sobriety. As such, the practice has also necessarily assumed a methodical, bureaucratic nature. Since the mid-to-late nineteenth century, executions have taken place behind the walls of a jailhouse.⁶⁶ Admittance is limited by the state, which also maintains the method of execution and exerts strict control over the schedule of the defendant's last 24 hours alive. The date and time of the defendant's execution is predetermined and made known to him well in advance, and the whole process is designed to proceed in a deliberate, controlled, intentional, and organised manner. This is a result of the nature of death, *qua* irrevocable, but also, it may be argued, due to the nature of the agency of the state, *qua* state.

With a few notable exceptions such as Camus (discussed below), the implications of state agency for the proportionality of a retributive punishment have not been explicitly recognised by either contemporary scholarship or the Court's jurisprudence. It may, however, be argued that these implications are implicitly acknowledged. Even the most fervent proponents of retributivism as a sufficient reason for punishment acknowledge that the mirroring of harm implied by the *lex talionis* principle of an "an eye for an eye" should not be strictly applied (or, at least, not without a significant effort to conceptually reinterpret this principle).⁶⁷ For example, it is commonly assumed that the arsonist should not be punished

⁶⁵ For recent philosophical literature generally supporting the assertion that collectives such as states have agency, see, e.g., CAROL ROVANE, *THE BOUNDS OF AGENCY: AN ESSAY IN REVISIONARY METAPHYSICS* (1997), CHRISTIAN LIST & PHILIP PETIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011), DEBORAH PERRON TOLLEFSEN, *GROUP AS AGENTS* (2015), RAIMO TUOMELA, *SOCIAL ONTOLOGY: COLLECTIVE INTENTIONALITY AND GROUP AGENTS* (2016). The view broadly represented here supports the position that collective bodies such as states may be said to exercise agency, while not necessarily possessing phenomenological consciousness.

⁶⁶ For a detailed and interesting historical account of changes to the American death penalty during this period, and the altered dynamic this brought about between the local community and the state, see STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 168-205 (2002).

⁶⁷ For an interesting and well-argued example of one such reinterpretation, see Jeremy Waldron, 34 *Lex Talionis* 25, *ARIZONA L. REV.* 34 (1992).

by turning his house into a state-sponsored bonfire. A central reason for this, it may be suggested, is that the character of these actions would become even more perverse if done by the state. Where arson might (to varying degrees) have been the result of an uncontrolled impulse, spontaneous desire or external influence (such as alcohol) when performed by an individual, a level of deliberation, awareness and intentionality would be exerted by the state which would intuitively make such an action unconscionable as a punishment. In contrast (it may be supposed) to the average arsonist, the state *qua* punisher acts with absolute clear-headedness and autonomy. As such, the state both completely lacks any attributes which (in the case of an individual) might mitigate culpability, and acts-out to a super-individual degree many of the aggravating or “wrong-making” qualities (to borrow Jeremy Waldron’s terminology)⁶⁸ which would otherwise be considered quintessential hallmarks of criminal depravity.

In ‘Reflections on the Guillotine’, Camus addresses the question of the death penalty’s alleged proportionality. With words which prefigure those of the Court in *Furman* and *Gregg*, Camus begins by asserting that capital punishment must be recognised for what it is: a retaliatory “instinct” within society that “whoever has put out my eye must lose an eye; and whoever has killed must die.”⁶⁹ Retribution “confers” legal status upon this instinct.⁷⁰ Provided that the legitimacy of this instinct is conceded, its “quasi-arithmetical” calculus must then be inspected.⁷¹ Would this action, when performed by the state, be proportional to the crime of homicide?

Camus’ answer is unequivocal: between individual and state killings, “there is no equivalence.”⁷² Capital punishment, Camus writes, “adds to death a rule, a public premeditation known to the future victim, an *organization*”.⁷³ Capital punishment, particularly in its modern format of meticulous state control, displays an extraordinary level of planning. Indeed, Camus claims it to be “the most premeditated of murders”, with practically every experience which the defendant has in the hours preceding his execution being subject to his killer’s control.⁷⁴ Critics of the death penalty often point out that this state practice amounts to “killing in order to show that killing is wrong.” In fact, however, the situation is far more asymmetrical than this. U.S. capital punishment is more akin to killing in *the most controlling and premeditated way possible* in order to show that premeditated killing is wrong.

In addition to this systemic planning, Camus highlights the distinctive harm inflicted by the state in this punishment. Both the defendant and his family are informed of the former’s fate months in advance and must live with that knowledge, compounded by the dreadful uncertainty of whether a reprieve might be possible. This extended period of “devastating, degrading fear”, Camus claims, is arguably “more terrible than death”.⁷⁵ On many U.S. “death rows” today, criminals awaiting

⁶⁸ *Id.* at 35.

⁶⁹ CAMUS, *supra* note 41, at 150.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 151.

⁷³ *Id.* (emphasis added).

⁷⁴ *Id.*

⁷⁵ *Id.* at 152.

execution may also be confined for up to 23 hours a day to spatial units in which they are completely isolated from other inmates, continuously monitored by state authorities, and subject to perpetual artificial lighting. Based on this assessment, it might be asked what sort of culpability is being exercised by the state when it puts an individual to death. Is not the sort of death inflicted by the state “materially” greater in depravity than other killings? If so, might not the aggravating factor found by the jury in *Godfrey* of an “outrageously or wantonly vile, horrible and inhuman” act also apply to its homicidal acts?⁷⁶ And finally, what does this (together with our previous considerations) imply for the anthropology of capital punishment? A brief summary of this section may help to clarify the import of these questions.

4. Summary

The objective of this article is not to argue that the death penalty is disproportional as a retributive punishment *per se*. Rather, the aim has been to ask what needs to be presumed about the nature of the criminal defendant in order for the death penalty, given its particular nature, to be proportional.

What sort of anthropology is needed to balance retribution’s scales when death is the punishment? A sketch of this answer can arguably be discerned from the U.S. Supreme Court holdings outlined above. Firstly, capital punishment is distinct from other punishments due to its severity, which includes the irreversible nature of the harm it inflicts on the defendant. As such, for death to be a proportional punishment, the defendant’s depravity must be “materially” greater than other offenders (*Godfrey*; *Atkins*), the consequences of his actions “beyond repair” (*Coker*), and his character “irretrievably depraved” (*Roper*). Secondly, capital punishment, *qua* homicide by the state, is by its nature the most deliberate, methodical and controlled infliction of harm possible on a defendant. In killing a convicted criminal, the state exercises a self-determination and conscious control of the situation which is absolute. As a result, it may be argued that it can only be a proportional instance of retribution for those whose culpability displays a kindred level of wilful initiative and rational calculation (*Atkins*; *Roper*). The absolute nature of the state’s intentionality and deliberateness in killing arguably requires the defendant’s culpability and depravity to be correspondingly complete. Not only must the defendant’s character be “beyond repair”, but it must also be absolute in its brokenness for death by state execution to be a proportional punishment.

As the proportionality of retributivism in U.S. capital punishment turns on the moral culpability of the criminal, moreover, it is not (and cannot be) an issue which is determinable on the basis of evidence. The defendant’s character must be believed to be such that the scales of retribution are balanced and death an appropriate punishment. As detailed above, in *Atkins v. Virginia* Justice Scalia rhetorically asks “[b]y what principle of law, science, or logic can the Court pronounce that [the jury’s judgment based on society’s moral outrage] is wrong?”, before observing that “[t]here is none.”⁷⁷ From the perspective of grievance retributivism (as discussed

⁷⁶ It may here be argued that in practicing capital punishment, the state kills not simply as means of achieving retribution, but out of necessity, insofar as its act is as one of self-defence against an aggressor. The legitimacy of this justification, which has been termed the penal goal of “incapacitation”, will be discussed below.

⁷⁷ *Atkins v. Virginia*, 536 U.S. 304, 351 (2002).

above), this is a valid point: outrage over the consequences of someone's conduct cannot be objectively falsified, scientifically or otherwise. However, Scalia's observation may also be instructive under the auspices of character retributivism. Whether or not the defendant deserves to be executed according to the demands of retributive justice is not a matter which can be assessed empirically. Rather, it is a judgement of the defendant's character as a human being, which implies belief in a certain philosophical anthropology.

The central point here is arguably inadvertently strengthened by two *reductio ad absurdum* arguments which Scalia makes in *Atkins* and *Roper v. Simmons*. In response to the Court's ruling in *Atkins* that mentally retarded persons face a "special risk" of being sentenced to death by the jury when their level of culpability or depravity does not warrant this punishment, Scalia comments that "I suppose a similar 'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people."⁷⁸ These somewhat flippant remarks belie what, from the Court's perspective, should arguably indeed be a serious concern. Once it is accepted that an essentially and completely depraved character is required in order for capital punishment to be proportional, a serious epistemological difficulty is raised not only in the case of those who are stupid, inarticulate and ugly, but in all cases.

Similarly, in *Roper*, Scalia writes that "[n]or does the Court suggest a stopping point for its reasoning... Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors 'overpower[ed]' by 'the brutality or cold-blooded nature' of a crime... could not adequately weigh these mitigating factors either."⁷⁹ From the perspective of character retributivism, this concern is again well-founded. Far from being absurd then, Scalia's *reductio* does not go far enough.

C. INCAPACITATION

In addition to the commonly cited purposes of deterrence and retribution, another penal aim of capital punishment should be mentioned: the incapacitation of offenders in response to the threat they pose to society. Before critiquing the Court's position in *Atkins v. Virginia* that executing the mentally disabled does not serve the penal goals of deterrence or retribution, Justice Scalia writes that "[t]he Court conveniently ignores a third social purpose of the death penalty [in *Gregg v. Georgia*] - incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future."⁸⁰ The goal of incapacitation may be seen as analogous to an individual practicing self-defence. In removing an offender from its ranks, or by ensuring in some other way that they cannot re-offend, society pursues the common good of its members.

This rationale, which Camus notably described as the only "frontier" on which "discussion about the death penalty is legitimate",⁸¹ is often overlooked, despite its historic status as a rationale for capital punishment amongst even those (such as

⁷⁸ *Id.* at 352.

⁷⁹ *Roper v. Simmons*, 543 U.S. 551, 621 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 321(2002)).

⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 350 (2002).

⁸¹ CAMUS, *supra* note 41, at 168.

Camus) who would otherwise argue against the practice.⁸² Today, the logic of the death penalty as the incapacitation of criminal threats can be seen to have a latent, underlying and persistent appeal in U.S. Supreme Court jurisprudence.

1. *The Court's Jurisprudence of Dangerous Capital Defendants: Coker, Ramos and Tison*

In *Coker v. Georgia* (1977), the U.S. Supreme Court ruled that it would be a violation of the Eighth Amendment to execute someone for the non-capital crime of rape.⁸³ In his dissenting opinion, Chief Justice Burger pointed out that “by his life pattern, Coker has shown that he presents a particular danger to the safety, welfare, and chastity of women, and, on his record, the likelihood is therefore great that he will repeat his crime at the first opportunity.”⁸⁴ Burger continually emphasises the defendant’s status as a “continuing danger to the community”. This danger, Burger writes, is “abundantly clear” from the defendant’s demonstrable “propensity for life-endangering behavior”.⁸⁵ Rejecting *lex talionis*’ “primitive” retributive metric of “a life for life, eye for eye, a tooth for tooth”, Burger argues that, even where defendants have not committed a homicide, definitive weight may be placed on their “criminal activity which consistently poses serious danger of death or grave bodily harm.”⁸⁶ Under Burger’s view, the state is justified in killing demonstrably dangerous individuals not only on the retributive basis of what they have *done*, but according to what they *might do* if left at liberty in the future.

Burger’s opinion in *Coker* did not represent the Court, which ruled that the talionic principles of retributive proportionality meant that death was not an appropriate punishment for non-homicidal crimes. Burger’s insistence on the centrality of the defendant’s dangerousness may, however, be regarded as a useful backdrop to the Court’s subsequent decisions in *California v. Ramos* (1983)⁸⁷ and *Tison v. Arizona* (1987).⁸⁸

In *California v. Ramos* the Court (led by Justice O’Connor) upheld a mandatory instruction to the jury (the “Briggs instruction”) in California, unique to that state, which informed the jury that if the defendant received life without the possibility of parole rather than the death penalty, a possibility existed that his sentence might be commuted by the governor to life *with* the possibility of parole at some point in the future.⁸⁹ Rejecting the assertion that the Briggs instruction was too speculative in nature for the jury to consider, the Court ruled that this instruction allowed the jury “to assess whether the defendant is someone whose probable future behaviour makes it undesirable that he be permitted to return to society, thus focusing the jury

⁸² For another example of this, *see e.g.*, the eighteenth century critic of capital punishment, Cesare Beccaria in CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 70 (Adolph Caso ed., 1992).

⁸³ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁸⁴ *Id.* at 606.

⁸⁵ *Id.* at 610.

⁸⁶ *Id.* at 620.

⁸⁷ *California v. Ramos*, 463 U.S. 992 (1983).

⁸⁸ *Tison v. Arizona*, 481 U.S. 137 (1987).

⁸⁹ *California v. Ramos*, 463 U.S. 992 (1983).

on the defendant's probable future dangerousness."⁹⁰ By pointing out that if not executed, a possibility (however slim) exists that the defendant will one day return to society, California's Briggs instruction arguably encouraged significant weight to be given to the defendant's future dangerousness during the jury's considerations on whether he should be put to death. In sanctioning the instruction, the Court in *Ramos* can clearly be seen to recognise the importance placed upon the consideration of the defendant's future dangerousness by the capital sentencing jury.⁹¹

In *Tison v. Arizona*, the defendant, Gary Tison, had participated in a prison break, during which a prison officer was killed. The question before the Court was whether an intention to kill (which Tison lacked) was necessary to sentence him to death for the officer's death, which Tison did not directly cause, but was instead an accomplice to the crime in which the death had occurred.⁹² Writing again on behalf of the Court in *Tison*, Justice O'Connor stated that although consideration of the defendant's mental state remains essential for determining criminal culpability, "[a] narrow focus on the question of whether or not a given defendant 'intended to kill,' however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers."⁹³ Immediately of note here is the apparent conflation O'Connor makes of defendants' culpability (on the one hand) and dangerousness (on the other), rather than treating them as separate concepts relating to the separate penal goals of retribution and incapacitation, respectively. The central subject of the Court's opinion is the culpability of defendants, such as Tison, who fall short of an intention to kill. However, at the roots of this discussion a thinly disguised concern for the dangerousness of defendants—rather than their personal culpability—can be discerned.

For example, in making the case that those such as Tison are eligible for the death penalty, O'Connor points out that many who intend to kill are not in fact criminally liable (for instance, those who successfully claim their actions were pursuant to self-defence), while "some nonintentional murderers may be among the most dangerous and inhumane of all."⁹⁴ This telling pivot away from the culpability of criminals for any specific crime, to the dangerousness of their natures, arguably underlines a crucial observation made by Justice Brennan in his dissenting opinion: unlike the above hypotheticals cited by O'Connor, not only did Gary Tison not *intend* for anyone to die; he did not (directly) cause anyone's death.⁹⁵ While it may

⁹⁰ *Id.* at 992.

⁹¹ *Ramos* concerned a jury instruction unique to California. However, the same recognition of future dangerousness's centrality to capital sentencing can also be discerned in the later case of *Simmons v. South Carolina*, 512 U.S. 154 (1994). In *Simmons*, the Court ruled that wherever future dangerousness is raised as consideration in a capital case, the jury should be informed that if not put to death, the defendant will not be eligible for parole. This is in recognition of the fact that, as Justice O'Connor observes in her concurrent opinion in *Simmons*, "[w]hen the State seeks to show the defendant's future dangerousness...the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case" *Simmons v. South Carolina*, 512 U.S. 154, 177 (1994). See also *Shafer v. South Carolina*, 532 U.S. 36 (2001).

⁹² *Tison v. Arizona*, 481 U.S. 137 (1987).

⁹³ *Id.* at 157 (emphasis added).

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.* at 169.

be true that an intention to kill is not sufficient for the criminal culpability required for retribution to be proportional, Brennan notes that it is nevertheless necessary.⁹⁶ In ruling that someone may be executed on the basis of his subjective state of a “reckless indifference to the value of human life”,⁹⁷ the Court thereby passed a ruling which could not be justified on a purely backward-looking, retributive basis; future dangerousness must be invoked.

2. The Proportionality of Incapacitation

Although rarely stated, the penal goal of incapacitation (akin to retribution) involves an assessment of how proportional a punishment is, given the facts of a particular situation.⁹⁸ The logic here is analogous to that of an individual’s legal claim of self-defence. A person may only be justified in defending themselves if their use of force, or means of self-defence, is proportionate to the severity of the threat they face and what action is necessary to stop it. So too, a state practice aimed at incapacitating offenders will only be proportionate if it does not use a force which is greater than what is needed to quell the threat posed by the offender.

As with the goals of both retribution and deterrence moreover, the existence of a state prison-system, and the possibility of lifelong incarceration, necessarily also bear upon the presumptions which must be made about the criminal’s nature for capital punishment to be a proportionate exercise of incapacitation. The existence of prisons entails that facilities are available where defendants can be detained outside society and treated for as long as it is necessary for their dangerousness to subside. This possibility of spatially containing the defendant for an indefinite period of time arguably means that, as with the anthropological assumptions concerning the defendant’s culpability and depravity needed for retribution (*Roper*), the defendant’s dangerousness (which follows automatically, one might assert, from this depravity) must be an essential and permanent feature of his condition. As Camus maintains, there is “no room for imagining that [the defendants to be incapacitated] can ever repent or reform”, with the result that “[t]hey must merely be kept from doing it again, and there is no other solution but to eliminate them.”⁹⁹ Furthermore, while incarcerated, there is no possibility of the defendant being a threat to the wider community. In order for incapacitation to require death therefore, it must arguably be assumed that the criminal will continue to pose a legitimate threat to society even while in prison. Put simply, it must be believed that the defendant’s very *existence* is dangerous, and that this dangerousness cannot be nullified by physical restraint, spatial containment,¹⁰⁰ or institutional treatment. For incapacitation is

⁹⁶ *Id.* at 173.

⁹⁷ *Id.* at 157.

⁹⁸ See e.g., John F Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, VA. L. REV. 916 (2011).

⁹⁹ CAMUS, *supra* note 41, at 168.

¹⁰⁰ It might be argued, following *Ramos*, that “life without the possibility of parole” in fact only means life “without the possibility of parole, barring the future possibility of executive clemency.” However, (as the dissent in *Ramos* points out), the same qualifier could conceivably be added to any sentence, including death. Another possible counterpoint is that prisoners may escape while still alive, although in contemporary society this is such a remote possibility that it can arguably be discounted as a serious consideration.

to be proportionally achieved by the death penalty, it must be believed that the criminal, if allowed to live, will always be dangerous.¹⁰¹

*D. SUMMARY: PENAL GOALS AND THE PHILOSOPHICAL ANTHROPOLOGY OF
CAPITAL PUNISHMENT*

Due in part to the existential severity of death, the nature of the capital punisher (*qua* state), and the existence of imprisonment as an alternative sentence, to believe that there may be a hypothetical situation in which it is *possible* for the death penalty to be an appropriate punishment, non-empirical anthropological commitments must be presupposed. For capital punishment to fulfil the penal goal of deterrence, one must make assumptions about the nature of those within society; for retribution, that the one to be executed possesses a moral culpability which is “irretrievably depraved” (*Roper*) and essential to who they are as a person (*Roper*; *Atkins*); for incapacitation, one must believe that the very *existence* of the individual before them presents a permanent and irredeemable danger or threat to the community. Such beliefs rely on anthropological commitments which can be neither demonstrated nor disproven through inductive or deductive reasoning, and entail normative judgments regarding the value of others’ lives.¹⁰² Owing to the irreversible nature of death as a judicial sentence, moreover, the epistemological certainty with which these judgements must be held must be of a qualitatively different order than that which is involved in sentences of correctable (or at least compensable) punishments. Whereas judgements in the case of non-capital sentences may be based on the sort of balance-of-probability analyses involved in answering many empirical questions, the certainty demanded by the terminal nature of a death-sentence is more akin to the non-probabilistic certainty associated with religious faith. The anthropology which underpins the death penalty is thus a kind of philosophical anthropology which, as such, cannot be tackled on a purely scientific or deductive basis.

In ‘Christian Witness, Moral Anthropology, and the Death Penalty’, Richard W. Garnett critiques modern legal discourse for being insufficiently attentive to the anthropological assumptions which underpin the constitutional debate over U.S. capital punishment.¹⁰³ He writes that “I believe that, for the most part, our nation’s moral vocabulary, constitutional law, and political discourse - including its debates about capital punishment - rest upon the unsteady foundation of a flawed moral anthropology.”¹⁰⁴ Garnett proceeds to advocate shifting away from this “flawed” foundation towards a Christian moral anthropology. Despite the ambitious nature

¹⁰¹ On a side note, one might suggest that a societal belief in such especial dangerousness is evidenced by the particular institutional measures commonly taken against capital prisoners. While on death row, these inmates are commonly placed in an isolated but constantly monitored cell for 23 hours a day, with prison security even more heavily increased on the day of their execution.

¹⁰² This point can be found in Camus, who acknowledges that the argument for and against the death penalty comes down to a belief about the nature of other human beings which cannot be objectively adjudicated. As he states, “[t]his is the point... where the arguments clash blindly and crystallize in a sterile opposition.” CAMUS, *supra* note 41, at 169.

¹⁰³ Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541 (2012).

¹⁰⁴ *Id.* at 555.

of this challenge and the substantive contribution of his article, Garnett concludes that:

This essay is offered more as a prolegomena than a resolution. I am not yet sure what all this might mean, or what a shift in our anthropological premises and idiom might yield, in the context of the death penalty debate.¹⁰⁵

Outside the work of philosophers such as Camus, Garnett's work remains notable for raising the issue of capital punishment's philosophical anthropology. This is particularly true within legal scholarship. Although the Court's rulings arguably do offer some insights into the sort of human nature required for death's proportionality as a punishment, the picture which emerges from these cases is piecemeal and fragmentary, insofar as the Court remains narrowly focussed on the culpability of particular defendants (*Coker*; *Godfrey*) or classes of defendant (*Atkins*; *Roper*), rather than on the (logically prior) question of what the proportionality of capital punishment requires human beings *as such* to be. Through this article's discussion of the penal goals of capital punishment and the anthropological assumptions they involve, I hope to have clarified how capital punishment might be approached more comprehensibly through the lens of philosophical anthropology. The potential implications for the U.S. debate over capital punishment, I submit, are stark: either the U.S. death penalty must be understood as depending upon a morally evaluative, non-empirical anthropology, or it must be conceded that, although this practice may indeed deter crime, exact vengeance or incapacitate criminals, it cannot claim to be a *proportionate* fulfilment of these penal goals for human beings.

IV. CONSCIENTIOUS BELIEFS AND THE IMPOSSIBILITY OF CAPITAL DUE PROCESS

One set of implications from this argument concerns the relationship between a proportionate and purposeful capital punishment (on the one hand) and the demands of legal due process (on the other). In one respect, this angle on the U.S. death penalty debate is not new. When the Court in *Furman v. Georgia* suspended capital punishment in 1972, it was partly pursuant to the view that the death penalty (as it was then practiced in certain U.S. states) did not meet the standards of impartiality or objectivity required by the Fifth and Fourteenth Amendments.¹⁰⁶ Instead, the Court found that the process by which capital juries in Georgia reached their determinations was potentially discriminatory and capricious, resulting in an unacceptably high risk that defendants would be erroneously sentenced to death. This is contrary to the Due Process Clause of the Fifth and Fourteenth Amendments, the spirit of which requires

¹⁰⁵ *Id.* at 558.

¹⁰⁶ *Furman v. Georgia*, 408 US 238 (1972). For an article which has since sought to extend the Court's post-*Furman* Due Process jurisprudence so as to apply to capital punishment *per se*, see Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777 (2003). The proposed argument of the current piece differs from such scholarly attempts insofar as its starting point is the philosophical anthropology of capital punishment, combined with an appreciation for the Eighth Amendment requirements of proportionality and purposiveness.

that the necessary constituents of a sentence be proved “beyond a reasonable doubt” on the facts of the case before criminal punishment is given.¹⁰⁷ The Due Process Clause therefore sets a high bar of objectivity and certitude which, the Court in *Furman* ruled, the capital justice system was not reaching.

As Justice Douglas suggests in his concurrence in *Furman*, the Court’s collective judgments in this case bore witness to an implicit connection between concern for equal protection and due process under the Fourteenth Amendment, and the question of whether something constitutes a “cruel and unusual” punishment under the Eighth Amendment.¹⁰⁸ As discussed above, this implicit connection can subsequently be seen to resurface in the Court’s rulings that certain defendants, such as the mentally retarded (*Atkins*) or children (*Roper*), are particularly vulnerable to having aggravating characteristics falsely ascribed to them, and so to being unjustly sentenced to death.¹⁰⁹ In making this determination, the Court recognised that its role as watchman for the death penalty’s constitutionality may require asking whether one can objectively, reliably, and “beyond a reasonable doubt”, determine that penal goals are fulfilled by the execution of particular classes of capital defendant.

The Court’s post-*Furman* capital jurisprudence has thus implied a close connection between the Eighth Amendment’s prohibition on “cruel and unusual punishments” and the Due Process Clause of the Fifth and Fourteenth Amendments. As the Court stated in *Coker v. Georgia* (1977), it regards the Eighth Amendment as demanding that criminal punishment not be “purposeless” or “grossly out of proportion”;¹¹⁰ rather, the enactment of a death sentence on the defendant must be capable of proportionally fulfilling a penal purpose, such as deterrence or retribution (*Furman*). The constitutional right to due process under the Fourteenth Amendment, meanwhile, demands that this determination can be fairly, reliably and unambiguously made.

The Court’s rulings in favour of the defendants in *Atkins* and *Roper*, it was noted, thus turned on an epistemic difficulty: how can the culpability and essential character required for the death penalty’s proportionality as a retributive punishment be reliably gauged by the jury, particularly where the defendant’s courtroom presentation could be misleading? An appreciation of the uniquely essentialist demands of capital punishment’s philosophical anthropology makes this difficulty both deeper and broader. I have argued that in order for state execution to be “deserved” (in the sense of being a proportional retributive punishment), the human being on trial must possess a culpability and character which is essentially and permanently depraved. To require that such a determination be “beyond a reasonable doubt” is intrinsically problematic, irrespective (pace *Atkins* and *Roper*) of the person’s mental capacity or age. This is because the essentiality or permanence of someone’s character is not conclusively demonstrable empirically. How then, it might be asked, can legal due process be guaranteed in *any* death penalty proceeding?

¹⁰⁷ See *In re Winship*, 397 U.S. 358, 354 (1970) (Brennan, J., writing for the Court). More recently, see *Victor v. Nebraska*, 511 U.S. 1 (1994).

¹⁰⁸ *Furman v. Georgia*, 408 US 238 249 (1972) (Douglas, J., concurring).

¹⁰⁹ In this dissent to the Court’s approach in *Atkins*, Justice Scalia noted the Court’s implicit tying of the Eighth Amendment to a Fourteenth Amendment concern for “due process”. See *Atkins v. Virginia*, 536 U.S. 304, 352 (2002).

¹¹⁰ *Coker v. Georgia*, 433 U.S. 584, 591-92 (1977).

This point may be illustrated with reference to one of Camus' most famous fictional works, *The Stranger* (*L'Étranger*). In this novel, Camus' anti-hero Meursault becomes the defendant in a capital trial, after deciding to shoot an Algerian man in cold blood. Through first-person narration, Camus presents Meursault as deficient in emotional responsiveness, empathy and consequential reasoning. He is paradigmatically sociopathic. As Meursault admits to the reader following the prosecutor's accusation that he showed no remorse or contrition for the crime, he is simply "far too much absorbed in the present moment, or the immediate future, to think back", akin (one might posit) to a non-human animal.¹¹¹ As Camus' title suggests, Meursault is quintessentially unrelatable. Indeed, he seems almost deliberately engineered at times to circumvent the reader's sympathies. What this portrayal does serve to exemplify, however, is how even when such a seemingly strange and detached psyche is located within the courtroom dock, an epistemological chasm remains to be crossed in order to condemn the person to death. During his trial, Meursault's disposition on the day of his mother's funeral, whether he cried, how quickly he left, and whether he stopped at her grave or knew his mother's age, are all among the details used to determine the defendant's culpability for the murder.¹¹² The most contingent and insignificant of circumstances, such as who offered whom coffee, thus take on a decisive significance. Meursault bathetically describes how

[a]fter asking the jury and my lawyer if they had any questions, the Judge heard the doorkeeper's evidence. On stepping into the box the man threw a glance at me, then looked away. Replying to questions, he said that I'd declined to see Mother's body, I'd smoked cigarettes and slept, and drunk *café au lait*.¹¹³

Although these are temporary moments in an individual's history of decision-making, they are elevated by Camus' prosecutor to demonstrations of an essentially depraved character: "a criminal at heart".¹¹⁴ The scene Camus describes is consciously parodic in nature. Most capital cases, it might be objected, turn on far graver and more disturbing details than one's social etiquette or choice of beverage. The thrust of Camus' account, however, remains pertinent; as between acts of small consequence (drinking *café au lait*) and those of greater significance (such as intentional and aggravated murder) there is a difference in degree, rather than kind. In either case, the agent's act results from her temporary subjective state. A person's essential nature or character, however, remains a different matter.

As Camus' *L'Étranger* prosecutor notes, "first, you have the facts of the crime; which are as clear as daylight. And then you have what I may call the night side of this case, the dark workings of a criminal mentality."¹¹⁵ What Camus' novel implicitly invites the reader to ask is how such a transition from the former to the latter can ever be made. A person's actions, along with her outward demeanour and previous history (the "facts" of a case) are, in principle, empirically confirmable. A

¹¹¹ ALBERT CAMUS, *THE STRANGER* 63 (Stuart Gilbert trans., 1954).

¹¹² *Id.* at 56.

¹¹³ *Id.*

¹¹⁴ *Id.* at 60.

¹¹⁵ *Id.* at 62.

person's essential character, on the other hand, is not. The objects of the judgments, moreover, are modally distinct: one concerns the contingent or accidental, the other that which is essential or permanent. To commandeer the term of another existentialist thinker, Søren Kierkegaard, there remains an "infinite qualitative difference" between the judgments which can be made about these respective objects.¹¹⁶ In this sense, insofar as the death penalty is constitutionally required to be a proportionate and purposeful punishment, every U.S. capital trial may be said to have just as much Eighth Amendment "due process" as that of Camus' *café au lait* drinking defendant.

Whereas the 1972 *Furman* Court tied its provisional judgment of capital punishment to the circumstances of the punishment's application at that time, it is here suggested that the death penalty, *qua* state-punishment of death, *inevitably* lies in tension with the demands of legal due process once the requirements of the Eighth Amendment are appreciated. Taken together, these Amendments constitute the horns of a constitutional dilemma for capital punishment. The Fourteenth Amendment stipulates that no person should be deprived of life "without due process of law"; the Eighth Amendment requirements of proportionality and purpose make such capital due process impossible. The anthropology of capital punishment supposes that some human beings, despite not possessing any features which would definitively demarcate them from the rest of humanity, are nevertheless essentially different in nature. This lies beyond the bounds of what any human being can empirically and reliably gauge—without arbitrariness, bias or caprice—about another person on the facts of her case. As such, the suggestion may be made that it is fundamentally at odds with the implicit requirements of legal due process.¹¹⁷

V. CONCLUSION

The arguments presented here represent only a new opening gambit in the ongoing ethico-legal debate over U.S. capital punishment. It will not have escaped notice that the novelty of this article's claims about the anthropology of capital punishment mean that its conclusions currently lack supporting legal precedent. Much of what has been said, furthermore, would benefit from further development. What I do hope to have demonstrated through this article, however, is how the internal secular logic for penal goals such as deterrence and retribution fundamentally breaks down when the punishment is death. For these aims to function in the context of the death penalty, the members of the jury must assume some degree of access into the subjective state of the defendant (retribution; incapacitation) or prospective criminals within society (deterrence), such that the character of these individuals

¹¹⁶ See SØREN KIERKEGAARD, PRACTICE IN CHRISTIANITY 28-29 (Howard V. Hong & Edna H. Hong eds. & trans., 1991); SØREN KIERKEGAARD, THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING 126 (Howard V. Hong & Edna H. Hong eds. & trans., 1980).

¹¹⁷ A loose (and consciously tongue-in-cheek) analogy might be made to the trial and execution of (alleged) witches, as occurred in Europe during the 16th-18th centuries. In both situations, it is the ontology of the accused—the state of her or his nature—which is ultimately on trial, resulting in an insurmountable difficulty for the prospect of legal due process.

may be definitively judged as highly calculating (deterrence; retribution), critically dangerous (deterrence; incapacitation) and/or irretrievably depraved (retribution; incapacitation). Whether conceived in terms of the defendant's moral culpability or dangerousness, to sentence someone to death is to make a definitive judgment about who they are, rather than simply to make a probabilistic judgment about what they have done. The basis for this judgment goes beyond the empirical, so as to render it a fundamentally conscientious position. Such are the anthropological commitments required by belief in capital punishment's legitimacy as a proportional and purposeful punishment. On this basis, a new ethical and legal challenge to U.S. capital punishment has been suggested from the (in)compatibility of the beliefs required for its (Eighth Amendment compliant) instigation, with the demands of legal due process. Seen in this light, death is indeed different.

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